# REPORTS

OF

CASES ARGUED AND DECIDED

IN

# THE SUPREME COURT

OF THE

# STATE OF TEXAS

DURING AUSTIN TERM, 1852, AND A PART OF GALVESTON TERM, 1853.

BY OLIVER C. HARTLEY.



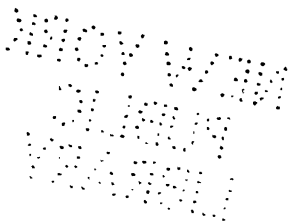


VOL. IX.

GALVESTON:
PRINTED AT THE CIVILIAN BOOK OFFICE.
1853.

This volume contains the cases argued and decided during Austin Term, 1852, and the former part of Galveston Term, 1853—printed in the order in which they were decided. The statements of the cases, with some exceptions, were supplied by the Judges who delivered the OPINIONS.

GALVESTON, August 25th, 1853.



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OF THE

# NAMES OF THE CASES

REPORTED IN THIS VOLUME.

The letter *v* follows the name of the appellant or plaintiff in error.

# SUPREME COURT OF TEXAS.

## AUSTIN TERM, 1852.

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### JOHNSON AND OTHERS v. ERSKINE, CHIEF JUSTICE, USE OF HANGER.

The general rule is, that, when directed to be made in a particular mode, that mode must be substantially pursued, in order to make a valid *statutory* bond: but, to render a bond *void* for want of conformity to the statute, it must be made so by express enactment; or be intended as a fraud on the obligors, by color of law, by an evasion of the statute; or be more onerous than is required by the statute.

The objects of the two statutory bonds required of ferrymen, by the 14th Section of the Act of 1836, (Hart. Dig. Art. 1385,) and the 5th Section of the Act of 1840, (Hart. Dig. Art. 1391,) were obviously distinct.

Where the statute required ferrymen to give a bond to do certain things, specifically, and the bond taken, was conditioned "that they shall well and truly perform and discharge all the duties required of them as ferrymen," it was held that the bond, being more onerous than required by the statute, was void and would not sustain an action as a Common Law bond.

A literal conformity to the statute, in a statutory bond, in general, would not be required; but where its conditions are specially and particularly set out, the bond should substantially embrace each of those conditions.

REHEARING.

Where the statute specially sets forth certain things or conditions to be done and performed, and the bond sets out those conditions substantially in the terms of

the statute, but proceeds to set out other conditions, the bond will be good under the statute, as to the conditions properly contained in it, the other conditions being considered surplusage; but, where none of the conditions set out in the statute, are contained in the bond, and the only condition set out is collectively, "to perform and discharge all the duties," &c., the bond will not be valid under the statute.

If a bond intended to be taken by authority of a statute, cannot be sustained as a statutory bond, it will not be valid as a Common Law, voluntary bond, unless it will stand, as such, without the aid of the statute. There is a class of bonds, that may well be sustained, from their form and structure, without the aid of any statute: injunction bonds, bail bonds, replevy bonds, forthcoming bonds, appeal and writ of error bonds, and all such as are made payable to the beneficiary, or interested party, unless taken under coercion and oppression, or by fraudulent imposition; they would be valid at Common Law, without resorting to the statute, to give them effect.

The right to keep a ferry and charge ferriage is a Common Law right; but, by our statutes, this natural right has been abridged, and it has been made a franchise, to be exercised on giving bond, and obtaining a license for its enjoyment.

Where a party had a right at Common Law, to do a certain thing, as to keep a ferry, and a statute exacts the giving of a bond, as a condition precedent, the giving of the bond cannot be called a voluntary act; and if the bond be not good as a statutory bond, it will not be binding as a voluntary bond, at Common Law.

It seems to be well settled, that, if a bond be not good as a statutory bond, but be good as a Common Law bond, there can be but one recovery on it.

Sound policy forbids the Court to sustain a bond, intended to be taken by authority of a statute, as a Common Law bond, except in cases which are very clear.

A ferryman who has not given a valid bond in conformity to the statute, is liable as a common carrier.

Appeal from Guadaloupe. This suit was instituted in the District Court for the county of Guadaloupe, to recover damages from the appellants, for the loss of mules and other property whilst attempting to cross the river at the ferry kept by the appellants. The suit was brought on the bond given by the appellants, on their obtaining a license to keep a ferry. It was taken under the 14th Section of the Act of the Congress of the Republic, of December 20th, 1836, Article 1385 of Hartley's Digest. That Section reads as follows; "That at "all times, the County Courts throughout this Republic, shall "have power to establish ferries as are hereinafter directed; "that, before any person shall establish a public ferry, in the

"Republic, he shall apply to the County Court of the county "in which such ferry is intended to be established: and the "Court, for good cause being shown by the party applying, "may grant a license to establish a ferry, and shall affix the "rates of ferriage for crossing all persons, horses, cattle, car- "riages, &c., that shall pass the same; and shall moreover "require from the person or persons applying for license, to "give bond with good and sufficient security, in the sum of "one thousand dollars, payable to the Judge of the County "Court of the county in which the application is made, and "his successors in office, conditioned, that the person or per- "sons to whom said license may be granted, shall provide "and constantly keep good and sufficient boats or other craft; "also, the banks on each side of the water-course in good re- "pair; and that said ferry shall be well attended, for travel- "lers or other persons, to carry or pass with horses, carriages, "or effects over such river or water-course."

The condition of the bond sued on was, that they "shall "well and truly perform and discharge all the duties required "of them as ferrymen."

There was a verdict and judgment for the plaintiff. Motion in arrest of judgment on the ground that the condition of the bond did not conform to the statute. Overruled.

*Webb & Oldham*, for appellants. The judgment should have been arrested. This purports to be a statutory bond, and it does not conform to the statute.

The condition of the bond is not in accordance with the statute, and therefore it is not good as a statutory bond, and the facts set forth in the petition did not authorize the plaintiff to maintain this suit for the use of Hanger. (Hibbits v. Canada, 10 Yerg. R. 463; M'Intosh v. Langtree, 6 Yerg. R. 317; Sumner & Foster v. Henry, 4 Yerg. R. 155; Janes *et al.* v. Reynolds, Adm'r, 2 Tex. R. 250.)

Regarded as a Common Law obligation, the facts alleged do not constitute a breach of the condition, for want of privity between the obligors and Hanger.

*Paschal* and *Gordon*, for appellee. The motion in arrest of judgment, in this case, is a general exception to the judgment, and under our system of pleading and practice, should not be allowed to seek inquiry into the case. The object of the motion, however, is to attack the validity of the bond of defendants or appellants, upon which this suit was brought. Although the bond is not in the precise words of the statute, yet it imposes upon them all the obligations and responsibilities of the statute. They bind themselves to "discharge all the duties required of them as ferrymen;" and the statute requires certain duties to be performed by ferrymen: hence the bond, although not literally, is substantially in compliance with the statute.

"An official bond required by statute, but which is not in "conformity with the statutory provisions, is good, so far as "it does conform, unless, the statute expressly provides that "bonds not made in conformity therewith shall be void." (1 Kelly, Ga. R. 581-2.)

"A bond taken under the statute, is not void for not con- "forming precisely to the directions of the statute, unless it "be made so by express enactment, or the variance was in- "tended to evade the statute, or to operate as a fraud upon "the obligors. (2 Bail. R. 376; 2 N. & McC. R. 425; 2 McC. R. 107; 6 Binn. R. 298.)

"A bond is not void merely because it does not in all re- "spects conform to the statute under which it is taken. It is "absolutely void only when the statute declares it void."— (Van Deusen v. Hayward, 17 Wend. R. 67; Ring v. Gibbs, 26 Wend. R. 502.)

"A variance between a statutory bond and the requisitions "of law is fatal, only where the condition would impose on "the obligor, a greater burden than the law allows." (The Commonwealth v. Lanb, 1 Watts and Serg. R. 261.)

"The obligor in a statute bond can in no case be permitted "to take advantage of the omissions of conditions, where the "omission is beneficial to himself." (The Justices v. Wynn, Dudley, Ga. R. 22.)

"Where there has been a substantial compliance with the "law, the want of rigid conformity with the mere letter of the "statute requiring a bond to be taken, is not a fatal objection "to the bond." (Central Bank v. Kendrick, Dudley, Ga. R. 66.)

"The rule in regard bonds or other deeds void in part, by "Common Law, or by statute, is, that they are void as to such "conditions, covenants, or grants as are illegal, and good as "to all others which are legal and unexceptionable." (Whitted v. The Governor, 6 Port. R. 335.)

If this bond is not a statutory bond, it is good at Common Law, and there being no distintion in our Courts, between law and equity, it matters not whether the bond be sued upon as a statutory or Common Law bond, or a mere voluntary obligation; the parties are liable under it, provided they have been allowed all of their equitable defences; therefore the judgment must be good.

Lipscomb, J. It is manifest, that the conditions of the bond sued on, are not in conformity with those expressly required by the statute, under which the bond was taken; but, is such non-conformity sufficient to invalidate the bond? In the case of Janes *et al.* v. Reynolds, administrator, (2 Tex. R. 255,) this Court acknowledged that the general rule on the subject of statutory bonds, is, "that when directed to be made in a particular mode, that mode must be pursued;" but we say, that "this rule is subject to modifications, and it is laid down, that, "to render a bond void for want of conformity to a statute, it "must be made so by express enactment, or must be intended "as a fraud on the obligors, by color of law, by an evasion of "the statute." (Treasurers v. Bates, 2 Bail. R. 376; United States v. Tingey, 5 Pet. R. 129; United States v. Bradley, 10 Id. 343; United States v. Lynn, 15 Id. 290; Speake *et al.* v. United States, 9 Cr. R. 28.) There is no provision in the statute, making the bond void for non-conformity to the mode prescribed. And if it is void as a statutory bond, it is so, on the ground of some other vice in it.

It is laid down, in the decision of this Court, in the case we have cited, if not in express terms, by implication, at least, that, if the covenants contained in the bond are more onerous than those imposed by the statute, such departure from the statute would invalidate the bond. The condition of the bond in this case is "that they shall well and truly perform and discharge all the duties required of them as ferrymen," language sufficiently comprehensive to embrace, not only all the conditions expressly enumerated and required by the statute directing the bond to be taken, but also, all other duties required by law from the licensed ferryman. And, if there are other duties required by law, it would result that the bond is more onerous to the obligors, than those imposed by the law, under which it was taken. It will be found that the last sentence of the 15th Section of the same Act, gives to any person who may be detained at a public ferry, by the neglect of the ferryman performing his duty, the right to recover by a warrant from a Justice of the Peace, ten dollars for such delay. The 16th Section imposes a penalty for exacting more toll than is allowed by law. These are duties not imposed by the conditions of the statutory bond, but would be embraced in the conditions of the bond sued on.

Again, the 5th Section of the Act to amend an Act organizing Justices' Courts, and defining the powers and jurisdiction of the same, January 19th 1840, (Dig. Art. 1391,) enacts, "That the County Courts throughout the Republic, shall re-"quire the owner or owners of the ferries established in their "respective counties, to give bond with good and sufficient "security, in the sum of one thousand dollars, payable to the "Judge of the County Court of the county where such ferry "is established, and to his successors in office; conditioned, "that the person or persons giving such bond, shall keep the "banks on each side of the water-course in good repair, and "that the slope or amount of rise from the water's edge of "such bank shall not exceed two feet for each rod. And if "any ferryman or owner of any ferry shall not comply with

"the conditions above mentioned, he shall forfeit and pay to "the County Treasurer of the county, ten dollars a day for "each day he shall so neglect to keep the said banks in re- "pair, said money to be applied to the use of the county."

The conditions of the bond sued on, would render the obligors bound for the performance of the duty here imposed on the ferryman, whether any damage had been sustained or not, if the duty had not been performed. The object of the two statutory bonds required to be given by ferrymen or owners of ferries was obviously distinct; the first was intended as a security for those who should sustain damage from the breach of its conditions; and if no damages had been sustained, there could be no ground for an action. The second was, to secure the penalty for the non-performance of a duty imposed, without regard to the question whether damages had been sustained or not; and yet the bond sued on is so framed, that it could with as much propriety, and perhaps more, claim to be taken under the last as under the first. A literal conformity to the statute in a statutory bond, in general, would not be required; but where its conditions are specially and particularly set out, as they are in the statute under which the bond sued on was made, the bond should substantially embrace each of those conditions. The conditions expressed in the statute, have been so entirely disregarded in the bond sued on, that we believe, it could not be the ground of an action under the statute, and that the judgment must be reversed and cause dismissed.

It may be proper to remark, that the law under which this suit was brought, and the provisions of other statutes cited, have all been repealed, or suspended by the Act of 23rd of January, 1850, (Dig. Art. 1413.)

REHEARING.

*I. A. & G. W. Paschal*, for appellee. This Court, in the opinion delivered at the last Term, we respectfully submit,

erred, in holding the bond to be void and directing the suit to be dismissed. Whether viewed as a Common Law or statutory bond, the plaintiff had the right to recover. (Grimes v. Butler, 1 Bibb, R. 192; Bartlett & Co. v. The Governor, for the use of Prather, 2 Bibb, R. 586 and 641; Colley v. Morgan, 5 Ga. R. 178; Justices Inferior Court v. Ennis, 5 Ga. R. 569; Governor Crawford, for the use of Ward, v. Stephens, *et al.*, 1 Kelly, R. 574; and the same case, 3 Kelly, R. 499; Hall v. Cushing, 9 Pick. R. 395; Morse v. Hudson, 5 Mass. R. 314; Commonwealth v. Hatch, 5 Mass. R. 191; United States v. Bradley, 10 Pet. R. 343; Miner v. Mechanick's Bank, 1 Pet. R. 69; United States v. Tingey, 5 Pet. R. 115; Acker v. Burrell, 21 Wend. R. 605; State New York v. City of Buffalo, 2 Hill, 434; Allegany Supervisors v. Van Campen, 3 Wend. R. 48; Triplett v. Gray, 7 Yerg. R. 13; Spear v. Ditts, 8 Verm. R. 419; United States v. Morris, 2 Brock. R. 96; Stevens v. Treasurers, 2 McC. R. 107; Branch v. Commonwealth, 2 Call, R. 570; Johnson v. Gwathmey, 2 Bibb, R. 186; Treasurer v. Bates, 2 Bail. R. 362; Janes *et al.* v. Reynolds, 2 Tex. R. 250.) These authorities have been cited to the single point decided by the Court. The cases cited in Janes v. Reynolds, (2 Tex. R. 250,) completely exhaust the subject and show the true rule and its reasons.

Lipscomb, J. After the opinion of the Court, in this case, had been delivered at the last Term, on the petition of the appellee's counsel a rehearing was granted, and an argument has been heard at this Term. The counsel for the appellee has endeavored, with much ability, to establish two positions: 1st, That the bond sued on is a good statutory bond. 2nd, That, if not good as a statutory bond, yet it is a good and valid bond at Common Law, sufficient to sustain the judgment of the Court below.

We have endeavored to bestow due consideration on his arguments, and the very respectable authorities referred to by him. On the first position assumed, we will, in addition to

what is said in our opinion, in support of the conclusion that the bond is not a good bond under the statute, further say, that, although it is admitted that where the statute specially sets forth certain things or conditions to be done and performed, and the bond sets out those conditions substantially in the terms of the statute, but proceeds to set out other conditions to be performed, that the bond will be good under the statute, because it has specified all that the statute required, and as to the others not required, they may be considered as surplusage, and the bond inoperative as to them; yet, that it is not so, where none of the conditions set out in the statute, are contained in the bond, and the only condition set out is collectively, "to perform and discharge all the duties required of them as ferrymen," and other duties being required by law, for which another bond is required to be given. We are not furnished with any certain data, to enable us to say what duties were intended to be secured to be performed, by the bond on which this suit has been brought; but it is insisted, that, if the bond sued on is not a good bond under the statute, it is valid as a voluntary bond at Common Law. And it is admitted, that this position seems to be supported by the authority of some adjudicated cases of great respectability. The case most relied on by the counsel for the appellee, and pressed with great force, is Stephens *et al.* v. Crawford, Governor, (3 Kelly, 499.) Stephens had been elected Sheriff, and had, within the time required by law, after his election, given bond, and was in office under his election, and after the expiration of the time allowed by law, to the Sheriff elect to give bond, on some suggestion of the insufficiency of the bond he had given, he voluntarily gave another bond; the Court ruled, that this last bond was not good under the statute, but that it was valid and binding upon him and his securities, as a voluntary bond at Common Law. And it was further decided in the same case, that as a Common Law bond, it could invoke the aid of the statute, the provisions of which it had so far disregarded, as to be held not a statutory bond, to give it force and effect.

To this last proposition, notwithstanding the great and sincere respect we entertain for the Court so ruling, we are unable to yield our assent. We believe, that, if a bond, intended to be taken by the authority of a statute, cannot be sustained as a statutory bond, that it cannot be valid as a Common Law, voluntary bond, unless it will stand as such, without the aid of the statute by which it has been repudiated. There is a class of bonds, that may well be sustained, from their form and structure, without the aid of any statute: injunction bonds, bail bonds, replevy bonds, forthcoming bonds, appeal and writ of error bonds, and all such as are made payable to the beneficiary or the interested party, unless taken under coercion and oppression, or by fraudulent imposition on the party; they would be valid at Common Law, without resorting to the statute, to give them effect as such.

Again, we are not prepared to say, that the bond sued upon in this case, is a voluntary bond, because, independently of all statutory enactments, the appellants were under no moral obligation to give a bond, before they could exercise the privilege of keeping a ferry boat upon their own lands, and demanding a compensation from those who received their services. But by our statutes, this natural right has been abridged, and it has been made a franchise, to be exercised on giving bond, and obtaining a license for its enjoyment. The statute should, therefore, require a more strict observance. Now it will be seen, that, in most of the cases cited by the appellee's counsel, the suit was on an official bond, as was the case in 3 Kelly; and it cannot be contended, that, to require an official bond from an officer on entering upon the discharge of official duties, is any abridgement or restraint upon his rights; yet, the eminent Judge who delivered the opinion in the case referred to, to support the conclusion, that the second bond was a voluntary bond, seems to place much stress on the fact that Stephens was already in the office of Sheriff, when that second bond was given by him. Had the appellants been already in the enjoyment of the franchise, under a

license when they gave the bond, it would have been analogous, in many respects, to the case of the Sheriff, Stephens; but they were not, and were required to give the bond, before they could exercise a right that unquestionably belonged to them, if there had been no statute in relation to ferries.

In the case of the Commissioners of the Poor for Lawrence District v. Gains, *et al.* 1 Vol. South Carolina Rep., 459, which was a suit on a bastardy bond, Judge Nott, who gave the opinion of the Court, says, that the bond is not valid as a statutory bond; that, where an Act of the assembly requires a thing to be done in a particular way, that way, and that alone, must be pursued; that every feature of the Act is so distorted by this bond, that one would hardly suppose it had any relation to it, and he proceeds, "I do not think it a good "bond at Common Law; if it had been voluntarily entered "into, for the purpose of supporting this child, I should con- "sider it a duty which the obligor was under a natural and "moral obligation to perform, and therefore a debt which he "was legally bound to pay. But it appears on the face of it, "that he was taken by virtue of a warrant from a Magistrate, "and compelled, under color of legal authority, to enter into "a bond for purposes which he was neither naturally nor "morally bound to perform." Independently of the statute as before said, the appellants were neither legally nor morally bound to give the bond as a prerequisite to the exercise of the right to keep a ferry, and as they were required to give the bond before exercising it, the giving it cannot well be called a voluntary act.

Unless we felt very clear, that the bond was valid as a voluntary Common Law bond, sound policy would forbid our sustaining it as such. Any latitude allowed to officers, whose duty it is to take bonds, in departing from the terms required by the statute, in the structure and framing the bond, will be an encouragement to a further disregard and inattention to its requisitions; and it must be productive of an evasion of the statute altogether, because it seems to be well settled, that, if

a bond is sued upon as a Common Law bond, there can be but one recovery on it, (see case 3 Kelly, before cited.) Hence a bond might so far depart from the statute, as not to be sustainable as a statutory boud, and this through design; and when sued upon as a Common Law bond—say that it was a Sheriff's bond—the Sheriff might invoke a recovery against him for a few dollars which would prevent any other suit being sustained on it—a bond that the statute contemplated should be a security against delinquencies to the amount of twenty or even one hundred thousand dollars would be discharged by a judgment on it, as a Common Law bond for a mere nominal amount.

Believing that the bond sued on was neither void under the statute, nor at Common Law, we adhere to the opinion that the judgment must be reversed and the cause dismissed. The only legal remedy that the appellee had, was a suit at Common Law, against the appellants as common carriers, if he had suffered by the negligence of themselves, their servants or agents.

Reversed and dismissed.

Wheeler, J., gave no opinion in this case.

## Fisk and others v. Norvel, Adm'r.

It is contended by the appellants, that there is no such administration known to our laws, as that of administration *pendente lite*. However that might be, under the laws in force prior to the Act of 1848; yet, by that Act, provision is made for the appointment of an administrator, under the designation of administrator *pro tem.* for substantially the same purposes, and with the like powers and limitations, as those of an administrator *pendente lite*. The designation of the administration, by the terms "*pendente lite*," is not fatal to the grant; but, the latter terms, being those employed in the statute, should be used by the Court from which the letters issue.

In 1839, all the property of a decedent vested immediately in his heirs; the heirs had the privilege of accepting the estate, with or without the benefit of inventory: if accepted without inventory, there was no necessity for the appointment of an administrator, for the heirs became unconditionally liable for the payment of the debts.

By the law now in force, the whole estate vests in the heirs, subject, with certain exceptions, to the payment of his debts; but, upon the issue of letters testamentary or of administration, the executor or administrator has a right to the possession of the estate as it existed at the death of the deceased, in trust for the disposition of the same under the provisions of the Act. (Hart. Dig. Art. 1221.)

When a succession has once been administered and closed, the effects are, by operation of law, restored to the heirs: they have the full ownership, with all the rights of control, disposition and actions for its recovery and possession; and the Probate Court has no authority to re-open the succession.

It may be proved in a collateral proceeding, that the Probate Court had no jurisdiction; for example, that the person was not dead, or that the estate had been fully administered and closed: but, not that the Court acted irregularly or erroneously, upon a subject matter properly within its cognizance.

Where administration was granted in 1839, and the administrator filed his final account in 1848, and, it appearing to the Court that the estate had been fully administered, it was ordered that the said account current be received and recorded, and said succession closed, and that the administrator be fully discharged, upon his presenting to the Court a receipt showing that the effects of the estate remaining in his hands, had been passed over to the heirs of the deceased or their legal representatives: *Held*, That the succession, if open for any purpose, was merely open for the formal discharge of the administrator, on production of his receipt from the heirs; that the property of the succession vested immediately in the heirs; and that the Probate Court had no jurisdiction to appoint an administrator.

Appeal from Williamson. Suit by the appellee, as administrator *pendente lite* of the estate of Milton Hicks, against

the appellants to recover a tract of land. There was a motion to dismiss; a demurrer; general denial; special verdict; judgment for the plaintiff; motion in arrest of judgment overruled. The other facts, so far as material, will be found in the opinion of the Court.

*Fisk* and *Armstrong*, for appellants.

*Oldham & Marshall*, for appellee.

Hemphill, Ch. J. The appellee, Norvel, as administrator, *pendente lite*, of one Milton Hicks, deceased, sued the appellants for the recovery of a tract of land. One of the principal questions in the cause, and the only one which I shall examine, is whether the plaintiff, by virtue of the grant of administration *pendente lite*, had lawful authority to bring the action, or whether the grant was null and void, and conferred no right to represent the interests of the deceased.

The facts of the case, as affecting this question are, that Milton Hicks departed this life in 1839; that administration, in the same year, was granted to Charles K. Reese, and continued in him until December, 1848, when his account with the estate for final settlement was filed, and it appearing to the Court that the estate had been fully administered, it was ordered that the said account current be received and recorded, and said succession closed, and that the administrator be fully discharged, upon his presenting to the Court a receipt that the effects of the estate remaining in his hands, had been passed over to the heirs of the said deceased, or their legal representatives. Subsequently, in January, 1850, letters of administration *pendente lite* were granted by the same Court, to the appellee; but there is no evidence showing upon what facts such grant was obtained.

It is contended by the appellants, that there is no such administration known to our laws, as that of administration *pendente lite*. However that might be, under the laws in force

prior to the Act of 1848, yet by that Act, provision is made for the appointment of an administrator, under the designation of an administrator *pro tem.* for substantially the same purposes, and with the like powers and limitations, of an administrator *pendente lite.* To authorize the grant of either there must be a contest pending respecting the probate of a will, or the right of administration. On the conclusion of the suit, the grant, whether denominated "*pendente lite*," or "*pro tem.*" is terminated. (Art. 1137, Dig.; 1 Williams on Ex'ors, p. 409.) The designation of the administration, by the terms "*pendente lite*," instead of "*pro tem.*," is not fatal to the grant; but, the latter terms, being those employed in the statute, should be used by the Court from which the letters issue.

It being determined, then, that the grant of limited administration, described as "*pro tem.*" in the 28th Section of the statute, (Art. 1137,) would not be rendered void by its being designated *pendente lite*, the question arises whether, under the facts of this case, as alleged and proven, the Probate Court had any lawful authority to grant such administration, whether it be under the description of "*pendente lite*" or "*pro tem.*"

It appears from the record, that general letters of administration upon this estate, had been granted more than ten years previous to the commencement of this suit, to Charles K. Reese, and that more than one year antecedent to the grant of this administration *pendente lite*, the said Reese had filed his account current, for final settlement with the estate, that the same was received and approved, and the succession having been fully administered, as stated in the decree of the Court, was ordered to be closed, and the administrator discharged on his producing a voucher that the effects of the deceased had been passed to the representatives of the deceased. It appears from this decree, that all the purposes legally within the scope of administration, had been effected; that the necessity for continuing the succession open had ceased; and it was ordered to be closed. If open for any purpose, it was merely for the formal discharge of the administrator, on production of his receipt from the heirs.

The rights of the latter to the exclusive control and possession of the property, as it existed at the close of administration, had accrued; and, unless they could again be rightfully divested, for administrative purposes, the grant of this administration must be void.

All letters of administration, whether general or special, are for purposes more or less temporary. The duration of even general letters of administration was, under former laws, precisely fixed, with power under special circumstances, of prolongation; and under the existing statutes, the policy of speedy administration and adjustment, in order that the succession may be closed, is continued. At the death of a deceased, all his property vests immediately in his heirs, whether they be testamentary or *ab intestato*. Such was the law at the death of the intestate Hicks; but, under the law as it then existed, his heirs had the privilege of accepting the estate, with or without the benefit of inventory. If accepted without inventory, there was no necessity for the appointment of an administrator, for the heirs became unconditionally liable for the payment of debts. By the law now in force, the whole estate vests in the heirs, subject, with certain exceptions, to the payment of his debts; but, upon the issuance of letters testamentary or of administration, the executor or administrator has a right to the possession of the estate as it existed at the death of the deceased, in trust for the disposition of the same, under the provisions of the Act. (Art. 1221.)

The estate, then, at the death, vests immediately in the heirs, as the true and full owners. A qualified interest is subsequently vested in executors and administrators, principally for the collection and payment of debts and demands for and against the estate; and when the object of the trust is satisfied, the property remaining is again to be restored to the heirs, as rightful proprietors. Nay, under the provisions of the statute, the heirs are not to be deprived of the enjoyment of the property until the debts are completely discharged. After the expiration of twelve months from the grant of admin-

istration, the heirs may require partition of the residue, the administrator retaining sufficient to pay all the debts, allowed, approved or established, or rejected or disapproved and which may be established; and no suit on a claim for money can be subsequently instituted against an executor or administrator, but the holder shall have his action against the heirs, devisees, or legatees. (Art. 1196–97.)

These provisions show that when a succession has once been administered and closed, the effects are, by operation of law, restored to the heirs. They have the full ownership, with all the incidental rights of control, disposition and actions for its recovery and possession. What possible beneficial purpose, could be secured by a second administration? The heirs can prosecute their own rights, disembarrassed of any supposed interest in an executor or administrator. Should they labor under disability from infancy or coverture, the law has provided for their protection, but not through the agency of an executor or administrator.

Were it not for the express authority of law, the Probate Court could not originally take the estate out of the heirs, to vest it in an administrator. For certain purposes, this is permitted: but, when the trust is executed, and the property restored to the heirs, disencumbered of all the relations growing out of the trust, where is the authority for again disturbing the heirs, and placing the estate once more under administration? Such intrusion, as we have before stated, is not necessary for the benefit of the heir; nor is it necessary for creditors. They have their action against the heirs, devisees, and legatees; and, if even expedient, yet such power could not be exercised, unless authorized by law. If, then, the Court has no rightful power to re-open a succession which has once been fully administered, and finally closed, the attempt to do so in this case must be void, and the grant of administration absolutely null.

It may be said that the Court, having the right, in proper cases, to grant letters of administration *pro tem.* or *pendente*

*lite*, it must be presumed, when the question is raised collaterally, that the circumstances existed, which justified the exercise of the power, or that the Judge, having power to perform such act, if, in the exercise of his discretion, he acted improperly, the act is only voidable and not void, and cannot be incidentally questioned by third persons.

That the Probate Court has extensive authority, over all matters pertaining to the estates of deceased persons, is true; and it is equally clear, that all its acts on subjects within its cognizance, however erroneous they may be, are voidable—not void. If, at the opening of the succession, the Judge had improperly granted letters of administration *pendente lite*, these might have been subsequently revoked; but the acts of the administrator, as an officer *de facto*, would have been valid, and could not have been, by third persons, collaterally attacked; that would have been a case, in which the Court might have rightfully the power to grant administration to some one; but under the facts of this case, he had no power to grant administration to any. His grant is not regarded in the light of an erroneous act of a tribunal having jurisdiction over the subject matter, but as the act of a Court without jurisdiction.

As the point under discussion, has been well illustrated in the case of Griffith v. Frazier, I will cite some passages from the opinion, in which the distinction is drawn between the void and voidable acts of a Court having testamentary jurisdiction. "To give the Ordinary jurisdiction, a case in which "by law letters of administration may issue, must be brought "before him. In the common case of intestacy, it is clear that "letters of administration must be granted to some person, by "the Ordinary; and, though they should be granted not ac- "cording to law, still the act is binding until annulled by the "competent authority: because he had power to grant letters "of administration in the case. But, suppose administration "to be granted on the estate of a person not really dead. The "act, all will admit, is totally void; yet, the Ordinary must

"always inquire and decide whether the person whose estate "is to be committed to the care of others, is dead or in life. "It is a branch of every case in which letters of administra- "tion issue; yet the decision of the Ordinary, that the person "on whose estate he acts, is dead, if the fact be otherwise, "does not invest the person he may appoint, with the charac- "ter or powers of an administrator. The case, in truth, was "not within his jurisdiction—it was not committed to him by "law, and it was not one in which he had a right to deliberate."

Other cases in which the act of a Probate Court, in the grant of administration, would be absolutely void, were referred to, for illustration. It was held that the appointment of an administrator on the estate of a deceased whose executor was present, in the constant performance of his duties, would be absolutely void; that the ownership, by the executor, of the chattels, for the purpose of administration, was incompatible with any power in the Ordinary, to transfer those chattels to another, by the grant of administration; and that such grant would pass nothing, and be absolutely void. (8 Cr. R. 9.)

In this case, the power of the Probate Court, over the estate, for the grant of administration, had ceased. No such case could have been presented, as would have authorized the grant. The estate had vested or been restored to the heirs in full ownership. They were as much proprietors, as was the intestate in his lifetime. Their rights were exclusive and incompatible with any power in the Probate Court, to transfer their property to another; and any attempt to do so was beyond the jurisdiction of the Court, and a mere nullity.

Without further discussing this subject, we are of opinion that the grant of administration, to the appellee, was void, that it conferred no right or power upon him to represent the deceased. The judgment must therefore be reversed, and the cause dismissed.

Reversed and dismissed.

## T. G. McGehee v. C. V. Shafer.

That the plaintiff had endeavored to entice away the slave of the defendant, promising to return to carry out his purpose in a month, is no justification of a whipping inflicted upon the plaintiff by the defendant in the meantime, and alleged to have been done for the purpose of deterring the plaintiff from carrying out his unlawful intent; although the same facts were admissible in extenuation of damages.

It seems that matters which go merely in aggravation or in extenuation of damages, need not be pleaded; and, if pleaded disconnected from a good cause of action or ground of defence, are subject to exceptions.

In cases in which the jury are at liberty to impose exemplary damages, a new trial will not be granted on the ground of excessive damages, unless they be so flagrantly excessive as to warrant the conclusion that the jury were actuated by passion, partiality or prejudice.

Where it was urged as a ground for a new trial, that one of the jurors had been a member of a grand-jury which found a bill against the defendant for the same trespass, it was answered that the fact no where appeared, and, that, if there had been any objection to the competency of a juror, it should have been urged when the jury were impannelled, or the defendant should have adduced, at least, the evidence of his own affidavit, to the fact that the objection to the juror was not then known to him.

Where, in support of a motion for a new trial, it was proved that one of the jurors had been heard to remark previous to the trial, that the plaintiff "would have "friends at the trial, who would point out to him who would be his friends on "that occasion," the Court said the remark was not deemed to afford evidence of partiality or prejudice; and that it should have been made the subject of challenge, if known to the defendant; and if not known, the affidavit of the defendant, to that effect, at least, should have been submitted in support of the motion.

Appeal from Caldwell. The appellee sued the appellant for a trespass, committed by the latter, upon the person of the former, by the infliction of stripes.

The defendant justified the trespass, pleading, specially, in bar of the action, in substance, that the plaintiff, on the night previous to the whipping, (which he admited) had endeavored to entice away his negro, and had made an appointment to come and take him away two months thereafter; and that the

whipping was necessary to prevent the contemplated injury. He also pleaded "not guilty."

The plaintiff excepted to the special plea. The exceptions were sustained: but the defendant was permitted to give in evidence, the matters specially pleaded, in mitigation of damages.

It appeared in evidence, that the plaintiff, wagoning upon the highway which led by the defendant's residence, stopped at or near his house, to pass the night; that, in the night, he had a conversation with the negro man of the defendant; that, on the following morning, the defendant collected some of his neighbors, pursued after and overtook the plaintiff, accused him of having endeavored to incite his negro to run away, or of having had a conversation with him about running away, and demanded a confession, which the plaintiff refused, protesting that he had done nothing wrong, and offering to go before a magistrate; upon which the plaintiff cut switches or sticks with which he inflicted blows upon the back of the plaintiff, which he continued for some time; stopping occasionally to repeat the demand of a confession. At length the plaintiff confessed that he had a coversation with the negro, of the character charged by the defendant, when the latter desisted.—During the whipping the plaintiff fell down, and so remained until it ceased. He was severely bruised; he called in a physician; and, according to some of the witnesses, was, for some time, disabled from attending to his affairs, though he was not confined, but rode and walked about.

The defendant proved that, since the whipping, the plaintiff, publicly, and on various occasions had admitted having conversed with the defendant's negro, on the night previous, about running away, and going to Germany, and being free, and had said that he would be along that way with his wagon again in two months, when he would take him away with him. But the plaintiff accompanied these admissions with the statement that he was but jesting with the negro.

There was a verdict for the plaintiff for one thousand dol-

lars damages, whereupon the defendant moved the Court for a new trial on the following grounds: 1st. That the verdict was contrary to law and the evidence. 2nd. That the damages were excessive. 3rd. That a juror, one Hoskins, was also a member of the grand-jury, who had returned a true bill against the defendant, for the same assault and battery which is the subject of this suit; and that the juror was not impartial.

In support of the motion, the defendant submitted the affidavit of one Hammonds, who stated that, previous to the trial of the cause, he heard the juror, Hoskins, say, that the plaintiff "would have friends at the trial who would point out to him who would be his friends, on that occasion"

The Court overruled the motion and gave judgment upon the verdict; and the defendant appealed. The errors assigned were,

1st. The sustaining of the plaintiff's exceptions to the defendant's plea.

2nd. The overruling of the motion for a new trial.

*B. F. Caruthers*, for appellant.

*C. C. McGinnis* and *A. J. Hamilton*, for appellee.

Wheeler, J. It is clear, that the matters specially pleaded by the defendant, did not constitute, in law, a justification of the trespass committed by him, or a good plea in bar of the action. Those matters could only avail the defendant, in extenuation of the trespass, and in mitigation of damages. Matters which go merely in aggravation, or in extenuation, and whose effect is but to enhance or diminish the damages, need not be pleaded. They are necessarily incidental to, or intimately connected with, and inseparable from, the facts which constitute the cause of action or ground of defence; which they merely serve to qualify, or illustrate, and, in connection with which, they are always admissible in evidence as a part of the *res gestæ*, without being specially pleaded. And if

pleaded, disconnected from the principal facts, which give the right asserted, and upon which they are thus dependent, exceptions to the pleading may properly be sustained; since, in that form, it will not constitute a good cause of action or ground of defence, and consequently will not afford the basis of an adjudication in favor of the party. Every pleading must contain the averment of material, issuable facts; facts upon which an issue may be formed, which, when decided, will determine the controversy, and authorize a judgment for the party in whose favor it may be found. The pleading to which the exceptions in this case were sustained, contains no averment of any such fact, either in bar of the action, or in abatement of the suit. The exceptions, therefore, were rightly sustained.

But, were it otherwise, the defendant had the full benefit of the matters pleaded. The facts were in evidence before the jury, who were permitted to give to them all the effect, which the defendant could legally claim for them. It is manifest, therefore, that the defendant can have suffered no injury, or prejudice in consequence of the ruling complained of. (Hardy *et al.* v. De Leon, 5 Tex. R. 211.) The remaining assignment of errors relates to the overruling of the motion for a new trial. The grounds of the motion, deemed to require notice, are, 1st. That the damages assessed by the jury are excessive. 2nd. Objections to one of the jurors.

In respect to the first ground, it is to be observed, that this was a case in which the jury were at liberty to impose exemplary damages: and, in cases of this character, a new trial will not be granted on the ground of excessive damages, unless they are so flagrantly excessive as to warrant the conclusion that the jury were actuated by passion, partiality or prejudice. In these cases, where there is no rule of law regulating the assessment of damages, and the amount does not depend on computation, the judgment of the jury, and not the opinion of the Court, is to govern, unless the damages are so grossly excessive as to manifest that the jury must have acted under some undue, or improper influence. (2 Pick. R. 113; 9

Johns. R. 45; 10 Id. 443; 16 Pick. R. 541; 4 Mass R. 1; 9 Pick. R. 11; 1 Bibb, R. 247; 3 Da. R. 464; 2 Penn. R. 814.) The finding in this case was, doubtless, governed in a great degree, by the weight which the jury attached to the evidence introduced by the defendant in mitigation of damages. Of the weight to which the evidence was entitled, the jury were the judges. And we see nothing in the case to warrant the supposition, that they were actuated by partiality, prejudice, or any undue influence.

In respect to the remaining ground of the motion, it may suffice to remark that it nowhere appears that the juror, Hoskins, was a member of the grand-jury, as alleged. If, however, there was any objection to his competency which would have been good cause of challenge, it should have been urged when the jury were impannelled, (8 Yerg. R. 607; 2 N. & McC. 261,) or the defendant should have adduced, at least, the evidence of his own affidavit, to the fact, that the objection to the juror was not then known to him.

The remark attributed to the juror, is not deemed to afford evidence of partiality or prejudice. And the same is true of this, as of the other objection to the juror; it should have been made the subject of challenge, if known to the defendant, and if not known, he should, at least, have submitted his affidavit to that effect, in support of the motion.

The very ingenious and eloquent argument of the counsel, who opened the case for the appellant, would have received a more particular consideration, in reference to the positions maintained in the argument, if, in the opinion of the Court, the questions involved, were attended with any real difficulty; or if the law of the case, was not regarded as too well settled, to admit of serious controversy. The judgment is affirmed.

Judgment affirmed.

## Kegans v. Allcorn.

It does not appear to have been necessary by the Spanish Law to make the heirs parties, in order to divest the interest of an estate.

Where an administratrix was sued in 1838, in the District Court, for the specific performance of a contract of her intestate to convey land, and she named in her answer the children, and heirs, of her intestate, all of whom were minors, and for whom the Court appointed guardians *ad litem*, who appeared and answered; *Held*, That, in the absence of any positive regulation or provision on the subject, it was competent thus to make the minor heirs parties; that they were concluded by the judgment; and that they were not entitled to a writ of error on attaining full age.

The Ordinance of 22d January, 1836, (Hart. Dig. Art. 983,) introduced the Louisiana law, merely as the law of procedure in the settlement of successions; it did not furnish the rule of decision or practice in suits between the estate and third parties in the District Court.

Persons improperly omitted, may be made parties in the progress of a cause; and the manner of doing it, when not prescribed by positive law, must be determined and regulated by the Courts.

Where there was no positive provision of law requiring it, the Court said, No sensible object could be attained by the service of process on an infant of eleven years; and there can be no reason for requiring the performance of that idle formality.

The security of property, the repose of society, public policy require, that the proceedings of the Courts, in former times, under which rights were supposed to have vested, and on the faith of which property has been transmitted, should be upheld, whenever this may be done without doing violence to the established principles and usages of the law.

Error from Washington. This suit was brought in 1838, by the defendant in error, against Nancy Kegans, as administratrix of James Kegans, deceased, for the specific performance of a contract between the plaintiff and the defendant's intestate, for the conveyance by the latter to the former, of a half league of land.

The defendant, in her answer, named the children and heirs of her intestate, James Kegans; all of whom were minors. The presiding Judge thereupon appointed an attorney *ad litem* for each of the heirs; who appeared and answered for the heirs, whom they respectively represented. At the Spring Term,

1839, the Court rendered a final decree in favor of the plaintiff, against the heirs and legal representatives of Kegans. On the 5th of November, 1850, the plaintiffs in error, heirs of James Kegans, the eldest of whom was eleven years old when the judgment was rendered, obtained this writ of error.

*J. D. Giddings* and *G. W. Horton*, for plaintiffs in error. I. Under the idea that some objections will be raised to the right of the plaintiffs in error to maintain the present proceeding, we advert to some authorities in support of the right.

1st. Are the present plaintiffs in error the proper parties to prosecute this writ? Tomlin in his Law Dictionary gives the following rules: "Any person damaged by error in the record, "or that may be supposed to be injured by it, may bring er- "ror to reverse it, whether he be party or not." The heir may bring error to reverse the judgment against the one under whom he claims. He who is made party by the law, may bring error, although not originally a party. (1 Toml. 648-9; 2 Bac. Ab. 456, Title Error.)

2nd. Are the plaintiffs in error barred by limitation? We say not. At the time the judgment was rendered in the Court below, the Spanish Law of prescription was in force in Texas. We find nothing in that law, as given in the Partidas, relating to the limitation of appeals—writs of error not being known to the Spanish Law. But the sixth Partidas, Title 29, provides that minors and married women do not lose by prescription.

The Acts of limitation by the Congress of the Republic, (see Acts of 5th Congress, p. 162,) we think easily admits of an interpretation in favor of the right of the plaintiffs in error to prosecute this writ. The 9th Section provides that no writ of error shall be granted after two years after final judgment. But the 11th Section says that no law of limitation shall run against minors, married woman, &c.; and when the limitation does not commence prior to the disability, the same time is allowed such persons after removal of disability, as is allowed to others.

The plaintiffs in error being minors at the rendition of the judgment, the limitation consequently did not commence prior to the disability of minority, and therefore two years, the time allowed in the law to bring a writ of error, is given by law to the plaintiffs in error, to prosecute their writ. In the case under consideration the record discloses the fact that the eldest of the present plaintiffs in error, viz: George W. Kegans, was a minor of the age of eleven years, at the rendition of the judgment, that is, in March, 1839. He would therefore be of age in March, 1849, allowing the two years after the removal of the disability of minority, he would have until March, 1851, to bring his writ of error; the writ being obtained in November, 1850, some four months of the term had yet to run, when this proceeding was commenced. It will follow as a matter of course, that, if the eldest of the minors is not barred by limitation, the younger are not.

Having, as we confidently suppose, established the proposition that the proper parties have been made to this proceeding, and that the plaintiffs in error are not prejudiced by any law of limitation, we proceed to discuss the several assignments of error, and

II. 1st. That there was error in this, that the plaintiff below proceeded against the administratrix of Kegans alone.

The 3rd Section of an Ordinance of the Provisional Government, entitled "an Ordinance for opening the several Courts of Justice," &c., (see printed volume p. 135-6,) provides that all proceedings relative to successions, matters of probate, *et cetera*, shall be regulated and governed agreeable to the principles and laws in similar cases in the State of Louisiana.

The case under consideration was a proceeding relative to a succession. It was a suit against the succession of James Kegans, and is such a case as was comprehended in the terms of the Ordinance cited. It, then, was a case to be regulated and governed by the laws of Louisiana. If we examine the Louisiana law in reference to such cases, we see at once that the error assigned was committed in the Court below.

Suits against vacant successions must be against the heirs and the curator appointed to administer the succession, when the heirs or any of them are present or represented in the State. (Code of Practice, Art. 122–3 p. 42.)

The record discloses the fact that the heirs were present in the Republic when the suit below was instituted, and they should therefore have been made defendants, with the administratrix; and if the heirs had not been present, that fact should have appeared affirmatively in the petition, to have authorized the plaintiff to have proceeded against the administratrix alone. The naming of the minor heirs in the answer of the administratrix, did not make them defendants.

III. And this brings us to the second assignment of error, viz: that the Court erred in treating the minors as defendants, upon the mere naming of them by the administratrix, in her answer.

Under no system of laws, can a party be treated as a defendant to a suit, till he be notified of the suit, by the service of some sort of process upon him.

The 8th Section of the Act of Congress requires that the petition should contain a clear statement of the names of the plaintiff and defendant, and "there shall be delivered to the defendant by the Sheriff, a copy of the writ and petition."—(See page 200 vol. 1st, Laws of Republic. The minors, not having been named in the petition, and not having been served with any notice of the suit, could not be properly treated as defendants in the suit.

IV. As to the third assignment of error. An attorney *ad litem* for minors, is not known to any laws. But, admitting that in this case, attorney was synonymous with curator or guardian, still the Court below erred in the appointment. Where a suit is instituted against a minor who has no guardian, the plaintiff may apply to the Judge of the place to appoint some one to assist the minor and answer for him. (Partida 3, Title 2, Law 11, Vol. 1, p. 32, and see Art. 118, Code of Practice, p. 38, to the same effect.) Consulting the laws just cited, it will be

seen, that it must be shown affirmatively that the minor has no guardian; and the plaintiffs must demand that the appointment must be made by the Judge. Neither is it shown that either of the curators appointed, ever took the oath faithfully to discharge the trust. A judgment against a minor without his having a guardian or some one appointed to represent him in the suit, is invalid. (Partida 3, Title 2, Law 11, vol. 1, p. 32.) A judgment against one not previously cited is not valid. (Partida 3, Title 22, Law, 2, vol. 1, p. 274.)

V. Having, as we confidently suppose, shown that the proceedings in the Court below, were wholly irregular and erroneous, we proceed now to notice briefly the more important point in the cause, viz: that the Court below erred in giving judgment at all, in favor of the plaintiff below.

We lay down the proposition, that, taking the facts alleged in the petition of plaintiff below, and as found by the jury, to be true, still the plaintiff below was not entitled to recover. The contract, or bond, sued on, and which is made a part of the petition, shows that Kegans had contracted to sell a part of the league of land received by him as a colonist in Austin's colony. It is also shown that he had received the title of possession of the land on the 23rd March, 1831, and that, on the 11th May of the same year, that is in less than two months after he received the title of possession of the land, he sold or contracted to sell a part of it. He could not then by any possibility have completed the cultivation of the land awarded to him as a colonist. The 27th Article of the Colonization Law of 1825 prohibits in positive terms, the new settlers from selling the lands awarded to them, until they had completed the cultivation of those lands. Kegans not having completed the cultivation of his land at the time he undertook to sell a part of it, he was clearly under the prohibition contained in the 27th Article of the Law of Colonization, and the sale or contract was therefore void. It was a mere nullity and not enforceable in a Court of Justice. That the sale was illegal, and that parties to it were perfectly aware of it, is shown by the contract

itself: for Kegans covenants, convey only when the laws will permit. Believing, then, that the contract between Kegans and Allcorn was one prohibited by the law, and therefore void, we deem it sufficient for the present purpose, to cite the Court to the decision of this Court in the case of Hunt v. Robinson, (1 Tex. R. 748.) and the reasoning of the Court in that case and the authorities there cited.

*Webb & Oldham*, for defendant in error. The most material question in this case, is whether the heirs of Kegans should have been made parties defendant, to the suit instituted by Allcorn for a specific performance of the contract entered into between himself and the deceased, in the lifetime of the latter. If the Ordinance of 1836 providing "that all proceedings re-"lative to successions, matters of probate, *et cetera*, shall be "regulated and governed agreeably to the principles and laws "of the State of Louisiana" introduced the provision of the "Code of Practice" prescribing the manner in which a specific performance of a contract for lands might be enforced against the representatives of a deceased person, it was necessary that they should have been made parties, otherwise it was not.

The rights of the administrator in regard to the estate, were not acquired under the laws of Louisiana, but under the laws of Spain, then in force in Texas. The laws of Louisiana only regulated the mode of proceeding; the laws of Spain determined the interest. Under the laws of Louisiana, the administrator did not possess such a complete title to the realty as to render the heirs unnecessary parties in suits for specific performance of a contract in relation to the same. Under the laws of Spain he did.

Such we understand to be the decision of this Court in Thompson v. Duncan. (1 Tex. R. 485.) It is there said, "These distinctions" (the distinctions of the Common Law) "are unknown to the civil law, as it prevailed under Spanish "modification in Texas. * * * * * * * * All pro-"perty without distinction was classed together."

But such is not the case in Louisiana. All property without distinction is not classed together, but the heirs have an interest in the realty of their ancestor, which cannot be divested, without their being made parties to the proceedings instituted for that purpose. But not having such interest under the Spanish Law, the reason for making them parties to the suit, does not obtain, and it is therefore unnecessary.

It is believed, that the Acts of the Congress of the Republic, and those of the Legislature of the State, do not clothe the administrator with more extensive powers, than those he possessed under the Spanish laws. Such seems to be the opinion expressed by this Court in the case of Thompson v. Duncan, *supra*. The Court say, "The Spanish Civil Law being the "basis of our jurisprudence, much of our legislation, after the "Revolution, was imbued with its influence; hence our Act "of Congress passes all of the estate of the decedent into the "hands of the personal representative," &c.

Under this Act of Congress, it has been repeatedly decided by this Court, that the administrator alone is the necessary party to suits for land. (Thompson v. Duncan, *supra*; Graham v. Vining *et al.*, 2 Tex. R. 423; Moore v. Morse, 2 Tex. R. 400; Howard v. The Republic, 2 Tex. R. 311; Holt v. Clemmens, 3 Tex. R. 423.)

The case of Thompson v. Duncan decides, that, under the Spanish Civil Law, in force at the time of the institution and determination of this suit, the entire estate, real and personal, was cast upon the administrator; that the probate law conferred upon him the same rights, as those acquired under the laws previously in force; and that case, with the succession of cases since decided, and which we have cited above, has settled the question, that the heirs are neither necessary nor proper parties to a suit in relation to land, and that the administrator alone is the proper person, through whom their interests can be asserted.

Hence we contend, that, as the rights and powers of administrators in Texas, previous to 1840, were derived from the

Spanish Civil Law then in force, and not from the Probate Laws of Louisiana, which did not clothe heirs with as extensive powers, that Article of the Code of Practice, requiring the heirs to be made parties to suits for land, was not adopted by the Ordinance of 1836, providing "that all proceedings "relative to successions and matters of probate *et cetera*, shall "be regulated and governed agreeably to the principles and "laws of the State of Louisiana."

If our conclusions are correct, upon this question—and that they are we have but little doubt—the administratrix of Kegans was the only proper party defendant to this suit, and consequently, the heirs have no right to prosecute this writ of error, and the same should be dismissed.

If the heirs were not necessary parties, and were not properly made defendants, they cannot seek to avoid the judgment for errors, in the Court below, of which the administratrix alone had the right to complain.

It is conceded that the heirs were not made parties to the suit, and that the order of the Court, appointing "curators *ad litem*" for them, did not make them such, because process had neither been prayed against, or served upon them. The judgment, so far as it affected them, was a nullity. They had no interest, in the subject matter of controversy, which was not represented by the administratrix; and were deprived of no right, by the judgment against them.

The decree against the administratrix was valid and binding upon her in her representative character, and transferred the interests of the heirs of her intestate, and conveyed to Allcorn the land, according to the contract between him and Kegans. So far the judgment is valid and binding.

If the judgment is void as to the heirs, it is not so as to the administratrix, and furnishes no cause for its reversal as to her. A void judgment is no judgment and cannot be reversed; but its nullity may be declared by the Court.

We conceive that this Court can do no more, than simply declare the decree a nullity so far as it affects the heirs and

dismiss the writ of error, leaving the decree of the District Court in force against the administratrix of Kegans, who was alone the proper party, and the only party made a defendant in the cause.

Wheeler, J. It is insisted on behalf of the plaintiffs in error, that it was incumbent on the plaintiff below, to have made the heirs of James Kegans parties to the suit; that he did not do so, and that consequently the judgment is erroneous, that their rights are not concluded by it, and that, being minors, limitation did not run against their right of appeal, until within less than two years next before the bringing of this writ of error.

We have been referred to no provision of the Spanish Law, in force here at the time, which required, that, to divest the interest of the estate, the heirs be made parties. But reference is made to the Ordinance of the 22nd of January, 1836, (Hart. Dig. Art. 983.) and to the Code of Practice of the State of Louisiana. The Ordinance introduced the Louisiana law, merely as the law of procedure, in the settlement of successions: but it had no reference to a case like the present. This was not a "proceeding relative to a succession," within the terms and meaning of the Ordinance. That related to the proceedings in the opening and administration of the succession, in the Court which had cognizance of that subject. But it did not furnish, nor was it intended to furnish, the rule of decision or practice in suits between the estate and third parties, in the District Court. This was a suit between the estate and the plaintiff, not in relation to the administration, or settlement of the succession, but to property which once belonged to the deceased and had been sold by him. Neither the Ordinance, nor the Code of Practice of Louisiana had any application to the case.

But if, by the laws in force at the time, it was necessary that the heirs should have been made parties to the suit, in order that the decree might bind them, this, it is conceived, was

done in the present case. There can be no legal objection to the making of parties, during the progress of a cause, who may have been improperly omitted, in the bringing of the suit. This is the constant practice in Courts of Chancery.—In what manner it shall be done, when not directed by positive law, must be determined by the practice of the Courts, and like other matters of practice, is subject to be regulated by them. The Courts of this country, at that day, were not subject to the rules of practice of Courts of either Common Law or Chancery: and their proceedings are not to be tested by those rules. We are aware of no rule of positive law, which prescribed the manner in which the heirs should be made parties, in a case like the present, if indeed that were necessary. The course adopted, was, it is believed, the prevailing, if not the universal practice, at the time, where it was proposed, by the judgment, to conclude the rights of infants; and no reason is perceived why it did not afford them as effectual protection, as a different practice would have done. No sensible object could be attained by the service of process on an infant of eleven years; and there can be no reason for requiring the performance of that idle formality. Under the practice adopted in this case, many rights have been acquired, and a vast amount of the property of the country has been held and transmitted. And those rights ought not now to be disturbed unless for very cogent reasons, founded in a legal necessity. It ought first to be clearly shown that they were acquired against law. The security of property, the repose of society, public policy require, that the proceedings of the Courts, in former times, under which rights were supposed to have vested, and on the faith of which property has been transmitted, should be upheld, whenever this may be done, without doing violence to the established principles and usuages of the law.

We are aware of no usage or principle of the law, in force here at the time, which was contravened by the practice adopted in this case. We think it was competent for the Court, in the absence of any positive regulation or provision

on the subject, thus to make the heirs parties. Having been made parties to the suit, and not having appealed, the plaintiffs in error are concluded by the judgment. (Taylor v. Duncan, Dallam.) The writ of error must, therefore, be dismissed.

Writ of error dismissed.

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## Boyle v. Forbes, Adm'r.

An administrator who was appointed when the laws of Louisiana relating to successions, were in force in this country, could not sustain an action in his representative capacity, commenced after the expiration of a year from his appointment, without showing a continuance of the administration, by the Probate Court.

If an administration has been closed, the presumption is that all the debts have been paid off; and it would seem, that, after a lapse of thirteen years from the grant of administration, and no order for its continuance open, the presumption would be equally strong, that all the debts had been paid off.

Independently of the statute fixing the precise period of one year to the administration, it would seem, that, after a lapse of thirteen years, the presumption would be that all legal demands against the succession had been discharged.

Where the petition showed that administration had been granted to the plaintiff in 1838, and there was no demurrer, but the defendant, by way of amendment of his answer, not under oath, denied the representative character of the plaintiff, it was held that the plea was well pleaded.

Appeal from Fayette. This was a suit brought by the appellee, as administrator of W. H. Carson, against the appellant, to recover a tract of land granted by the government of Coahuila and Texas, as a headright, to the intestate. The petition set out the grant and field-notes, and charged the trespass to have been committed by the appellant. It alleged the death of Carson, the grantee, in 1838, without a will, and the issue of letters of administration to the plaintiff, by the Probate Judge of Brazoria county, that being the county of the

residence of the intestate, at the time of his death. The letters showed the appointment to have been made on the 21st day of February, A. D., 1838. The petition did not disclose, by averment or otherwise, that any order of the Probate Court for continuing the succession open up to the time of bringing this suit, the 12th June, 1851, had ever been applied for or granted.

The appellant objected to the appellee's right to sustain this action, and his objection was overruled. The overruling the exceptions to the appellant's right to sue for the land, on the facts stated in his petition, was the only question presented for consideration.

*Fred. Tate*, for appellant. The right of an administrator, to maintain an action as such, is derived from his appointment; and whenever his appointment ceases to be of force, whether by mere operation of law, or by a removal from office by the Chief Justice, his right to sue must necessarily expire with his appointment. In an action of ejectment, the defendant may show that the title of the plaintiff expired before the institution of the suit. (U. S. Dig. Title EJECTMENT; 1 Blackf. R. 26.)

The letters of administration, taken in connection with the law in force at the time they were granted, show that the title of the appellee as administrator, had expired long before the institution of this suit. He therefore had no right to sue as such. By the law of Spain, no one could hold the office of executor or administrator, for a longer period than one year. After that time he was *functus officio*, and the estate went to the heir; or if he were absent, or a minor, to a curator appointed for him. (Johnson's Laws of Spain, 143 to 4.) By the ordinance and decree of the 22nd of January, 1836, (Vide Ordinances, p. 136,) the 3rd Section of which will be found in Hartley's Digest, Art. 983, the law of Louisiana was adopted as the law of Texas, in relation to successions; and, by that law, the term of the administration is fixed at one year, unless

continued by the Court, upon good cause shown, but in no event could the term be extended beyond five years. (Civil Code, Art. 1179, 1197, 1199; 3 Mart. N. S. 601.)

By the 32nd Section of the Act of the 5th of February, 1840, (Hart. Dig. Art. 1026,) the term of the administration is fixed at one year from the day of the appointment of the administrator, unless continued upon good cause shown. The 60th Section of the same Act, (Hart. Dig. Art. 1042,) makes it the immediate duty of the Probate Courts, "to cause all the "executors and administrators to whom letters have been "granted twelve months prior to the passage of this Act, to "appear before them" and settle their accounts as executors and administrators. This suit was brought thirteen years after the appointment of the appellee as administrator of W. H. Carson, deceased; and by no law in force at the time of, or subsequent to, his appointment, could he have been recognized as the administrator, when the suit was instituted. No extension of his term within the prescribed limits of the law could have made him so. By the law of Louisiana, which was in force at the time of his appointment, and which must therefore govern this case, his term had expired eight years before, even if it be admitted that it had been continued to the utmost limit of the five years. The Act of 1840 did not relieve him: for by that also the term of the administration is limited to one year, unless continued, &c. (Hart. Dig. Art. 1026.)

Although no objection be made, at the trial of a cause in the lower Court, to the authority of the plaintiff to sue; yet, if the record does not show that he had authority, the objection will be heard in this Court, and will be fatal. (1 Tex. R. 203.)

But, in this case, the appellee's representative authority (and of course his authority to sue) was contested by the plea of *ne unques administrator*, which was properly pleaded in bar, and should have been sustained by the Court. (3 Hill, R. 444; 16 Wend. R. 579; 2 Greenl. Ev. 324 to 329; 2 Williams on Executors, 1381.)

On the trial of an issue joined on a plea of *ne unques administrator*, the *onus probandi* is on the plaintiff who has to prove the affirmative of the proposition. (2 Williams on Executors, 1381; 2 Greenl. Ev. 321 to 329.)

The expiration of his term deprives an administrator of all power of further administration. (7 Mart. N. S. 619.) To entitle the appellee to maintain an action after the expiration of the five years, for the recovery of property belonging to the estate of his former intestate, he should have been appointed administrator *de bonis non*, proof of which, if done, should have been made under the plea of *ne unques administrator*. An executor has no right to maintain a suit as such, thirteen years after the death of the testator, although the term be extended. (4 Mart. R. 340.)

The Court erred in overruling the plea of *ne unques administrator*.

*J. T. Harcourt*, for appellee. I. The appellant Boyle, who was defendant in the District Court, filed his original answer on the 23rd day of September, 1851, in which he nowhere denies the representative character of the appellee, but, on the contrary, tacitly admits it, if he does not positively do so, by his plea. An admission once made, cannot, by any subsequent amendment, be wiped out. The plea denying Forbes being administrator was made in an amendment, filed April 26th, 1852, and neither previous to that time, nor at any subsequent time, did Boyle demur to Forbes' petition, unless the plea of "no such administrator" could bear the name of a "special demurrer," as it is styled in the appellant's bill of exceptions.

II. The plea of "no such administrator" was taken up and argued as a "special demurrer" to the petition, before the trial of the cause commenced, as appeared by the bill of exceptions taken by the appellant. Hence, if said plea was admissible at all, as an amendment, the appellant by his own act having confined it to the face of the petition, and not hav-

ing even read it upon the trial, he did not by his bill of exceptions to the refusal of instructions asked, nor by his assignment of errors, place himself in a position to object in the Supreme or District Court, to the representative character of Forbes.

III. The law of Louisiana was very much modified, if not superseded, by an "Act organizing Inferior Courts, &c.," approved December 20th, 1836. (Hart. Dig. p. 146.) The Louisiana law required a new bond to be given at the end of a year from the grant of letters, if the administration was continued. The above Act leaves this discretionary with the Court; and all the subsequent laws leave the requiring of new security a matter of discretion. The law of February 5th, 1840, provides that any administrator appointed before the passage of the law, failing to make a settlement, should be liable to the penalty prescribed by the law. (Art. 1042.) That penalty was attachment. (Art. 1020.) So the law continues the administration, only prescribing a penalty, if the administrator did not settle in the limited time. The law of January 16th, 1843, expressly provides that no administrator should be required to settle, except on the petition of a creditor, &c. (Art. 1067.) This law continues all administrations indefinitely. The present law prescribes no limits to administrations. (Art. 1191, 1193, 1195, 1196, 1198.) And the same law provides for old administrations to be continued under its provisions. (Art. 1226.) The whole history of our probate legislation contradicts the position, that it is absolutely necessary for an administrator to obtain an order of Court to continue the administration; but, on the contrary, the spirit of the law implies that the functions of an administrator were intended to remain in full life, without the order of continuance; and under our statutes, it does appear to us, to be plain, that, if an administrator, subsequent to the law of December 20th, 1836, showed his letters or other evidence of authority, it would be incumbent on the party attacking his representative capacity, to show that his office had ceased.

IV. Is not the plea of "no such administrator," a plea in abatement, within the meaning of our statute? If so, it should have been sworn to. (Art. 690.)

V. Under the Louisiana law, administrations could be prolonged for five years. Between February, 1838, (in which month Forbes was appointed administrator,) and February, 1843, five years elapsed, and in January, 1843, the law was passed providing that no administrator should be compelled to settle except by creditor, &c. (C. C. Art. 1197.)

LIPSCOMB, J. At the time this succession was opened, we had no statutory enactment on the subject. The laws of the State of Louisiana, in relation to vacant successions, had been adopted by the Ordinance of the 22nd January, 1836. (Art. 983, Hart. Dig.) In the case of Flores, administrator, v. Howth & Dwyer, 5th Texas, it was ruled by this Court, that, under the laws of Louisiana, an administrator held his appointment for one year only, but that it could be extended for sufficient cause shown, from year to year, not exceeding five years. The laws of Louisiana, so adopted, continued in force until superseded by the Act of the Texas Congress of February 5th, 1840.

By this Act, however, the limitation was still continued to one year for closing the administration, unless continued open for good cause shown. (Hart. Dig. 1026.) It would seem, then, that at the date of the institution of this suit, the authority of the administrator held by virtue of his appointment in 1838, had long before expired, and the right of action for the land sued for belonged to the heir. If the administration had been continued so long—not, however, a fair presumption—it could only have been done by an affirmative act of the Probate Court, which ought to have been averred in the petition, and proven. If the administration was not continued by the Court, the appointment would cease to confer any authority, at the expiration of one year from the date of the letters of administration.

In the case of Fisk v. Norvel, administrator, at the present Term, it was decided that the property of an intestate belonged to his heirs, incumbered, however, with his debts; and that the object of the administration was to pay off and remove the incumbrance, after which the heir was entitled to the possession of the balance not absorbed by the debts. That this is correct, we entertain not the least doubt. If the administration has been closed, the presumption is that all the debts have been paid off; and it would seem, that, after a lapse of thirteen years from the grant of administration, and no order for its continuing open, the presumption would be equally strong, that all the debts had been paid off. If this was not the case, the creditors would have taken some steps ere this, to have had them paid.

We believe that the plea of no administrator was well pleaded, and if true, that it was decisive against the plaintiff's right to sue; because it was in his representative capacity alone, that he could have any pretext for suing for rights that belonged to the heir. Independently of the statute fixing the precise period of one year to the administration, it would seem, that, after a lapse of thirteen years, the presumption would be that all legal demands against the succession had been discharged. If, however, this was not the case, and protracted litigation had prevented this from being done, it would be the duty of the administrator to repel the presumption by proof of the fact, to sustain his right of action. The judgment must be reversed, and cause remanded.

Reversed and remanded.

## James Cole v. The State.

The prohibition against playing at cards in a house where spirituous liquors are retailed, includes the whole house from the cellar to the garret; whether the approach to the room, be from the exterior or interior of the building.

Appeal from Travis. Indictment under the statute to suppress gaming. The statement of facts showed that the playing was in a room of the same house, and adjoining the one used by the appellant for retailing spirituous liquors. The room had been occupied generally, as a private apartment, by the appellant; sometimes by his boarders; its approach being from the street. The Judge charged the jury, that the law applied to playing in the house, and included the whole house from the cellar to the garret.

*H. P. Brewster*, for appellant.

*Attorney General*, for appellee.

Lipscomb, J. We can perceive no error in the charge, and believe that it is fully embraced in the decision of this Court, in the case of McGaffe v. The State. (4 Tex. R. 156.) In that case the language of this Court is: A room is a part of a house, and there could be no playing in a room, without its being in the house of which the room formed a part. We believe that the charge given by the District Judge was in law correct, and happily expressed. The judgment is affirmed.

Judgment affirmed.

## James Burdett v. The State.

In cases of concurrent jurisdiction, the Court first exercising jurisdiction rightfully, acquires the control, to the exclusion of the other.

After indictment it is not competent for a Justice of the Peace to hear a complaint for the same offence; and the certificate of conviction or acquittal before the Justice, in such a case, is no bar to the indictment.

The replication recognized in criminal pleading.

Appeal from Travis. Indictment for assault and battery. The appellant pleaded to the indictment, a former recovery before a Justice of the Peace, for the same offence, and produced the certificate of the Justice, in accordance with the statute, in support of his plea. The State, by the District Attorney, replied, that the defence set up ought not to be allowed; because, he says, that, before the Justice of the Peace who tried and convicted the said Burdett for said offence, had any jurisdiction of the same, the indictment in this case had been filed in the District Court, &c. To this replication the appellant demurred, and the demurrer was overruled; whereupon a trial was had; a verdict and judgment against the appellant.

*H. W. Sublett*, for appellant.

*Attorney General*, for appellee.

Lipscomb, J. The only question presented, is the sufficiency of the bar of a former recovery, as pleaded by the appellant. We have no doubt that the judgment of the District Court, overruling the appellant's demurrer to the replication of the State is correct. It is founded on the well established rule, that, in a case of concurrent jurisdiction in different tribunals, the Court first exercising jurisdiction rightfully, ac-

quires the control of the case, to the exclusion of the other. After the indictment had been found, the Justice of the Peace had no jurisdiction; and his action thereon was a nullity. The judgment is affirmed.

Judgment affirmed.

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## Cox v. Giddings.

If the provisions of the Act to settle disputes by conciliation or arbitration, be not observed, the award will not have the effect of a statutory award.

*Quere?* Whether the Act to settle disputes by conciliation and arbitration, (Hart. Dig. p. 89,) embraces cases in which suit has been brought. However that may be, it is clear, that, if the directions of the statute be not pursued, the jurisdiction of the Court will not be divested.

Where, after suit, there was an agreement to arbitrate, which did not conform to the statute, and afterwards there was an agreement to go to trial at the next Term, which was done, and the party in whose favor the award had gone, did not offer the award in evidence, it was held that the award had been waived.

Construction of an agreement that the testimony then on file, should be read at the trial, subject to all legal exceptions, not going to the form and manner of taking.

Appeal from Washington. The appellee sued the appellant, for the proceeds of a league of land, which the latter had sold for the former, as his agent. The defendant pleaded that he was not indebted, and that he had fully accounted to the plaintiff.

After the cause was at issue, the parties entered into an agreement in writing, to arbitrate reserving the right of appeal, in which they appointed four arbitrators by name, and stipulated that any three of them should be authorized to act; and, in case they should fail to act, the award was to be made by such arbitrators as might be agreed upon by the parties; the award to be made the judgment of the Court. The case was continued. The controversy was submitted to the arbi-

trators named, three of whom made an award of $599 62, in favor of the plaintiff, who thereupon, gave notice of appeal. On the fourth day of the Term of the Court next succeeding, he moved the Court to set aside the award. There did not appear to have been any action of the Court upon the motion, nor did any further notice appear to have been taken of the award. The case was continued by consent; and an agreement was entered into by the parties, for a trial at the next Term. The case was accordingly tried at the succeeding Term. The plaintiff offered in evidence a certified copy from the records of Harris County, of an agreement between the defendant and a commercial firm in the city of Houston, concerning the terms of the sale of the land, in which, in consideration of an amount credited to the defendant by the firm, he undertook to settle for them an indebtedness of theirs to a firm in the city of New York. The copy of this agreement was attached to interrogatories, propounded by the plaintiff to a witness to the agreement, for the purpose of proving its execution. The interrogatories, with the copy of the agreement annexed, were filed June 15th, 1850, with the papers in the case; but no further steps were taken to procure answers to the same.

The defendant objected to the reading of the paper in evidence. The plaintiff then referred to an agreement between the parties to the suit, filed on the 22nd day of March, 1851, by which it was agreed that "the testimony now on file in "said case for each party, shall be read on the trial, subject "to all legal exceptions not going to the form and manner of "taking." The Court permitted the paper to be read. There was evidence conducing to show, that, under the agreement between the defendant and the firm at Houston, the land was conveyed by the defendant to the firm in New York, in satisfaction of four thousand dollars of the indebtedness to them of the Houston firm, and that the defendant received, or was to receive, in consideration, a credit upon the books of the latter firm, of twenty-five hundred and seventy-seven dollars and

sixty-two cents. There was a verdict for the plaintiff, for twenty-two hundred and seventy dollars and twenty-five cents; a motion by the defendant for a new trial, which the Court overruled, and gave judgment for the plaintiff; and the defendant appealed. The assignment of errors embraced the following points:

1st. That the Court had not jurisdiction to render judgment in the case.

2nd. That there was error in admitting in evidence the copy of the agreement, from the records of Harris county.

3rd. That the verdict was not warranted by the evidence, and was not responsive to the issue.

*J. E. Shepard*, for appellant.

*J. Sayles*, for appellee.

Wheeler, J. The assignment of errors brings in question the effect of the submission of the controversy to an arbitration, the admissibility of the transcript from the records of Harris county, the sufficiency of the evidence, and the relevancy of the verdict to the issues.

It was doubtless the intention of the parties, to avail themselves of the provisions of the Act of 1846, (Hart. Dig. p. 89,) in submitting the case to arbitration. The statute prescribes the proceedings which shall be had; and, if they would have invoked its aid, they should have observed its directions. This they have not done, but have substituted their agreement, variant from the law, for its provisions. (See Statute, Section 4 and 6.)

In the case of Owens v. Withee, (3 Tex. R. 161,) a doubt was expressed whether the statute was intended to embrace a case where suit had been brought. However that may be, it is clear, upon the authority of that case and upon principle, that this award could not have been made the judgment of the Court, under the statute; because the submission did not pursue its directions. The agreement to arbitrate, therefore, not having conformed to the statute, did not divest the Court of its juris-

diction of the case, and formed no obstacle to the subsequent proceedings and judgment. If any advantage could have been derived to either party in this case, by reason of the award, it was waived by consenting to disregard the award, and proceed to trial.

In respect to the admissibility of the copy of the agreement from the records of Harris county, we have felt more difficulty. It clearly was not admissible, unless under the agreement of the parties, of the 22nd of March, to the reading in evidence of the "testimony" then on file. This paper was on file; it was attached to interrogatories filed in the case. But whether it was intended that it should be embraced by the terms of the agreement, may admit of some doubt. It is, however, a question of intention, and that such was the intention, at least of the party offering the paper, appears probable, from the fact that, though its admission in evidence was very important to his case, he took no further steps to make the proof necessary to enable him to introduce it. It does not very satisfactorily appear what other papers were on file, intended to be read in evidence by the parties respectively, to which the agreement referred. It was the opinion of the presiding Judge, that it embraced this paper; and we are not prepared to hold that he erred in that opinion. We regard the evidence in the case, as quite sufficient to authorize the finding; and, had not this paper been before the jury, we should hesitate to disturb the verdict on the ground that it was not warranted by the evidence.

There is nothing in the objection that the verdict is not responsive to the issue. The answer put in issue the alleged indebtedness of the defendant; and it is never necessary, to entitle the plaintiff to a verdict, that he should prove the whole of his demand. He is entitled to recover what the evidence shows to be due. The judgment is affirmed.

Judgment affirmed.

Lipscomb, J., not having heard the argument, gave no opinion.

## The State v. Burnett, Empresario.

It was not incumbent on an Empresario, suing the State under the authority of the statute, to allege that he was a citizen; the grant of authority to Empresarios to sue, was general; the exclusion of aliens was special; and, if the disability existed, it was matter of defence.

The fact of the present residence of the plaintiffs in the State of New York, (November 1846,) does not raise the presumption that they were aliens to the Republic, at the passage of the statute authorizing Empresarios to sue.

Appeal from Travis. This was an action for the establishment of the claims of an Empresario. The petitioner, David G. Burnett, representing himself as a citizen of the county of Harris, in the State of Texas, and as suing for the use of Stephen Whitney, John Haggerty and George Griswold, resident citizens of the city and State of New York, alleged that he entered, on the 22d day of December, 1826, into a contract, with the proper authorities of the State of Coahuila and Texas, to settle and colonize three hundred families upon a certain tract of land (the boundaries of which are described) within the limits of Texas.

He represented further, that, by the contract, the said families were to be settled within the limits of the said colony, in the space of six years, and that this term was, by a subsequent Act of the Congress of Coahuila and Texas, prolonged to the space of nine years; that, within the time so extended, he and those who acted with him, and by his authority, did carry out and fulfill the said contract in all its parts, by settling the three hundred families stipulated in said contract, whereby he became entitled to receive fifteen leagues and fifteen labors as premium lands, which premium lands neither he nor any other person acting for or representing him, in carrying out said contract, had ever received or any part thereof.

The petitioner also represented, that, after the making of the said contract, finding himself unable from his own resources

to carry out the said enterprise of colonization, he engaged the assistance of certain persons, who undertook to carry out and perform all the obligations and stipulations of said contract, and for which he agreed that they should receive all the benefits resulting from the performance of the same, and that said persons did fulfil all of his duties as said contractor, and that the said Stephen Whitney, John Haggerty and George Griswold, for whose use he sues, are the lawfully authorized representatives of said persons, and as such are entitled to the benefits of any decree to be rendered in the premises. He prayed that Albert C. Horton, acting Governor of the State, might be made a party to the suit, and, in substance, that he might have judgment in conformity with the prayer of the petition, &c. The petition was filed on the 10th of November, 1846.

The answer consisted of a general demurrer and a general denial, filed at the Spring Term, 1847; and, at the Fall Term, 1848, there was filed a special demurrer, assigning for causes:

1st. That the petition does not allege or show that John Haggerty, Stephen Whitney and George Griswold, for whose use and benefit the said suit was instituted, are, or were citizens of the State or Republic of Texas.

2nd. On the contrary, it shows that the petitioners were aliens to the said Republic of Texas; all of which he is ready to verify.

The plaintiff offered in evidence the original contract (as filed in the General Land Office) between himself and the government of the State of Coahuila and Texas; also the decree extending the time of the said contract, the original commission of George Antonio Nixon, commissioner for the said colony, the said commission being also on file in the General Land Office. The plaintiff also introduced the abstract of titles issued by Nixon, as filed in the General Land Office, showing that there had been settled in the said colony, under said contract, two hundred and twelve families, and forty-four single men; and also the original deeds from said Land Office, ex-

ecuted by the said commissioner to the colonists. The plaintiff also proved that neither he nor any other person for him or in his name had received any premium lands for introducing, colonizing and settling said families and single men in said colony.

To the introduction of all of which testimony the defendant objected; and the objection being overruled, exception was taken. It was agreed by the parties that certified copies from the Land Office, of the said contract, commission, and abstract of titles, should be sent up in the transcript to the Supreme Court, and that the Court or either of the parties might, if deemed necessary, refer to the original documents offered in evidence, the same being on file in the General Land Office. A jury being waived, the cause was submitted to the Court, and a decree for eleven leagues and fifteen labors of land was entered for the plaintiff, for the use of the parties named in the petition; and certificates were ordered to issue.

*Attorney General*, for appellant.

*J. Webb*, for appellee.

Hemphill, Ch. J. The defendant contends, in his brief, that the demurrer should have been sustained on the grounds, first, that there was no authority in law authorizing suit to be brought against the Governor of the State, the statute, permitting suits to be brought against the President of the Republic, conferring no right of action against the State Executive. We may remark that no action was had on the demurrer in the Court below, and the same might be considered as waived or abandoned. But, if it be admitted that the demurrer had been brought to the notice of the Court and formally overruled, yet there is no force in the first ground of exception. The statute of April 26th, 1846, (Art. 2159, Dig.,) declares that parties may in all cases commence suits against the Governor or the State of Texas, in which parties had been authorized, by the

laws, to institute suits against the President of the Republic, or against the Republic of Texas.

The second ground in support of the demurrer, urged by the appellee is, that the parties for whose use the suit was brought, are nowhere alleged to have ever been citizens of the Republic or State of Texas. This objection arises, we presume, from the proviso of the Section authorizing suits by Empresarios, and which declares that neither aliens nor the assignees of aliens shall be entitled to the benefits of the Act.

This is an objection which cannot, on the pleadings of this case, be reached by demurrer. The statute does not require that the plaintiff shall expressly allege that he is a citizen of the Republic or State, or that he is not an alien. The grant of authority to Empresarios to sue, is general. The exclusion of aliens from this right is special. To maintain such action, it is not necessary that the plaintiff should allege that he does not labor under the disability imposed on a certain class of Empresarios, by the statute. If this disability exist in fact, it is matter of defence, and should as such be averred and proven. The petition does not show on its face that it is brought by an alien, or the assignee of an alien. The plaintiff, Burnett, the contractor with the government, in whose name this colonization contract, as it appears from the record, was taken out and was progressing to completion, alleges that he is a resident citizen of Texas, and that the persons for whose use he sues, are resident citizens of the State of New York. But the fact of their residence in the State of New York, does not make them, at least at the time of bringing this suit, aliens to the State of Texas. They and the persons whom they represent, and by whose means, efforts and agency this enterprise was partially performed, may, for aught that appears, have been citizens and residents of Texas at the passage of the Act, and for a long period afterwards. They may not have removed until subsequent to annexation; and if so, they certainly would not at any time have been aliens to the Republic or State.

The fact of their present residence in the State of New York, does not, as the defendant contends, necessarily raise

the presumption that they were aliens to the Republic, at the passage of the statute; such presumption, at most, is not conclusive. But this is not a case for presumption or conjecture. If any fact which would have deprived the plaintiffs of the benefit of the act existed, it was doubtless susceptible of proof, and might have been established. It is sufficient for the plaintiffs in this case, that, on the facts as they appear in the pleading, they are not disabled by the statute, from bringing the action. The exclusion of alien Empresarios or their assignees, from the benefit of suit, was in accordance with the general policy of the country, in the grant of lands to resident citizens; but the law does not require an Empresario to continually reside in the country. His disability arises from alienage, and not the want of continuous residence.

We are of opinion that the demurrer, even if it should not be regarded abandoned, could not have been sustained. On the facts as established by proof, the plaintiff was entitled to the judgment of the Court. His contract and its extension by decree No. 192, the commission to Nixon, and the fact of the introduction of the number of families and single men, entitling him to the amount of premium adjudged, were proven fully and by competent evidence.

It is ordered, adjudged and decreed, that the judgment in favor of the plaintiff for eleven leagues and fifteen labors of land be, and the same is hereby affirmed, and that so much of the judgment of the District Court as authorizes the Clerk of the District Court to issue certificates, be, and the same is hereby reversed; and it is further ordered, adjudged, and decreed that the Clerk of this Court do, in conformity with the Act of February 11th, 1850, issue to the said plaintiff, for the use of the said Stephen Whitney, John Haggerty and Geo. Griswold, eleven certificates for one league of land each, and one certificate for fifteen labors; and that he otherwise proceed in the premises in conformity with law.

Ordered accordingly.

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

## H. W. Sublett v. The State.

An indictment for playing cards for money, &c., at a house for retailing spirituous liquors, need not contain any allegation for the purpose of identifying the particular place in which the playing is charged to have been done.

Appeal from Travis. This was an indictment for playing cards in a house for retailing spirituous liquors in the county of Travis. The charging part of the indictment was as follows: "In a certain house for the retailing of spirituous liquors, "then and there situate, did then and there play at a certain "game at cards called poker, on which said game, then and "there played as aforesaid, money was then and there bet, "contrary to the statute," &c., &c. The defendant excepted to the indictment, on the ground that the offence was not sufficiently identified. The exception was overruled, and the defendant was convicted.

*H. W. Sublett*, for appellant. It is believed by the appellant, that, inasmuch as card-playing is not generally prohibited, but is only prohibited at certain places, the place at which the playing is charged to have been done, ought to be described. It is of the essence of the offence; and besides this, there is no other way of identifying the acts constituting the precise offence with which the party is charged. If the indictment had charged a sufficient number of other facts and circumstances, to have identified, with reasonable certainty, the particular offence the defendant was required to answer, possibly, a description of the place might have been omitted. But upon reflection it will be seen, that, in this particular character of offences, there is no other convenient mode of identifying an indictable transaction, than by describing the place at which it was done. Hence, then, it must follow, that a de-

scription of the place at which the playing was done, is necessary.

The law points out the mode of describing and identifying any and every offence. An assault and battery is identified by the person on whom it is committed; rape, likewise; larceny, by a description of the goods stolen and the name of the owner. And so of every offence known to the law: there is always some allegation in a good indictment, for any offence, apprising the defendant with reasonable certainty, of the particular acts constituting the offence. In this case it was not done. In the case of Click v. The State, (3 Tex. R. 282,) Justice Wheeler quotes from 7 Cranch, 389, this language: "The rule, it has been said, that a man shall not be charged "with one crime and convicted of another, may sometimes "cover real guilt, but its observance is essential to the pre- "servation of innocence." In the case of Burch v. The Republic, (1 Tex. R. 608,) Justice Wheeler uses this language: "But it is not sufficient to aver generally, that the defendant "did vend spirituous liquors, in a quantity of a quart and over, "without stating at what house or establishment or to whom "the vending took place, or some other fact tending to iden- "tify the transaction; and though the objection may not have "been available in arrest of judgment, yet it was fatal to the "indictment on demurrer."

*Attorney General*, for appellee. The precise question here presented—the degree of certainty in the description of the place of playing required in an indictment for "playing at cards in a house for the retail of spirituous liquors," &c.—has been decided in favor of the State, in the case of Prior v. The State of Texas. (4 Tex. R. 383.)

Lipscomb, J. The statute under which the indictment was found, is as follows, i. e.: That, if any person shall play at any tavern, inn, store-house, house for retailing spirituous liquors,

or any other public house, or in any street, or highway, or in any other public place, or any out-house where people resort, at any game or games with cards, upon which money or property, or the representative of either, shall be bet, such person or persons so playing shall be deemed guilty of a misdemeanor, and, on conviction thereof by indictment, shall be fined in a sum not less than ten, nor more than thirty-five dollars. (Art. 1474, Hart. Dig.)

The question is not a new one, and we believe is fully answered in the case of Prior v. The State. (4 Tex. R. 383.) In that case, in which the objection was, that it was not proven who was the owner of the house, and in the indictment the owner was named, the language of the Court is, "The most "material fact, and indeed all that was necessary to be "averred, was the playing at a public place, or at a house oc- "cupied for retailing spirituous liquors. It could not be im- "portant to allege who owned the house; such an inquiry "could only have been essential, had the owner or occupant "been indicted for permitting playing at cards in his house. "In this indictment, it is nothing more than surplusage; the "indictment is good without it." We believe the law was correctly ruled in the case cited, and we are therefore not at liberty to depart from it; and we believe, therefore, that the indictment in this case is good, and substantially follows the statute. The judgment is affirmed.

Judgment affirmed.

## Allcorn and another v. Butler, Adm'rx.

In a suit for specific performance, it is proper to make a previous vendor, in whom the legal title yet remains, a party; and, in such a case, a letter from the previous vendor to the plaintiff, informing him when he expected to be able to convey, is admissible in evidence, as conducing to prove that he had contracted to convey, but had not conveyed, to the plaintiff's immediate vendor, (the other defendant,) the land in question.

Where one attorney at law procures another to represent him in a case, of which the client has notice, and makes no objection, the client cannot, afterwards, when sued by the attorney whom he employed, for his fee, object to the right of the latter to make the substitution.

A contract between attorney and client for a specific fee, is not affected by a compromise of the suit.

Error from Washington. This suit was brought by the defendant in error, against the plaintiffs in error, Allcorn and Chrisman, for the specific performance of a contract to convey land, evidenced by a bond for title, made by Allcorn in favor of Butler, in September, 1839. Allcorn had purchased the land of Chrisman, who still retained the legal title.

The plaintiff offered in evidence a letter from Chrisman to Butler, dated in March, 1843, informing Butler when he expected to be able to make title, to which the defendant objected, but the Court overruled the objection. The defendant Allcorn contested the plaintiff's right to a conveyance, on the ground that the consideration of the contract had failed. It appeared that the bond to make title was given in consideration of the professional services of Butler, as an attorney at law, in a suit in which Allcorn was defendant. Butler appeared for Allcorn in the suit, and conducted the defence during several years previous to 1847. In the Spring of that year he told the brother of the defendant (who came to consult with him about the suit, at the defendant's request) to tell the latter to employ another attorney, that he could not attend to the case any longer. Afterwards, intending to go abroad, he

engaged three other attorneys to represent him in this and other cases. They did represent him in this case, with the knowledge of the defendant, who made no objection. He employed no other attorney, nor did those who represented Butler charge or receive any fee for their services. The parties subsequently settled their controversy by compromise, and the suit was dismissed. These were the principal facts relied on to establish the failure of consideration. There was a verdict and judgment for the plaintiff.

*A. M. Lewis*, for plaintiffs in error.

*J. Sayles* and *J. D. Giddings*, for defendant in error.

WHEELER, J. It does not appear on what ground the objection to the admissibility in evidence, of Chrisman's letter, was founded. It certainly was proper to make him a party to the suit, and his letter to Butler was as certainly admissible in evidence, as conducing to prove that he had contracted to convey, but had not conveyed to Allcorn, the legal title to the land in question.

The only question in the case, deserving of notice, is, whether the defence of a failure of consideration was made out in evidence; and we are of opinion that it was not. The defendant Allcorn received the professional services of Butler, in pursuance of their contract, through a series of years; and although the latter did make the declaration that he could no longer attend to the case, he did not act in accordance with that declaration; but, on the contrary, engaged others to attend to the case for him. The acceptance of their services by the defendant, precluded him from afterwards objecting to the right of Butler to make the substitution. The fact that the defendant saw fit to compromise the suit, did not deprive the attorney of his right to his fee. The compromise appears to have been advantageous to the defendant; and there can be

no pretence that he suffered any injury in consequence of the absence of his attorney. We are of opinion that there is no error in the judgment, and that it be affirmed.

Judgment affirmed.

## McKean v. Ziller.

A motion for a new trial must be determined during the Term at which it is made, or it will be discharged by operation of law.

After the adjournment of the Term, a judgment can be set aside or vacated, only by an original proceeding, instituted for that purpose, setting forth equitable grounds, sufficient to entitle the party to a rehearing.

Appeal from Travis. The appellee recovered a judgment against the appellant, which was regularly entered at the Spring Term, 1851. At the same Term, the defendant moved for a new trial, which motion the Court took under advisement, and continued the case until the next Term, and, at the same time, declared all further proceedings on the judgment stayed until the motion for a new trial should be decided. At the next Term, the Court acted on the motion, and granted a new trial. At the next Term thereafter, (Fall Term, 1852,) the plaintiff moved the Court to dismiss the case from the docket, and award execution on the judgment theretofore rendered. The Court overruled the motion, and the plaintiff, declining to proceed further, the case was dismissed for the want of prosecution. The plaintiff brought a writ of error to reverse the judgment, rendered on the motion to dismiss the case from the docket and award execution of the judgment previously rendered.

*Oldham & Marshall*, for appellant.

*J. Lee* and *A. W. Sneed*, for appellee.

WHEELER, J. The statute (Hart. Dig. Art. 766) provides that "All motions for new trials, in arrest of judgment, or to "set aside a judgment, shall be determined at the Term of the "Court at which such motion shall be made."

It is insisted that the statute is but directory, and that it was within the power of the Court to postpone to the next Term, and then act upon the motion for a new trial. We cannot so regard it. We think the mandate of the law is peremptory, and must be obeyed; and that, at the end of the Term, the motion, not having been acted on, was discharged by operation of law.

The suspending of the judgment was consequent upon the continuance of the motion. The one was but incidental to, and was dependent upon the other. But the Judge, not having the legal authority to continue the motion, the order for that purpose, and that made dependent upon it, were alike void.

It is true that the Court has control over, and for good cause, may alter or vacate its judgments during the Term; but, in this case, the Court did not set aside or vacate the judgment during the Term. It could do so afterwards only by an original proceeding, instituted for that purpose, setting forth equitable grounds, sufficient to entitle the party to a rehearing. (Goss v. McClaran, 8 Tex. R.)

We are of opinion that the Court erred in refusing so set aside the proceedings subsequent to the judgment, and award execution; that the judgment be therefore reversed, and such judgment be rendered as the Court below ought to have rendered.

Reversed and re-formed.

## Meuley v. Meuley.

Case of conflicting testimony; judgment affirmed.

Appeal from Nueces.

*G. W. Paschal*, for appellant.

*A. J. Hamilton*, for appellee.

Lipscomb, J. This was an action brought by the appellee, against the appellant, to recover the value of services performed at the request of the appellant.

From the state of the record, there is nothing presented for our revision, but the single question, "Did the Court below err in overruling the appellant's motion for a new trial?" The statement of facts sent up, presents some conflict in the evidence, but not sufficient, in our judgment, to justify our setting aside the finding of the jury, on that testimony. There does not appear to be any conflict, as to the fact of the appellee's being in the employment, for a considerable length of time, of the appellant; and the only discrepancy in the evidence seems to be, as to the value of the services. The judgment is affirmed.

Judgment affirmed.

## Williams and another v. Bailes.

As a general rule, all exceptions touching the legal sufficiency, whether of form or of substance, of the pleadings, should be taken before going to trial upon the issues of fact.

Where a plea impeaching the consideration of an instrument or note in writing, is filed, unsupported by affidavit, the plaintiff must except or move to strike out, before going to trial, or it will be deemed that he waives the affidavit.

A plea of *non est factum*, unsupported by affidavit, will not cast the burden of proof on the plaintiff, although under such defective plea, if not objected to in time, the defendant may adduce evidence in his own defence.

Appeal from Williamson. Suit on a promise to pay, under seal. Plea of failure of consideration, not supported by affidavit. On the trial, the defendants offered evidence in support of their plea; but the Court excluded the evidence, on the ground that the plea, not having been supported by affidavit, was no part of the pleadings in the cause. The defendants excepted.

*Oldham & Marshall*, for appellants. The affidavit in support of the answer, as required by the statute, (Hart. Dig. Art. 710,) is no part of the answer. It is but a prerequisite, to the admission of the answer, upon the files of the cause. If the plaintiff intends to object to the answer, for want of the affidavit, he should do so before going into the trial, by moving to strike the answer out of the record; but if he neglects to do so and goes to trial, it would seem that he thereby waives the objection, and cannot exclude evidence which may be offered in support of the answer.

Under the Common Law practice, if a defendant file a plea not verified, which the law requires should be sworn to, and the plaintiff does not object to it, but goes to trial, it will then be too late to object by moving to exclude evidence offered under the plea. (Hagar v. Mounts, 3 Blackf. 57; Id. 261.)

*E. R. Peck*, for appellee. I. The note sued on is under seal. (2 McC. R. 380; 3 Mis. R. 79; 4 McC. 267; 3 Blackf. R. 161; 2 Id. 322; Bee, D. C. R. 140; Flemming v. Powell, 2 Tex. R. 225.)

II. The answer is special, and goes to the impeachment and inquiry into the consideration of the note. It is not sworn to; therefore it is a nullity, and defendants were not entitled to prove matters therein set forth in answer to plaintiff's cause of action. (Hart. Dig. Art. 710.)

III. The plaintiff, in not excepting to the answer, did not loose his right to object to the evidence sought to be given under it. (2 Tex. R. 594.)

Plaintiff was not compelled to demur. Our practice does not require a proceeding of that character. The statute in relation to pleadings in a suit, go no further than petition and answer.

It is true, at Common Law, a party that did not except to a plea, because it was not sworn to, waived his right to resist evidence under that plea, if otherwise good; but the reasons and policy of that rule, does not apply to our practice, and therefore the rule ceases, because,

1st. It was only dilatory pleas, not pleas to the merits, that were required by Common Law, to be sworn to. (4th Anne c. 16, Sec. 11; Gould, Pl. 230.)

2nd. The party was compelled to plead until an issue was formed on all the pleadings.

3rd. If he answered a defective pleading, *in forma*, he could not afterwards demur or object to evidence under that plea, because by pleading he had admitted its correctness and waived his right to do so.

Hemphill, Ch. J. The only question, in this case, is as to the alleged error, in excluding the evidence offered in support of the plea of the failure of consideration. The objection to its admissibility was, that the plea was unaccompanied by the affidavit required by the statute.

The provision of the Act which is applicable here, is expressed as follows, viz: "No plea, impeaching the considera- "tion of any instrument or note in writing under seal, shall "be admitted, unless supported by the affidavit of the defend- "ant, or some person for him, stating that the facts set forth "in said plea are true," &c.

The appellants contend, that, if the plaintiff intended to object to the plea for the want of an affidavit, he should have done so before going into the trial; and, that, having neglected to do so, he has waived the objection, and cannot exclude the evidence in support of the plea. The question is not without difficulty. The oath is declared to be a positive, legal requisite of the plea, and is therefore not to be lightly disregarded.

If, without the affidavit, the plea be essentially a nullity, it is no plea, and may be stricken out at any time. But this requisite, imposed by statute upon the plea, is not for the benefit of the defendant, but for that of the plaintiff. Were it not for the restriction of the statute, a plea impeaching the consideration of a sealed instrument would not require the support of an oath. This is an advantage to the plaintiff. He can, no doubt, waive it expressly; and if he do so by implication, he must be bound by his own acts. As a general rule, all exceptions touching the legal sufficiency, whether of form or of substance, of the pleading of the parties, should be taken before they go to trial upon the issues of fact. If an objection were subsequently allowed, it might operate as a surprise, and greatly to the inquiry of a party, especially as he is then precluded from curing the defect by amendment.

Had the objection in this instance been taken before the trial, the defendants might (had the Court permitted, and no delay been occasioned) have amended their plea by their oaths; but from the chance of this benefit they are now excluded, and their defence, however meritorious it may be, cannot avail them.

The refusal of the evidence under the circumstances, op-

erates oppressively upon the defendants, and is in conflict with the rules of practice established in analogous cases. In Richmond v. Tallmadge, (16 Johns. R. 307,) it was held, that, where a Sheriff, in an action for an escape, pleads or gives notice of a voluntary return of the prisoner before suit brought, without verifying his plea or notice, by affidavit, as required by the statute, the plaintiff might treat the plea as a nullity, and proceed to judgment, or move the Court to set it aside, as is the case with dilatory pleas; but if he accept the plea and go to trial, he waives the irregularity. If he treat the plea as good in point of form, the Court will not press the defect upon him. The case amounts to this, that, as it was competent for the plaintiffs to waive the affidavit and treat the plea as valid without it, they should be held by their acts to have done so in that case; and we are of opinion that the exception in this case, having not been taken before trial, and the plea having been treated as valid, the objection afterwards came too late, and should have been overruled.

The language of the statute, in requiring this plea to be supported by affidavit, is almost identical with the words used in relation to the verification of the plea of *non est factum*, and of pleas in abatement. But the rule above stated, as to the waiver of the affidavit, is inapplicable to the plea of *non est factum*. The defendant could not be permitted to throw upon the plaintiff, by a plea wanting this statutory requisite, the burthen of proving the execution of the instrument or the cause of action; although under such defective plea, if not objected to in time, he might adduce evidence to support his own defence. Judgment ordered to be reversed and cause remanded for a new trial.

Reversed and remanded.

## The State v. G. W. Foster.

Alienage or other disqualification of a grand-juror, may be pleaded in abatement of an indictment.

The incompetency of a single grand-juror vitiates an indictment; but, unless the want of qualification of the juror is apparent upon the face of the indictment, or upon the record, it cannot be taken advantage of by motion to quash; but must be pleaded in abatement: and it is necessary that the plea should set forth sufficient to enable the Court to give judgment upon it, on demurrer.

Appeal from Nueces. An indictment was preferred against the appellee, who moved to quash it, on the ground that certain of the grand-jury by whom it was found, were aliens.—The Court entertained the motion, and heard evidence touching the qualifications of the jurors, and it appearing that one of them was not a citizen of the United States, or of this State, quashed the indictment. The State appealed.

*Attorney General*, for appellant. All the authorities cited by appellee, except the case of the State of Tennessee v. Duncan, (7 Yerg. R. 271,) will be found to go only to the extent of showing that men, not having the required qualifications—among which is alienage—are not competent jurors, without further touching the question here presented, of "whether or "not the incompetency of a grand-juror can be inquired into, "in any way, after indictment found, and the indictment be "avoided for this cause." The excepted case, (7 Yerg. 271,) is directly in point on this question, and stands against the appellant; but it will be found that Judge Catron rests the opinion of the Court, in that case, mainly on Stat. 2 Henry 4, Chap. 9, which he quotes, stating the point to have been a doubtful one at Common Law; and that statute was in force in Tennessee, in this wise: Tennessee adopted the statutory

law of North Carolina in force at the time of their separation, and North Corolina had adopted, so far as they were adapted to her situation, all the statutes of England "in force and use" at the time of her settlement, (4th year of James I,) of which this was one.

Against this authority—of doubtful application in this purely, Common Law discussion—I will cite 1st, the course of decision of the State of New York, upon this question, as at Common Law purely, as shown in the twice considered case of People v. Jewett, to be found in 3 Wend. R. 314; and 2ndly, Boyinton v. State, 2 Port. R. 100, is expressly in point also, against the opinion of Judge Catron; and so is the course of adjudication in Massachusetts. (9 Mass. R. 107.)

The dicta of elementary writers to the contrary will be found, I think, invariably, to have British statutes for their foundation, whatever language they may employ.

*E. Hendre*, for appellee. I. The only questions presented by the record, are

1st. Whether the alienage of a member of the grand-jury, will vitiate an indictment found by it.

2nd. Whether a motion to quash, was the proper mode of attacking an indictment, for a defective organization of the grand-jury.

II. As to the first point, see 7 Yerg. R. 271; 1 Chit. Cr. L. 307; Bac. Abr. JURIES; State v. Bennett, Mart. & Yerg. R. 135; 6 Johns. R. 332; 1 Bac. Abr. ALIEN.

III. As to the second point, the technical rules of Common Law pleading, are not applicable; for they have been so modified by our statutes, as to sanction any mode, by which illegal proceedings may be brought to the notice of the Court. The object of all pleading, is a just apprehension of the rights of parties, and the remedy of wrongs, in the clearest and most speedy manner, possible. If the indictment in this case, be illegal, nothing more could be sought than to bring this illegality, to the knowledge of the remedial power; and if this

could be accomplished as well by motion, as by plea, which is to be preferred?

It can certainly make no difference, whether the defect of the indictment were latent or patent; for, in either case, it must be void and inoperative. If there were technical informalities apparent on the face of the indictment, it would be bad on motion to quash. If it were void *ab initio*, as having been fonnd by an unauthorized tribunal, it certainly would not require a more circuitous and formal plea, to vacate it. But this is not necessary even under the strict rules of Common Law pleading. (2 South. 539; 2 Gallis. R. 364; 2 Va. Cas. 20.)

WHEELER, J. The decisions in different States, are conflicting on the question whether, after indictment found, the defendant can take advantage of the incompetency of any part of the grand-jury who found it. In Massachusetts and New York the doctrine seems to be, that objections to the personal qualifications of grand-jurors will not affect the validity of the indictment, after it has been accepted and filed in Court. (9 Mass. R. 107; 3 Wend. R. 314.) This, however, has been doubted in Massachusetts. (2 Pick. R. 563.) The same rule appears to have been adopted in an early case in Alabama. (2 Port. R. 100.) But the question has since been determined otherwise in that State; (5 Port. R. 484;) and in Virginia and Tennessee, it is the settled law, that, if an indictment be found by a grand-jury, one of whom is an alien, or otherwise disqualified, the disqualification may be taken advantage of, and the indictment may be avoided by plea in abatement. (2 Va. cases, 20; 1 Grattan 556; 7 Yerg. R. 271.) Such, also, is the English law. (2 Hale, 155; Bac. Abr. JURIES A.; 1 Chit. Cr. L. 309.) It is true there is the statute of II Henry 4, Ch. 9, which is referred to for the rule of the law upon this subject, in England; but the statute is, probably, but declaratory of the Common Law. It was the right of the accused, at the Common

Law, and it is his right under the Constitution and laws of this State, to have the question of his guilt determined by the concurring decision of two competent juries, before he can be condemned to punishment for any capital or infamous crime. The Common, and our statute law require the interposition of a competent grand-jury, by way of presentment or indictment, before the accused can be required to answer to the charge of any offence above the grade of a common misdemeanor. But this right must be frequently denied him in practice, unless he may take advantage of the disqualification of a grand-juror, by pleading it to the indictment. For it must frequently happen that persons accused, especially of minor offences, will not have been aware that their conduct was the subject of investigation by a grand-jury, until after the indictment has been found. An incompetent or prejudiced jury may find an indictment against an innocent man, who could have had no knowledge that he was to be made the subject of their animadversion. In such cases, the accused would have no opportunity afforded of objecting to incompetent jurors by challenge. It seems, therefore, that to ensure to the accused the right, intended to be secured to him by the law, he must be permitted to plead to the indictment the alienage, or other disqualification of a grand-juror.

But, unless the want of qualification of the juror is apparent upon the face of the indictment, or upon the record, it cannot be taken advantage of on motion to quash; but must be pleaded in abatement. And it is necessary that the plea should set forth sufficient to enable the Court to give judgment upon it, on demurrer. (4 Leigh, R. 667; 10 Yerg. R. 527.) It was an error in the Court, to entertain the question of the qualification of the jurors, on a motion to quash the indictment; for which the judgment must be reversed and the cause remanded.

Reversed and remanded.

## San Antonio v. Lewis.

All parol contracts, made by the authorized agents of a corporation, within the scope of the legitimate purposes of its institution, are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action will lie.

The legal effect of written evidence is matter of law, to be determined by the Court. It follows as a necessary consequence, that the Court must instruct the jury as to the legal effect of such evidence; and it is no infraction of the law which forbids the Court to charge the jury upon the weight of evidence.

By permitting testimony to go to the jury, without objection, as to the meaning of a written contract, the parties did not deprive the Court of the right, nor exonerate it from the duty, of expounding to the jury what was the legal interpretation of the contract.

Where work is done for a corporation under a special contract, it is not competent to introduce evidence as to the value of the work, unless for the purpose of showing that the contract was so grossly unequal as to raise the presumption of fraud, or want of authority in the officer to make it.

Appeal from Bexar. This suit was brought by the appellee, to recover of the appellant $511 57, the amount of an account for printing, done by the former for the latter, pursuant to a contract between the parties.

The defendant denied that the work was done under the contract, and averred that it was worth no more than thirty-two dollars. The contract was evidenced by the following proposition, accepted by the city by its Mayor, acting under the authority of the Board of Aldermen:

"San Antonio, July 5th, 1850.

"The undersigned propose to do the city printing at one "cent for each ten words, and for each insertion in the paper; "and for each hundred bills, at thirty-five cents for each ten "words."

Witnesses were called who testified without objection, to their understanding of the meaning of the contract, and to the value of the work done. On both points the testimony was

conflicting. It was proved that the work was done as charged, and that it was contracted for by the Mayor, by the authority of the Board of Aldermen of the city; but whether given in writing or verbally, did not certainly appear. The minutes of the City Council showed no written authority.

The Court instructed the jury, that, if the Mayor was authorized by the Board of Aldermen of the city, either verbally or otherwise, to contract, and did contract accordingly, the contract was legal and binding upon the city, and that the meaning of the contract admitted in evidence was, that the undertakers should receive thirty-five cents for every ten words of the first hundred hand bills; and in the same proportion for any greater or less number.

The Court was asked by the defendants, but refused to give the instruction, "That no resolution of the Board of Alder-"men of the city is binding upon the inhabitants, unless re-"duced to writing and spread upon the records."

There was a verdict for the plaintiff, for the full amount of his account; a motion by the defendant for a new trial—overruled, and the defendant appealed. The assignment of errors questioned the correctness of the instructions of the Court, and the propriety of the verdict, under the evidence and the law of the case.

*I. A. & G. W. Paschal*, for appellant.

*Harris & Pease*, for appellee.

Wheeler, J. It seems to be the well settled doctrine that all parol contracts, made by the authorized agents of a corporation, within the scope of the legitimate purposes of its institution, are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action will lie. (7 Cr. R. 299; 2 Cond. R. 501; 14 Johns. R. 118.)

This doctrine is not now questioned; but the instruction now objected to, is that in which the Court undertook to give an interpretation of the contract; and it is objected, that, in this instruction, the Court both misconstrued the contract, and charged upon the weight of evidence.

It is within the province of the Court to construe written instruments. The legal effect of written evidence is matter of law, to be determined by the Court. It follows, as a necessary consequence, that the Court must instruct the jury as to the legal effect of such evidence; and it is no infraction of the law which forbids the Court to charge the jury upon the weight of evidence. It was not the intention of the statute, to transfer from the Court to the jury the interpretation of written instruments, or to trench upon the right of the Court to respond to questions of law. Whether such a contract existed, was a question of fact, exclusively for the decision of the jury. What was its true interpretation and legal effect, it appertained to the Court to determine; and we concur in the interpretation given in the instruction in question.

The testimony of witnesses, as to their understanding of the meaning of the contract, is not entitled to consideration, and had it been odjected to, it must have been excluded by the Court. It was not competent to construe by parol testimony, a written contract; or thus to prove its contents, when the contract itself was before the Court, and was free from ambiguity. By permitting the testimony to go to the jury without objection, the parties did not deprive the Court of the right, or exonerate it from the duty of expounding to the jury what was the legal interpretation of the contract. That was a question of law within the exclusive province of the Court, and one, consequently, which it could not confide to the decision of the jury. (4 Blackf. R. 369; 3 Cr. R. 180; 2 Watts, R. 347; 10 Mass. R. 384.)

It having been proved that the work was done pursuant to the contract, and the charges being in accordance with its stipulations, the jury were not at liberty to consider the evi-

dence respecting the value of the work; nor could evidence of its value properly be submitted to them, unless for the purpose of showing a contract so grossly unequal as to raise the presumption of fraud, or want of authority in the Mayor to make it. The amount to be paid had been settled by the contract. The only questions, therefore, properly before the jury were, as to the existence of such a contract, and the rendition of the services under it; and upon these questions their finding was fully warranted by the evidence.

But if the verdict rested upon the evidence respecting the actual value of the work done, apart from the contract, we would not be warranted in setting it aside. The evidence leaves it doubtful whether the charges exceeded the customary prices or the real value of the work. The testimony on this point was conflicting, and nothing can be better settled than that the jury are the exclusive judges of the credibility of witnesses and the weight of evidence; and that where these are the questions involved, the Court will not disturb their verdict. We are of opinion that there is no error in the judgment, and that it be affirmed.

Judgment affirmed.

## Young v. Lewis.

A hiring by the month, at so much per month, is a hiring from month to month; each party having a right to terminate it at the expiration of a month, but not after another month has commenced to run.

There is no distinction, as to the rights of the parties, between a hiring for a year and a hiring for a shorter period.

Where the owner of a slave sued the hirer for the value of the slave, which had died of cholera while in the hirer's possession, alleging, as the ground of the defendant's liability, that the latter had refused to re-deliver the slave on demand at the expiration of the term of hiring, it was held, that, if the plaintiff had sought to recover on the ground that the defendant had not treated the slave with proper diligence, it should have been the subject of a distinct averment; and that the admission of testimony as to diligence, without objection, did not affect the question.

Where the hirer refuses to re-deliver the property, at the expiration of the term of hiring, he becomes liable for all loss, diligence or no diligence.

In a case of hiring from month to month, neither party, it seems, is entitled to warning.

Appeal from Bexar. The appellant brought his suit, to recover from the appellee the value of a negro girl, a slave, alleged to have been the property of the appellant, and to have died of the cholera in the possession of the appellee, to whom she had been hired by the appellant.

In the petition it was stated, that, in the month of March, A. D. 1849, petitioner hired to the said Nathaniel Lewis a negro woman, a slave, by the month, of the value of five hundred dollars; that, at the expiration of the said month, and before the cholera broke out in the city of San Antonio, where the said Lewis was then residing, and where he kept the said negro woman, your petitioner, greatly apprehensive that said slave might fall a victim to the cholera then raging in said city, as hundreds were dying, demanded the said slave of the said Lewis, for the purpose of taking her home and out of the influence of the cholera, and positively refused to hire said slave for another month, as the risk was too great, on account of the cholera; but said Lewis refused to deliver up said slave,

and wrongfully detained her from your petitioner, who had a right to control his own property as he saw proper. The petition, in substance, then proceeded to state, that the slave, while so in the possession of Lewis, in the said city of San Antonio, and in the month of April or May, A. D. 1849, and while the said Lewis detained the said slave in his possession, contrary to the will of petitioner, and contrary to petitioner's repeated request to have said slave delivered up, died of the cholera. He alleged, that, in consequence of such wrongful act of detaining the slave, after petitioner had demanded her to be delivered up, petitioner sustained damage, by the loss of said slave, to the amount of five hundred dollars, &c. The petition contained no other averment.

The proof was that the slave was hired "at twelve dollars per month;" that the hire of the first month was paid; and that the slave continued with the defendant until about ten days thereafter, before she was demanded; and that she died of the cholera within six days after she was demanded. There was also some proof as to diligence.

There was a verdict and judgment for the defendant. Motion for a new trial; overruled. The only question was whether the Court ought to have granted a new trial.

*I. A. & G. W. Paschal*, for appellant. I. We do not believe that a monthly hiring, at twelve dollars per month, *ipso facto*, gave Lewis the right to retain the negro another month, if the owner did not demand her at the end of the first month.

Such a proposition would include another, inconsistent with the best received notions, viz: that the hirer was at all events to keep the slave another month, unless he returned her at the end of the first month; thus imposing on him responsibilities to supply medicines, physicians, &c., (which it has been decided by this Court falls upon the hirer, in the absence of a special contract to the contrary,) which perhaps he never intended. And if such a rule as to mutual implied promises, be

good as to a monthly hiring, it would also be good as to a yearly hiring.

We think the law will the rather be found to be, that, after the expiration of the month, the hirer holds the slave as a tenant at will, subject to be re-delivered on demand: and that, at most, if demanded at the middle of the month, the bailee might claim to be excused from paying the half month's hire.

Such a hiring will be considered as a hiring at will, if indeed it be considered any hiring at all. (Story on Contracts, 2nd Ed. Sec. 962 (g); Bailey v. Rimmell, 1 Mees & Web. 506; Rex v. Matthews, 3 T. R. 449; and see Story on Contracts, 962, a a.)

A careful examination of these references will show, that daily, monthly, and weekly hirings, are all placed on the same footing; and that neither of them involves the necessity of warning, or the implied right to hold over, from silence. They are mutually hirings at will. If the slave be hired for a day, a week or a month, there is as much obligation to return her on the hirer as the owner. The rights and obligations are precisely mutual: the hirer may hold over with the right to return her at will, paying *pro tanto:* the owner may demand her without liability for damages.

II. If this be regarded as an ordinary case of bailment, in which the hirer was to be charged with the same diligence, which a man would ordinarily take of himself, under the like circumstances; and the rule of law be administered, which was observed in the case of Mitchell and Mims, and the Harris county case decided the last Term at Galveston; i. e. that the proof of due diligence devolves on Lewis, there has clearly been a failure to establish that degree of diligence. (See the rule in Mimms v. Mitchell.)

*J. W. Harris*, for appellee. It is for the appellee contended, that the appellant can have no claim against him, on account of the death of this slave. (See Wheeler's Law of Slavery, 133.) This authority shows that if Lewis had even

covenanted to return the slave, he would not have been bound to do so.

The hirer is only bound to use ordinary diligence. (Miller v. Salisbury, 13 Johns. R. 211; 2 Kent, Sec. 40, 4th Ed. and note (a); Story on Bailments, Sec. 398, 399.)

Lipscomb, J. The first question presented for our consideration, is as to the meaning of the contract set out in the petition, and its legal effect. From the language employed in stating it, we can entertain no doubt that it was a contract from month to month, so long as it should be continued; and that each party would have a right to terminate it at the expiration of a month; the bailor could demand his property at such periods, or the bailee could surrender it up; but that after another month had commenced to run, neither the one nor the other could terminate it without the consent of the other, until the month then running should elapse. This we believe to be clearly the law of such a contract of hiring or bailment. For the time stipulated in the contract, the bailee is regarded as the owner, and entitled to the entire control of the property so bailed or let, with the restriction that it is not to be used for a purpose different from that the parties to the contract contemplated. (Story on Bailments, Sec. 373; Id. 383, and the Sections following under Art. 1, and Title Hire of Things; to the same point, Story on Contracts, Sec. 730 and 731; McGee v. Curry, 4 Tex. R. 221, and the authorities there cited.)

In the argument, it was insisted by the counsel for the appellant, that there is a distinction where the hiring is for a year, and where it is for a shorter period; that, in the latter case, the bailor can resume his property at will. It is, however, believed that such a distinction has no foundation in principle, nor has it the sanction of a single adjudged case.

To apply the law, then, to the facts as presented by the record in this case, it will be seen, that, at the end of the first month, the appellant demanded and received the stipulated

wages for the slave; and, that, after the second month had run some ten or fifteen days, he demanded the slave to be delivered up to him. The proof, therefore, fails entirely to support the allegation of a breach of the contract, as, by that contract, he could only have lawfully demanded her at the expiration of the month. The jury, therefore, in finding a verdict for the defendant, did not find contrary to the evidence, but strictly in accordance with it.

It will be found, by a reference to the authorities already cited, that the defendant was bound to take the same care of the slave hired, that a prudent and reasonable master would use with his own slave. If he had failed to do so, he would have been liable to the plaintiff for such damages as resulted from his failure to comply with, and observe, that degree of care and diligence. If, however, the plaintiff had sought to recover damages on this ground, it should have been the subject of a distinct averment; and there has been no rule more uniformly adhered to by this Court, than the one that the *allegata* and the *probata* must agree; and that the averments must be so made as to let in the appropriate testimony. (Mims v. Mitchell, 1 Tex. R. 443; Coles v. Kelsey, 2 Tex. R. 541; Hall & Jones v. Jackson, 3 Tex. R. 309, 310, 311.) And in the last case, the concluding remarks of the Court, in giving its opinion, are: "If, however, the decree, upon its "face, appeared sufficient to divest the title of the defendant "to any specific lands, yet, being based upon material facts, "which are not alleged, and which, therefore, cannot consti- "tute the basis of a decree or judgment, it cannot be sup- "ported." There being no averment of negligence, it is altogether unnecessary to inquire whether there was sufficient evidence of such fact, to entitle the plaintiff to recover damages.

If the plaintiff had proved a demand and a refusal to deliver up the slave at the end of the first month, when he demanded and received the month's wages, the defendant would, by such violation of his contract, have become liable for all loss, diligence or no diligence, as he would, in such case, have be-

come the insurer against all loss. This is believed to be the doctrine of both foreign and American jurists; and such is believed to have been the ruling of this Court at Galveston, the last Term, in the case of Porter & wife v. Miller. But this he entirely failed to prove.

We therefore believe there is no error in the judgment of the Court below, and it is in all things affirmed.

Judgment affirmed.

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## Kinney v. McCleod.

As a general rule, the defendant is entitled to be sued in the county of his domicil; but to this rule there are exceptions, among which are suits for the foreclosure of mortgages; in which cases, suit may be brought either in the county where the mortgaged property is situated, or in the county of the defendant's domicil.

This suit was for the foreclosure of a mortgage, and the only question was, whether the suit must be brought in the county in which the mortgaged premises lie, or whether it may be prosecuted (as in this case) in the county of the defendant's residence.

*J. Webb*, for appellant.

*Oldham & Marshall*, for appellee.

Hemphill, Ch. J. The statute confers upon defendants the general right to be sued in the forum of their respective domicils; but this privilege is not universal. There are various exceptions to the rule, some of them imperatively requiring

suits to be instituted elsewhere, and others leaving them to be brought, either in express terms or by implication, at the residence of the defendant, or in some other designated county.

For instance, married women must be sued in the counties in which their husbands reside; executors, administrators, guardians and trustees, in the county in which the estate is administered; and, where the recovery of land and damages thereto is the object of the suit, it must be brought in the county where the land or a part thereof is situated. But, where the object of the suit is the foreclosure of a mortgage, it is not declared, as in the above cases, that it must be prosecuted in the Courts of the county where the mortgaged premises lie, but only that it may be so prosecuted. It is the general right of the defendant to be sued in his own county; but where the suit is on a mortgage, the plaintiff has the privilege of suing in the county where the property is situated.

This exception to the general rule, that the defendant must be sued in the forum of his domicil, is for the benefit of the plaintiff, and not of the defendant, and the latter cannot complain, if suit be brought at his residence. The demurrer was therefore (if not waived or abandoned) properly overruled.

There is also assigned for error that the judgment does not follow the decree of the Court. There was perhaps some mistake in copying this assignment. As it stands, it is unintelligible; but the appellee admits that the judgment is defective, in not specifying the mortgaged property, and he prays that the same may be re-formed.

It is ordered, adjudged and decreed that the decree of the District Court, so far as it gives judgment for the recovery of the debt sued for, as described in the petition, together with the interest thereon and the costs of suit, be, and the same is hereby affirmed, and that all the other portions of said decree be, and the same are hereby reversed; and, the Court now proceeding to render such judgment as should have been pronounced below, it is ordered, adjudged and decreed, that an order of sale do issue to the Sheriff of Refugio county, direct-

ing him to sell the property described in the said mortgage, viz: the said certain Stock Ranch, known as the Mustang Island Ranch, situated on Mustang Island in the County of Refugio, and State of Texas, containing 2,000 acres of land, more or less, together with all of the stock of every description on said ranch, included in the said mortgage, and which is described in the said mortgage, consisting of six hundred stock cattle, more or less, twenty-six Spanish mares, one stallion and one jack; or so much of said property as can be found; it is further ordered, adjudged and decreed, that, if the proceeds of the sale of such mortgaged property be insufficient to satisfy said judgment and costs, then, and in that case execution shall issue against said Kinney as in other cases, directed to the Sheriff of Nueces county, commanding him to levy on the goods and effects of the said Kinney, or so much as shall be sufficient to satisfy the judgment and costs, or the balance of the same, it is further ordered, adjudged and decreed, that, if the proceeds of said sale exceed the amount of said judgment, then, and in that case the Sheriff shall return the overplus to the said Kinney.

Judgment re-formed.

## Horton v. Pace and another.

An entry made 19th February, 1838, on the back of a headright certificate, as follows: "Located one league of land on the San Antonio Road, Guadaloupe, east side, being league No. 1, this 19th February, 1839. B. Sims, County Surveyor of Bastrop," was sufficiently certain to designate what land was intended to be appropriated.

On the 19th of February, 1838, there was no law that we are aware of, that required the Surveyor to keep a book, in which to enter applications for land; whatever obligation the instructions of the Commissioner of the General Land Office may have imposed on the Surveyor, his neglect of them did not impair the right of the locator.

The instructions of the Commissioner did not pretend that the validity of a survey or entry should depend, in any degree, on its being entered in the Surveyor's book; nor do we think that he had any authority so to declare. It was only intended as a convenient regulation for the Surveyor's office. It was to the map, that the law more directly pointed, for a *prima facie* designation of appropriated and unappropriated lands.

The 21st Section of the land law of 1837, (Hart. Dig. Art. 1857,) which requires that all surveys for individuals, on navigable streams, shall front one half of the square on the water course, and the line running at right angles with the general course of the stream, is directory, and probably would not injuriously affect a survey which did not strictly pursue its directions.

We do not question the right of a Surveyor to adopt a previous survey, which he thinks correct; but we cannot admit that it was the duty of the Court, to oblige him to adopt one shown to be incorrect.

The Court will not issue a *mandamus* to compel an officer to do an act in violation of a directory statute.

Where the facts do not clearly show that there is a necessity for a survey, the Court will not issue a *mandamus* to compel the Surveyor to make it.

Appeal from Travis. After the decision of the case of Horton v. Brown, (2 Tex. R. 78,) awarding a *mandamus* to issue to the Commissioner of the General Land Office, to issue to said Horton a patent for the league of land in controversy in that suit, Horton applied to the District Surveyor, Pace, to have the land surveyed; and the Surveyor having refused to survey the land, Horton obtained a rule against the Surveyor to show cause why a peremptory *mandamus* should not be issued to compel a survey of the land. To this the

Surveyor returned that he had previously surveyed the land for one Joseph Rowe, there being, at the time of Rowe's application, nothing in the records of his office to show that a prior location had been made by the said Horton. M. C. Hamilton who held under Rowe, was made a party. It appeared that Horton's entry or location had been indorsed on his headright certificate, as follows: "Located one league of "land on the San Antonio Road, Guadaloupe, east side, being "league No. 1, this 19th February, 1838. B. Sims, County "Surveyor of Bastrop;" that no other record of the entry was made; that the Commissioner having refused to patent, because of the previous grant to Brown, Horton took his certificate out of the Surveyor's office, for the purpose of suing Brown to vacate the land and to obtain a *mandamus* against the Commissioner; that in the meantime while the certificate was out of the office as aforesaid, Rowe applied for a survey of the land, upon a certificate admitted to be genuine; which survey was made as aforesaid; that, previous to Rowe's application, the name of the appellant was entered in the diagram of league No. 1, on the county map; that, at the time of Horton's application in 1838, the land back of the league was vacant, and that the league No. 1 had more than half its front on the Guadaloupe, which at that place, has an average width of more than thirty feet.

The facts were agreed to by the parties, and the Court dismissed the rule.

Special Court composed of WHEELER, Justice, and Asa M. LEWIS and JAMES WILLIE, Special Judges.

*J. Webb* and *T. H. Du Val*, for appellant.

*A. J. Hamilton* and *J. Hancock*, for appellee.

LEWIS, S. J. We are satisfied that the location, or entry,

of the plaintiff, in 1838, was sufficiently certain to designate what land was intended to be appropriated.

At the time of the location, there was no law that we are aware of, that required the Surveyor to keep a book, in which to enter applications for land.

The instructions of the Commissioner of the General Land Office, to the Surveyor of Bastrop county, bear date the 26th of February, 1838, which was after the plaintiff's entry, and after the Surveyor had certified that the field notes were correct. Whatever obligation the instructions may have imposed on the Surveyor, his neglect of them did not impair the right of the plaintiff. (Stringer v. Young, 3 Pet. R. 337.)

This order of the Commissioner does not pretend that the validity of a survey, or entry, shall depend, in any degree, on its being entered in the Surveyor's book, nor do we think he had any authority so to declare. It was only intended as a convenient regulation of the Surveyor's office. The failure to enter an application in a book kept for that purpose, did not leave subsequent applicants without the means of ascertaining what was located and what unlocated lands. In the law of 1837, (Hart. Dig. Art. 1876,) and the law of 1840, (Hart. Dig. Art. 1978,) there are provisions made for entering surveys on maps, in reference to which the Supreme Court, in the case of Smith v. Power, (2 Tex. R.,) says: "The legisla-"tion in relation to the maps of the counties, seems to have "been intended, when fully executed, to point out at least *pri-*"*ma facie*, what lands are public and what private property." The name of the plaintiff was entered on the map, in the diagram of league number one, previous to the application of Rowe, for the same land. Therefore, we conclude, that at the time Rowe made his application, he had notice of the previous appropriation of the land in question.

The objection to the *mandamus*, because it seeks to oblige the Surveyor to survey more than half the front of a league on the Guadaloupe river, seems to be well taken. The 21st Section of the land law of 1837, (Hart. Dig. Art. 1857,) en-

acts, "That all surveys for individuals, on navigable water-"courses, shall front one-half of the square on the water-course, "and the line running at right angles with the general course "of the stream, if circumstances of lines previously made un-"der the law, will permit," &c. The 42nd Section of the same Act, (Hart. Dig. Art. 1378,) enacts that all streams of the average width of thirty feet, shall be considered navigable streams, within the meaning of this Act, as far up as they retain that average width, &c.

The statement of the case shows that the Gaudaloupe, at the point where league No. 1 is situate, is of the average width of thirty feet; that, at the time of the plaintiff's application, the lands back of this league were vacant; and that league No. 1 has more than half its front on the stream.

We think it is the settled law of the Court, that a *mandamus* cannot issue to compel a public officer to do an act which is not clearly prescribed by law. (Cullem v. Latimer, 4 Tex. R. 329; Bracken v. Wells, 3 Tex. R. 90.) It is true, that the 21st Section of the law above referred to, is directory, and probably would not injuriously affect a survey that did not strictly pursue its directions; but the Court cannot command a public officer to disobey the law.

It was pressed upon the consideration of the Court, that the land having been surveyed for Brown, it was competent for the Surveyor to adopt that survey for the plaintiff; and the case of Linn v. Scott, has been relied on as authority. We do not question the Surveyor's right to adopt a previous survey that he thinks correct; as was done in that case. But we cannot admit that it was the duty of the Court to oblige him to adopt one shown to be incorrect.

If, at the time the Surveyor was required to survey the land for the appellant, other locators had made their entries so as to prevent his from being run in the prescribed form, he might then perhaps have been allowed to take his land according to the vacancy left; but, as he does not show any reason for asking a survey with more front on the river than the law allows,

we think the Court below did not err in refusing this extraordinary remedy.

The pleadings do not clearly show that there was any necessity for a survey; and, although there may be no objection to the Surveyor's making as many surveys of the same land as the locator may desire, we do not think he ought to be obliged by the Court, to do an act which is not shown to be necessary to the rights of the party. (Arberry v. Beavers, 6 Tex. R. 457.) The judgment is therefore affirmed.

Judgment affirmed.

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## York's Ad'mr v. Gregg's Adm'x.

Matter which would properly constitute a defence to a suit pending, cannot be made the subject of an independent suit to restrain the proceedings and annul the cause of action in such former suit, &c.; but the objection must be taken before answer to the merits.

To render a certified copy of a record or document admissible in evidence, without other authentication, it must be certified by the officer having charge of the original.

Every document of a public nature, which there would be an inconvenience in removing, and which the party has a right to inspect, may be proved by a duly authenticated copy; and, where proof is by a copy, an examined copy, duly made and sworn to by any competent witness, is always admissible.

The records of the proceedings of the Ayuntamientos respecting the denouncement and condemnation of lands, for failure to perform conditions, &c., properly belong to the archives of the General Land Office; and a certified copy from the same, by the Clerk of the County Court, in whose office they were placed probably from a mistaken interpretation of the thirty-third Section of the Act of 1836, to organize inferior Courts, (Hart. Dig. Art. 260,) is not admissible in evidence, without further proof.

Where the defendant in an injunction suit, failed to deny an important allegation in the petition, and his administrator afterwards, on the eve of trial, denied under oath all the allegations not previously answered, and especially the one in question, calling for strict proof, it was held that proof by one witness was sufficient.

Where, in an executory contract, the title proves defective in a part or to an extent

not very essential, the contract will not, in general, be rescinded; but performance will be decreed, with a rateable deduction of the purchase money, by way of compensation for the deficiency. But where the failure of title extends to that part which formed the principal inducement to the purchase, it seems to be more in consonance with justice, that the purchaser should be enabled to rescind the contract altogether.

But, although there may not have been, at the time of this contract, any intentional misrepresentation made, yet it can scarcely admit of a doubt, that the plaintiff was deceived and misled to his prejudice, by the representations and promises of the defendant, and his subsequent conduct inconsistent therewith: and it can make little difference in morals or law, whether it was the intention of the defendant originally, to deceive, or whether he subsequently conceived that intention.

Where the verdict is for a greater amount than is claimed in the petition, although warranted by the proof, it is erroneous; but the excess may be remitted.

Appeal from Burleson. The record disclosed that in September, 1837, the appellant's intestate, York, sold to the intestate of the appellee, Gregg, a league of land, and executed his bond to make title; $1,000 of the purchase money was paid down, and two notes, one for $1000, and the other for $2,400, were given for the residue; one payable in February, and the other in December, 1838. In February, 1844, York brought suit for the collection of these notes. The present suit was instituted in December, 1845, to enjoin the suit for the collection of the notes, to rescind the contract of purchase, and to recover back the purchase money paid, with interest.

The petition, with its amendments, stated the contract of purchase and sale of the league of land, known as the Kuykendall league, made in 1837; described its locality and boundaries, bounded on one side by a league of land known as the Brooks league; that one Oldham was in possession, claiming under the title issued to Brooks, of about six hundred and forty acres included in the survey of the Kuykendall league; that York represented to the plaintiff, at the time of the purchase, that the lines of the two leagues did not conflict; that Oldham had no legal claim to the land, of which he was in possession within the survey of the league sold to the plaintiff;

that the title to the Brooks league was worthless, for that Brooks had abandoned the country and forfeited his title; and that he promised to dispossess Oldham, and place the plaintiff in possession of the entire league; that the land in possession of Oldham was more valuable than any other portion of the league, in consequence of its superior quality and the timber upon it; and that it formed the principal inducement to the purchase; that afterwards, in February, 1839, the plaintiff paid to the defendant's attorney, Watrous, $1600 in Texas promissory notes; that he afterwards learned that Oldham was the owner and in possession of the Brooks league by a valid, legal title; that the surveys conflicted and that the title of Oldham included that part of which he was and is in possession, and which was included in the purchase made by the plaintiff; that he made improvements on the land, but that the defendant took no steps to dispossess Oldham, until in February, 1844, when he brought suit against Oldham, long after the plaintiff had abandoned the land and contract; that the representations and promises of the defendant, in respect to the title and possession of the land, were false and fraudulent, and that the plaintiff was thereby deceived and induced to make the purchase. He tendered his title bond to the defendant, and prayed that the suit on the notes be enjoined and the notes cancelled; that the contract be rescinded, and his purchase money with interest be refunded; and that the defendant be required to answer on oath all the allegations of the petition, which was sworn to.

At the Spring Term, 1847, the defendant answered as required, under oath. He admitted the contract, but alleged that he informed the plaintiff that there was a small conflict in the two surveys mentioned; that the plaintiff was on the ground, examined the lines, and bought with a full knowledge of all the facts; that he (the defendant) was informed by the Surveyor of Austin's colony, that his league did not interfere with what legally belonged to the Brooks league, and that such is the fact; denied that he made any false representations;

alleged that he then believed and still believed that the title to the Brooks league was worthless; denied that Oldham had any legal title to the six hundred and forty acres of the Kuykendall league in question, or that that was more valuable than other portions of the league. He averred that he had offered and was ready, on payment of the residue of the purchase money, to execute to the plaintiff a warranty title to the land. He admitted that he was informed by Watrous, that he had $1605 in Texas promissory notes, belonging to the plaintiff, to pay to him, the defendant, if he would credit it upon the plaintiff's notes at par; that he did not receive or see it, and that Watrous never was his attorney. He denied the charge of fraud, and prayed for judgment for the balance of the purchase money.

At the same Term the plaintiff amended, and excepted to the answer as evasive. His amendment charged that Watrous and Jones were partners; that the defendant was indebted to them, and that although he did not receive or see the $1600, placed by the plaintiff in the hands of Watrous, yet he did receive the benefit of it; that it was placed to his credit or paid to one Pettus, on the defendant's order; and called on him to answer particularly to these and other charges in the amended petition.

The defendant answered further as to other allegations contained in the original and amended petition; but did not answer as to whether he received the benefit of the $1600, alleged to have been paid by his attorney.

The cause was continued from Term to Term, until the Fall Term, 1851. In the meantime, both the plaintiff and the defendant had died, and their administrators been made parties. At that Term, the plaintiff amended his petition, alleging that, in 1839, he tendered to the defendant the residue of the purchase money due, upon condition that the defendant would make him a good title to, and place him in possession of the land, which the defendant refused to receive, alleging as a reason, that Oldham was in possession of a part of the land, and

that he could not give possession, until he should eject him; that he did not take any steps to do so, until after he was notified by the plaintiff that he had abandoned the land, and considered the contract rescinded; and that the defendant was not, at the time of the sale, nor has been at any time since, able to give a good title, or the possession of the land.

The defendant excepted to the original and amended petition, on the ground that the matters therein contained could have been set up as a defence to the action on the notes; and also answered by a general denial under oath of the administrator, of all the allegations in the original and amended petitions not theretofore answered, and especially of all that related to any payment by the plaintiff to Watrous, or Watrous and Jones, of which strict proof was required. The exceptions to the petition were overruled.

The statement of facts embraced a mass of testimony which it is not necessary to recapitulate. It was in proof, that there was a conflict between the two leagues of land mentioned, of about six hundred and forty acres, of which Oldham was in possession; that that was more valuable than any other part of the league sold to the plaintiff; that it was of superior quality, and had on it water and a valuable cedar brake, and that the balance of the league was badly timbered; that, at the time of the contract, the parties went upon the land and ascertained the conflict, and that the league purchased by the plaintiff would include that in Oldham's possession, on the Brooks league; that Gregg said he would not make the purchase, unless he got all the land in the survey of the Kuykendall league, including the conflict; that York told him that he knew the title to the Brooks league to be worthless, and promised that he would dispossess Oldham and place him in possession; that it was understood that the part of the league in Oldham's possession was the main inducement to the purchase; that Gregg improved and cultivated a part of the land immediately after the purchase, but afterwards abandoned it; that no steps were taken by York to dispossess Oldham, until after the plain-

tiff had abandoned the land, when, in 1844, he brought a suit against Oldham for the land, which is still pending, and that Oldham has continued in possession; that in 1840 the plaintiff proffered to pay the defendant the balance of the purchase money then due, if he would make a good title and put the plaintiff in possession of the part occupied by Oldham, which the defendant declined to do. It was proved that $1089 were paid at the time of the purchase, and that $1605 in Texas promissory notes, the value of which was proved, were paid to the attorney of the defendant in 1839. The title to the Brooks league, under which Oldham was in possession, was given in evidence, and was a grant of a league of land to Bluford Brooks as a colonist, made on the 10th day of August, 1824. The title to the Kuykendall league, granted by the Commissioner Arciniega, in May 1831, was also given in evidence, and the conflict of boundaries proved. The defendant, to show the invalidity of the former title, offered in evidence a copy of the record of the proceedings of the Ayuntamiento of the municipality of Austin, certified under the seal of office of the Clerk of the County Court of Austin county. The paper offered purported to be a copy of proceedings before the Ayuntamiento on the 15th day of December, 1830, and appeared to be the same given in evidence in the case of Holloman v. Peebles, (described in the report of that case; 1 Tex. R. 675,) by which it appeared to have been determined that Bluford Brooks, having received a grant of a league of land by title, dated 10th August, 1824, and having abandoned the country in 1825, "the land is therefore declared vacant and the title null and void." To the introduction of this evidence, the plaintiff objected on two grounds: 1st. That it was not certified by the proper officer; 2nd. That it was not admissible under the pleadings. The Court sustained the objection, and the defendant excepted. The title bond, given by the defendant to the plaintiff, was conditioned to make title on payment of the purchase money.

There was a verdict for the plaintiff, finding the averments

of the petition true; and the amount of the purchase money paid and interest to be $3806; upon which the Court adjudged the contract rescinded, and gave judgment for the plaintiff; and the defendant, having applied for a new trial, which was refused, appealed.

*J. Sayles*, for appellant.

*A. M. Lewis*, and *Webb & Oldham*, for appellee.

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

Wheeler, J. The grounds relied on for reversing the judgment, are:

1st. The overruling of the exceptions to the petition;

2nd. The excluding of the evidence offered by the defendant;

3rd. The refusal of a new trial.

1. Had the objection now insisted on, that the matters embraced in the petition in this case, ought to have been pleaded to the suit upon the notes, been taken in the first instance, it ought to have been sustained: for there was no necessity of making two suits of what related to the same subject matter, and might as well have been litigated in one. But this objection was not taken until years after the defendant had answered to the merits. It is an objection not going to the merits, but to the form of the proceeding, and ought therefore to have been taken in the first instance. If, even, it should have been entertained at so late a stage of the proceedings, it could only be entitled to be now considered as presenting a question of costs. But the objection came too late, and was rightly overruled.

2. Did the Court err in rejecting the evidence offered to establish the alleged invalidity of the title issued to Brooks? Was the Clerk of the County Court authorized to certify copies of the proceedings of the Ayuntamiento?

To render a certified copy of a record or document admissible in evidence, without other authentication, it must be certified by the officer having legal custody of the original. (1 Greenl. Ev. Sec. 485; Hart. Dig. Art. 744.)

We have been referred to no law, and we are aware of none, which gives the legal custody of the original, in this instance, to the Clerk of the County Court. On the contrary, it appears to have belonged to the custody of the Commissioner of the General Land Office. He, and not the Clerk of the County Court, was the proper person to authenticate by his certificate, copies to be used as evidence. (Hart. Dig. Art. 1786, 1819, 1835.) The original, however, appears not to have been deposited in the custody of the Commissioner. And being in the possession of an officer to whom its legal custody did not belong, it could not be proved by a certified copy. But it might have been proved by producing the original and proving its genuineness; or, being a document of a public nature, if there would have been an inconvenience in removing the original, it might have been proved by an examined copy, first having proved the genuineness of the original, by the testimony of those, who, from having had custody of the original, or from information derived from other sources, can testify as to that fact; (1 Greenl. Ev. 508, 484, 485;) the rule being that every document of a public nature, which there would be an inconvenience in removing, and which the party has a right to inspect, may be proved by a duly authenticated copy; and, where proof is by a copy, an examined copy, duly made and sworn to by any competent witness, is always admissible. (Ib.)

But it is sufficient for the present inquiry, that, not being certified by the officer who had the legal custody of the original, the copy was not admissible.

3. It remains to inquire whether the verdict and judgment were warranted by the evidence.

It is insisted that the evidence is especially insufficient in respect to the payment of the $1605 to Watrous for the use of

the defendant, the fact being denied by the answer, and proved by but one witness.

In respect to this alleged payment, it is to be remarked, that, although the defendant, York, in his lifetime did deny that Watrous was his attorney, or that he received from him the money, yet he admitted that Watrous told him that he had received the money for him; and when charged with having answered evasively upon this point, and with having received the benefit of the payment, and when specially interrogated as to whether the money was not paid to his order, and whether he did not receive the benefit of it, he declined any answer to these inquiries. The facts were specially alleged, and the defendant having answered without denying the allegations, they must have been taken as true without further proof, but for the answer of the administrator of York. His answer, filed at the trial Term, was not a response to the particular allegations and interrogations of the amended petition, but was general in its character, and was evidently intended as a disclaimer, simply, of any knowledge on the subject, in order to put the plaintiff on proof of the allegations not previously answered. It is not to be supposed that the administrator had a more competent knowledge of the facts, than his intestate. He does not profess or assume to answer from such knowledge; and when he undertakes to file a general denial on oath, of all the facts and allegations not previously denied, he ought to be understood, as he doubtless intended, simply as denying any knowledge on the subject, and as requiring proof.

The payment was proved by one witness, who testified distinctly and circumstantially to the fact. York, in his lifetime, did not deny, but admitted it. Under the circumstances, the fact was, we think, sufficiently proved: there was the testimony of one witness strongly corroborated by circumstances. Had the denial been made at the time of first answering to the merits, or at a Term previous to the trial, the plaintiff would have been apprised of the necessity of being prepared with proof, and there would be more force in the argument that he

should have procured the testimony of the attorney, through whose agency the payment was made. But, previously to the Term of the trial, the fact not having been denied, there was no necessity of proof to establish it. To have required more, would have operated oppressively on the plaintiff; and would have given the defendant an undue advantage from his own omission to answer when first interrogated as to the fact.

It is further insisted that the evidence does not support the charge of fraud, and that the failure of title in so small a part of the land, does not constitute a ground for rescinding the contract, but only for compensation or a proportionate reduction in the price contracted to be paid.

It was however proved that the part of the land, respecting which there was a failure to give a clear title and possession, was much the most valuable portion of the league; that it possessed superior advantages, which were important to the use and enjoyment of the residue; and that it formed the main inducement to the purchase. The contract was not executed, but executory, and under the circumstances, the plaintiff could not, we think, be compelled to accept a title which did not convey the essential interest and possession which the defendant had contracted to convey, and which he had agreed to purchase. Where the title proves defective in a part or to an extent not very essential, the contract will not, in general, be rescinded; but performance will be decreed, with a rateable reduction of the purchase money, by way of compensation for the deficiency. But, where the failure of title extends to that part which formed the principal inducement to the purchase, it seems to be more in consonance with justice, that the purchaser should be at liberty to rescind the contract altogether. (2 Kent, Com. 475, 476, and notes.)

"There are (says Kent) conflicting cases on this point, but "in the English law, the better opinion seems to be, that, if "a purchaser contracts for the entirety of an estate, and a "good title can only be made to a part of it, the purchaser "will not be compelled to take it." (Id. 470, n. e. 5th Ed.)

Even where there is no charge of fraud, "it would seem, (he "says) to be a sound doctrine, that a substantial error between "the parties, concerning the subject matter of the contract, "either as to the nature of the article, or as to the considera- "tion, or as to the security intended, would destroy the con- "sent requisite to its validity." (Id. 471.)

But, although there may not have been, at the time of this contract, any intentional misrepresentation made, yet it can scarcely admit of a doubt, that the plaintiff was deceived and misled to his prejudice, by the representations and promises of the defendant. The latter may have believed that the title under which Oldham was in possession, was worthless, and he may have intended to dispossess him; and it seems that the plaintiff would not have made the purchase had he not confided in these representations and promises. The defendant ought, then, in fairness and honesty, to have taken some steps and to have instituted some proceedings to enable him, within a reasonable time, to comply with his undertaking.

He was to make title on payment of the purchase money. The last payment became due in December, 1838. At that time, unless excused by the plaintiff, he ought to have been prepared to make title and give possession in accordance with his contract, or, at least, to have taken some steps preparatory to a compliance, within some reasonable time. But no such steps were taken until after six years had elapsed, and the plaintiff had abandoned the land, and elected to consider the contract at an end, when, in 1844, he brought suit against Oldham; but this suit he had not prosecuted to judgment at the time of the trial. This delay on the part of the defendant was scarcely consistent with fair dealing. His representations and promises, and failure to perform, or attempt a performance, operated as complete a deception on the plaintiff, as if, at the time, the defendant had not intended a performance. The plaintiff had a right to rely on his representations and promises; and if deceived and misled by them, and the subsequent conduct of the defendant inconsistent with them, to his injury, it can make little difference in morals or law,

whether it was the intention of the defendant originally to deceive, or whether he subsequently conceived that intention. In either case the effect was the same. The plaintiff was misled by representations and promises of the defendant, which the latter did not verify, and which he has not shown that he had the ability to verify.

Upon the whole, we conclude that a case was made out by the plaintiff, proper for the rescission of the contract, and that the verdict and judgment were warranted by the evidence.

The proof shows a larger amount of purchase money paid, than is claimed in the petition, and the jury found in accordance with the proof. The plaintiff, however, having remitted the excess, this objection to the verdict is removed. We are of opinion that there is no error in the judgment, and that it be affirmed.

PETITION FOR A RE-HEARING.

To the Honorable, the Chief Justice and Associate Judges of the Supreme Court of the State of Texas:

The appellant in this case, by his counsel, respectfully asks that you grant him a re-hearing, for the reason that, as he conceives, in the consideration of this case, the Court mistook the law and did not consider the force and effect of the 33rd Section of "An Act organizing the inferior Courts and defining the powers and jurisdiction of the same," approved December 20th, 1836, which Act, he believes, authorized the copy of the order or judgment of the Ayuntamiento of the Municipality of Austin, which was offered in evidence by the appellant, to be read as evidence on the trial in the District Court, being authenticated, as it was, by the certificate and seal of the Clerk of the County Court of Austin county; that officer, as he conceives, being made by the Section of the law above referred to, the proper depository of all the papers, documents, and records, of the said Ayuntamiento Court. And he will ever, &c.

W. T. McFARLAND,
*Att'y for Appellant.*

WHEELER, J. We have examined the provisions of law referred to by the counsel for the appellant, in respect to the legal custody of the document containing proceedings of the Ayuntamiento of the municipality of Austin. We are of opinion that this was a document, of the character contemplated by the provisions of the law to which we before referred, and that consequently, it belonged to the custody of the Commissioner of the General Land Office.

The Act of 1852, to which reference has been made, shows merely what the evidence in the case showed, that the document had not been removed to the proper place of deposit; but it does not determine, nor was it intended to determine, to whose custody it properly belonged.

We adhere to the opinion that the judgment be affirmed, for the reasons expressed in our opinion delivered at the last Term.

Judgment affirmed.

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## HUBERT v. BARTLETT'S HEIRS.

To the objection now urged to the Land Office copy of the title to Miller, that it was not a translated copy, it is a sufficient answer, that this objection was not made at the trial.

Where the translator and recorder of Spanish deeds, in the General Land Office, certified to the correctness of a copy of an original Spanish document on file in that office, and the Commissioner of the General Land Office certified "that E. Sterling C. Robertson, whose name is signed above is the translator and recorder of Spanish deeds in this office," it was held, that, although the attestation was not in the most approved form, yet, that it was sanctioned by long usage, (of which the Court took notice judicially,) and sufficient.

A certified copy of an original Spanish title, properly on file in the General Land Office, is admissible without further proof of the original, and without the filing previous to trial, and notice to the opposite party.

Certified copies of public acts which were filed in the office of any Alcalde or Judge in Texas, previous to the first Monday in February, 1837, are admissible in evi-

dence, without other proof of the originals, and without the necessity of filing three days previous to the commencement of the trial, and of giving notice to the opposite party. (Hart. Dig. Art. 746.)

The most material and most certain calls will control those which are less material and less certain. A call for a natural object, as a river, a known stream, a spring, or even a marked tree, will control both course and distance; although there are many cases where the course and distance will control natural marks or boundaries, as where it is apparent on the face of the grant that these were inserted by mistake, or were laid down by conjecture; and so of a variety of cases which may be supposed.

Appeal from Washington. Trespass to try title, by the heirs of Jessee Bartlett against Mary A. Hubert. The plaintiffs deraigned title from Samuel Miller, who received a grant, from the government of Coahuila and Texas, of one league of land, in 1824, which he conveyed, by public act before Horatio Chrisman, Alcalde of the Municipality of Austin, to Bartlett, in 1832. The defendant claimed the land in controversy, as being included within the boundaries of Adam Lawrence's survey, made in 1831, and by him conveyed to her husband, of whose estate she was the administratrix. The matter in controversy was as to the true western line of the Miller survey.

The record contained the following bill of exceptions:

"Be it remembered, that, on the trial of this cause, the "plaintiffs offered to read in evidence a copy of a deed, in the "(Spanish) language, marked exhibit A, and also a paper in "the Spanish language, purporting to be a grant from the "government marked B, without having filed the same or "given the defendant notice thereof, to which the defendants "objected as well for the reasons aforesaid, as for the manner "in which said copy was authenticated, which objection was "overruled by the Court and said paper read to the jury; and "also the plaintiff offered to read in evidence a paper purport-"ing to be a deed from Samuel Miller to Jessee Bartlett, "marked C which was filed in the office of the Clerk of this "Court March 15th, 1851, and no notice thereof given to the "defendant; and the trial of this cause commenced on the

"17th March, 1851; to which the defendant objected; which "objection was overruled by the Court, and said papers per- "mitted by the Court to be read to the jury; to all of which "the defendant excepts and tenders this bill of exceptions, "which is signed, sealed and made a part of the record."

Exhibit A was a certified copy of the original title to Miller. Exhibit B was the original *testimonio* of same title. Exhibit A was authenticated in the following manner:

"GENERAL LAND OFFICE,) I, E. Sterling C. Robertson
"*State of Texas.* ) translator and recorder of Span- "ish deeds in the General Land Office of said State, bonded "and sworn, certify the foregoing to be a correct copy of the "original document on file in this office. Given, &c.

"E. STERLING C. ROBERTSON.

"GENERAL LAND OFFICE,) I, George W. Smyth, Com-
"*State of Texas.* ) missioner of the General Land "Office of said State, certify that E. Sterling C. Robertson, "whose name is signed above, is the translator and recorder "of Spanish deeds in this office, bonded and sworn. In tes- "timony, &c.

{L. S.} "GEORGE W. SMYTH."

The deed from Miller to Bartlett was a public act, done before Horatio Chrisman, Alcalde of the municipality of San Felipe, in 1832, with three assisting witnesses. On the 29th of August, 1837, one of the assisting witnesses appeared before the Chief Justice of Austin county and declared on oath, that the signature of Chrisman was genuine; that the instrument was signed by Chrisman in his presence; and that the signature as assisting witness was his own and done by him. Sworn to and subscribed, &c.

Same day Oliver Jones appeared before said Chief Justice, and made oath that he was well acquainted with the signature of Samuel M. Williams, another of the assisting witnesses, and that the signature of the public act, purporting to be the signature of said Williams, was genuine.

Then followed the certificate of the Clerk of the County

Court of Austin county, dated March, 1851, that "the above "and foregoing is a correct copy of a deed in the Spanish "language, from Samuel Miller to Jessee Bartlett," on file in his office, and that he is proper keeper of conveyances and other instruments of writing, between private individuals, which were filed in the office of the Alcalde or Judge of Austin's first colony.

The field notes of the Miller survey were as follows:

"Beginning at the upper corner of the above survey, a post, "from which an ash twelve inches in diameter bears S. 40° "W. 8vs., another nine inches in diameter bears N. 30° W. "6 vs.; thence W. 3143 vs., to S. W. corner, a post, from "which a cedar twelve inches in diameter bears S. 20° E. "4 vs., and a pecan fourteen inches in diameter bears N. 45° "W. 5 vs.; thence N. 5000 vs., to N. W. corner, a post, from "which an elm nine inches in diameter bears S. 40° E. 3 vs.; "a cedar twelve inches in diameter bears N. 80° W. 3 vs.; "thence E. 7310 vs., to upper corner on the river, a post, from "which a burroak eight inches in diameter bears N. 13° "W. 4 vs.; an elm ten inches in diameter bears S. 2° W. "4 vs.; thence down the river with its meanders to the place "of beginning."

A survey of both tracts was ordered by the Court.

"To the Honorable District Court, Washington county.— "Agreeably to your order, issued October 2nd, 1850, I pro- "ceeded to the S. E. corner of the Samuel Miller survey, on "the Brazos river, where I found two ash trees marked as "bearing trees, but caved over the bank. I then run due "west, between the Miller and Barnett surveys, an old line "1017 varas to N. W. corner of the Barnett survey; con- "tinued on said line 2650 vs., to a cedar and pecan marked "as bearing trees; found no stake; continued due west on "said line 3300 vs., to the line of Gibson Kuykendall's survey, "an old field; thence due north by said survey 1328 vs., to a "stake, from which a hackberry bears N. 5 vs., distant; this "the N. E. corner of Kuykendall's; and from this point I find

"no old line continuing north; return to the cedar and pecan "on the line of Miller's survey; thence due north, and, after "passing some distance through prairie, enter timber, where "I find an old line blazed and running due north; continues "about 4900 vs., by our measure to an elm tree, marked as a "bearing tree, notched and blazed, but no stake standing. "Thence due east about 7300 vs., to the Brazos river. Thence "down said river with the meanders thereof, to the place of "beginning, a plot of which survey you will find attached, "within the lines of which is contained an area of about 3900 "acres of land. All of which is respectfully submitted.

"[Signed,] D. PARKER,

"County Surveyor, W. C."

In pursuance of an order of Court, the Deputy Surveyor, O. H. P. Garrett, also made a survey of the Lawrence quarter league—the field notes of which he returned as follows:

Begining at a stake in the north boundary of Gibson Kuykendall's three-fourth league; thence N. 80° E. 1254 vs., to a stake, in old marked line; thence due N. 3675 vs., to corner; thence due E. 880 vs., to New Year creek; thence run up said creek with the meanders thereof, for the line, to where Little Cedar creek empties into New Year creek, corner on an elm eighteen inches in diameter; thence W. 300 vs., to a stake; this the N. W. corner; thence due N. with the E. boundary of the Miller quarter league; at 208 vs., cross Little Cedar creek, 5443 vs., to the place of beginning.

This survey was certified to be correct by the County Surveyor of Washington county, D. Parker.

The testimony of several witnesses corroborated the return of the survey of the Miller league, as to present appearances, but there was no proof as to the actual survey. Verdict and judgment for the plaintiffs. Motion for new trial overruled.

*J. Sayles*, for appellant.

*J. Willie*, *J. E. Shepard* and *A. M. Lewis*, for appellees.

WHEELER, J. It is objected to the judgment, 1st. That the Court erred in its rulings, upon the admissibility of evidence introduced by the plaintiffs. 2nd. That the verdict was contrary to law and the evidence.

To the objection now urged to the Land Office copy of the title to Miller, that it was not a translated copy, it is a sufficient answer, that this objection was not made at the trial.

The manner in which the instrument was attested, is certainly obnoxious to just criticism. It was a mode of attestation adopted, doubtless, from a supposition that the Spanish Clerk was especially responsible for the accuracy of copies of instruments, in the Spanish language. It is not the most approved form, certainly, of attesting copies of such instruments; but it is believed to have been used for years without having been questioned. And we think we may apply a liberal construction in favor of a practice of attesting copies, as old, perhaps, as the office from which they emanate; and hold it a substantial compliance with the statute. The copy introduced was a copy of a record in the Land Office, and as such was rendered admissible by the attestation of the Commissioner. (Hart. Dig. Art. 744.)

The copy of the act of sale from Miller to Bartlett, passed before the Alcalde, Chrisman, and certified by the Clerk of the County Court of Austin county, was admissible in evidence under the 91st Section of the Act of 1846. (Hart. Dig. Art. 746.) It was the original, or *protocol*, which remained in the office of the Alcalde, and is now in the legal custody of the Clerk of the County Court. It was admissible, therefore, upon his certificate.

The principal question in the case, is whether the verdict was warranted by the evidence. The evidence establishes, we think, beyond question, the north-west and south-west corners of the Miller league, by marked trees, answering to the calls of the survey of that league; and also a plainly marked line, from one corner to the other, as its western line. No witness testified to the fact, as of his own knowledge, that this

was the line actually run and marked in making the original survey of the land for Miller; but the facts and circumstances in evidence, all tending to this conclusion and admitting of none other, were so numerous, so clearly and fully proved, and were of so conclusive a character and tendency, as to leave no doubt of the fact. This line, it is true, does not answer to the calls for distance west, but there is none which does. Proceeding west, the distance called for, and there are neither lines nor corners found, which could have been marked as the corners and lines of the survey. The conclusion, therefore, is inevitable, that the marked corners and lines found, answering to the description given in the field-notes, were the corners and lines marked and run in making the survey, unless we adopt the supposition that the survey was not actually made, and the lines run and marked, as the survey purports. The appellees do not ask us to indulge this supposition; nor would it become them, claiming under the grant to Miller, to rest their case upon it. We are not at liberty to assume that there was no actual survey made; on the contrary, we must suppose that the Surveyor did his duty, and that he actually traced and marked the lines of the survey; and the testimony establishes the fact beyond a doubt.

But the line thus run and marked, as the western line of the survey, and the calls of the field notes for distance west, do not agree. The Surveyor stopped short of the distance called for, and included in the survey less than the required quantity of land. And the question is presented, whether the marked lines of the survey actually made, or the course and distances shall govern, in ascertaining the land conveyed in the grant to Miller.

The law, as applicable to a case like the present, seems to be well settled. The general rules are, that, 1st, natural boundaries, 2nd, artificial marks, and 3rd, course and distance should govern the location. A correct location, it has been said, consists in the application of any one, or all of these rules, to the particular case; and when they lead to contrary

results, that must be adopted which is most consistent with the intention apparent on the face of the grant. (McCullough v. Richardson, 1 McC. S. C. R. 167.) Hence, there are many cases where the course and distance will control natural marks or boundaries, as where it is apparent on the face of the grant that these were inserted by mistake, or were laid down by conjecture, and without regard to rule; and so of a variety of cases which may be supposed to exist. (Ib.; 2 Const. R. 115.) There is, however, nothing in the present case to exempt it from the operation of the general principle we have stated, and which is thus stated by Chief Justice Marshall, in the case of Newsom v. Pryor's Lessee. "It is," he said, "that the "most material and most certain calls shall control those which "are less material and less certain. A call for a natural ob-"ject, as a river, a known stream, a spring, or even a marked "tree, shall control both course and distance." (7 Wheat. R. 7; Urquhart v. Burleson, 6 Tex. R.)

The application of this principle, to the facts of the case in evidence, required that the verdict should have been set aside, as manifestly contrary to law, and a new trial awarded. The judgment must, therefore, be reversed, and the cause remanded for further proceedings.

Reversed and remanded.

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

## Ewing v. Kinnard.

Where, on the dissolution of an injunction in restraint of an execution, the plaintiff in the execution moved for the issue of a *venditioni exponas*, and the Judge wrote across the motion "granted" and signed the same officially, there being no further entry of judgment; *Held*, There was no judgment from which an appeal would lie.

Error from Washington.

*J. D. Giddings* and *J. Sayles*, for plaintiff in error.

Lipscomb, J. The only error assigned and relied on by the counsel for the plaintiff in error, is the granting the motion of the defendant in error, for an order of *venditioni exponas*.

There had been an execution and a levy, which was enjoined on the application of the plaintiff in error, and on his giving bond and security as required by the mandate of the Judge, as a condition to the issue of the injunction. The injunction, after standing for several years, was dissolved, and the petition dismissed. There was no appeal from the dismissal of the petition. Seven days after the decree dismissing the petition for the injunction, the counsel for the plaintiff in the execution entered a motion for *venditioni exponas* to issue.—Across this motion the Judge wrote, motion granted, to which he put his name officially. He signed a bill of exceptions, in which he states that the counsel for the present plaintiff in error, resisted the motion on the ground of a want of notice thereof, and that it had not been spread on the motion docket. This is all that the record discloses about this motion, and no error assigned to the correctness of the decree dismissing the petition. We do not think that there has been any judgment on the motion, that we can revise; we must therefore

dismiss the writ of error. If the order has been improperly granted for the sale, and it should be attempted to be enforced, its correctness can be tested in another proceeding, which will require from the Court below such a judgment as can be revised. The writ of error is dismissed.

Writ of error dismissed.

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## Ramsey v. McCauley.

A judgment will not be reversed for any mistake, miscalculation, or misrecital, of any sum or sums of money, or of any name or names, where there is among the records of the proceedings in the suit, any verdict or instrument, whereby such judgment or decree may be safely amended.

Error from Washington. This was an action upon a promissory note, by George J. McCauley against John Ramsey, the plaintiff in error. The defendant answered by plea of general denial, statute of limitations, and payment. After a trial, appeal to the Supreme Court, and reversal of the judgment, the cause again came on for trial, the record reading as follows:

"J. H. McCauley, v. John Ramsey, } District Court, Spring Term, 1850.

"This day came the parties and thereupon came a jury, to "wit: &c., good and lawful men, who were duly elected, &c., "and upon their oaths do say, we, the jury, find for the plain- "tiff seven hundred and fifty dollars. (Signed by the Fore- "man.) It is therefore considered by the Court that the plain- "tiff recover of the defendant," &c.

Then followed a motion for a new trial entitled George J. McCauley v. John Ramsey; then an order that the motion be

overruled, entitled J. H. McCauley v. John Ramsey; then a statement of facts entitled George J. McCauley v. John Ramsey. The defendant prosecuted a writ of error. The defendant in error moved the Court to correct the error of the Clerk of the District Court, in entering up the judgment.

After the defendant had procured a writ of error, at the Fall Term, 1852, the mistake was, on motion of the plaintiff, after notice to the defendant's attorney, corrected by the District Court, as appeared by a transcript of the proceedings.

*J. Webb*, for plaintiff in error.

*J. Sayles*, for defendant in error.

Lipscomb, J. In this case, in the Court below, when the Clerk entered the verdict of the jury, in stating the case in the margin, he entered it J. H. McCauley v. John Ramsey, and then entered the verdict of the jury. The whole proceedings had been in the name of George J. McCauley v. the plaintiff in error. The verdict did not give the name at all, and the judgment followed the verdict, without giving the name of the plaintiff, but referring to each as plaintiff and defendant, and not distinguished in any other way. This judgment was rendered at the Spring Term, 1850. The record shows that at the Fall Term, 1852, this error, if any, was corrected by order of the Court, by the insertion of the name of the plaintiff.

It is contended by the plaintiff in error, that the amendment was made too late, and the Court below erred in its judgment in so rendering it, and the amendment could not cure the defect in the verdict and judgment, as at first entered. The amendment made in the Court below, is predicated on the 786th Article, Hartley's Digest. It is as follows: "When, "in the record of any judgment or decree of any District "Court, there shall be any mistake, miscalculation, misre-"cital, of any sum or sums of money, or of any name or "names, and there shall be, among the records of the pro-

"ceedings in the suit in which such judgment or decree shall "be rendered, any verdict or instrument of writing, whereby "such judgment or decree may be safely amended, it shall be "the duty of the Court in which such judgment or decree "shall be rendered, and the Judge thereof in vacation, to "amend the judgment or decree thereby, according to the "truth and justice of the case; provided, that the opposite "party, his agent or attorney of record, shall have reasonable "notice of the application for such amendment; and if the "transcript of such judgment or decree, at the time of such "amendment, or at any time thereafter, shall be removed to "the Supreme Court, it shall be the duty of that Court, upon "inspection of such amended record, to be brought before it "by *certiorari*, if need be, to affirm such judgment, if there "be no other error apparent in such record."

It will be seen that there is no limitation as to time, within which the amendment may be made, and we believe that if it be done at any time before the final judgment has been rendered in this Court, it is sufficient under the statute; and it was a case clearly within the article of the statute cited, there can be no doubt, as the petition and the citation, and every distinct part of the record, preceding the entry of the verdict and judgment, could furnish the safe means of making the amendment, as each of them gave the true name of the plaintiff in the suit; and there can be no doubt but a reference to the original verdict, as returned into Court, would have shown the same, as it is most likely that it was written on the petition; and it was not an error or mistake of the jury, as supposed by the counsel for the plaintiff in error.

The verdict was correct; the mistake was made by the Clerk in stating the title of the case in the margin, before entering the verdict. The judgment is affirmed.

Judgment affirmed.

## Munson v. Newson.

Under the Act of 1848, (Hart. Dig. p. 478.) the appointment of a guardian, by the Chief Justice of any other county than that of the minor's residence, is absolutely void.

It seems, that, under the Act of 1848, to regulate proceedings in the County Courts, relating to guardians and wards, for the purposes of the appointment of guardians, other than testamentary guardians, the domicil of the minor is not regulated by that of the deceased parents, although this case may have gone upon the ground of the right of the surviving mother to change the domicil of her children.

The County Court has jurisdiction to declare null and void, its own proceedings in a case in which it had no jurisdiction in the first instance.

Appeal from Washington. Munson filed his petition in the County Court of Washington county, to September Term, 1851, alleging that he had been appointed guardian of Albert and Ann Jordan, minor heirs of Stephen Jordan, deceased, by the County Court of Burleson county, at the April Term, 1851, of said Court; that Newson, the defendant, at the September Term, 1850, of said County Court of Washington county, had obtained letters of guardianship of said minors, and by virtue of said appointment, was then seeking to obtain possession and control of the property of said minors; that, at the time of granting said letters of guardianship to said Newson and for a long time previous, said minors had their residence in the county of Burleson; that said minors were not within the jurisdiction of said County Court of Washington county; that said letters were therefore wholly null and void; and further that said letters had been obtained without legal and proper notice, &c. Wherefore he prayed that said letters might be annulled.

Newson alleged in his answer that Stephen Jordan, the father, at, and for a long time before, his decease, was a citizen of Washington; that said minors had been removed out of the county of Washington, by the wrongful acts of the said Munson;

that he, Newson, had been lawfully appointed guardian of said minors; that Munson had possession and control of them; praying that he might be required to deliver them up to said Newson.

An agreement was filed, that Stephen Jordan died in the county of Washington, in 1839; that letters of administration were taken out in said county upon his estate; that he left a widow and two children, said Albert and Ann; that his widow intermarried with Munson in 1843; that she, with her two said children then removed to Burleson county; that said children, had continued to reside in said county of Burleson, with said Munson, up to the present time; and that said Albert and Ann "are under fourteen years of age."

The grant of letters of guardianship, by the County Court of Burleson county, to Munson was not denied. It appeared that Newson was the brother of the mother of the minors, Albert and Ann; and that the mother had died in Burleson.

The County Court dismissed Munson's petition. Munson appealed to the District Court. On motion of Newson the District Court dismissed the appeal for want of jurisdiction.

*J. Sayles*, for appellant.

*A. M. Lewis* and *J. Willie*, for appellee.

Hemphill, Ch. J. It is very clear that the County Court of Washington county had no authority to grant the letters of guardianship, now sought to be revoked. The minors, on the intermarriage of their mother with the appellant, had removed to Burleson county, and have since continued to reside there. The appointment of their guardians pertained to the jurisdiction of the Chief Justice of the latter, and not of the former county. The statute of 1848, in several of its provisions, declares, in effect, that the guardianship of minors is within the special cognizance of the Chief Justices of the counties of their respective domicils. The third Section, (Art.

1534,) provides that whenever it shall come to the knowledge of any Chief Justice that there is within his county any minor without any legal or natural guardian, if such minor be under the age of fourteen years, such Chief Justice shall appoint a guardian for such minor; and the Section further provides for the appointment of his guardian, if he be over fourteen years of age. And by the sixth Section, (Art. 1537,) it is declared that a minor, having a guardian of his person or of his estate, appointed by the Chief Justice, upon attaining the age of fourteen years, may choose another guardian of his person or of his estate, before the Chief Justice of the county of the minor's residence, &c. The only distinct exception to the general rule, is in relation to testamentary guardians, who receive their letters from the Court where the will is probated; and their letters must be obtained within six months after probate, otherwise their appointment will be void; (Art. 1538;) and the jurisdiction of the County Court of the minor's residence, to appoint another guardian would at once attach. The exception, however, has no application in this case. The deceased was intestate, and consequently, the Court within whose jurisdiction the minors reside, has the exclusive power over questions touching the appointment of their guardians.

It was contended that the power of the Chief Justice of Washington county was deducible from the provisions of the Act regulating proceedings in the District Court, requiring executors, administrators, guardians and trustees to be sued in the county where the estate is administered. If this position be supported by the proper construction of the provision, then the provision itself would loose its force, as being repugnant to those on the same subject matter, in the statute of 1848. But the terms do not necessarily imply the meaning attached to them. The language goes no further than to require that the officers, entrusted with the control of estates, shall be sued in the counties of their administration. Thus, executors and administrators can be subjected to suit, only in the county where the succession is open; and trustees and guardians,

where the trust estate, or that of the wards, is possessed and administered.

But the point under consideration is not affected by the provision, whatever may be its construction. Its solution depends upon, and is controlled by the statute of 1848.

There is a propriety in vesting this jurisdiction in the Court of the minor's residence. He may be interested in more than one estate, and this would involve the necessity of more than one guardian, if the power of appointment attaches as an incident, to the Court where the succession is opened. In this case the father died in one and the mother in another county, and if the latter left any estate there might be two contemporaneous guardians, if the fact of a succession being opened in a particular county, confers upon the Court of that county the power of appointing a guardian to the minor heirs of such estate. But the confusion resulting from such conflict, is avoided by restricting the power to one County Court: that being the one whose territorial limits embrace the residence of the minor.

The act of the County Court of Washington, in the appointment of the appellee as guardian, being void, there can be no doubt that the same Court has the power to declare its judgment a nullity, and revoke its letters for guardianship. (11 Wend. R. 542; 15 Pet. R. 119; Chambers v. Hodge, 3 Tex. R. 531.) Such act of revocation is not the exercise of the power of revising, for error or irregularity, a judgment rendered in the exercise of a competent jurisdiction, and which consequently remains valid until reversed; but it is the formal declaration of the nullity of that which is in itself void, which gives no right, confers no authority, and may at any time when set up, be collaterally impeached. Under such appointment, the appellee can rightfully perform no act; he is not vested with either the character or authority of a guardian; but the semblance of authority, which he has, may embarrass the guardian legally appointed, operate greatly to the prejudice of the minors and of third persons, and should be formally revoked and annulled.

It is ordered, adjudged, and decreed, that the judgments of the County and District Courts be annulled and reversed; and it is further ordered, adjudged, and decreed, that the order of the County Court of Washington county, appointing the appellee as guardian of the said minors, Albert and Ann Jordan, be, and the same is hereby annulled, vacated and wholly set aside, and that his letters of administration be, and the same are hereby revoked.

Reversed and re-formed.

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## Newson, Guardian, v. Chrisman.

Where the petition for a *certiorari* to the Probate Court, alleged, that, at the time of the trial, he was necessarily absent from the county on important business of the estate, and that he had employed an attorney of the Court, to represent him, but he had been detained by the severe sickness of his family, alleging also that he was entitled to large credits which had not been allowed, and showing satisfactory reasons why he had not taken an appeal, it was held that the writ was properly issued.

The District Court has jurisdiction, independent of the 15th Section of the IVth Article of the Constitution, to act directly and originally upon executors, administrators, and guardians, to prevent frauds and fraudulent combinations, that might result in the destruction of the rights of those interested in the estate.

The 10th Section of the IVth Article of the Constitution, gives to the District Courts all the Common Law and Chancery jurisdiction, known to the Common Law and Chancery of England, not incompatible with the Constitution of the United States and of this State, and laws under them.

The proceedings of the Probate Court may be brought into the District Court, either by appeal, under the 15th Section of the IVth Article of the Constitution, and the laws enacted in pursuance thereof; or, showing good cause why an appeal was not taken, and sufficient ground for apprehending that injustice has been done, by *certiorari*, under the 10th Section of the same Article.

Where the proceedings of the Probate Court are brought into the District Court, by *certiorari*, it is the duty of the latter Court, either to dismiss the *certiorari*, if it has been improperly awarded, or to try the matter *de novo*, and certify the decree back to the Probate Court, to be carried into execution. (Hart. Dig. Art. 718.)

Newson v. Chrisman.

Appeal from Washington. Chrisman had been appointed administrator of one Stephen Jordan, in 1839; had given bond and returned an inventory; and it did not appear that anything further had been done, until Newson, representing himself, to be the guardian of Albert and Ann, minor heirs of said Jordan, filed a petition in their behalf, in 1851, that said Chrisman be required to settle his account, &c. Chrisman was duly notified; and failing to appear, the Probate Court made a decree against him. This was at the April Term, 1851. At the May Term, Chrisman appeared and moved to set aside the decree; which motion was refused. On the 8th of July, thereafter, Chrisman obtained a writ of *certiorari*. The petition for the *certiorari* set forth that at the April Term, the petitioner was necessarily absent from the county on important business of the estate; that, before leaving, he had employed an attorney of the Court, to represent him, but he had been detained by the severe sickness of his family; that he had paid out large sums of money for the estate, for which he should have had credit, &c.; and that Newson was not guardian as he represented himself to be.

The District Court reversed the decree, and remanded the case for a new trial, to the Probate Court.

*A. M. Lewis*, for appellant.

*J. E. Shepard* and *J. Sayles*, for appellee.

Lipscomb, J. From the view we have taken of this case, it is not considered material, to look beyond the proceedings of the District Court.

It appears that a balance, to a very large amount, had been struck, by the Probate Judge, against the administrator. He was not present when the account was struck by the Probate Judge; he had, however, been cited to appear and render in his account. He applied to the Judge of the District Court

for a *certiorari* to take the case into the District Court, and rested his application on grounds that seem to be sufficient. Although he had been cited to appear, yet, from circumstances that ordinary care and foresight could not have anticipated, he was not present in person or by his counsel; and the proceedings against him were, therefore, in point of fact, *ex parte*. After the case had been taken to the District Court by *certiorari*, that Court, after hearing argument, reversed the decree, or order, of the Probate Court, and remanded the cause without instructions, or showing the grounds for so remanding it.

The judgment of the District Court, was appealed from; and it is assigned for error, that the judgment is erroneous. We believe that this assignment is well taken, and that it must be sustained. By the 15th Section of the Judicial Department of the State Constitution, it is provided as follows, i. e.: "The District Courts shall have original, and appellate "jurisdiction, and general control over the said inferior tribu- "nals, and original jurisdiction and control over executors, "administrators, guardians, and minors, under such regula- "tions as may be prescribed by law." (Hart. Dig. p. 64.) It would seem, that, after conferring the jurisdiction, it left the mode of exercising that jurisdiction, to be prescribed by the Legislature. The action of the Legislature on the subject, will be found in the 642nd Article, Hartley's Digest. It is as follows: "The District Court shall have and exercise appellate "jurisdiction, and general control over such inferior tribunals "as have or may be established in each county for appoint- "ing guardians, granting letters testamentary and of admin- "istration, for settling the accounts of executors, administra- "tors, and guardians, and for the transaction of business ap- "pertaining to estates, and original jurisdiction in probate "matters, only in cases where the Judge or Clerk of Probate "is interested." It will be seen that legislation on this subject, is not explicit; and it may be doubtful whether the object of the Constitution has been carried in its effect. It has

never been decided, in express terms, that the original jurisdiction, given to the District Court by the Constitution, can be exercised in the absence of express legislation; yet, in the case of Chevallier v. Wilson and wife, (1 Tex. R. 164,) such an exercise of jurisdiction was acted upon in this Court, and not repudiated nor affirmed: the case resting upon its peculiar features. In the case of Long *et al* v. Wortham, (4 Tex. R. 381,) the original jurisdiction of the District Court was sustained, in suspending an executor and appointing a receiver; and the exercise of jurisdiction seems to have been rested on the Constitution; Section cited. That the conclusion of the Court was right, there can be no doubt; although it may well be doubted whether it was placed on the true ground; as the general jurisdiction of the Court, independent of the provision cited, would have authorized it to interpose, on the ground of fraud charged, and a squandering of the assetts of the intestate, and the wrong Section was referred to in the opinion delivered.

In Merle v. Andrews, it was held that a monied demand might be sued with other grounds for going into the District Court, without having first presented the monied demand to the administrator. It was held, upon the principles of equity jurisprudence, that, as petitioner had other grounds of equitable relief, presented by the petition, he might well connect therewith the monied demand; especially as all evidence of such demand rested upon vouchers and documents in the possession of the defendant, as to the amount of such demand, and it would not be possible for the claimant to present his claim in the mode required by the probate law. In Dobbin, adm'r, v. Bryan, (5 Tex. R. 276,) it is said by the Court, that "The "District Court have jurisdiction to investigate and arrest a "fraudulent combination between an administrator and others, "confederating to injure those interested in the faithful ad- "ministration of the estate."

We have reviewed these cases, to show that the District Court will exercise jurisdiction, acting directly and originally

upon the administrator, without resting this exercise upon the clause of the Constitution cited, where it is to prevent frauds and fraudulent combinations, that might result in the destruction of the rights of those interested in the estate; and, in so doing, we believe we are fully sustained by the 10th Section of the IVth Article of the State Constitution. By this Section, all the Common Law and Chancery jurisdiction, known to the Courts of Common Law and Chancery of England, is conferred on the District Courts, not incompatible with the Constitution of the United States, nor the Constitution of this State, and laws under it. We believe, that, where a person, and not the Court, is to be acted upon, this jurisdiction may be exercised by proceedings in the usual form, to prevent an injury, or to enforce a remedy. But, where it is to control an inferior jurisdiction, by acting upon such tribunal, to restrain its action, or to review, revise, or correct its proceedings, it must be by the use of some process issued from the District Court, or one of its Judges. To this there is an exception, that an appeal will lie from the Probate Court to the District Court. This right of appeal, however, does not destroy the right of the District Court, to exercise this control in the manner mentioned above, if, from any sufficient cause, an appeal has not been taken. In the cases cited, of Long *et al* v. Wortham, and Dobbin v. Bryan, the original jurisdiction of the District Court, was sustained on the principles of the general jurisdiction of the Court; and the action was not upon the inferior tribunal, but on the administrator, to prevent injury to the parties interested in the estate, by the fraud of the administrator. In the case before us, the action of the District Court is sought to act immediately upon the inferior tribunal, which, it is true, might have been by appeal from the Probate Court, under the 15th Section of the IVth Article of the Constitution; but, sufficient reason being shown why an appeal was not taken, resort was had to the general jurisdiction, under the 10th Section; and it was exercised by a writ of *certiorari* under the mandate of one of the Judges of the District Court.

(Titus v. Latimer, 5 Tex. R. 433; O'Brien v. Dunn, Id. 570.)

From the facts presented by the record before us, it is not certain but they would have justified the guardian in commencing proceedings in the District Court, against Chrisman A period of near twelve years had elapsed from the granting of the letters of administration to Chrisman, when the assetts went into his possession; and it does not appear that anything had been done by him, to close the administration, or appertaining to it, excepting the act of returning to the Court, an inventory of the appraisement. (See McIntyre v. Chappell, 4 Tex. R. 187.) The guardian, however, sought his remedy through the Probate Court, and the account was settled by the Court, against the administrator. The question is, therefore, what should the action of the District Court have been, upon the case, after it had been brought into that Court, by its own process. It seems that one of two things was plainly the duty of the Court: the first, to dismiss the *certiorari*, if it should be satisfied that it had been improperly awarded, without sufficient grounds to support it; or, to have opened the account and had it tried *de novo*, and certified back to the Probate Court, to be carried into effect under the provisions of Article 718, Hart. Dig. If the appeal had been taken, as authorized, as a matter of right, the statute in express terms requires the District Court to try it *de novo*, and to certify the result to the Probate Court, to be carried into effect. Its being brought up by *certiorari*, was only another mode known to the jurisdiction of the District Court, to effect the same object, in cases where the party was prevented from availing himself of that mode of having a new hearing.

My object in reviewing the decisions, was to show that they were sustainable on their own features, without violating the Constitution, or any legislation on the subject of the original jurisdiction of the District Courts in matters of probate; as I believe they have been thought, by some, to have done; and to show that those cases only sustained the original jurisdiction of the District Court, under peculiar circumstances, to prevent

fraud and great misconduct, without at all calling in question or drawing into the discussion the regularity of the proceedings of the Probate Court. In this case the Court below reversed the judgment of the Probate Court, and remanded the cause; when the Court should have tried the case, as new, and certified the result to the Probate Court. The judgment of the District Court must therefore be reversed, and the case remanded.

Reversed and remanded.

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## Beardsley and another v. Hall.

The Act of 1846, (Hart. Dig. Art. 1599,) has reference to the granting of an injunction for causes existing at the time of the rendition of the judgment; it could not have been intended to embrace a case, where the injunction is sought upon the ground of a payment and satisfaction of the judgment.

The statute of limitations has no application to payments.

Where judgment was obtained in 1840 and execution issued same year, after which there were several executions issued, one in 1844, upon which there was a levy and appraisement, and a fifth in 1850, against which the defendant obtained an injunction, in this case; the Sheriff who had received the *alias*, testified, without objection, that he was present at a conversation between the debtor, the person who had been Sheriff and received the first execution, and the attorney of the defendant, at most, if not all of which, the attorney of the creditors was present; that he did not recollect the precise conversation; he only recollected that it was understood amongst them that the execution which had been in the hands of the former Sheriff (in 1840) had been satisfied; and that the former Sheriff admitted or stated that the amount had been settled with him while Sheriff; but witness did not recollect that the attorney of the creditors took any part in the conversation; *Held*, That it was competent for the jury to infer the fact of a legal payment and satisfaction of the first execution when in the hands of the Sheriff.

It is immaterial in our practice, whether the present be regarded as a proceeding to enjoin execution, or to obtain an entry of satisfaction of the judgment, there being a prayer for general relief.

Appeal from Washington. Beardsley and Adriance ob-

tained a judgment against Hall in 1840. An execution was issued and placed in the hands of Robert Stevenson, Sheriff. At the foot of this execution, in the transcript of the record, were written these words: "Came to hand April 8th, 1840, and executed." The margin contained a note by the Clerk, "Endorsement of the Sheriff." But the name of the Sheriff was not signed. July 12th, 1842, an *alias* execution was issued and returned not satisfied, by J. P. Lynch, Sheriff. On tha 17th of November, 1842, a *pluries* execution was issued, and returned not satisfied; but there was no signature to the return. Execution again issued on the 30th of May, 1843, and was indorsed by the Sheriff, Van R. Iron, as received by him; but no further return appeared. On the 30th of May, 1844, another execution issued, and was returned with a levy upon 150 acres of land, and an appraisement thereof. On the 30th of March, 1850, another execution issued; and this suit was brought by Hall, the defendant in the execution, to enjoin the execution, and for general relief. The petition alleged that the principal and interest of the judgment had been paid to Stevenson, on the first execution; and that the costs had been since paid. The defendants denied the payment, and pleaded the statute of limitations. An exception to the plea of the statute of limitations was overruled. There were two trials, both resulting in favor of Hall. On the last verdict, judgment was entered for Hall, ordering the execution to be returned satisfied. A motion for a new trial was overruled.

The only evidence in the case, besides the executions and indorsements thereon, as they are recited above, was the testimony of J. P. Lynch who succeeded Stevenson as Sheriff of Washington county. Lynch testified that an *alias* execution in said case, came to his hands as Sheriff of Washington county, sometime, he thought, during the year 1841, and was returned by him with the understanding that the former execution had been satisfied; that it was understood between the said Hall, Stevenson and Crosby (Hall's attorney) that the former execution had been paid. In answer to a cross-inter-

rogatory, the witness stated that Wilson Y. McFarland (the attorney of Beardsley and Adriance in this and the former suit,) was present during most, if not all the time of a conversation which occurred, the witness thought, during the year 1841, between Stevenson, who had been Sheriff of Washington county, and Hall and Josiah J. Crosby, in relation to the settlement of the first execution, while in the hands of said Stevenson; witness did not recollect the precise conversation between the parties; he only recollected that it was understood amongst them, that the execution which had been in the hands of Stevenson, had been satisfied; and that Stevenson admitted or stated that the amount of the execution had been settled with him while Sheriff; but witness did not recollect that McFarland took any part in the conversation. No exception was taken, to the admissibility of that part of Lynch's testimony, which was received, and is stated above.

The Court charged the jury, that no admissions or statements made by Stevenson after he went out of office, were binding upon Beardsley and Adriance; but, that, if said statements were made in the presence of Beardsley and Adriance or their attorney, then the jury might give the said statements such credence as they thought proper.

That if the jury believed from the evidence, that the debt was actually paid by Hall to Sheriff Stevenson, while in office, that then and in that case the statute of limitations could be made to apply to said payment.

*J. Sayles*, for appellants.

Wheeler, J. The Act of 1846, (Hart. Dig. Art. 1599,) has reference to the granting of an injunction for causes existing at the time of the rendition of the judgment. It could not have been intended to embrace a case, like the present, where the injunction was sought upon the ground of a payment and satisfaction of the judgment. The fourth instruc-

tion asked by the defendant, was rightly refused. The statute of limitations had no proper application to the case.

The deposition of the witness Lynch, was permitted to go to the jury without objection. The objection to its admissibility comes, now, too late. Though the facts deposed to may not have been binding upon the plaintiffs in execution, as an estoppel, yet it was competent for the jury to infer from them, the fact of a legal payment and satisfaction of the execution, when in the hands of the Sheriff. When a payment was spoken of, it was reasonable to infer that a payment in money was intended. The question of fact was for the determination of the jury.

It is immaterial in our practice, whether the present be regarded as a proceeding to enjoin execution, or to obtain an entry of satisfaction of the judgment. The prayer for general relief was sufficient to authorize the judgment.

We are of opinion that there is no error in the judgment and that it be affirmed.

Judgment affirmed

## Winburn's Ex'ors v. Cochran.

Where the executors of a bailee assume the absolute ownership of the property and perform acts inconsistent with the acknowledgment of the title of the bailor, the statute of limitations commences to run, and bars an action by the bailor, in two years.

The statute of limitations not only bars the remedy for the recovery of personal property, but vests the right; so, that, if the former owner should casually obtain the possession, the subsequent claimant under the statute may recover it. *Quere?* As to real estate.

Appeal from Washington.

*J. E. Shepard*, for appellants. There is a single question involved in the case: Will the statute of limitations vest the property? It is expressly so decided in Broh v. Jenkins, 2 La. Cond. R. 20.

"The statute is not only a bar to the remedy for personal "property, but it takes away the legal right, and vests it in "the holder; so, that, if the property comes to the hands of "the former owner, the party may bring suit and recover it "from him. Legal right and legal remedy are the same "thing." (5 Litt. R. 282; Starly v. Earl, 3 J. J. Marsh. R. 278, 368, 374; 3 Litt. R. 138; Litt. Sel. Cas. 439.)

That adverse possession of land gives title there can be no doubt. (Angell Lim. 396.) "An adverse possession, where "it actually exists, may be set up against any title whatever, "and to make out a title under the statute of limitations." (Broadstreet v. Huntingdon, 5 Pet. R. 438, cited with numerous other authorities, in note 1, p. 396, Angell on Limitations.)

The reasoning is certainly much stronger why possession should give title to personal property.

The Supreme Court of Louisiana gives three methods of acquiring title to slaves: "by prescription, the owners con-

sent, or a forced alienation." (Dufour v. Comfranc, 2 La. Con. 245.)

*Lewis & Barber*, for appellee. I. The statute of limitations will not aid the appellants. They were plaintiffs and should have set out how they claimed.

II. Where the statute is relied on, there must be some allegation either by exception, answer, or petition, to show that it is intended to be relied on, so that the defendant may reply to it.

III. The statute could not create a right, but an exemption from servitude of judicial process. (Angell Lim. 1, 2 and 5.)

The 17th Section of our statute of limitation creates a title simply by possession; the others exempt the party from suit.

IV. The possession of the appellants was permissive, and could never ripen into a title. (Angell Lim. 401.)

Lipscomb, J. The refusal of the Court to grant a new trial is assigned for error. On looking into the statement of facts, it will be seen, that, as to the mode in which the appellants acquired possession of the slave sued for, there is little or no conflict in the testimony. It is in evidence she went into the possession of McHenry Winburn, the former husband and testator of Mrs. Robinson, before the year 1842, by a loan from the brother of Mrs. Robinson, Jeremiah Cochran; that she remained in the said possession of Winburn, until some time in the year 1847, when the said Winburn died testate, making his wife Lucy A., and J. L. Hill his executors; that she was taken possession of by the executors, shortly after the death of Winburn, as a part of his property, and so continued down to about the 19th July, 1851, when she was clandestinely taken by the defendant, Thomas Cochran, in the night time. For the defence, it was in evidence, that Jeremiah Cochran died in 1843 or '44, and Thomas Cochran administered on his estate. And one witness swore that she, the slave, was sent

to the administrator to be appraised. Whether the statute of limitations commenced running anterior to the time of the death of Winburn, need not be discussed, as there can be no doubt from the evidence, that, from that time, the possession was adverse, and the statute commenced running; and, fixing on that period for its commencement, it had completed the bar before the slave was captured by the defendant. The evidence of Hill and Kaller is conclusive on this subject; and it is not, in the slightest degree, controverted by the other witnesses.

It was, however, contended by the defendant, that the statute does not give a right; that it only interposes a bar to a recovery, which may be exemplified in this way: if defendant instead of taking the negro clandestinely, had sued Robinson and wife, the statute would have been a bar to his recovery; but as he had recaptured her, no matter how reprehensible the means resorted to the statute would not now operate against him. Strange mode of reasoning! that the statute could be defeated by such unjustifiable means! But, strange as it is, it at one time received judicial countenance, in the Courts where the Common Law formed the body of jurisprudence. Their maxim was that the statute could be used as a shield of defence, but not as a sword, to assail. This doctrine, has however, been overruled, so far as the statute applies to personal property, or property capable of being moved from place to place; and it has so often been so ruled, by the highest judicial tribunals of the land, that the statute, when the bar becomes complete, not only bars the remedy, but vests the right in a slave, which right could be set up and sustained in the Courts of any other State where the slave should have been moved after such bar had been completed, that it is not now to be questioned. And it may safely be said, that this has been the rule of decision in all of the southern and western States, for nearly a half century. It has been repeatedly so held in Virginia, North Carolina, South Carolina, Tennessee, Kentucky, and Louisiana.

This has always been the rule of the Civil Law; and one of

the modes by which property can be required, is by prescription, according to that system. In England, when the first statute was enacted, personal property was not held in very high estimation, and it was not, with the exception of merchandize used in commerce, often the subject of traffic; and the policy of the statute was supposed to embrace contracts for money, or possessory actions for real property. It is, however, with us, greatly different. The value of personal property in the South, vastly exceeds that of the landed; and, as to personal property, we form our first impressions of ownership from the possession; and the personal property, in possession, is sure to gain to its possession some credit; it is sold and conveyed from hand to hand, without any other formality than delivery: therefore possession is looked upon as evidence of title. Not so with landed property. The records of the Court will always disclose who are its true owners. But the rule is too firmly established to excuse discussion. There was no conflict as to the possession of the executors of Winburn; and the verdict was clearly, not only against the evidence, but contrary to the law, as applicable to the facts proven; and the Court below erred in overruling the motion for a new trial. The judgment is reversed and the cause remanded.

Reversed and remanded.

## Wood and Wife v. Wheeler.

The decree of the Supreme Court becomes, to the inferior Court, the law of the particular case; and the latter may be by peremptory writs compelled to carry it into execution; it cannot be varied, nor examined for any other purpose than execution, and to settle so much as has been remanded.

Appeal from Washington. The facts will be found in the report of the same case in the seventh volume of these Reports. The controversy was about a homestead under the Act of 1839; and on the former occassion, the cause was remanded with a decree giving specific instructions to the Court below, in respect to the rights of the parties in the particular case. In the Court below, the appellant proposed to file new pleas, controverting facts which were either expressly or impliedly established on the former appeal: the fact of the indebtedness, &c. This he was not permitted to do; and the Court went on to carry into effect the decree of the Supreme Court.

*J. Sayles*, for appellant.

*J. Willie*, for appellee.

Hemphill, Ch. J. By the decree, on the former appeal, the widow of the deceased and her child, were to have the benefit of the lot, or its value, and five hundred dollars out of the value of the improvements—the excess of the value of the said improvements being subjected to the payment of debts contracted anterior to the 16th February, 1846.

The attempt, in this proceeding, is in effect to reverse this decree, and to require the creditor in whose favor it was rendered, to relinquish his claim, thus legally established, to payment out of this special fund, and throw him upon the general

assetts of an estate, thus rendered hopelessly and deeply insolvent, for satisfaction.

The Court very properly refused to countenance a proposition so utterly without the semblance of justice, and so repugnant to the firmly fixed principles of law. For there is no rule better established, than that whatever is before this Court on an appeal, and disposed of, must be regarded as finally settled. The decree of this Court becomes, to the inferior Court, the law of the particular case; and the latter is bound by the mandate of the former, and may be enforced, by peremptory writs, to carry it into execution. It cannot be varied or examined by the District Court, for any other purpose than execution; nor can the Court intermeddle with it in any way, except to settle so much as has been remanded. (12 Pet. R. 491, and cases cited; 1 Johns. Chan. R. 189; 3 Tex. R. 517.) Such was the view taken by the District Court of the extent and limitations on its powers. At least, its action was in accordance with these rules; and there being no error in the judgment, it is ordered that the same be affirmed.

Judgment affirmed.

## DeCordova, Adm'r v. Smith's Adm'x.

A Court of equity will never decree performance, where the remedy is not mutual or one party only is bound by the agreement. But, *Quere?* As to the application of this rule.

It is an acknowledged rule of equity jurisprudence, that a party entitled to a specific conveyance of property, personal or real, will not be permitted to hold back from an assertion of his rights, and speculate upon the chances of such changes as may decide whether it would be to his interest to have the conveyance made; but he is required to be vigilant and prompt in the assertion of those rights; and if changes have occurred, during the lapse of time, in the value of the property to be conveyed, or in the consideration to be paid, a Court of equity will always refuse its aid, and leave the party to seek redress, where the law had left him, by a suit for the breach of the covenant.

Lapse of time will create a presumption that the parties have waived or settled their rights, and stale claims, when brought into a Court of Chancery, are received without favor and entitled to but little consideration, unless attended with circumstances that will repel such presumption.

Where there is no express limitation to the remedy, as for a specific performance of an executory contract for the sale of land, the better authority seems to be that a point of time should be assumed, analogous to the law of limitations of the forum. But, *Quere?* As to the application of this rule in practice.

If a party applies for relief, in equity, after being guilty of gross laches, or after a long lapse of time unexplained by equitable circumstances, his bill will be dismissed; except where a part has been performed or paid, in which cases the defendant will be decreed to refund, to make compensation, or to a specific performance.

Taking out a patent in his own name by a trustee, when not contemplated by the trust, manifests an intention to claim and enjoy the land as his own; and lapse of time from that date, unexplained by equitable circumstance, imputes laches to the *cestui que* trust, and after a time (not yet definitely settled) bars the equity.

Circumstances which, after the lapse of ten years or thereabouts, justified the presumption of a mutual abandonment of an executory contract relating to lands.

This was an action, commenced in January, 1848, upon a covenant in the following words:

Republic of Texas, } This agreement, made and entered
*County of Bexar.* } into this, the second day of April, 1838, between J. W. Smith on the one part, and Joseph Baker on the other part: witnesseth, that, whereas the said Joseph

Baker, selected and improved a tract of land, lying on the Salado creek, where the Gonzales road crosses said creek; and whereas, the said tract of land has been located by a certificate in the name of said Smith as assignee of ————: now it is agreed on the part of said Smith, and he hereby obligates himself to perform the same, that, as soon as a survey of said tract is made, he is to convey to the said Baker all the interest thereby acquired by said location—it having been hitherto understood and agreed upon between the parties, that the location is made for the benefit of said Baker. It is further understood and agreed on between the parties, that, whereas the said John W. Smith, has in his own name a transfer of a headright claim for one league and labor of land, being the headright of Casimero de la Garza, which is really the property of said Baker, and on which a certificate has not yet been granted: now if the said claim should pass the Board of Land Commissioners, then the said Smith is to receive it in exchange for the one located on the said tract of land, for which he is, in that case, to make a lawful conveyance to said Baker, but in case it should not pass the Board of Land Commissioners, he is to lift said claim now located there, and locate in the same place two-thirds of a league certificate belonging to said Baker, which are left with said Smith.

Done in San Antonio on the above date, and signed,

JOHN W. SMITH, [Seal.]

*Witnesses:* {JOHN S. SIMPSON, {JOHN MCCREARY.

The plaintiff averred that prior to the second day of April, 1838, Baker had selected and improved the land in question, and that, in consequence, he was entitled to a preference right to the land under the constitution and laws of the Republic: that John W. Smith located said tract of land by virtue of a league certificate issued in the name of Maria Gertrudes de Alenez, and afterwards obtained the patent for the same; that in making said location, Smith was acting as agent and in trust for Baker; and that the writing was entered into to evidence that trust; and he so held the property in trust, until

his death in 1845; that M. J. Smith became the administratrix of J. W. Smith, and finding among the assests of Smith the patent, she caused the said tract of land to be inventoried as Smith's property, and under an order of the Probate Court, on the first Tuesday in September, 1847, sold the said property at public auction for $5,400—one fourth cash, and the balance secured by notes and mortgages of Meads and the other purchasers.

The petition also averred, that the representatives of Baker, not being prepared to take the necessary steps in regard to their rights; that Augustus Fisher, acting for Baker's estate, and D. C. Vanderlip, acting for Smith's estate, entered into the following covenant:

STATE OF TEXAS, } Whereas, the heirs of Joseph Baker,
*County of Bexar.*} deceased, have preferred a claim against the estate of John W. Smith, for one league of land situated on the Salado below the Gonzales road, patented to John W. Smith as assignee of Maria Gertrudes de Alenez, and whereas, said land has been advertised for sale by order of the Probate Court of Bexar county, and to prevent an injury to the sale by the conflicting claims, it is hereby agreed between the counsel of said parties, that said sale shall proceed according to said order; that if, hereafter, the heirs of said Joseph Baker, shall produce evidence of an equitable title to said land, and establish the same in a Court of Justice, the proceeds of said sale, after deducting the necessary expenses of the division and sale of said land, shall be a valid claim against the estate of said John W. Smith, deceased, if the title proved will so warrant it. This agreement shall not be construed into an acknowledgment of any right of the heirs of Joseph Baker to said land, nor shall it deprive the administrator of the estate of John W. Smith, deceased, of any legal defence she might make otherwise to said claim.

D. C. VAN DERLIP,
Att'y for estate of J. W. Smith.
AUGUSTUS FISHER,
Att'y for the heirs of Joseph Baker, deceased.
San Antonio, Sep. 6, 1847.

The petition charged, that, since the death of John W. Smith, large debts have been exhibited and established against his estate; that his estate was much involved in litigation; and generally all the circumstances which constitute insolvency; that to be rated as a creditor would subject the plaintiff to interminable delay and loss. Offering, therefore, to pay for the certificate, if it had not been paid for, he prayed for an injunction against the administratrix and the purchasers, in order that the trust fund might be secured until the final hearing.

The injunction was granted; but dissolved upon the coming in of the answers—afterwards it was conditionally renewed; but the defendant, Maria J. Smith, allowed to collect the purchase notes and mortgages, upon giving bond and approved security. So that the controversy was about the fund; the right depending upon Baker's estate establishing an equitable title to the land.

The answer denied the agency of Smith in originally making the location, and treated the contract as a sale, negotiated after the location. The answer also treated the contract as containing an obligation or condition precedent on the part of Baker, in reference to the certificate of Casimero de la Garza. To resist the specific performance, the statute of four years, and time generally was relied on.

The plaintiff proved the contract declared on; the location of the league of land in controversy, the field notes dated 1st June, 1838; the patent to Smith dated 9th June, 1841; notice from S. W. Baker, one of the heirs of Joseph Baker, asserting the right of Baker to the land; the power of attorney from S. W. Baker to Augustus Fisher; the agreement between Vanderlip and Fisher; and an "agreement that Vanderlip "had all the power which the administratrix could confer; "and that he acted under her immediate direction; and that "Fisher had like power;" that Baker improved and settled the league in controversy in 1837, and that it was always called the Baker league; that his house was about the middle of the

league; that the account of sales and expenses disclosed in M. J. Smith's answer was correct; that since the dissolution of the injunction she had collected the entire amount.

The defendant proved Smith's application for a certificate for Casimero de la Garza, (the Board adjourned the question, but never rejected the certificate;) that a short time after the issue of the patent to Smith, Smith conveyed to Baker two tracts of land for one third of a league each, for which a money consideration was acknowledged; that pending the contestation about Smith's succession, Baker visited San Antonio, and Vanderlip mentioned to him, that among Smith's papers there was a small note and account, and Baker admitted some indebtedness, but said nothing about his claim to the land; that Mrs. Smith qualified as administratrix in June, 1847; and Vanderlip, being cross-examined, said there was a greal deal of correspondence between Baker and Smith; that Smith was a careful preserver of papers, and he found no trace or mention of the transaction in question; that the land, in 1838, was only worth a few hundred dollars, and it is now worth five dollars per acre.

It was also proved that the administrator of Smith had delivered to the administrator of Baker, three certificates for one third of a league each. But to the admission of this proof the plaintiff excepted.

The plaintiff, as rebutting evidence, proved that the only certificates issued to Baker, except his own headright, were one-third league to him, as assignee of Fermon Martinez, one-third league to Andrez Varcinez, and one-third league to him, as assignee of Esmerizildo Ruiz; also proved an augmentation to John W. Smith, as administrator to Ruiz, of two-thirds of a league, all of which certificates were confirmed; and also proved that J. Baker became a Spanish translator in the Land Office, in 1839 or 1840, and continued there as translator for several years; that he was a careless improvident man; that Smith was a keen, shrude man; identified Baker's im-

provement on the plat; that the field notes in the patent were in the handwriting of Woodhouse.

The plaintiff asked the Court to instruct the jury,

1st. That it belongs to the Court, and not to the jury, to construe and determine the legal effect of the contract.

2nd. That, by the contract of Smith and Baker declared on, Baker was not bound to the performance of any act, or thing, or payment, as a condition precedent to making the title.

3rd. That by said contract, Smith was bound to convey unto Baker the land therein described. That it was a trust estate, held to the use and benefit of Baker, and he was bound to make a title so soon as the same was surveyed; provided, Casimero de la Garza's certificate passed the Board; (from the word "provided" added by the Court.)

I give the above charge with the *proviso*.

THOS. J. DEVINE.

4th. That the contract is a covenant under seal, and that in order to prove a release of said contract, it must have been by an acknowledgment of the same, by Baker, of equal solemnity, *i. e.*, a writing under seal.

5th. That although the headright certificate of Casimero de la Garza might not have been granted, it was the duty of John W. Smith to locate the two certificates of a third of a league, each belonging to the said Baker, if the same were in Smith's possession, and placed there by Baker for the purpose.

6th. If the jury believe that John W. Smith undertook to establish the headright certificate of Casimero, as the agent of Joseph Baker, it was his duty to use due diligence to establish said certificate, and if he did not use due diligence to establish the same, his negligence could not result to the injury of Baker.

I decline to give the 4th instruction.

THOS. J. DEVINE.

7th. The delivery of the three certificates, of a third of a league each, by the administrator of John W. Smith, to the administrator of Baker's estate, and after the land had been

patented, did not at all affect the right of the estate of Baker to the land in controversy.

8th. That, under the Constitution and laws of Texas, if, from the evidence, the jury believe that Baker had his improvement upon the land in controversy, he had a preference right over others in locating said lands.

I decline giving the 7th and 8th charges.

THOS. J. DEVINE.

9th. Though the certificate of Casimero de la Graza may have been rejected, or never granted, it was the duty of John W. Smith to locate such certificates as remained in his possession, from and after the date of the contract, upon the land in controversy; and if he possessed such certificates, and neglected or failed to do so, the same did not result to the injury of Baker. Provided, they were the certificates, alluded to in the contract as a two-thirds of a league certificate. (From the word "provided" added by the Court.

THOS. J. DEVINE.

10th. That the contract in question is not vague and uncertain, but clear and specific in its terms, and free from ambiguity, and of the legal import defind in instructions two, three, and four—if the jury believe it was intended to embrace the land in controversy.

I decline giving the tenth charge.

THOS. J. DEVINE.

And for the defendant the Court charged,

1st. That a contract, which is sought to be specifically executed, ought not only to be proved, but the terms of it should be so precise, that neither party could reasonably misunderstand them. If the contract be vague or uncertain, or the evidence to establish it be insufficient, a Court of Equity will not exercise its jurisdiction to enforce it.

2nd. That a party, seeking for the specific performance of an agreement, must show that he has performed, or offered to perform, on his part, the acts which formed the consideration of the alleged undertaking, on the part of the defendant.

3rd. That, if circumstances should have so changed, that the object of the party can no longer be accomplished, and he cannot be placed in the same situation as if the contract had been performed in due time, in such case equity will not relieve the party by decreeing a specific performance.

4th. When a considerable length of time has intervened, where the party demanding a specific performance has failed to perform his part of the contract, and a demand is made, after a great change in the title and value of the land, and there is a want of reciprocity in the obligations of the respective parties, a Court of Equity will not interfere.

There was a verdict for the defendant; motion for new trial overruled, and judgment accordingly. The appellant assigned ten errors, covering the points made in the Court below.

*I. A. & G. W. Paschal*, for appellant. I. It can scarcely be necessary to contend that this is an instrument which acknowledges a trust made upon the best of all considerations—that of mutual confidence—and a pre-existing right in Baker to secure the land in controversy by his own head-right. The contract acknowledges this fact, and the proof establishes it.

The contract was not one of mutual obligation, in which any conditions were imposed upon Baker; but one in which every act was to be performed by Smith. The payment for the certificate did not rest upon Baker, but was in Smith's own hands—he holding the certificate as well as the land in trust.

And first if the certificate of Casimero de la Garza passed the board, it was to be exchanged for Smith's certificate, which was to be located in lieu of it; and in obtaining this claim, which, although the property of Baker, was assigned to Smith, Smith undertook to act as attorney in the premises, as appears from the contract and evidence.

But should the claim of De la Garza fail, then Smith was to withdraw his own certificate, and locate in lieu thereof two one-third of a league certificates, which Smith held as Baker's

property. It is difficult to see how any misconstruction of such a contract, could originate in any mind.

It can scarcely need authorities to support the legal proposition, that no matter in what manner Smith afterwards procured the title, or patent, the trust attached. He held the property for his *cestui trust*, Baker: and Baker was entitled to a specific performance of his contract.

II. It only remains to inquire whether the plea of the statute of limitations, or the question of time in the manner insisted upon in the answer, would avail the defendant Smith. This involves the question as to whether the instructions of the District Judge as to time were correct. It is respectfully insisted that the evidence does not warrant said instructions.

As to the statute of limitations we doubt not but it received the correct interpretation by the Chief Justice of this Court, in the case of Hemming v. Zimmerchitte. (4 Tex. R. 166.) The Chief Justice says: "It will be seen by reference to the "statute of limitations, that in no one of its provisions does it "include an action for the specific performance of agreements "for the transfer of property. The laws prescribing such "rules must be sought elsewhere."

The Chief Justice then proceeds with the review of the authorities, (against the conclusions of which, he expresses some doubts,) and concludes: "The limitation on his right of ac- "tion did not commence its operation until the vendor had "indicated an intention to refuse performance, or to claim the "property as his own. (7 Johns, Ch. R. 90; Cheves, R. 22, "23; 2 Rich. Eq. R. 133; 20 Johns. R. 33; 19 Verm. R. "526; 6 B. Mon. R. 479; and 1 Rice, Eq. R. 373.")

But for the doubts expressed by the Chief Justice, and my having heard that the rule thus so correctly stated, has perhaps been qualified, and, as claimed by some of the profession, overruled in cases at Galveston and Tyler, which I have not seen, I should not deem it necessary to notice further the authorities; particularly since the Court is so fully in possession of my researches in the printed brief in the case of Bissel v. Thomas Haynes *et al.*

I think the rule, as to Courts of Equity being controlled by time, or the staleness of the demand, has been correctly stated by Judge Story in his Equity Jurisprudence, Section 1520, viz: "That Courts of Equity do not act so much in analogy to the statutes, as in obedience to them." (See Hovendon v. Lord Amnesty; 2 Sch. & Lef. 607 to 630.) And wherever a Court of Equity refuses its relief merely in consequence of the laches of a party, it is where the Court of Common Law would have concurrent jurisdiction and the remedy is barred at law, or where the circumstances raise a strong presumption of payment and satisfaction: in other words, where there is an apparent want of equity in the party seeking relief. (Piatt v. Vattier, 9 Pet. R. 416; McKnight v. Taylor, 1 Howard, 161, which is a strong illustration of the rule.) And thus, in a very early case, Smith v. Clay, Ambler, 645, Lord Camden especially puts the decision on the ground that a bill of review would not be entertained after twenty years, because twenty years by the statute, would bar a writ of error. And this was the ground upon which Lord North put the case of Edward v. Carrol in the House of Lords. And see Bond v. Hopkins, 1 Sch. & LeFroy, 429; Note 3 to 2 Story, Eq. Sec. 1520.

The 1520th (a) Article of Judge Story's, which was charged by Judge Devine, was not the work of the author, but of the late editor. The principle, if stated as a mere abstraction, is not corroborated by any particular case, certainly cannot control the case under discussion.

It may be admitted that where "the relation of trustee and "*cestui que trust* is no longer admitted to exist, or time and "long acquiescence have obscured the nature and character "of the trust, or the acts of the parties, or other circumstances "give rise to presumptions unfavorable to its continuance, in "all such cases a Court of Equity will refuse relief upon the "ground of lapse of time and its inability to do complete jus-"tice;" and yet it would not follow, that, in every case where the statute of limitations would bar an action for damages, that a specific performance would not be decreed, because it would be impossible for a Court of Equity to do justice.

The first case cited to support the proposition, (Provost v. Gratz, 6 Wheat. R. 481; 5 Cond. 142,) is rather a decision upon the failure of proofs, than upon the principle; an unwillingness to presume fraud against the dead, rather than to allow fraud to avail under a plea of time. It is emphatically stated that "in general, length of time is no bar to relief, in the case of a trust once clearly established."

In the case of Attorney General v. Fishmonger & Co., (5 Mylne & Cr. 16, 17,) it will be seen that four hundred years had intervened, and yet the principle decided was in relation to the existence of the trust and not anything to excuse the trustee, when once the trust is clearly established. And that every case depends upon its own peculiar circumstances, see Boone v. Chiles, 10 Pet. R. 177; Michaud v. Girod, 4 How. R. 559, *et seq.*

It may safely be said, that, as a general principle the statutes of limitations will not run against a trust clearly proven; nor will the law presume payment, from length of time merely. (See Jones v. Turberville, 2 Sumner's Vesey, 11, and notes; and see Alley v. Deschamps, 13, Ves. 225; Hertford v. Boone, 5 Ves. 719; Omerod v. Hardman, 5 Ves. 722; Harrington v. Wheeler, 5 Ves. 686; Drew v. Hanley, 6 Ves. 675; Halsey v. Grant, 13 Ves. 73—Sumner's edition.)

I have thus cited the cases generally in order that the correct rule may be seen. It seems to me, however, that the present case is clearly embraced in the case in 4th Texas. It is a case where the plaintiff had nothing to do, but the defendant was bound to execute the title at all events.

Nor can the defendant support his case by any of our statutes of limitations. For if the three or five years statute be relied on, no proof of possession sustained it; nor had Smith any legal title except that held in trust for Baker which is not adverse. And although the defendant pleads, "that her in-"testate did not agree or obligate himself to convey the title "to the league of land, mentioned in plaintiff's bill, within "four years after the issuing of the patent to the same, and

"next preceding the institution of this suit, and that more "than one year in addition has elapsed, since the death of "defendant's intestate, before the filing of said bill," yet we trust it has been sufficiently shown, that this was a trust not intended by the statute, and, indeed, a stronger case than Zimmerschitte's. Besides, four years were not proven to have intervened, after the 9th day of June, 1841, when the patent issued, and the Spring of 1845, when Smith died. Nor did a year intervene after Smith's death, and the qualification of his administratrix in June, 1847, before the commencement of this suit, in January, 1848. Therefore there is nothing either in law or equity, on which to base a presumption of payment.

*J. Webb* and *J. W. Harris*, for appellee. I. In the first place, we assume that the contract had been annulled by the parties to it, and we think the circumstances connected with the case abundantly show it. At all events it was a question of fact for the jury to decide. They did decide it, by finding in favor of the defendant, and in our judgment, their verdict is fully sustained by the evidence. It is true, there is no direct, absolute proof of the rescission of the contract, by the parties; but the circumstances which conduce to establish that fact, are so numerous, and conclusive in their character, that no reasonable doubt can be left upon the mind, of its existence. It will be remembered that the land was surveyed in June, 1838, and that, by the contract, Smith was to convey his right to it, or to withdraw his own, and place Baker's certificate upon it, immediately after that time; and yet there is not a shadow of proof that Baker ever required either the one or the other to be done previous to Smith's death in 1845, a period of seven years, or during his own life, which lasted to a still later period.

This of itself affords strong presumptive evidence that the parties had abandoned the contract; but when we add to it the further facts, that, in 1841, three years after it was made,

Smith obtained from the General Land Office, where Baker was living, and employed as a Clerk, a patent for the land in his own name, and that Baker made no objection to it, and did not demand a conveyance of it to himself—that Smith a short time afterwards conveyed to him two other tracts for one third of a league each, being the precise quantity that his certificate would have covered, and that nothing was said then about the conveyance of this;—that, after the death of Smith, Baker acknowledged to the attorney who was managing the affairs of the estate, that he owed Smith, and would make arrangements to settle his indebtedness, without even intimating that he had a claim against the estate for this land; that he subsequently died without ever having, up to that moment, asserted such a claim, or giving the slightest notice of its existence; that Smith, who was proved to be a man of great particularity in the transaction of his business, and a very careful preserver of his papers, left no memorandum or document of any kind in reference to such a claim; and that Baker, in all his correspondence with Smith, and it was extensive, never adverted to it, or intimated that he held such a demand; we say, that, when all these facts are put together, it is scarcely possible for the human mind to resist the conviction that these parties had long before abandoned the contract, or knew that it had been settled and adjusted between them.

II. But, suppose that it was not abandoned, Was it a contract that a Court of Equity would enforce?

There can be no question that the plaintiff is not entitled to a specific performance of that part of it which relates to the conveyance of the land by Smitth, because the precedent condition of de la Garza's claim passing the Board of Land Commissioners, was not performed. It was upon that condition that the contract was based; and it was only upon the performance of it, that Smith bound himself to convey the land. Had the conveyance actually been made at the time, instead of a mere agreement to convey, Baker would, from the period of the failure of De la Garza's claim to pass, have held the

land in trust for Smith. A conveyance of property without consideration is always regarded as creating a resulting trust in favor of the grantor. (2 Story, Eq. Ju. Art. 1198, 1201; 5 Johns. Ch. R. 1; 6 Cow. R. 706; and the authorities cited in 2 Story, Eq. in connection with Art. 1198, 1201.)

The other part of the contract labors under the same difficulty. It was wholly without consideration, and a Court of equity would never enforce it. Baker paid nothing to get the land from Smith—not even the surveying fees. The promise, on the part of Smith, to give up the location, and withdraw his certificate, was wholly voluntary and gratuitous, and could not be enforced. (2 Story Eq. Ju. Art. 793 a, 787; 1 Johns. Ch. R. 336; 12 Ves. 39, 45; 1 Cow. R. 711; 13 Ves. R. 148.)

It is unnecessary, again, to urge that Baker acquired no right to the land, or to the location by virtue of any improvement made upon it. And although he may have supposed, when he caused his jackal to be built, that it would give him a preference in the location of the land, and Smith may have thought the same thing, when he consented to yield his own location upon it, yet he acquired no such preference under the law; and that belief constituted no sort of consideration for the promise of Smith to yield it.

III. If we were to admit, however, that the contract when made, was a good and valid one in law and equity, and that Baker, at one time, would have had the right to demand the specific performance of it, we should still insist that no such right existed at the time this suit was brought.

If a party to a contract fails to perform his part of it, or if, by holding back for a long time, the other party is prevented from performing, until the circumstances in which the contract originated have entirely changed, he can get no aid from a Court of equity to enforce it, and especially when injury or injustice would result from the enforcement of it. (2 Story Eq. Ju. Art. 769, 750, 771; 14 Pet. R. 173; 8 Cr. R. 471; 5 Ves. R. 720; 4 Pet. R. 311.)

The offer to pay now the value o Smith's certificate, at the

time the location was made, presents not a shadow of equity. At that time the whole country was open to location; lands were in no demand; as good, perhaps better, might have been obtained in the same neighborhood, had Smith then got the certificate of de la Garza to place upon them. Now the whole country is appropriated, and lands which were then selling for comparatively nothing, are at this time commanding from four to five dollars per acre. It would be impossible, therefore, specifically to enforce this contract now, without doing great injustice, even though the value of the certificate should be paid. (2 Story, Eq. 750 a, 736, 737; 1 Pet. R. 376, 382; 5 Pet. R. 264.)

IV. Again—the circumstance of Smith's having conveyed to Baker, very shortly after he obtained the patent for this land, two other tracts of a third of a league each, (as much as his certificate would have covered,) presents a strong presumption that they were given to him in the settlement of this very contract; and Baker's total silence upon the subject ever afterwards, adds great weight to that presumption. It is true, the deeds to Baker express a monied consideration for the land; but it by no means follows that that consideration was paid—if it were, it might have been proved. The execution of the deeds with special warranty only, is a circumstance to show that something else was meant by the transaction, than an ordinary sale of land. At all events, it was a proper matter for the consideration of the jury with the other circumstances of the case.

V. The claim was barred by the statute of limitations when the suit was brought. Without entering into a more tedious discussion of the various relations which may exist between trustees and their *cestui que trusts*, it is sufficient, in this case, to say that no such relations existed between these parties after the patent was obtained by Smith in his own name, and with his own means in 1841. That act placed him in an adverse position to Baker, in reference to this land; and if he had ever occupied the relation of trustee, he then severed it;

and from that moment the limitation commenced to run in his favor. The suit was not brought for near seven years after. (2 Story, Eq. Sec. 1530, 1520 a, and notes, 4 Tex. R. 165, and authorities cited.)

Lipscomb, J. From the terms of the covenant of John W. Smith with Joseph Baker, and the circumstances which transpired between the date of its execution and the commencement of this suit, can the aid of a Court of equity be invoked for a specific performance? or should the plaintiff be left to compensation in damages, if any, for its breach? This is the inquiry presented for our consideration; and the fact, that the land in question, has been sold by the administrator of Smith, under an order of sale, made by the Probate Court, and the proceeds of that sale only, and not a conveyance of the land, is now sought, cannot divert our inquiry, whether a specific performance ought, under the circumstances, to be decreed, if the land had not been sold. Because, if it would not, then the plaintiff has no right to the fund he is seeking to have applied to his use.

I will examine, first, the objection presented on the face of the covenant. It seems to me to want an essential element, in its structure, to give it effect, either against the maker or his representatives: it is wanting, in not showing a valid consideration; and it wants mutuality. Smith is bound by it, when it imposes no corresponding obligation on Baker. Chancellor Kent says that "it seems to be very generally and very "properly laid down in the books, that a Court of equity will "never decree performance, when the remedy is not mutual, "or one party only is bound by the agreement;" (Parkhurst v. Van Cortlandt, 2 Johns. Chan. R. 282;) and he refers to Arringer v. Clark, Bunb. 111; Troughton v. Troughton, 1 Ves. R. 86; Lawrenson v. Butler, 1 Sch. & Lef. 13; Bromley v. Jeffres, 2 Ves. R. 415. The Chancellor asserts the same principle, in Benedict v. Lynch, 374, same volume cited, and says that a contrary doctrine had been held in some cases in

England, but, that from the more recent decisions, the principle he had laid down, prevailed there now.

This is not, however, the ground on which I am instructed by my associates to rest the decision of the Court. We believe that our decision can be placed more satisfactorily, on the intrinsic merits of the case, admitting that the covenant ought to have been specifically performed, and that it was a fair subject for the exercise of equity jurisdiction, to compel such performance, had the application been made within a reasonable time after the covenant had been broken, or after the time when Baker could have demanded performance, from Smith. But, if a party having rights, will slumber on them, for years, he need not be surprised, when he wakes up, to find that other rights have intervened to prevent the enforcement of his own. Both Courts of law and equity turn an unwilling ear to those who show no vigilance in the assertion of their rights. By the covenant, Smith was bound to convey to Baker, as soon as the survey had been made. It appears from the record, that this was done, 1st June, 1838; and the patent to Smith bears date 9th June, 1841. The suit was brought to the Spring Term of the Court, 1848.

What effect this lapse of time, near ten years, should have, on the equitable rights of the plaintiff, will now be considered. It is an acknowledged rule of equitable jurisprudence, that a party entitled to a specific conveyance of property, personal or real, will not be permitted to hold back from an assertion of his rights, and speculate upon the chances of such changes as may decide whether it would be to his interest, to have the conveyance made; but he is required to be vigilant and prompt in the assertion of those rights; and, if changes have occurred during this lapse of time, in the value of the property to be conveyed, or in the consideration to be paid, a Court of equity will always refuse its aid, and leave the party to seek redress, where the law had left him, by a suit for the breach of the covenant. Now, it is a matter of history, and the facts, too, are established by the record, that, for years after this contract was

entered into, such was the uncertainty of the government's being able to sustain itself, and the Indians were so troublesome in the neighborhood of San Antonio, that land was considered of very little value, and many would have preferred an unlocated certificate to the best land in the vicinity of that place, both on account of trading it better, and affording an opportunity to locate in a neighborhood promising greater security. If the covenant had been then satisfied, Smith could have located other lands of nearly equal value, to the land which is the subject of this suit; but now, an unlocated certificate would afford to his representatives no such advantage; the land has appreciated near tenfold; and it would be wholly impossible to decree a specific performance, upon any known principle of equity, and do justice to the representatives of Smith. This state of things could not have occurred, had Baker, in the language of Lord Kenyon, (quoted by the Master of the Rolls in Milward v. Thanet, 5 Ves. R. 720,) "shown himself ready, desirous, prompt and eager" in the assertion of his rights. We therefore come to the conclusion that a specific performance cannot be decreed.

There is another aspect in which this case may be presented, that would bring us very satisfactorily to the same conclusion. It is an old and well established rule, familiar to equity jurisprudence, that lapse of time will create a presumption that the parties have waived or settled their rights, and such stale claims, when brought into a Court of Chancery, are received without favor and entitled to but little consideration, unless attended with circumstances that will repel such presumption. This doctrine will be found laid down by Chancellor Kent in Ellison v. Moffat, (1 Johns. Chan. R. 46,) and in Ardens, Ex'ors v. Ardens, Ex'or. (Id. 313.) It will be found to have been uniformly acted upon and recognized by the Court of Chancery, in South Carolina, (Riddlehover v. Kinnard, 1 Hill, Ch. 378,) and in Sims v. Autrey, (4 Strobh. R. 117,) Chancellor Dargan, in giving the opinion of the appellate Court, affirming the decree of Chancellor Dunkin, made on the circuit, uses the

following strong language, on this subject; the Chancellor, following strictly the course of the decisions, makes these observations: "After the possession of twenty-five years, the Court "will presume a sale by the executor, for the payment of "debts, an administrator *de bonis non* after Lyle's death, a sale "by such administrator, or almost anything else, in order to "quiet the possession." He adds, "This is strong language; "but not stronger than is warranted by the authorities, or demanded by a stern, imperative public policy." And he says further: "The law requires diligence in the assertion of a "right by legal actions. Life is short, parties and witnesses "are mortal; memory is frail; written muniments are spread "upon perishable materials, and are subject to many accidents; "and time throws a veil of obscurity over transactions of the "distant past: under circumstances like these, is it either unreasonable or unjust, that he who has a claim should be required to assert it within a limited time?" This doctrine, in principle, is believed to prevail in some degree, in every community of men, both savage and civilized; but in most, if not in all of the States of the American Union, a period of time has been fixed upon by judicial sanction, after which these presumptions will arise. Such rule, however, as to the period of time is not considered to have any influence beyond the jurisdiction of its own forum; and every Court, governed by the rules of equity jurisprudence, must adapt it, as to the length of time to peculiar circumstances. The same learned Chancellor whose opinion has been last cited, says: "As to "the precise time at which they (presumptions) arise, each "independent community must judge for itself. We have "adopted the law of the mother country. In South Carolina, "as in England, by the lapse of twenty years without admissions, specialities and judgments are presumed to be satisfied, and trusts discharged." The discussion of this subject, in the opinion of this Court, at its last Term, in Lewis v. San Antonio, sustains the proposition, stated by the Chancellor just cited, that each community may establish its own rule, as

to the precise time. It would, however, seem to us to be exceedingly difficult to lay down a rule that should be one of universal application. Each case would depend, in some degree, on its own peculiar circumstances. If, however a rule should be adopted, in analogy to the rule prevailing in England, there would be many and cogent reasons against adopting the precise time prescribed by that rule. From the situation of our country, our records, muniments and evidence of title, are not so permanent and well secured as they are in old and well regulated communities. And every one of observation would readily perceive, and admit, that there are more changes and incidents crowded into five years, with us, than could occur in twenty in England, or in South Carolina. It would seem, then, that the principle could and would be better guarded, at any rate until our population has become more permanent and society better regulated, to be governed more by the peculiar circumstances, than by any fixed rule as to time. The better authority seems, however, to be, that a point of time should be assumed, analogous to the law of limitations of the forum, where there is no express limitation to the remedy. The difficulty then is, to determine to which law of limitation to refer, as analogous to the relief sought. Mr. Angell says, that, when a conveyance of land is the relief sought, Courts of equity will apply the statutory bar prescribed to the action of ejectment. (Angell, Lim. 25, Sec. 2.)

But, suppose the case where there was no person in the actual possession of the land to which title was sued for, it may be doubtful whether either the five years that to the possessor gives a bar, or the ten years that bars an entry, would either of them apply; and if either, which one. If the legal title should be considered as giving a constructive possession, perhaps the five years; if not, it is difficult to perceive how the ten years could apply to such a case. If we had a statute of limitation, that was express in barring the action, or one analagous, such limitation would be a good defence, without resorting to any other attending circumstances. If we have

none, express or analogous, it would seem that we could lay down the rule as to the time, ourselves; (Angell, Lim. 24, Sec. 1;) but, from the circumstances before noticed, we feel unwilling to do so.

There is another head of equitable jurisprudence, that there can be no doubt, had a common origin with all laws of limitation. We mean laches and neglect. Mr. Justice Story says: "If he (the party) has been guilty of gross laches, or if he "applies for relief after a long lapse of time unexplained by "equitable circumstances, his bill will be dismissed; for "Courts of equity do not, any more than Courts of law, admin- "ister relief to the gross negligence of suitors." To this rule, he says, there is some qualification. (2 Story, Eq. 771.) The qualification seems to be this, that, although, there may have been laches, yet, if a part has been performed or paid, the bill will not be dismissed, but the defendant will be decreed to refund, to make compensation, or to a specific performance. What laches will be sufficient to defeat the equity, depends upon circumstances. In the case cited by Chief Justice Hemphill, in Hemming v. Zimmerchitte, (4 Tex. R. 166,) the plaintiff had notice, that defendant had abandoned his contract; did not file his bill for nearly a year afterwards, the delay was held to be unreasonable, and the bill dismissed. (Watson v. Reed, 1 Russ. & Myl. 236; 4 Pet. R. 311.) In the case cited from 4 Tex. R. the Court say: "In the cases generally where the effect of laches has been the subject of discussion, the contract had not been fully executed by either party; and the one against whom relief was sought, had indicated by his acts or expressions, his intention to disavow or abandon, the contract." In the case under consideration, the obligee had nothing to do; if the exchange had been made agreeably to the contract, there would have been a full performance and execution of the covenant. If it was not made, each party would have been in the same condition, they were in before, as each would have the same land; and when Smith indicated by his acts, such as a failure to convey as soon as the survey had been made, and

the taking out the patent in his own name, the obligee, Baker, if he wished to compel its enforcement, then should have commenced suit. At all events, when Smith took the patent in his own name, and from that period, laches may be imputed to him It is, however, contended on the part of the appellants, that Smith became the trustee for Baker, and held the land in trust for him, and that it was a continued trust. The correctness of the principle is admitted, if there was nothing for Baker to do. But it is material to inquire how long, under the circumstances of this case, the trust continued. In the case before cited from 4 Tex. R., the Court uses the following language; "In this case the vendee having performed his obligation, the "vendor's subsequent possession or interest in the land, was "held in trust, and in subordination to the superior equitable "right of the vendee; and this possession would continue to "maintain its fiduciary character, until the vendor would man- "ifest an intention to claim and enjoy the land as his own. "The possession would then become adverse." To apply the principle, when Smith failed to make the conveyance, and took the patent out in his own name, the trust was at an end, and he held adverse to Baker.

When the circumstances as presented by the record in this case, are considered, they so strongly conduce to prove that the contract had been mutually abandoned, that we have no hesitation in saying, that such evidence, unrebutted, would have sustained a verdict of a jury for the defendant, had a suit been brought on the obligation to recover damages for its breach. We will recapitulate the strongest of this circumstantial evidence: it is the long acquiescence of Baker; the patent, recorded in the public archives of the country, which all persons are bound to take notice; Baker's being a Clerk in the Land Office; his silence as to any right to the land or claim upon the estate when Vanderlip told him that he was indebted to the estate, which he admitted; the death of Smith and Baker, cutting off the probability of better proof, before this suit was

commenced. And the record presents nothing on the part of the appellant, to rebut and explain this *prima facie* evidence of an abandonment. The judgment of the Court below is affirmed.

Judgment affirmed.

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## Mitchell, Adm'r v. McLemore.

Without reviewing, or attempting to reconcile the cases on this subject, (the necessity or not, of demand before suit against an agent or factor) it may be stated as a general rule, that, where the money is due, or where the action is for a precedent debt or duty, no demand is necessary.

An agent or factor cannot be liable, until he has disobeyed his orders, either actually or impliedly, by some act or omission inconsistent with his duty to his principal; this, he cannot do, until he has been called upon, or has received the instructions of his principal, where there is an understanding, either express or implied from custom and usage in the particular case, that he is not to pay the money or render an account, until requested or instructed by his principal. But where there is not such an understanding, either express or implied, it is the duty of the agent to pay the money or to account within a reasonable time; and on his failure to do so, an action will lie without a previous demand.

It has been said that the statute of limitations does not commence to run in favor of an agent or factor, until after a demand; but this is in cases only, where a previous demand is necessary before suit: where such demand is not necessary, the statute runs from the time when the suit could have been maintained.

Appeal from Navarro. The appellee filed his petition in the District Court, on the 28th day of September, 1850, setting forth, that, on the 18th day of November, 1839, the defendant's intestate executed to the plaintiff his receipt, whereby he acknowledged the receipt from the plaintiff of four hundred and fifty dollars, to be by him invested in the paying government fees for Texas scrip, placed in his hands for location; that he thereby became bound to apply the money to

the purpose mentioned in the receipt, or, if he failed to do so, to refund it to the plaintiff: and that he had failed to apply the money agreeably to his undertaking, or to account for it to the plaintiff.

The statute of limitations was pleaded, to which the plaintiff excepted, and his exceptions were sustained by the Court. There was judgment for the plaintiff, and the defendant appealed; the appeal being sent to Austin by consent of parties.

*F. L. Barziza* and *A. M. Lewis*, for appellant.

*E. H. Tarrant*, *J. P. Henderson* and *J. E. Cravens*, for appellee.

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

Wheeler, J. The principle question is whether the cause of action was barred by the statute of limitations.

The relation between the parties to the receipt, was that of principal and agent; and the principle, applicable to the case, is the same as in the cases of agency and factorage. In these cases, where money has been collected by an agent for his principal, or an attorney for his client, or where goods have been consigned to a factor for sale, there has been some, at least apparent contrariety of opinions, as to whether an action will lie until after demand, and, consequently, whether the statute of limitations will commence to run in favor of the agent or consignee, till that time. (1 Taunt. R. 571; 12 Mod. R. 444; 3 Gill & Johns. R. 422; 15 Wend. R. 302; 5 Hill, (N. Y.) R. 395; 7 Greenl. R. 298. Angell on Lim. 178, Ch. 17.)

Without reviewing, or attempting to reconcile, the cases on this subject, it may be stated as a general rule, that, where the money is due and payable immediately, or where the action is

for a precedent debt or duty, no demand is necessary. (1 Chit. Pl. 329, Am. Ed. of 1840.)

In the case of Stafford v. Richardson, (15 Wend. R. 302,) the Supreme Court of New York held, that, in an action against an attorney for money collected by him, the fact that a demand was not made within six years before suit brought, would not prevent the running of the statute; that, if a demand was necessary, the plaintiff should have made it in season to have brought his suit, within six years, after the default of the defendant. And in Lillie v. Hoyt, (5 Hill, 395,) the same Court held, that it is the duty of a mere collecting agent, who receives money on account of his principal, to pay it over within a reasonable time; and if it be not so paid, the principal may maintain an action for it without any previous demand. A foreign factor, receiving the proceeds of sales made by him, it was considered, is not liable to an action until after demand.

The law upon the subject of the liability of factors to suit, without demand, underwent a full and clear exposition by Chief Justice Parker, in giving the opinion of the Supreme Court of Massachusetts, in the case of Clark v. Moody. (17 Mass. R. 145.) It is there shown, that, even in the case of foreign factors, a demand is not, in all cases necessary. "The general rule laid down in the books," it was said, "is that, when "goods are delivered to a factor, to be sold and disposed of "for his principal, the law implies a promise on the part of "the factor that he will render an account of them, whenever "called upon by the principal; and if he refuses to account, "he is liable to an action of *assumpsit* for the breach of his "implied promise. The learned Judge, adverting to the opinion of Lord Holt, in Wilkin v. Wilkin, (1 Salk. R. 9,) that wherever one acts as bailiff, he promises to render an account, says: "Although in Comyn on Contracts, 261, the inference "from this case is made to be, that the factor is liable only on "demand, or on refusal to pay money; yet, if the general "principle adopted by Holt is right, that the mere acting as "bailiff is promising to account, it would not seem that a de-

"mand was, in all cases, necessary to enable the principal to "maintain his action." And he proceeds to instance cases in "which an action will lie without demand. "Generally," it is said, "the consignor of goods accompanies his consign- "ment with directions how to apply the proceeds; either to "pay them over to a third person; or to remit in bills, or in "merchandize, or in specie; or to hold them to answer his fu- "ture orders." This, I conceive, is the reason why a demand has been held to be necessary in these cases.

The factor cannot be liable, until he has disobeyed his orders, either actually, or impliedly, by some act or omission inconsistent with his duty to his principal. The agent must be chargeable with some laches or default; which he cannot be, until he has been called upon, or has received the instructions of his principal, where there is an understanding, either express, or implied from custom and usage in the particular case, that the agent is not to pay the money or render an account, until requested or instructed by his principal. Until he receives instructions to remit, or account, his duty, and consequent liability, will not attach. But where there is not such an understanding, either express or implied, it is the duty of the agent to pay the money or to account within a reasonable time; and, if he should neglect to do so, this neglect would be a breach of his contract, which would subject him to an action. And, I apprehend, it will be found generally true, that, where an agent is in default, or where he is chargeable with laches, or a breach of duty, an action may be maintained against him immediately, without demand. If this be so, no demand was necessary to subject the agent to an action in the present case. There was no understanding, either express or implied, that he was to delay payment for further orders or instructions. He had already received his instructions; and nothing remained but to apply the payment agreeably to his undertaking. The time of payment was not specified; but the contract evidently required that it should be made immediately or within a reasonable time. What that would be must

depend upon the circumstances of the case. But there is in the record, nothing but the contract itself to show that the undertaking of the agent was of such a nature, and attended with such contingencies, that it could not have been performed immediately. There does not appear to be anything in the nature of the undertaking, from which it can be inferred that it might not have been performed, if at all, within a year or two. Surely, it cannot be supposed that a period of five or six years was not a reasonable time. When that time had elapsed, and the agent had failed to apply the money in the manner required, he was in default, and was chargeable with laches, and there was, it would seem, no necessity of a demand to fix his liability. His neglect was a breach of his contract, for which an action might then have been brought against him, and, consequently, the statute of limitations commenced to run in his favor. When a sufficient time had elapsed to have enabled the agent, with reasonable diligence, to perform his promise, the plaintiff's right of action accrued, and the statute commenced to run. Nearly eleven years elapsed from the time of the undertaking, until the commencement of this suit. Allowing the agent half that time for performance, and surely more could not be required, unless under special circumstances which do not appear, and the action was barred long before the suit was brought. If, as we cannot doubt, the defendant's intestate, was guilty of such negligence as subjected him to suit, it was no excuse for the plaintiff's negligence in not calling him to an account. And even if a demand was necessary, the plaintiff should have made it within time to have brought his suit, before the statute had interposed a bar, from the time the default occurred. (15 Wend. R. 306.) It is the plaintiff's own fault, that he did not put himself in a condition to sue; and if the defendant's intestate might have protected himself from suit, for the want of a demand, (as was said by Chief Justice Savage in a case before cited,) he was not, for that reason, to be subject all his life to demands however stale. (Id. 306.)

We are of opinion that the Court erred in sustaining exceptions to the plea of the statute of limitations. The judgment must therefore be reversed and the cause remanded.

Reversed and remanded.

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## The State v. Sullivan.

Depositions, or written agreements of the facts, by the parties or their attornies, are not admissible where the State is a party, and the oral testimony of a given number of witnesses is required by the statute, as in cases of suits to establish headright claims.

The Boards of Land Commissioners, under the Act of 1837, had authority to grant an additional quantity of land, sufficient to make up the quantum to which the party was entitled, where he had received a previous grant for less than he was entitled to.

It seems that a single person, owning negroes, was the head of a family, within the meaning of the colonization laws of Coahuila and Texas. But, *Quere?*

Appeal from Milam. This was a suit, under the Act of the 4th February, 1841, for the re-establishment of a certificate which had not been recommended by the investigating Board of Commissioners, as a genuine and legal claim against the government. It appeared from the petition, that the petitioner emigrated to the country in 1835; that he had been, from that time, and still was at the commencement of the suit, a citizen; that he was, and still is, the head of a family; that he had received a grant of one-third of a league of land, (leaving it to be inferred that this was issued before the commencement of the Revolution,) and that he had obtained from a Board of Land Commissioners, a certificate for the additional two-thirds of a league of land and labor, to which he conceived himself entitled; and the said certificate not being recommended, he prayed that the same may be now established.

There was an agreed statement of facts; and from this, among other matters, it appeared that the petitioner performed all the duties required of him as a patriotic citizen; that he had never been married; and that his family consisted of negroes; and that the land sued for, was the quantity (in addition to the third of a league previously granted) that would make the amount to which, as the head of a family, he was entitled. The cause was taken and retained for some time under advisement, by the Court; but was finally submitted to a jury, who found for the plaintiff.

The defendant, at the trial, objected to the admission in evidence of the statement of facts as agreed upon between the attorneys of the parties; but the objection was overruled and exception was taken.

And the defendant also objected to an instruction, charging the jury, in effect, that, if the plaintiff was in the country at the Declaration of Independence, and a single man, owning negroes at the time, and was entitled to the quantum of land allowed by law, he was entitled to recover.

*Attorney General*, for appellant. I. The written admission of the District Attorney, of the facts of plaintiff's title, was so clearly "to the prejudice of the interests of the State," and therefore in contravention of law, and is of a character so often reprobated by this Court; the Supreme Court of the Republic; by the Congress of that government; and by the Legislature of this State; as scarcely to require argument or authority, on this occasion, to support the first error assigned. (Hart. Dig. Art. 627, 2039, 2043; Republic v. Riley, Dallam's Dig.)

II. The second assignment of error is plainly sustainable, and should not only produce a reversal of this judgment, but, when in connection with it, we look at the facts, stated by plaintiff in his petition to entitle him to the "augmentation" asked for, should lead to a dismissal of his suit in this Court.

It is deemed only necessary on the part of the State, in support of this assignment, to say that no law of the Republic or State entitles the plaintiff to the "augmentation" he seeks here, and to refer to all the provisions of our law bearing on the question, and ask that they may be read. This is all the argument we have to offer. (10th Sec. Genl. Provisions Const. Hart. Dig. p. 38; Hart. Dig. Art. 1859, 1865, 1866, 1926.)

Hemphill, Ch. J. There is no doubt that the first assignment rests on substantial grounds. The admission of a written statement, or agreement, as to the facts, is certainly erroneous. The jurisdiction to hear and determine these land claims against the government, is special; and the prescribed mode of its exercise, must be strictly pursued. The statute declares, for instance—and it has always been held to be obligatory—that the facts substantiating the claim, must be proven by two or more credible witnesses. One witness, however umblemished his character for veracity, is not sufficient. And, what is material to the point under consideration, is, the statute has declared that the testimony shall be oral, and that only—and thus effectually excludes any other character of evidence. Depositions or written statements of the facts, which should be proven by witnesses, are inadmissible; and the objection to the introduction of such evidence should have been sustained.

The next assignment presents a question of more difficulty. The language in which the instruction is couched, as embodied in the exception, is scarcely intelligible. The Court is represented as charging, that, if he was a single man, owning negroes, at the Declaration of Independence, and was entitled to the quantum of land allowed by law, he was entitled to recover. The meaning of this instruction (if it have any) is, that, if a single man owning negroes at the date of the Declaration of Independence, was entitled to a league and labor of land, then the plaintiff was entitled to recover in this

suit. This would leave to the jury the determination of the legal proposition, whether a single man, with negroes under his control, constituted the head of a family, or not. This point was for the decision of the Court, and not of the jury.

But it may be presumed that the charge, as given, is not accurately stated in the exception. At all events, the objection, as stated in the assignment of error, is only to that portion of the instruction which charged that the plaintiff was entitled to recover.

The ground of this objection, is, that the plaintiff, owning negroes at the time, received from the former government one third of a league as a single man; that he has not subsequently married, nor has there been any other supervening fact which by law entitles him to the augmentation claimed in the petition.

If it be admitted, that, under the former government, a single man owning or holding negroes was entitled, as the head of a family, to a league and labor of land, and, it appearing from the facts of this case, that the plaintiff, though thus entitled, secured but one third of a league, the question then for consideration is, whether, under the land law of 1837, a Board of Land Commissioners was authorized to approve this claim for the additional two-thirds of a league and labor as a genuine claim against the government. It is immaterial what may be the justice or equity of the claim. It cannot be sustained unless the Board or the Court as its successor, have authority, express or implied, under the provisions of the statute, to hear and determine this class of claims.

There is no express provision authorizing or prohibiting a grant of this character. The Board, under the 11th Section, is required to investigate all claims on the government for headrights to lands; and they were authorized to grant to any person or persons, a certificate of their claim or claims, setting forth in the certificate, the amount of land the party is entitled to. The words used in conferring this power, especially when construed with reference to other provisions of the stat-

ute and of the Constitution, do not imply that the Court is restricted alone to the investigation of the highest amount which can be claimed under a headright, viz: a league and labor for a head of a family, and a third of a league for a single man. The Constitution authorized all citizens who might have previously received a league as heads of families, or a quarter of a league as single men, to receive such additional quantity as would make their grants equal to a league and labor or to one third of a league of land. There was no separate provision in the statute, authorizing the board to examine the claims to such augmentations. They were heard and determined, under the general authority to investigate claims for headrights. The apparent intention was, to give authority to investigate all claims for headrights, or for any portion of such rights, to which the applicants might deem themselves entitled. There was no power to investigate any other claims but headrights. The action of the Boards was restricted within the limits of this class of claims; but over this they had full authority: and it is but a fair deduction, that, if they could grant under the general authority to investigate claims for headrights, either a league and labor or a labor alone, as the parties might be respectively entitled, they had competent authority to grant a certificate for any intermediate portion of a headright, if the applicant was, under the law, entitled to the amount claimed. This is an equitable interpretation of the grant of power, under the statute. It is not repugnant either expressly or by legitimate inference, to any of the provisions of the law; and it is commended by every consideration of policy and justice, to our adoption. Had the applicant, in this case, been a married man; and had he, from ignorance of his rights, or the perversness of the authorities under the former government, been shorn of his league and labor and restricted to one third of a league, the hardship of the refusal of the Board, under the new government, to grant him a certificate for that portion of his league and labor of which, through his ignorance, or by official iniquity or misconstruction, he had been deprived,

would be most striking and flagrant. But this would not be sufficient to authorize the Board or Court to grant relief, unless they were empowered to do so by the law. We are of opinion, however, that the Board, and the Court as its successor, had authority to investigate this class of claims; and there was no error in the charge on the point to which the objection is raised, viz: that the plaintiff, on the facts, was entitled to recover.

But these facts were not established by competent proof—and for the error of admitting written evidence, the judgment is reversed and cause remanded.

Reversed and remanded.

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## Chappell v McIntyre.

Where the parties submit an agreed statement of the facts, to the Court, for its judgment upon the questions of law, arrising on the case submitted, all other pleadings will be disregarded, on an appeal from the judgment.

The questions of law upon the case stated, (as to separate property,) are settled in favor of the appellee, by the cases of McIntyre v. Chappell, (4 Tex. R. 187,) and Love and Wife v. Robertson, (7 Id. 6.)

Appeal from Washington. After suit brought and answer filed, the parties filed the following agreed statement of the facts, and submitted it for the final judgment of the Court, in the case:

"It is agreed between the parties to the above entitled cause, "that the plaintiff is the guardian of Sarah McIntyre; that "Harriet C. Chappell, wife of defendant, is the mother of said "Sarah; that James McIntyre, father of said Sarah, and said "Harriet intermarried in the State of Tennessee on the first "day of January, 1840; that, two weeks after their marriage,

"said James left his wife in Tennessee and came to Texas, "arriving in Washington county in March, 1840, bringing "with him some negroes; that he improved land, planted a "crop, and, after about three months, returned to Tennessee, "where he remained until the Spring of 1841; that in March, "1841, he returned to Texas, with his wife, and resided on "the place in Washington county, which he had previously "improved, until his death in 1842; that when said James "returned from Texas to Tennessee, he sold the land he in- "herited from his father's estate, that was his before their mar- "riage, to Daniel Reader, on a credit; that the money sued for, "to wit: $255, was received by defendant, of A. W. Bumpass, "who had so collected it of Reader, in 1845; that, if the Court "shall be of opinion that said debt due from said Bumpass, was "community property between said James and Harriet, his "wife, now wife of defendant, the judgment to be against de- "fendant for half the amount, and the costs to go as the Court "may direct. If the Court is of opinion that said debt due "from Bumpass, was not community, then judgment to be "entered for the plaintiff. It is further agreed, that, by the "law in force in the State of Tennessee, at the time the mar- "riage between said James and Harriet was celebrated, all "the personal property of the wife became the property of her "husband; that the plea of set-off and reconvention, filed in "this cause, is withdrawn, and that matter is settled in the "suit for the negroes. September 17th, 1851;" signed by the attornies of both parties.

Judgment was entered on this statement of the case, in favor of the plaintiff for $255 and interest thereon from the 25th day of December, 1845, and costs of suit.

The defendant moved for a new trial on the ground that the judgment was contrary to law, and because interest had been allowed on an open account. Motion continued and no further action had thereon.

In the Supreme Court the defendant in error remitted the interest.

*J. D. Giddings* and *J. E. Shepard*, for appellant.

*A. M. Lewis*, for appellee.

WHEELER, J. The parties submitted the case to the Court, upon an agreed statement of facts: and they asked the judgment of the Court upon the law arrising upon those facts.—The agreement expressly abandoned matters pleaded in defence of the action. Its terms leave no doubt that it was intended to embrace, and did embrace, all the matters on which the parties sought to obtain the judgment of the Court. It embraced the matters then in controversy. And, we think it clear, that, by thus asking the judgment of the Court, upon the questions of law, arrising on the case submitted, the parties are to be considered as having waived all previous irregularities, and the questions arising upon the pleadings. (Bates v. The Republic, 2 Tex. R. 616.) The questions of law, upon the case stated, are settled in favor of the appellee, by the case of McIntyre v. Chappell, (4 Tex. R. 187,) and Love and Wife v. Robertson. (7 Id. 6.)

By both the Common Law and the law of this State, money, derived from the sale of the property of the husband, was his. Upon the death of the husband, the money in question belonged to his heir, and the plaintiff, as her guardian, was entitled to recover it.

The *remittitur* of the interest removes the only remaining objection to the judgment. It is therefore affirmed.

Judgment affirmed.

## Lewis and another v. Riggs.

One of several promisors, not signing as a surety, cannot plead that he is a surety merely, for the purpose of requiring the alleged principal to be jointly or simultaneously sued, or of preventing the plaintiff from discontinuing as to the alleged principal not served with process, and proceeding against those served.

It is always more satisfactory to have a united Court; but it will not do to suppose, that, because one Judge of the three composing the Court, dissents, the law is not settled.

Error from Nueces. This suit was brought by the appellee against Wm. H. Perry, Gideon K. Lewis, and Henry L. Kinney, on a note signed W. H. Perry, Gideon K. Lewis, H. L. Kinney. The petition, as originally filed, alleged the residence of Lewis and Kinney to be in the county of Nueces, but did not state the residence of Perry, or allege that he resided out of the State, or that his residence was unknown. In an amended petition, filed during the Term at which the judgment was taken, the residence of Perry was alleged to be unknown; and at the same time the plaintiff discontinued as to him.

The defendant Kinney excepted to the petition, and answered that he signed the note as surety of Perry, "who is a citizen of the county of Bastrop, in the State of Texas"—the exception was overruled, and a jury being waived, and the cause submitted to the Court, judgment was rendered for the plaintiff against Lewis and Kinney, to which they excepted.

*J. Webb*, for plaintiff in error. The evidence is clear, that Perry was the principal on the note, and Kinney was a surety only; and also that Perry resided in the county of Bastrop, and was a man of property—more than sufficient to pay the debt. (Dig. Art. 670.)

"Parol evidence is admissible to show that one of the ma-

"kers signed the note as surety, although upon the face of the "note they all appear to be principals." (17 Johns. R. 334; 13 Johns. R. 174; Smith v. Doake, 3 Tex. R. 215.)

The judgment is erroneous, because it was rendered against the surety and not against the principal. The discontinuance against the principal was not because he resided beyond the State, or was insolvent—neither was alleged; and the proof is to the contrary. (Dig. Art. 705.)

*Oldham & Marshall*, for defendant in error. The question as to the right of the defendant Kinney, to aver that he is security in the present case is decided in Ritter v. Hamilton.

The plaintiff may discontinue as to defendants not served, and take judgment against the others under the provisions of Hart. Dig. Art. 704.

Lipscomb, J. This case comes clearly within the decision of this Court, in the case of Ritter v. Hamilton, (4 Tex. R. 325,) and the case of Hamilton v. Ritter, decided at Tyler, April Term, 1852. (8 Tex. R.) When the case of Ritter v. Hamilton was under consideration, it was supposed by some of the profession, that it was embraced by the decision of this Court, at the preceding Term, in Smith, adm'r, v. Doake. (3 Tex. R. 215.) This induced the Court to review that case, in its opinion, and to show that they rested upon distinct grounds, and had not the slightest analogy to each other. The defence set up and sustained by this Court, in Smith v. Doake, was in bar, that went to the discharge, and, in fact, showed that Doake had never been legally bound for the debt. The payee, at the time Doake put his name to the paper, became by his own undertaking, the agent of Doake, and was faithless and did not discharge, but violated the trust he had assumed. In the case of Ritter v. Hamilton, the defence set up, as in the one before us, was not in bar, but in abatement, claiming an advantage, under a statute that a majority of the Court be-

lieved did not embrace his case; and, if sustained, would only have abated the suit. It is true, the decision of the Court was not unanimous: the Chief Justice dissented; and it is to be regretted that there was any disunion of opinion among the members of the Court; and it is always more satisfactory to have a united Court; but it will not do to suppose, that, because one Judge of the three composing the Court, dissents, the law is not settled. A majority of the Court are well satisfied with the correctness of the decision, on the point presented; and, until satisfied of their error, will adhere to it as settled.

The judgment is affirmed; but no damages will be given, as it is presumable that the case of Ritter v. Hamilton had escaped the notice of the counsel, who brought the case up for revision.

Judgment affirmed.

## JENKINS v. CHAMBERS.

Where an emigrant settled in Milam's colony in 1831, and when Talbot Chambers was appointed Commissioner to issue titles to the families within that enterterprise, presented his petition for title to a certain league which he alleged he had selected with the approbation of the agent of the Empresario, and which he had improved and cultivated, and the agent of the Empresario certified to the Commissioner that the petition was true and that the petitioner was one of the colonists introduced by him as agent of the Empresario, whereupon (in 1835) the corresponding title was extended; *Held*, That the title so extended was preceded by no inchoate or equitable title on which it could relate back to any antecedent period; and that it must yield to a prior grant, issued subsequent to the settlers occupation.

Even a survey, without a concession or order of survey, would not be a legal appropriation of the land.

It seems, that, however locative and descriptive a concession may have been, yet it did not separate the land, from the public domain, nor did a subsequent title issued thereon, relate back to the date of the concession, where the concession was in the alternative, either for the land particularly described or any other vacant lands which the party interested might select.

Of the authority of the executive, under the 17th Article of the Colonization Law of 1825, to make the grant (of six leagues to a settler) there can be no question. The authority to increase the quantity, that is, to grant a quantity "in proportion to the family, industry and activity" of the applicant, presupposed the authority to judge of his qualifications. On this subject he was to receive the reports of the Ayuntamientos and Commissioners; but these were simply to enlighten his judgment, not control it; he was not prohibited from obtaining information from other sources, nor from acting on his own personal knowledge of the facts.

It was no objection to the validity of a concession made by the executive, in 1830, under the 17th Article of the Colonization Law of 1825, to an applicant residing in Leona Vicario, for lands in a colonial enterprise in the department of Bexar, that the executive referred the petition, for information, to the Ayuntamiento of Leona Vicario, and not to the Ayuntamiento of the municipality wherein the land was situated.

The executive having authority under the 17th Article of the Colonization Law of 1825, to increase the quantity, that is, to grant a quantity, "in proportion to the family, industry and activity," of the settler, he was constituted the judge of the qualifications of the applicant, and his decision was final, unless fraud be shown on the part of the grantee.

*Quere?* Whether a concession in 1830 for six leagues of land particularly described, or elsewhere as the party interested might elect, gave the right to the grantee to select the land in two places. However that may be, it certainly gave him the right to select the six leagues particularly described; which included a right

to select a less quantity at the same place; and it is not perceived that the having obtained a title to a part elsewhere, even if that were unauthorized and void, would affect the title of the grantee to the residue of the land actually embraced in the grant, in the place designated by it.

Where a concession was made in 1830, and the title, which was issued in 1834, recited that the land was surveyed for the grantee on the 3rd day of March, 1832, by the scientific and approved Surveyor, Thomas H. Borden, it was held that the presumption, was, that it was surveyed by order of the Alcalde, who was authorized by the concession to put the grantee in possession and issue to him the title, and in consequence of whose failure to complete the title, a special Commissioner was appointed for that purpose.

The presumption, arising from the language of the title, being that the Commissioner had evidence before him that there had been a legal survey of the land by competent authority, it was not necessary that he should have caused a survey, nor was it necessary that he should embody in the title, the authority under which the survey had been made.

The presumption is that the officer, authorized by law to issue the title, has done his duty, and acted in all respects in conformity to law, until the contrary appears. And it is incumbent on the party who would controvert a grant, executed by competent authority, with the forms and solemnities required by law, to repel this presumption by proof.

The Colonization Laws of 1832 and 1834 did not interfere with concessions previously made to purchasers or settlers; and such concessions were to be consummated in perfect titles, the same as if there had been no repeal of the law under which they were made.

We have heretofore decided that the construction of their powers and of the laws which conferred them, adopted and acted upon by the former authorities of the country, must be respected, unless it be clearly shown that they have exceeded their powers or have acted in manifest contravention of law.

By the 36th Article of the law of 1834, settlers, after having received the titles to their lands, were authorized to sell; the purchaser being charged with the performance of the conditions. There is, therefore, nothing in the objection that the grantee, in this case, did not perform in person, the condition of settlement and cultivation.

Where a concession was made in 1830 for six leagues, and the final title in October, 1834, and the payment of the dues was completed in 1839, and a small portion of the land was occupied and cultivated, by means of tenants, since the spring of 1840, it was held that the conditions had been performed, and that the instruction to the jury, that proof of their performance was unnecessary, whether correct or otherwise, was therefore immaterial.

Error from Bastrop. The plaintiff in error brought suit against one Walker and another, to recover the possession of a tract of land. The defendant in error, Chambers, intervened, claiming to be the rightful owner of the land, and was permitted to defend. The facts of the case were as follows:

The plaintiff offered in evidence the contract entered into by Benjamin R. Milam, with the government of Coahuila and Texas on the 12th day of January, 1826, to colonize three hundred families above the San Antonio road, on the west side of the Colorado river: to the introduction of which the intervenor objected on the ground that said contract had never been carried out by said Milam, and was revoked and had expired by its own limitation, before the execution of the deed to Haggard, under whom the plaintiff claimed; which objections were overruled by the Court; said contract was read to the jury; and the intervenor excepted.

The plaintiff then offered in evidence a document purporting to be a commission given to Talbot Chambers, by the Governor of Coahuila and Texas, dated Monclova, 31st October, 1834, which was granted on the application of Robert M. Williamson as the agent of Benjamin R. Milam, to execute titles and put the families introduced by said Milam in possession of their lands: to the introduction of which the intervenor objected, on the ground that no such contract existed when said commission was given, and that Elguizabal, who signed the same, was not the Governor of said State of Coahuila and Texas, but was a usurper; and other objections apparent; which objections being overruled, the commission was read to the jury as evidence, to which the intervenor excepted.

Supreme Government of the State of Coahuila and Texas. } To the citizen Talbot Chambers; Don Robert M. Williamson, agent of Don Benjamin R. Milam, having made representation to His Excelency the Governor, praying for the appointment of a Commissioner to put the families, which he has contracted with the Supreme Government of the State to settle in his colony, in possession of their lands and to confer upon them titles in property for the same, His Excellency has been pleased to make the following decree upon said petition:

Monclova, October 31st, 1834.

Attending to the fact that the contract, celebrated between

the government of the State and the Empresario Benjamin R. Milam, expired by its own limitation on the 25th of January, 1832, the government cannot consider the families that may exist within the territory of said colony, as belonging to it; but, attending likewise to the fact that said families ought to be provided for according to the 16th Article of the colonizatoin law of the 24th of March, 1825, now in force for this case by Article 29th of the law of the 26th of March of the present year; this government has commissioned the citizen, Talbot Chambers, of the vicinity of San Felepe de Austin, to put the said families in possession of their lands in conformity with the 16th Article of the said law of the 24th of March, 1825, and to confer upon said families the corresponding title, agreeably to the instructions of Commissioners, issued on the 4th of September, 1827; reserving to the Empresario the right to represent to the Honorable Congress, as soon as it convenes, the interruption to the fulfillment of this contract, produced by the passage of the law of the 6th of April, 1830. The Secretary of State will communicate this to the party interested, to the Commissioner appointed, remitting the corresponding instructions, and the Political Chief of the Department of Brazos, for the respective information of each one, and reserve the original record for the purpose of giving an account of the same to the Honorable Congress at its next session.

ELGUIZABAL.

JUAN ANTONIO PADILLA, *Secretary of State.*

Which I have the honor to transcribe to you by superior order for your information and the corresponding effects; to which end I transmit to you herewith the following documents:

No. 1. A copy of the law of colonization of the State, of the 24th of March, 1825, under which the contract was celebrated, and under which it has to be concluded.

No. 2. A copy of instructions to Commissioners, of the 4th of September, 1827, according to which the commission of the present Commissioner must be governed.

No. 3. A copy of the law No. 62, which regulates the fees of Commissioners, &c.

And I communicate this to you by superior order, for your entire compliance with the same. Accept the assurances of my esteem and consideration. God and Liberty! Monclova, 31st Oct., 1834.

JUAN ANTONIO PADILLA,
*Secretary of State.*

The plaintiff then offered in evidence the following title:

Third Seal. Two Bitts. [L. S.] For the Term of 1834 and 1835.

Mr. Commissioner: James Haggard, a colonist introduced by R. M. Williamson, agent of the Empresario Benjamin R. Milam for the contract which he celebrated with the Supreme Government of this State, dated 12th of January, 1826, with the greatest respect would represent unto you, that my state is that of a married man, and that, with my family, I have entered the country for the purpose of settling myself permanently, and that, with the approbation of the Agent of said Empresario, I have selected one sitio of land in the colony of the same; for which reason I present myself to you, that you (as Commissioner authorized for the purpose) may be pleased to admit me and put me in possession of said sitio, with the understanding that I offer to settle it and cultivate it according to law.

Village of Mina, 21st of May, 1835.

JAMES HAGGARD.

To Mr. R. M. Williamson, Agent of the Empresario, Benjamin R. Milam: You will be pleased to examine the foregoing petition, if the land indicated is vacant, and if not, the name of the applicant.

Village of Mina, 21st of May, 1835.

TALBOT CHAMBERS.

Mr. Commissioner: In attention to your foregoing decree, I am bound to say that the representations of the colonist, James Haggard, are true; he is one of the colonists introduced by me, (as the Agent of the Empresario Benjamin R. Milam,)

and that he is a man of family and entitled to the favor he solicits.

Village of Mina, 21st of May, 1835.

R. M. WILLIAMSON, *Agent.*

In view of the representations of the agent of the empresario Benjamin R. Milam, in the foregoing information, I admit the colonist James Haggard according to the law, and order that the indicated land be surveyed by the Surveyor, Bartlett Sims, to the end that the corresponding title may issue to the party interested.

Village of Mina, 21st of May, 1835.

TALBOT CHAMBERS.

Second Seal. Twelve Bitts.

Qualified by the State of Coahuila and Texas for the term 1828 and 29, 30, and 31, 32, 33, 34, and 35.

FLORES.

Talbot Chambers commissioned by the Supreme Government of the State of Coahuila and Texas for the partition of lands in the colony of the Empresario Benjamin R. Milam.

Whereas, Mr. James Haggard has been received as a colonist in the enterprise of colonization, contracted with the government of this State, by said Empresario, on the 12th of January, 1825, as appears on folio No. 35, of this manuscript record of titles; and the said James Haggard having proved that he is married, and presented the requirements provided by the Law of Colonization of the State, of the 24th of March, 1825; in conformity with the said law and the instructions which govern me, dated the 4th of September, 1827, in the name of the State I concede, confer and put in possession, real and personal, of one sitio of land, to the said James Haggard, which land has been surveyed by the Surveyor Bartlett Sims, previously appointed for the purpose, under the situation and following lines: Situated upon the western side of the Colorado river, and commencing at a stake, the north-east corner, and on the bank of said river, where there is a hackberry 24 inches in diameter, South 76° East, 3 varas distant,

and an elm 15 inches in diameter, North 57° East, 24 varas; thence South 60° West 11,400 varas to a stake and South-East corner of sitio No. 3, where there is a blackjack 8 inches in diameter in the direction South 45° West 7 varas, and a post-oak 12 inches, in the direction South 80° East 6 varas; thence North 45° West 1450 varas to a stake and South-West corner of sitio No. 3; thence North 42 East 4900 to a stake on the margin of said river and North-West corner of sitio No. 3; thence running down the river with the meanders of the same to the place of beginning: five labors of said land pertain to the temporal class, and twenty to the pasture class, which serves as a classification for the price which he is bound to pay the State for it, according to the 22nd Article of said law, and under the penalities therein established, remaining notified that within one year he is bound to construct permanent land marks in each angle of the land, and that he is bound to settle it and cultivate it in conformity with the provisions of the law. Therefore, using the powers which have been ceded to me by the proper law and consequent instructions, I issue the present instrument and order that a certified copy be taken of it and delivered to the party interested, that he may possess and enjoy the land, he, his children, heirs and successors, or whosoever of him or them may have a right to the same.

Given in the village of Mina on the 21st of May, 1835, which I sign with assisting witnesses according to law.

TALBOT CHAMBERS.

Assisting. Assisting.

WILLIAM OLDHAM, JOHN G. MCGEHEE.

The plaintiff then introduced in evidence a chain of title from Haggard to himself, to nearly all of which the intervenor objected, "for reasons apparent upon and connected therewith." The deed from Haggard was dated July 11th, 1837; and the deed to Jenkins, the plaintiff, May 20th, 1841.

The plaintiff proved that Haggard had immigrated to the country previous to 1831; that, in that year he built a cabin and settled upon the land, with a stock of hogs, and, in 1832,

cultivated it; that he did not afterwards reside upon the land, but remained in the neighborhood as near as safety would permit, having no fixed residence anywhere else, continuing to assert his claim to it; and that it was known as Haggard's headright league. One of the plaintiff's witnesses testified that Haggard came to the country "on his own hook;" that his wife never came; that two of his sons came in 1833 or '34; that one was killed by the Indians; that the other returned to the United States in 1835. Haggard remained in the country until his death. A witness for plaintiff said that Bangs' survey was made in 1832 by Pratt Coleman. Here the plaintiff rested.

The intervenor introduced in evidence a deed from Jose Manuel Bangs to him, for three leagues of land including the land in controversy, dated December 15th, 1834. He then proved the payment of the government dues, the last payment being made February 11th, 1839. The intervenor then offered to introduce in evidence, a deed executed to Jose Manuel Bangs on the 24th of October, 1834, by Ira R. Lewis, Special Commissioner, for four leagues of land, being part of a concession of six leagues made to said Bangs by the Governor of Coahuila and Texas, on the 11th of May, 1830: to the introduction of which the plaintiff objected on the grounds, 1st. That said concession was made contrary to, and in violation of law, and that the Governor of the State had no power to make the same. 2nd. That the application of Bangs was not made in accordance with law, to entitle him to a concession for six leagues of land, as a settler, and it shows that he was not so entitled. 3rd. That, if entitled to such concession, the document offered in evidence, shows that a portion of it (two leagues) was located and a title extended for it elsewhere, and that the subsequent location on the Colorado was illegal and void. 4th. That there was no legal survey of the land made by an authorized Surveyor previous to issuing the title by Commissioner Lewis. 5th. That the law under which the title purports to have been made, was not in force at the time of

executing the title by the Commissioner; and other objections apparent upon the document offered and other matters connected with it: all of which objections were overruled by the Court; and the said grant and deed were permitted to be read to the jury as evidence in the cause, to which the plaintiff excepted.

The grant was as follows:

Third Seal. Two Bitts. [L. S.] For the Terms of 1830 and 1831.

Most Excellent Sir: Jose Manuel Bangs, a native of the United States of the North, a citizen of this State and an actual resident of this capital, with due submission, would represent to you, that, on the 26th of September of the year 1816, I left Baltimore with the expedition of the man deserving of his country, General Xavier Mina; that I embarked on the ocean in May, 1817, employed in the service of the printing office; that I was permanently engaged in my profession all the above stated time, and with arms in hand defended the strong seige or blockade of the sea, of the Spanish General, Aredondo, until the 15th of June of the said year 1817; that I was a prisoner with the garrison which defended the fortification; I was conducted to the city of Monterey as a prisoner, and detained to labor in my office without any recompense except the greatest necessities; and laboring for the long space of time of four years in which I barely obtained a miserable subsistence, it became necessary for me to dedicate myself to other necessary labors foreign to my profession, as the tyranical government did not extend to me the requisite nourishment. In the year 1821, when the Independence of the nation was proclaimed, I obtained my liberty. In the year 1823 I returned to my country; from when again I returned in 1827, with my family and a proper printing establishment, which I established in the State of Tamaulipas, to which government I sold it, to remove myself to this capital with another printing press, which I also sold to your government and offered to serve it, and am now, in effect, engag-

ed. But desiring to establish myself permanently in the department of Bexar, with my family, and to dedicate myself to agriculture and stockraising, I pray you, most respectfully, to be pleased to grant to me, as a settler, six sitios of land, of the vacant lands of the State, on the west side of the Colorado river, at the crossing of the upper San Antonio road, in the colony of Colonel Milam, which sitos I offer to settle and cultivate in entire conformity to the law of colonization; this I pray as a consequence for my sufferings and the services that I have performed for the country, and which I have proven by the three certificates which I have duly exhibited, marked with the Nos. 1, 2 and 3, in the which I shall receive favor and grace.

JOSE MANUEL BANGS.

City of Leona Vicario, 20th of January, 1830.

Leona Vicario, 27th of January, 1830.

This petition will pass to the Honorable Ayuntamiento of this city, for them to inform me whether the petitioner possesses the requisites required by the 17th Article of the Law of Colonization to the State, to acquire the amount of land he solicits.

SANTIAGO DEL VALLE, Secretary.

VIESCA.

Most Excellant Sir: The Ayuntamiento of this city, in compliance with your superior decree of the 27th of January last, to the petition of the citizen Manuel Bangs, whether lands may be ceded to him in the department of Bexar, say that Bangs is married to a lady of his country, North America; they have two children; his public conduct, and that of his wife, is good and regular, without having given the public any cause of complaint; that his office of printer has relieved him from any occupation, and that under your inspection and by the same of the supreme government of the State demanding his qualification, whether or not he is entitled to that which he solicits.

Given at the session of the Ayuntamiento of Leona Vicario, on the 18th of February, 1850.—ARISPE—ALCOSER—VEGA.

JOSE GUADALOUPE SOLIS, Secretary.

Leona Vicario, 11th of May, 1830.

In conformity with the 17th Article of the law of colonization of the 24th of March, 1825, I concede, as a settler, to the petitioner, the six sitios of land which he solicits in the vacant lands of the State in the place which he selected, or in that where it may best suit him. The Alcalde of the municipality to which the land pertains, that he solicits, will put him in possession of said sitios and expedite the corresponding title, previously qualifying the class and quality of the said lands, to show the price he must pay the State for them, for which payment I concede to him the terms designated by the 22nd Article of said law. The Secretary will give the party interested a copy of the petition and of this decree, that he may present them to the Commissioner for the effects which are to follow.

SANTIAGO DEL VALLE, Secretary. VIESCA.

This is a copy of its original, which exists in the archives of the Secretary's office, under my charge, from which it has been ordered to be taken for the disposition of the most excellent Governor.

Leona Vicario, 26th of May, 1830.

SANTIAGO DEL VALLE, Secretary.

Then followed the petition of Bangs to the Political Chief of the department of Bexar, for an *amparo* for two leagues which it suited him to select, on the Brazos, dated November 3rd, 1830. The order of the Political Chief to that effect, same date. The consent of Jose H. League, agent for the Nashville Association, to the selection of the lands within that colony, dated August 14th, 1830. The *amparo* for the two sitios on the Brazos, issued November 17th, 1830, by the Alcalde of the municipality of San Felipe, to whom the order was directed.

Then followed a power of attorney from Bangs to Chambers, the intervenor, dated May 8th, 1831, to select the lands, take possession, receive titles and to comply generally with the requisites of the laws of colonization, that he was required to perform to secure complete and perfect titles. Then followed the petition of Chambers, as agent for Bangs, to the Governor praying for the appointment of a special Commissioner to put him in possession of the lands and issue the corresponding titles. It was dated June 23rd, 1834. Then the order:

Monclova, 28th of July, 1834.

In conformity with the law of colonization of the 24th of March, 1825, and by the 30th Article of that of the 26th of March of the current year, and in exercise of the faculties which by it are conceded to me, I confer a special commission on the citizen Ira R. Lewis, that he may put in possession this party, of the land to which he refers in his petition, and confer on him a title in due form, regulating himself to what is provided by the said law of the 24th of March, 1825, and consequent instructions of the 4th of September, 1827. The Secretary will give to the party interested a copy of this decree and his petition, that he may present them to the Commissioner appointed to carry out the effects that are to follow —uniting this to the foregoing.

JUAN ANTONIO PADILLA, Secretary. VIDAURI.

This is a copy, &c. (Usual certificate, signed by the Secretary.)

Then followed the petition of Chambers, dated July 29th, 1834, at Monclova, to Ira R. Lewis, Commissioner, for the title to the two sitios on the Brazos. Then followed the corresponding title, dated at San Felipe de Austin, September 23rd, 1834.

Then followed:

Third Seal. Two Bitts. [L. S.] For the Term of 1834 and 1835.

Mr. Commissioner Ira R. Lewis—The citizen Thomas Jefferson Chambers with the due respect before you, says:—That the citizen Jose Manuel Bangs having obtained from the supreme government of the State, a concession for six sitios of land, in class of settler, dated on the 11th day of March, 1830, he appointed me his attorney on the 8th of May, 1831, to take the possession; and at my petition the most excellent Governor of the State, on the 28th day of July current, was pleased to appoint you as special Commissioner to expedite the corresponding titles; and as I have had four of the six sitios surveyed on the western margin of the Colorado river, near and above the road that goes from Nacogdoches to Bexar, since the 3rd day of March, 1832, by the Surveyor Thomas H. Borden, I pray that you may be pleased to put me, in the name of my constituent, in formal possession of them, and expedite the title which corresponds; and in it I shall receive justice and favor.

Monclova, 29th of July, 1834.

THOMAS JEFFERSON CHAMBERS.

San Felipe de Austin, August 17th, 1834.

Being presented with the documents on the matter, I will put the party in possession of the four sitios which he has pointed out, and expedite the corresponding title, I, Ira R. Lewis, appointed for the purpose, thus I dispose, and sign with assisting witnesses.

IRA R. LEWIS.

Assisting. W. H. Steel.

Assisting. Garrett Low.

In pursuance of the decree of the supreme government, of the 28th of July, 1834, and my foregoing decree, and in conformity with the law of colonization of the 24th of March, 1825, and consequent instructions, I proceed to put the citizen Thomas Jefferson Chambers, attorney of the citizen Jose Manuel Bangs, in possession of the four sitios of land pointed out in his petition, part of a concession of six sitios which he has from the supreme government of the State, as a settler, under the following limits and boundaries: The land is found

on the right margin of the Colorado river, near and above the road leading from Bexar to Nacogdoches, and was surveyed for the said party interested, on the 3rd of March, 1832, by the scientific Surveyor and approved citizen Thomas H. Borden, in the form that follows: Beginning the survey on a cottonwood 36 inches in diameter, which is found on the western margin of the Colorado, on the upper edge of the road, from which bears a hackberry 10 inches, 8 varas to the South 46° East, and another hackberry 8 inches in diameter, 3 varas to the North 31° West, and taking the bearing to the West, at 14210 varas made a corner on a stake—thence North 45° West and at 4820 varas made a corner on a stake—and thence returning with the bearing North 45° East, and at 400 varas to the same river and made the upper corner on a stake, fixed on the margin of the river, from which 20 varas to the South 76° West, bears a postoak, and 23 varas to the North 54° West another oak; and from this point following the river down to the place of beginning. Within these limits and boundaries comprehend four sitios of land in the form designated on the annexed plan, and pertain to the temporal class the quantity of one half sitio, and the remainder to the pasture class, which serves as a clasification. Therefore, using the faculties conferred on me by the said decree of the supreme government, and regulating myself to the laws on the matter, in the name of the free State of Coahuila and Texas, I put the said citizen Thomas Jefferson Chambers, attorney of the citizen Jose Manuel Bangs, in the real and true possession of the said four sitios of land under the limits and boundaries and according to the aforesaid surveys, and I expedite to him the present title in form, that the party interested may possess, sell, barter, alienate, use and dispose of them at his will forever, his heirs or successors, or whosoever of him or of them may have cause or right. Given in the village of San Felipe de Austin, on the 24th of October, 1834.

IRA R. LEWIS.

Assisting.
W. H. STEEL.

Assisting.
GARRETT LOW.

The intervenor then proved occupation, and cultivation of a small portion of the land by means of tenants, since the Spring of 1840.

The intervenor then introduced in evidence a communication from Governor Latona, dated April 14th, 1834, to the Political Chief at Bexar, accompanying seventeen printed copies of the notice declaring what colonies had been forfeited, and the contracts annulled, including the contract of Col. Milam.

The intervenor then introduced the testimony of Mrs. T. W. Chambers formerly Mrs. Wilberger, taken by consent, who stated that Haggard was at the house of her husband, Josiah Wilberger, in 1831, and was speaking of the land on which he afterwards settled, and that her husband advised him not to settle upon it, as he had understood there was a Spanish title to it.

The plaintiff then introduced several witnesses who had resided in the vicinity of the land since 1830 and 1834, who testified that they never knew Bangs to be in this part of the country, or heard of his being here. The plaintiff also proved that parts of the land were for long periods occupied by men who purchased from Haggard.

It was admitted that the Ayuntamiento of Mina was not organized until 1834.

There was a bill of exceptions, as follows:

Be it remembered, that, on the trial of this cause, the Court charged the jury, that the title of Jose Manuel Bangs, which was read in evidence in this cause, was a good and sufficient title to convey the land embraced within it; the Court also charged the jury that the title of James Haggard issued by Talbot Chambers, Commissioner, was only good to convey the land embraced within it, from its date, and that it had no relation back to the time of the settlement of the said Haggard on the land, and that the party having the older title was entitled to recover in this suit. The Court also charged that no one but the government had a right to inquire into the nonperformance of conditions, attached to a grant, to be perform-

ed subsequent to its issuance; and, whether the conditions to Bangs' grant had been performed or not was a matter which could not be urged by the plaintiff in this suit, against the grant. To all of which charges the plaintiff excepts and prays, &c.

There was a verdict and judgment for the intervenor. Motion for new trial overruled.

It was assigned for error:

1st. That said District Court permitted the document purporting to be a title from the government of the State of Coahuila and Texas to Jose Manuel Bangs for the lands designated therein to be read as evidence to the jury, and overruled the objections of said appellant to the same.

2nd. That the Court erred in charging the jury, that the title to Bangs was a good and valid title to convey the land, and was an operative title from its date; also in charging the jury, that no person but the government could object to said title upon the ground that the conditions prescribed by law, connected with said title, had not been performed by said Bangs, or his assignee; also in charging that the grant to Haggard operated only from its date and could not relate back to the time of his settlement upon the land; also in charging, that, if both titles covered the same land, the elder was the better title.

3rd. In overruling motion for new trial.

4th. Judgment should have gone for the plaintiff instead of for the intervenor.

*Webb & Oldham*, for plaintiff in error. The evidence in the record shows that Milam contracted with the government in 1826 to settle three hundred families within certain assigned limits; that Haggard was in the country in 1830, and was then on his way to the colony; that, in 1831, after removing his stock to the colony, he built a house upon the league of land, a part of which is now in controversy, and claimed it as his headright, as a colonist; that he lived in the house thus

built for some time, and until he was forced (as is plainly inferable from the testimony) to leave it in consequence of its great exposure to Indian depredations; that he never established a permanent domicil elsewhere, but remained at the nearest places to the land where protection was offered him, and was never absent, except on occasional excursions in pursuit of the Indians, "who were very troublesome," and who actually killed one of his sons; and that he continued in the neighborhood until his death in 1841 or '42; that in 1832, he was residing upon the land and cultivating it, having then seven or eight acres in cultivation; and that from 1831, the league of land was known and recognized by every person in the country as Haggard's headright, and was universally called the Haggard League.

The colonial contract of Milam with the government, under which Haggard settled upon the land in dispute, was made in 1826 and expired by its own limitation in 1832. There never was a Commissioner appointed to execute titles to those who settled in the colony under the contract, until its expiration; and consequently those who settled there remained without their titles, or rather, without the proper evidence of their right, until 1835, a short time previous to which, Talbot Chambers was appointed (upon the representation of Robert M. Williamson the agent of the Empresario Milam) as special Commissioner, to put in possession and execute titles to those who had settled upon the lands as colonists; but in giving this commission to Chambers, although it was evidently intended to protect and cover the rights and claims of those who had come to the country and settled upon the grant within the time prescribed, yet it was so worded as to prevent the Empresario or contractor from claiming any benefit under it in the way of premium lands, as it expresses, that the contract having expired those persons could not be regarded as his colonists, but still ought to be provided for under another Article of the colonization law.

The appointment of this Commissioner and the phraseology

of the commission, most manifestly show, that the rights of the settlers to the lands upon which they had settled, were respected by the government and were intended to be protected and carried out in good faith, notwithstanding the penalties which it might choose to inflict upon the contractor, for a non-compliance with all the stipulations of his contract. And nothing less could have been expected from a just government. The settlers came to the country under the assurances of the contract then in force, and the promises of the government to secure to them their lands, and reposing upon these assurances and promises they settled in a wilderness exposed to hardships and Indian outrages, and by a sacrifice of toil and blood contributed to its amelioration and settlement.

A prominent question in the case, then, is, at what time did the rights of these settlers to the lands upon which they settled commence? For, upon the solution of this question the controversy in this case will rest, provided the views entertained by the plaintiff, in respect to the title under which the intervenor claims for himself and others who hold under him, should not be sustained.

As this title is set up adversely to the plaintiff's claim, it devolves upon him to dispute its validity, and to show what he conceives to be the fact, that it is utterly void. The first ground he takes to establish this proposition is, that the Governor of Coahuila and Texas had no authority, under the law, to make a concession of six leagues of land to Bangs, for the consideration mentioned in his petition and upon which the concession was made. That officer derived his whole power and authority from the written Constitution and laws of his State; and his acts in violation of either (whether official or unofficial) are entitled to no more respect than would be given to those of the humblest individual in the State. The validity of those Acts, then, must be tested by their conformity or non-conformity with those laws.

The concession to Bangs was made to him as a settler, he petitioned for it as a settler, and presented no consideration

known to, or recognized by the law, which entitled him to a grant at all, except his promise to settle the land and dedicate himself to agriculture and the raising of stock.

We are not disposed to deny that Bangs was entitled to a grant of one league of land as a settler; but, according to the facts stated in his petition and the report of the Ayuntamiento of Leona Vicario, he was only entitled to it under the provisions of the 3rd and 4th Articles of the colonization law of C. and T. of 1825. He did not, however, in his application, conform to any one of the rules prescribed by those Articles, and did not predicate his right to the law upon them; and if the concession had been for only one league, it would not have been sustained by them. Indeed, so thoroughly was the intervenor convinced that they did not sustain the grant, in the Court below, he did not attempt to urge them as his authority for it. He there planted himself upon the 16th, 17th, and 18th Articles of the same law, as having conferred the authority upon which it was made; and we will now examine them and see whether or not they did confer that authority. (Laws C. & T. p. 16, 18.)

Articles 14 and 15 of the law prescribe the quantity of land which shall be granted to colonists introduced by Empresarios under their colony contracts. Article 16 then provides that "families and single men, who, having emigrated separately "and at their own expense, shall wish to annex themselves to "any of the new settlements, can do so at all times; and the "same quantity of land shall be respectively assigned them as "specified in the two foregoing Articles." The quantity specified in those Articles is a labor for each family whose occupation is the cultivation of the soil, and a sufficient quantity to complete a sitio shall be added thereto, if the family combined stock raising with the cultivation of the soil—one fourth of this quantity was allowed to single men.

According to the terms of this Article, Bangs, being a man of family (having a wife and two children) who had emigrated separately and at his own expense, would have been entitled

to receive one league of land, had he gone to a colony and applied to the proper authority for it, and, had he settled in the colony within the first six years after its establishment, he would have been entitled to one additional labor, but to nothing more—and yet a concession was made to him for six leagues, as a settler in the colony, without his ever having seen it.

It is said, however, that, by the 17th Article of the same law, the Governor was authorized to increase that quantity, and that the concession was made in conformity with that Article. The Article reads thus: "It shall belong to the executive to increase the portions, specified in Articles 14, 15, and 16, in proportion to the family, industry and activity of the colonists, according to the separate reports upon the subject, that shall be rendered by the Ayuntamiento and Commissioners," &c.

The 18th Article of the same law, and which is also invoked by the intervenors in support of the grant, is as follows: "Families that shall arrive conformably to the 16th Article, shall present themselves forthwith to the political authority of the settlement they shall have elected, who recognizing on their part the necessary conditions required by this law, shall admit the same, put them in possession of the lands to which they are entitled, and give notice immediately to the executive, that the same of himself, or through persons he shall commission for that purpose, may issue them their titles." (Laws C. & T. p. 18.)

Taking the 17th and 18th Articles together, it is manifest that the Governor could not issue or authorize a title to be issued, to settlers who came in under the 16th Article, even for one league, except upon the report of the Ayuntamientos, the political authority of the settlement they elected, (Holloman v. Peebles, 1 Tex. R. 697-8,) who, having ascertained that the settlers possessed the necessary conditions (qualifications) required by the law to entitle them to land, had put them in possession of it, and reported the fact; and it is

equally manifest that an augmentation of the quantity allowed by the 16th Article, could not be granted under the 17th, except upon the report of the same Ayuntamiento, showing, that, in consequence of their "family, industry or activity," it was necessary. The right to judge of, and determine this necessity, was vested in the Commissioner of the colony, or the Ayuntamiento of the municipality in which the settler had established himself, and not in the Governor; and, until he received the report contemplated by the law, from one or the other of them, showing this necessity and the extent of it, he had no authority to act, or, in other words, he had no jurisdiction over the subject. (1 Tex. R. 729; 13 Pet. R. 498; 4 U. S. Cond. R. 356.)

But, suppose the Governor had the right to make an augmentation of the quantity of the land allowed to settlers by Articles 14, 15, and 16, of the colonization law of 1825, without receiving the report of the Ayuntamiento of the municipality, or the Commissioner of the colony, showing the necessity of it, by what rule of law was that right to be controlled? The 17th Article which gives the only authority is to be exercised, says that he may do it "in proportion to the family, industry and activity of the colonists." Now what was meant by the terms "the family, industry and activity of the colonists?" Ordinary minds would come to the conclusion at once, that the word "family," as used in this category, meant the extent or number composing the family. If a family emigrated to the country so numerous in itself, that one labor for agriculture and twenty-four labors for stock raising were insufficient for their actual wants, then the quantity might be increased according to their actual necessities. The word "industry" is of similar signification. It unquestionably means, that, if a colonist manifests by his industry that he is capable of cultivating more than one labor, or shows that he has stock which twenty-four labors are insufficient to pasture, the quantity may be increased to the extent necessary for either or both of those purposes. The word "activity," if intended to apply

to a quality different from that of "industry," was most manifestly intended to mean that superior activity which a colonist might exercise in promoting the objects of the colonization law in the settlement of the country—in ameliorating its condition by the erection of mills and other useful establishments —in defending it from the savages which infested it—and by other means, affording additional inducements to others to emigrate to and settle in it. This construction of the word is strengthened by the contemporaneous history of the country, in its early settlement. We know it was not unusual for grants of as many as five leagues to be made to individuals for building mills; but we never heard of a grant, except this, where an augmentation was made, and an unusual large augmentation, too, upon any consideration not connected with the promotion and advancement of the settlement; and we think the history of the land titles of the country will not furnish another instance of such an one having been made. That species of "activity" which would soften the rigors of a wilderness and greatly exposed region, might well entitle those who exerted it to a boon from a government inviting and anxious to obtain settlers upon its vacant territory; and we have no doubt, that a report made to the executive by the proper officers, the political authority of the settlement, that such had been exercised by a colonist, would have authorized him to grant to that colonist a tract of land larger than was allowed by the law to ordinary settlers.

If we have given a proper construction to the terms "family, industry and activity of the colonists," as used in the 17th Article in the Colonization Law, (and if language is used to convey definite ideas to the mind and is restricted to that object, it would seem impossible to give it any other that would be more liberal in respect to the rights of the colonists, or the power of the Governor to confer them,) what was there in the case of Mr. Bangs which brought him within the provisions of that Article?

There was certainly nothing in his petition; for, divest it

of the extraneous and irrelevant matters which were thrown into it, and it presents the simple case of a man with a small family who had emigrated to the State at his own expense, and who desired to relinquish his previous occupation of printing and dedicate himself to agriculture and stock-raising; and, for that reason, asked that land might be granted to him for the purpose. He did not even allege that his family was so numerous that the quantity of land which the law directed to be assigned to a settler, was insufficient to enable him to carry out his object; nor did he intimate, that, by industry, he would be able to cultivate more than a labor, or that he had a larger number of stock than twenty-four labors would pasture—or that by his activity in the "new settlement" to which he had annexed himself, (he had annexed himself to none) he had ameliorated its condition, increased its resources, or defended it from its enemies, and had thereby offered inducements to others to settle in it.

The previous sufferings or services of Mr. Bangs in the Revolution of Mexico, had nothing to do with his right, under the, law to a grant of land as a settler in Texas. Had he applied to the Congress, a statement of these sufferings and services might have been available in inducing that body to give him some compensation; or, if they were of a character which entitled him to a military grant, he might have obtained such an one, had he asked for it: and for all this Court knows, or can know, he may have applied for and obtained such a grant; but whether he did or not, this is not a grant for military services, and no consideration for a grant of that character can be invoked in aid of it.

The services of Mr. Bangs, as a printer, did not entitle him to a grant of land, under any law that we have seen; and if the concession was made in consideration of such services, it was without the authority of law, and void. (Patterson v. Winn, 6 U. S. Cond. R. 356-7; Polk's lessee v. Wenda, 3 Id. 286; Wilcox v. M'Connell, 13 Pet. R. 498.)

But, if the matters stated in Bangs' petition were sufficient

(if true) to have entitled him to an increase of the quantity of land allowed to ordinary settlers, still there was no legal evidence that the allegations of the petition were true. The law prescribed the mode by which evidence should be obtained and communicated to the executive: it was, "the separate report "upon the subject, that shall be rendered by the Ayunta- "miento and Commissioners." (Laws C. T. p. 18, Art. 17.) It is hardly necessary to repeat that the Ayuntamientos, referred to, were those of the municipalities in which the lands were situated and the settlements made. (Holloman v. Peebles, 1 Tex. R. 697-8.) This petition was referred to the Ayuntamiento of Leona Vicario. That body had no jurisdiction to investigate the matter; but, if it had, its report did not contain the evidence necessary to authorize the grant. It sustained the petition in the fact that Bangs was a married man, having a wife and two children, and that he and his wife had so conducted themselves as to bring no discredit to the State. It did not even recommend that the grant should be made; it referred, it is true, to his office of printer, but in a way that afforded no strength to the claim, because that it showed that in consequence of it, he had been relieved from all other public duties.

In denying that the Governor of Coahuila and Texas had authority, under the circumstances presented in this case, to make the grant, we are not seeking to controvert what we admit to be a general legal principle, that the acts of public officers, within the scope and limit of their jurisdiction, are presumed to be in accordance with the law. But the jurisdiction of the officer, over the subject matter, must first be shown to exist, before any such presumption arises in his favor. Jurisdiction is never presumed. In this case, the record not only does not show that the Governor had jurisdiction; but it shows affirmatively, that the facts necessary to give it, did not exist. Had it been entirely silent, there might have been some plausibility in urging the presumption that they did; but when the grounds upon which he acted (the petition of Bangs

and the report of the Ayuntamiento of Leona Vicario) are incorporated in the concession, as the foundation of it, there is nothing left for presumption; and, if these do not warrant it, it would be presuming against the record and against the facts, to suppose that there was anything behind which would sustain it. (1 Pet. R. 340; 2 Pet. Cond. R. 100; Cox, Dig. p. 21, Sec. 60; Id. 413, Sec. 37; 8 Wheat. R. 108.)

It may be urged here, as it was in the Court below, that it will be presumed the Governor had other evidence before him, when he made the concession, than what appears in it, because Mr. Bangs, in his petition, referred to certificates marked 1, 2 and 3, which he said he had duly exhibited.

The jurisdiction of the Governor, to augment the quantity of the land allowed to settlers, was a limited one, to be exercised only in the precise cases which the law authorized; and, when exercised, the facts upon which it was based, must be shown. Hence the practice of incorporating those facts in the title, in order that it may be seen that the authority to make it, existed. We are therefore not at liberty to presume anything which does not appear in the title. (3 Yerg. R. 366, 395; 5 Pet. R. 672; Hard. R. 493; 7 Mon. R. 221.)

But, if presumptions could be entertained in this case, nothing could be presumed, in favor of this title, from the reference to certificates 1, 2 and 3, in the petition, because it shows they were only offered to prove the previous sufferings and services of the applicant; and, as those sufferings and services constituted no legal ground for the grant, the proof of them would not have conferred jurisdiction on the Governor, to make it. The only thing which could have conferred that jurisdiction, would have been the report of the Ayuntamiento of the municipality in which Bangs settled, that he had emigrated to the country, separately and at his own expense, and had annexed himself to a "new settlement;" that he had been put in possession of the land to which he was entitled under the law, by the "political authority" of the settlement, and, in consequence of his "family or industry," the quanti-

ty assigned him was insufficient for his actual wants, or, that he merited a larger quantity, in consequence of the benefits he had conferred upon the settlement by his "activity."

None of these facts appear; but, on the contrary, a state of facts is presented, which shows absolutely that they did not exist. It is not, then, a question of the wrongful exercise of power, after jurisdiction had attached, we urge, but it is one of a usurpation of jurisdiction, where none existed. If the facts upon which the Governor acted were not such as would give him jurisdiction, under the law, his act was a nullity, "and could give no right and afford no defence." (Sutherland v. De Leon, 1 Tex. R. 310)

But, if the concession were good, the title issued by the Commissioner, upon it, in October, 1834, is bad for a variety of reasons. 1st. The land was conceded for the sole purpose of being occupied and devoted to agriculture and stock-raising, by the person who asked for it. The actual settlement and cultivation of it was the expressed and only consideration for the grant; and, if the evidence shows that Bangs did not give the consideration, and was incapable of giving it at the time the title was issued, it was void for the want of consideration —it was a *nudum pactum*.

It is seen, from documents connected with the title, that two leagues of land on the Brazos river, a part of this concession, were deeded to Bangs by the same Commissioner, and that he was put in possession of them a month before the execution of the title to him for the four leagues on the Colorado. Now, if he was entitled to hold those two leagues, it was because he settled upon them, with the intention of cultivating them and raising stock in conformity with the terms and conditions of the concession; and, if he carried out or intended to carry out in good faith that object, he could not have performed the conditions of his grant in respect to the lands on the Colorado; because he was incapable of settling upon and occupying both places at the same time. We do not mean to say that a man cannot have the constructive possession of

two tracts of land at the same time, or that, in legal parlance, he could not occupy them both. We admit, that, in contemplation of law, an occupation by his tenants or servants would be his own occupation; but the occupation contemplated by this grant, and which was the consideration for it, meant something different from an occupation by tenants or servants. The land was given to him as a gratuity. He asked for it that he might have a home where he could dedicate himself to agriculture and stock-raising—not to sell, or rent, or speculate upon. His personal occupation of it was the consideration and motive for the grant; and, when he was put in possession of, and received a title for, the lands on the Brazos, its object and purposes were accomplished. The concession had then performed its office. The grant could not be divided. (10 Pet. R. 309, 311.)

The title, in this case, was never perfected. The delivery of the corporeal possession of the land, by the Commissioner to the grantee, was essential to its perfection; and more especially was this the case in a grant, where the actual possession and occupation of the land was the sole consideration for the grant. The record shows that Bangs never was, at any time, upon the land, or with the Commissioner, to receive either the possession or the title. Every thing that was done in the matter, was done by his attorney; and, if it were competent for him to receive, in the name of his principal, the "formal" possession which the law requires to be delivered, and the delivery of which was a condition precedent to the final consummation of the title, that possession was never delivered, even to him. The deed was executed at San Felipe, near one hundred miles from the land; and it is seen, from the language employed, that the possession was then and there delivered. This, of course, could only have been a fictitious, nominal possession—certainly not a corporeal one, by livery of seizin, such as the law manifestly contemplated. Besides, it was a possession given without citing the adjoining proprie-

tors, one of whom was Haggard, under whom the plaintiff claims. (Laws C. & T. p. 71, Art. 4.)

The concession was of no value, until the precedent condition of settlement was performed, and could not be the foundation of a title. Such was the rule of the Spanish Law; (2 White Recop. 283;) and such was the rule asserted and reiterated by the Supreme Court of the United States in a class of cases from Florida precisely similar to the present one. (Kingsly's case, 12 Peters, 476; Mills', 12 Peters, 215; Seatons & Sibbald's, 10 Peters, 311, 313; Wiggins', 14 Peters, 334; Buyck & O'Harra's, 15 Peters, 215 and 275. See, also, United States v. King, 7 How. R. 833; and Menard's heirs v. Massey, 8 Id. 293.)

Another objection, and one which we consider fatal, to the deed executed by the Commissioner, is, the land was not surveyed previous to its execution, according to law, or by any officer known to the law. In the application for the deed, it is stated that the attorney of Bangs had caused the land to be surveyed in March, 1832, by Thomas H. Borden. The testimony says the survey was made by Pratt Coleman, a different person altogether. But, whether surveyed by one or the other of them, neither had any authority to make it. If made, it was a private survey, which no one was bound to respect; and it conferred no legal rights, upon the person for whom it was made. The Commissioner, however, adopted the statement made by the attorney in his petition, and assumed that the land was surveyed by Mr. Borden; but of this he could have had no official knowledge, because his own appointment as Commissioner was not made for more than two years after the time at which it was represented the survey was made. Who was Mr. Borden? Is there any evidence before this Court, or was there any before the Commissioner, upon which he could act, under the law, to show that Borden was authorized to survey the public lands and thereby to sever them from the public domain, to the prejudice of the rights of others? The 7th Article of the Commissioner's instructions (p. 71) made it his

duty to appoint the Surveyor and to require him to take an oath faithfully to execute the duties of his office; and the 24th Article of the same instructions, made it his duty to "take "special care that the portions of land granted the colonists "by Articles 14, 15, and 16, (Col. Law,) be measured by the "Surveyors with the greatest accuracy, without permitting any one to take more land than what is pointed out by the law.

In this case the Commissioner did not appoint the Surveyor; he did not require him to take an oath faithfully to execute the duties of office; and he knew nothing about the measurement of the land and did not know but a much larger quantity was embraced in the survey, than was pointed out by the law or authorized by the concession. He blindly adopted the representation of the attorney, and executed the deed upon that representation. It would have been just as well, and as much in conformity with the law, had he executed the deed upon a survey made by Mr. Bangs himself.

Should it be said that these instructions were directory to the Commissioner, and that third persons could not be prejudiced by his failing to observe them, we would reply that this might be true, if the violation of the law had not been knowingly committed by the party himself. If, for instance, the Surveyor had been previously appointed by the Commissioner, or had been known as the Surveyor of the colony, and his acts, as such, had been recognized by the Commissioner previous to his making this survey, the party calling upon him to perform the work, might not have been required first to ascertain whether or not he had taken an "oath faithfully to discharge the duties of office." Finding him in office, the presumption would have been that he was legally there and qualified according to law, to discharge its duties. But when he (the party) gets his own private Surveyor, knowing at the time that he had not been appointed by the Commissioner, and had not taken the oath of office which the law prescribed, he can claim no presumptions in his favor; because there is nothing upon which such presumptions could be based. If reason did not

sustain us in this position, the authorities upon the subject are clear and conclusive.

A survey made by a Deputy Surveyor out of his district is void; and a patent cannot issue upon it. (Pet. C. C. R. 418; 1 Wash. C. C. R. 18, 27, 268, 312.) And why? Because, for the want of authority to make it. A Deputy Surveyor is a sworn officer, and, being such, his official acts, even out of his District, ought to be entitled to as much respect and more credence, than the acts of an individual who was not sworn and had no district. Would a survey made by a sworn County or District Surveyor of Harris county, in the county of Travis, possess any validity? And upon such a survey, would the Commissioner of the General Land Office be authorized to issue a patent? (1 Tex. R. 67, 77.)

In Barton v. Smith, (1 Rawle, R. 403,) it is said that a survey made previous to a warrant, is void. Why? Because the warrant confers the authority to make the survey; and without it the survey has no authority. "A survey made by the agent of a Deputy is void;" (7 Sergt. & Rawle, 185;) and the reason is, that a Deputy cannot appoint an agent and confer authority upon him—much more should a survey be regarded as void, when made by the agent or employee of the party for whom it was made. In the case of John Smith T. v. The United States, (10 Peters, 327, 334, 335,) it is emphatically stated that a survey of the public lands, by a private Surveyor, is void. "No government gives any validity to private surveys of its warrants or orders of survey."

But, if the objections to the Surveyor were removed, another question would arise—could the Commissioner have legally executed a title, upon this survey? Did he know that land, surveyed more than two years before he came into office, was "measured by the Surveyor with the greatest accuracy" and that the party had not been permitted to take more land than he was entitled to? (Laws C. & T. p. 73, Art. 24.)

The Colonization Law of March 24th, 1825, under which the concession purports to have been made, was repealed in

1832, by the 38th Article of Decree 190; (Laws C. & T. p. 193;) and when the title was issued in 1834, there was no law in existence, which authorized it: and this objection, apart from all others, must prove fatal to the title. It is true, the 16th Article of the same decree saved the concession; but it was preserved only as a concession—an inchoate right, which could not have been perfected into a title, after the repeal, without the farther action of the Legislature. It stood, then, like an order of survey obtained "from a legally authorized Commissioner," prior to the Act of the Consultation closing the Land Offices. These orders of survey were preserved by the Constitution of 1836; but they could not be matured into a title, without legislative action; and hence the 12th and 20th Sections of the General Land Law of 1837. (Hart. Dig. Art. 1848, 1856.) This Court has frequently decided that applicants to obtain titles upon these orders of survey, "must com-"ply with all the requisites pointed out by the Land Law "of 1837." (3 Tex. R. 239; Dallam, 381.)

The repeal of a law, pending a proceeding under it, stops all further proceedings. Subsequent acts are void. (8 Blackf. R. 513; 5 Id. 195; 1 New Hamp. R. 61; 1 Gallison, R. 177; 5 Cr. R. 281; 2 U. S. Cond. R. 256, 346, 388.) By the 29th Article of Decree 272, (p. 251,) the decree 190 was repealed; but there is nothing in the repealing Act, which revived any portion of the previously repealed law of 1825, except the provision for issuing titles to the inhabitants of the frontier of Nacogdoches and those East of Austin's colonies. The augmentation spoken of in the 23rd Article, to families who had emigrated separately and at their own expense, manifestly referred only to the additional labor, which was to be allowed under the 16th Article of the Law of 1825, to those who settled in a colony within the first six years after its establishment; and a new mode was provided for obtaining titles to those augmentations, different from any that is found in the law of 1825. Such an augmentation or grant, as is claimed in this case, was evidently not provided for, or intended to be provided for, by

decree No. 272. And if it had been, it would not make the title good; because, in executing it, not a single provision of the law was complied with. (See Articles 32, 33, 34 and 35 of decree 272; also Articles 15 and 19 of the same decree, respecting the appointment and qualification of Surveyors.)

That the entire law of March 24th, 1825, was not intended to be revived by decree No. 272, is shown by the fact that as much of it as was necessary for issuing titles to the inhabitants of the Nacogdoches frontier, was specially revived—*inclusio unius est exclusio alterius*—and is farther shown by the new provision made for issuing titles for the augmentations allowed under the 16th Article of the old law. If it had been intended to revive, the whole of that law, this new provision was unnecessary.

Decree 309, of the 2nd of May, 1835, provides that titles shall be issued, to all persons who emigrated to the country previous to that time, in accordance with the law of the 24th of March, 1825, "agreeably to the Commissioner's instructions of the 4th of September, 1827." (Laws C. & T. p. 297.) Here, then, is a revival of the law of 1825. Its provisions are again brought into action—and it it is the first and only law, under the authority of which a title could have been issued to those who claimed under the law of 1825, after its repeal in 1832. This revival, however, does not give validity to the title issued by the Commissioner Lewis to Bangs in 1834: because the title was issued before the reviving decree was passed, and was not, in any particular, in conformity with the law of 1825 or the Commissioner's instructions in 1827. But the title to Haggard, of May 21st, 1835, comes directly within the spirit, intention and provisions of the decree No. 309, and is protected by it.

The 26th Article of the Colonization Law of 1825, (p. 19,) presbribed the term of six years as the period within which the "new settlers" shall occupy and cultivate their lands, otherwise they shall be considered as renounced. Now, if the concession of six leagues of land to Bangs had the author-

ity of law to support it, at the time it was made, still, being upon the consideration of settlement and cultivation by him, that condition must have been performed before a perfect right to the land, was, or could be vested in him, and if he failed to perform it within the time limited, the law considers that he had renounced all right which he acquired under the concession. (Holloman v. Peebles, 1 Tex. R. 673; Horton v. Brown, 2 Tex. R. 96.)

The concession was made in 1830; the land was surveyed, if surveyed at all, in 1832; and the record shows that Bangs never settled upon, occupied or cultivated it at any time, and that there was no attempt to occupy it by any person claiming under him, until 1840, and then only by a widow woman, under a lease of a few acres made to her by the attorney.

Whether the grantee could have taken the possession immediately after receiving the concession or not, is a question not now necessary to be discussed. He unquestionably could have done so immediately after his survey: that is, if his survey was a legal one—because a legal survey was the seperation of the land from the mass of public domain. A failure to take the possession for more than six years after the right to do so existed, was, in the language of the law, a renunciation of the right. (1 Pet. R. 635; 13 Pet. R. 498.)

This is not a grant within the meaning of that clause in the 10th Section of the general provisions of the Constitution of the Republic, which exempts citizens from the obligation to reside upon their land: because the whole contents of the first branch of that Section show that the mind of the framer of it was directed to that class of the citizens whose claims for headrights did not exceed one league and labor; and this is rendered more manifest by the 24th Section of the General Land Law of 1837, which, after releasing grantees from the performance of the conditions of their grants, provides that this release "shall not extend to any grantee or individual, for a greater amount of land than one league and one labor."—(Hart. Dig. Art. 1860.)

It is not admitted that the possession of Mrs. Burnet in 1840, under a lease from the intervenor, was a compliance with the consideration for which the concession was made, viz: that Bangs himself should settle upon it and dedicate himself to agriculture and stock-raising. Besides, Mrs. Burnet's possession will hardly be construed to extend beyond the limits of her lease; and the testimony shows that she only leased a small quantity and agreed to put in cultivation twenty acres. (Acts 4 Congress, p. 91, Sec. 21; 1 Tex. R. 779.)

We regard this grant as essentially different from one acquired by purchase under the 24th Article of the Colonization Law of 1825. In a grant of that kind, the main consideration was the price; and the fee immediately passed from the government to the grantee. The conditions of settlement and cultivation are subsequent and subordinate to the main consideration; and although the grantee might have been divested of the fee, for the non-performance of the subsequent conditions, yet that was a matter between him and the grantor. But, in this case, the main consideration for the grant was settlement, cultivation and stock-raising; and the performance of it was precedent to the right to hold the land.

But, in fact, there is nothing in the 24th Article, which requires settlement and cultivation to perfect the title; they are not conditions prescribed by law to the grant; and the 27th Article, shows that the absolute fee passed to the grantee, by the grant, became the right of alienation, one of the strongest evidences of dominion, is shown to exist in him, even though he had not settled and cultivated.

The term "new settler," in the 26th Article, was manifestly not intended to apply to purchasers under the 24th Article.

But, if the Court decide, in view of all the circumstances, that the grant to Bangs, under which the intervenor claims, is a good one, then the question arises—Which is the better title, Haggard's or Bangs'? And this brings us to the inquiry presented in the early part of the argument—At what time did Haggard's right commence? The evidence shows that

he was in the country in 1830; that he settled the land claimed by him and improved it in 1831; cultivated it in 1832, and continued to reside upon it until he was probably driven off by the Indians; that he stated, and it was understood by all, that he settled it as one of Milam's colonists, whose contract was then in force; and that it was universally recognized and considered from that time as his headright as one of the colonists; and that he never abandoned the country or the settlement, but remained as near the land as his personal safety would allow, and that he performed that essential and meritorious part of the duty, of a colonist, the protection of the settlement from Indian depredations as far as his ability permitted; that there never was a Commissioner appointed by the government to execute titles to the colonists of Milam, until 1834, and then not to them as his colonists, but as settlers under the 16th Article of the Colonization Law of 1825, and that he received a title from the Commissioner thus appointed, in May 1835.

Upon this state of facts, we insist that the right of Haggard to this particular tract of land commenced in 1831 at the time of his settlement upon it, and that his title, when issued in 1835, related back to the time when the right accrued. Article 9th of the Colonization Law of 1825, (p. 17,) declares that "Contracts made by the contractors or Empresarios with "the families emigrating at their own expense, shall be guar- "anted by this law, so far as they are in conformity with its "provisions." The report of Mr. Williamson, agent of the Empresario Milam, shows that Haggard settled on the land under a contract with him. What was that contract? Most manifestly that Haggard should receive a title to the land, upon which he thus settled as a colonist.

It is a principle in equity, that the patent which is the consumation of the title, relates back to the inception of title; and therefore, in a Court of Equity, the person who has first appropriated the land in contest, has the best title. (Taylor & Quarles v. Brown, 2 U. S. Cond. R. 243; 9 Cr. R. 19.)

A deed, executed in pursuance of a previous contract, relates back to the time of the contract, and covers all intermediate acts. (1 Johns. Cas. 81, 85; Vin. Abr. Tit. RELATION, 288-9; 3 Penn. R. 428.)

A subsequent grant, upon an elder entry, will vest a good title against an elder grant. (Anderson v. Cannon, Cooke, R. 27; Polk's Lessee v. Wendal, 9 Cr R. 87; Garretson v. Cole, 2 H. & McH. R. 459; West v. Hughes, Har. & Johns. R. 6-299; Ross v. Reed, 1 Wheat. R. 482; Bodley v. Taylor, 2 U. S. Cond. R. 228; 5 U. S. Cond. R. 271; 1 Pet. R. 664, 667.)

Which of these parties in point of fact had the oldest entry? Haggard actually settled in 1831, as a colonist.

This was notorious and direct notice to all who desired to locate. Bangs, without giving notice to him, (though living upon the land,) or to any other person, had it privately surveyed in 1832, by an unauthorized Surveyor; made no record of his entry or survey in the public office or with any known officer of the country; and in 1834 procured a title to be executed at a remote and distant place, (still without notice to Haggard,) which title he did not place upon the records of the municipality or country, until 1838.

According to the doctrine of relation, we insist that Haggard's deed, though, not executed until 1835, related back to his inceptive right in 1831, and that therefore he had the elder right.

Objections were made, at the trial below, to the introduction of some of the intermediate conveyances from Haggard to Jenkins the plaintiff. We shall not notice them here, 1st, because, being general, without any specification of the grounds upon which the objections were made, the Court very properly overruled them; and 2nd, because, upon examining the documents, we can perceive no valid objection to them. (Wallis v. Rhea & Ross, 10 N. S. Ala. R. 453.)

It was also urged below, as an objection to the commission and authority of Talbot Chambers, who executed the title to

Haggard, that Elguizabal, who gave the commission as Governor of the State of Coahuila, was not the legitimate Governor, but a usurper. The commission was issued on the 21st of October, 1834. (Rec. p. 19, 22.) Whether Elguizabal was in fact the Governor, or not, at that time; or whether he attained to the office by force or by law, the decrees do not show, and we have had no means of ascertaining; but we find by decree 292 of the 12th of March 1835, that he was the Governor previous to that time and recognized as such by the Congress; and his resignation of that office was on that day accepted by the Congress, and the executive power of the State was then vested in Jose M. Cantu. (Laws C. & T. p. 281.)

If we have succeeded in showing that either the concession or title to Bangs, was not good in law, or that the title to Haggard was elder and superior, then the charge of the Court to the jury was erroneous, and the judgment must be reversed. We think that the title of Bangs is clearly and incontrovertibly void; and, if so, the intervenor having relied upon no other, this Court, (the evidence being all in the record) will give such a judgment as the Court below should have given—a judgment for the plaintiff for the land in controversy.

*T. J. Chambers*, for defendants in error. These are kindred suits, (Blakey and others v. Chambers, and Jenkins v. Chambers and others,*) involving facts and principles almost identical. Each is for land covered by two conflicting Mexican titles; and the same title is relied upon by the same party in both the cases on one side, and on the other two other titles are set up, one in each case issued by the same authority. It is therefore proposed to discuss both cases in the same argument, and to submit them to this Court on the same brief. The records will be referred to by their respective numbers "53" and "54." The clearest copies of the documents used in the trials below, are contained in "Record 53;" and the

*The opinion delivered in this case disposed also of the case of Blakey and others v. Chambers. Rep.

Court is requested to refer to the original Spanish documents, as the translations are very defective. The facts and documents in both cases are, by agreement, to be used in either or both indifferently, with such exceptions as will be presented in the argument. The records are imperfect; and each will be used in either case to supply any deficiency in the other, the great object before this Court being to try the relative strength of the titles, upon all their merits, with a view to an end of litigation between the parties.

In "Record 54," T. J. Chambers was the plaintiff below, and is the appellee in this Court; and he claims under a grant and title of possession made to Jose Manuel Bangs, the grantee, by the Governor of the State of Coahuila and Texas, on the 21st day of May, 1830, and the title of possession by Ira R. Lewis, as special Commissioner for that State, on the 24th day of October, 1834.

H. P. Hill and M. S. Patton were intervenors below, and are the only parties prosecuting the appeal here; the other parties defendant having acquiesced in the judgment below. The intervenors Hill and Patton claim under a title issued in favor of Benjamin Tennill, on the 1st day of June, 1835, by Talbot Chambers, as Commissioner for the State of Coahuila and Texas. The land was never settled or occupied by Tennill, or any claimant under him.

In "Record 53," James R. Jenkins was the plaintiff below and is the appellant here; he claims under a title made in favor of James Haggard, on the 21st day of May, 1835, by Talbot Chambers, as Commissioner for the State of Coahuila and Texas.

T. J. Chambers was an intervenor below, and was really the only party having any interest in the defence. He is the appellee here; and he claims, as in the other case, under a grant and title of possession made to Jose Manuel Bangs—the grant by the Governor of the State of Coahuila and Texas, on the 21st of May, 1830, and the title of possession by Ira R. Lewis, as special Commissioner for that State, on the 24th

day of October, 1834. The conditions of payment of the government dues, and occupation and cultivation of the land being the only ones appertaining to the Bangs grant, were all duly performed within the time prescribed by the law. These facts were not contested in either suit. The benefit of "settlement" is claimed for Haggard as early as 1831 or 1832; but, on the other side, it is charged and shown that the settlement was illegal and without authority; that he was a settler in bad faith, knowing the existence of the other claim, and that he abandoned the land in 1832 and never returned to it; and that he never brought his family to the country. These are the only circumstances that distinguish the case from the other.

In the progress of the argument, for convenience, one side of the case will be frequently referred to as the "Bangs claimant," and the other as the "Talbot Chambers claimants." Thus it will appear, that, in "Record 54," the Bangs claimant was the plaintiff, and the Talbot Chambers claimants were intervenors; and that in "Record 53," the Talbot Chambers claimant was the plaintiff, and the Bangs claimant was intervenor; and that in both the trials below, there was a verdict and judgment in favor of the Bangs claimant.

Some exceptions were taken below to the mesne conveyances of the Talbot Chambers claimants; but, although it is believed that those exceptions might be sustained, they are waived now, in order that the battle may be fought here exclusively and fairly between the titles emanating from the sovereignty; the Bangs title on one side, and the Talbot Chambers titles, or titles issued by Talbot Chambers as Commissioner, on the other. In each case it behooves each party to demolish the title of his adversary; but, although either should achieve this, still he must sustain his own title or fall with it.

In this contest, may it please the Court, I shall endeavor to have fair play for the Bangs title; and, although I expect and hope to see a somewhat summary death inflicted upon the Talbot Chambers titles, I always feel a deep sympathy for the old

titles of the country, even in the hands of my adversaries; and therefore endeavor to take care that the mortal blows are given in a spirit of chivalry and fairness.

A grant made in contravention of law, or without authority of law, is void. (3 U. S. Cond. R. 356; 13 Pet. R. 498; 6 U. S. Cond. R. 356.)

The Talbot Chambers titles were issued not only without authority of law, but in direct violation of the law, and in defiance of several orders of the highest granting power. Elguizabal, who appointed the Commissioner Talbot Chambers, had no authority under the Constitution and laws of the State of Coahuila and Texas to make the appointment. He was a Colonel of the regular army of Mexico, who had deposed the Constitutional Governor of the State and usurped by force the authority of Governor for a few weeks, and during that time made the appointment. It will avail nothing, to say that he was Governor *de facto*. There was, at the same time, another Governor *de facto*, and Secretary of State. The licentiate Jose Maria Goribar was then acting and claiming to be Governor of the State of Coahuila and Texas; and Jose Maria de Aquirre was his Secretary of State. Both Governors *de facto*, with their respective Secretaries of State, were usurpers and had no authority under the Constitution and the laws of the State. The highest judicial authority of Texas declared them to be usurpers, and refused to recognize either of them as Governor. The Constitutional Governor, Francisco Vidaurri y Villasenor, was deposed by force on the 30th day of August, 1834; and, from that day, the executive power of the State of Coahuila and Texas was no more forever. From that day until the final separation of Texas, all was anarchy, usurpation, disorder, and confusion. The Constitution of the State was trodden down by usurpation and never again revived.

These historical and legislative facts will be sufficiently established for present purposes, by a critical examination of the book falsely palmed upon the people of Texas as the "Laws of Coahuila and Texas," from page 277 to the end of the book,

in conjunction with the collection of original authentic documents now presented to this Court. (See collection.) At present this subject will be discussed no further. The case before the Court does not require it—on some more appropriate occasion, when the decision of this Court must depend upon the political changes of those memorable and interesting times, they will be investigated and discussed more thoroughly and elaborately before this Court, and many more interesting documents shall be produced for their elucidation. Sufficient has been said to place this Honorable Court upon its guard. To recognize the acts of either of the usurpers Goribar or Elguizabal, would be attended with dangerous consequences to the State of Texas.

Supposing Elguizabal's authority as Governor to have been valid, still he had no power, under the laws of the State, to make such an appointment as that under which the Talbot Chambers titles were issued. The commission of Talbot Chambers (if the simple order under which he acted can be considered a commission) expressly prohibited him from regarding the colonists to whom he was to issue titles, as belonging to Milam's contract of colonization. That contract, having been entered into on the 12th of January, 1826, expired by limitation of time, and was forfeited by Milam, on the 12th day of January, 1832, six years after its date. Milam never introduced a single colonist into the country within the term limited by law; and, at the expiration of that term, the Governor of the State, Letona, in obedience to Articles 10 and 11 of Decree 128 "Laws Coahuila and Texas, p. 146," published to the world that the contract was forfeited by a non-performance on the part of the Empresario, and that the land had again become a part of the vacant domain of the State. Elguizabal then very properly prohibited the Commissioner Talbot Chambers from issuing titles to any persons as colonists of Milam's colony. The proof is clear and explicit, that neither Haggard nor Tennill came to the country as Milam's colonists; "they came on their own hook." It follows, incon-

testibly, then, that the titles issued to these parties by Talbot Chambers in 1835, as colonists of Milam's colony, were not only without authority of law, but in direct violation of the law and in disobedience of the declarations and orders of two Governors, the highest granting power, and of the express terms of the commission itself under which he acted. But, if such a construction can be given to the Talbot Chambers titles, as to enable them to serve as titles to the parties under the 16th Article of the law of colonization of 1825, as independent colonists, then it is insisted that the Governor of the State had no authority on the 31st of October, 1834, under the laws of the State to confer such a comission as that made in favor of Talbot Chambers, at least to put any colonist in possession of land and issue titles to them, except such as had secured to themselves the benefits of the law of colonization of 1825, prior to its repeal, by a compliance with its preliminary requirements. Not having come to the country under any Empresario contract, Haggard and Tennill could only have entitled themselves to the benefits of that law in the manner pointed out in Articles 1, 2, 3, 4, 16, and 18. The simple act of coming to the country, and being in it, entitled them to nothing. Many persons thus came in the pursuit of various objects, without the slightest intention of becoming colonists or of identifying themselves with the country; and the government considered them as visitors and transient persons, until they manifested their intention to take the benefit of the law of colonization, in the manner prescribed by that law. No person was permitted to appropriate land by his own act, without applying to some lawful authority. (Decree No. 13; Art. 9, Laws Coahuila and Texas, p. 12.) His compliance with the provisions of the law already referred to, would have operated as a contract with the State. The State had given its consent in the law and by the law; and a compliance, on the part of an immigrant, with the provisions referred to would have been consent given on his part and would have consummated a contract of colonization with the State,

which might have survived a repeal of the law under which it was made, and come under the provisions of the 16th Article of the law of colonization of 1832, (Laws Coahuila and Texas, p. 191,) and of the 30th Article of the land law of 1834. (Laws C. & T. p. 251.) But Haggard and Tennill never presented themselves to any legal authority to claim land in the country, until 1835, when they received titles from Talbot Chambers. In the mean time, the law of 1825 was repealed by that of 1832; and that of 1832, by that of 1834; so that they had lost the benefits of both, by declining or failing to comply with their preliminary requirements. Thus they had no contracts pending with the State, in 1835, when they got their titles; the laws had been repealed long before they sought the benefits of them, and their titles were without the authority of law. The Governor, himself, could not have granted them lands; much less could he give power to another to issue such grants in their favor.

But, if it had not been too late in 1835, for Haggard and Tennill to come under the contract of the Empresario Milam, still, Williamson could not have acted as the agent of the Empresario for the purpose of receiving and admitting colonists; this was a high personal trust, involving a delicate responsibility, and could not be delegated to another without the consent and previous approbation of the government. (Art. 1 and 2, Instructions Com. Laws C. & T. p. 70.)

But Haggard never could have obtained a league of land, under the law of colonization of 1825, whatever might have been his diligence, without bringing his family to the country: and the proof shows that he never brought it, and that he never intended to bring it. He therefore obtained his title in fraud of the law. (Holliman v. Peebles, 1 Tex. R. 673; Horton v. Brown, 2 Tex. R. 789.)

Haggard was a squatter in bad faith, with notice of the existence of the adverse title for the land. He evidently never expected to hold the land; he abandoned it soon after its settlement, and never returned to it. In 1835, seeing an oppor-

tunity to make a speculation, he surreptitiously obtained a title and immediately sold it.

The title of Jose Manuel Bangs, under which the defendant claims the land, is perfect in form, completely in accordance with the law, and highly meritorious in its inducements. It stands firmly and impregnably on the Articles 10, 16, 17, and 18 of the law of colonization of the 24th March, 1825; it was confirmed by the Article 16 of the law of colonization of the 28th of April, 1832; and it was again confirmed by the land law of the 26th of March, 1834, Articles 23, 24, and 30. (Laws C. & T. p. 15, 189, and 247.)

Bangs was not regarded or treated as a foreign immigrant colonist. He was a Mexican citizen by virtue of important patriotic services rendered in the first establishment of the liberties and independence of the country. He had illuminated their path onward to success by the light of the press, and aided in opening it sword in hand; suffering more than death in the cause he had espoused. And he was present in the country at the adoption of the Constitution of the United Mexican States and of that of the State of Coahuila and Texas; and by both he was recognized as a Mexican citizen, entitled to all the rights and privileges of a native, save those specially excepted. He was also a citizen by an honorary Act of the Congress of Coahuila and Texas. (Const. U. M. S. Art. —; Const. C. & T. Art. 17, 18; Laws C. & T. p. 139, Decree No. 112; 1 Mexican Sala, p. —; 5 Mexican Febrero, p. —.)

Services rendered to the country were always wisely and justly held, throughout the whole Spanish and Mexican legislation, as the highest consideration and inducement for grants of land; and they entitled the meritorious parties to a preference over all others. (Colonization Law of 1823, Art. 18; Col. Law of 1824, Art. 9; Col. Law of the State of C. & T. of 1825, Art. 10; Col. Law of C. & T. of 1832, Art. 26; Col. Law of the State of Tamaulipas of 1826, Art. 13 and 25.)

The jurisdiction and authority of the Governor, to make the

augmentation grant in favor of Bangs, is clear and explicit in the law; and the Ayuntamiento of Leona Vicario and the Governor of the State gave this indisputable construction to it and acted upon it. (Col. Law C. & T. Art. 17.) This action was in strict conformity with the law; it needs no legal presumption to prop it. Although Bangs established his claims on the ground of patriotic services, by three distinct documents, as the grant itself shows, taken in connection with his petition, the Governor, in order to comply fully with the forms of the law, referred the application to the Ayuntamiento of Leona Vicario, the applicant's place of residence, and took its report on the subject. The Ayuntamiento, in its report, very properly confines itself to the subjects committed to it by the 17th Article of the laws referred to by the Governor's order of reference: the family, industry and activity of the applicant; and as the industry and activity of the applicant were exercised under the direction and inspection of the Governor himself, the Ayuntamiento very properly and with delicate respect, well understood and almost always practiced by Mexican authorities towards one another, refers him to the evidence of his personal knowledge upon these particulars; and declares that it appertains to him to determine upon them. The attention of the Court is called particularly to the original Spanish language of the report, as the translation in the records is wholly wrong. A true translation is here given:

"Most Excellent Sir: The Ayuntamiento of this city, in "compliance with the superior decree of your Excellency, of "the 27th of January last, to the representation of the citizen "Jose Manuel Bangs, upon the subject of lands being given "to him in the department of Bexar, says that Bangs is mar- "ried to a lady of his country, North America; it is known "that he has two children, and that his public conduct and "that of his wife is good and orderly, without ever having "given room for anything to be said to injure them in public "opinion; and that as he discharges his office of printer un- "der the direction and inspection of your Excellency, it ap-

"pertains to the Supreme Government of the State to deter-"mine whether he is entitled to what he solicits."

It was as much the policy of the law to promote and foster the establishment of the arts and mechanical industry in the new settlements, as agriculture and stock raising; and no mechanical art could have been more important than that of printing; and surely no artizan could have been more worthy of being preferred and favored over other persons, in the distribution of the public lands of the State, than one who was exercising his art under the personal direction and inspection of the government itself, and who had contributed with many sufferings, and the implements of his art in one hand and the sword in the other, to the establishment of the liberties and independence of the country. (Law of Col. of 1825, Preamble and Art. 33, 36, 10; Instruc. to Com. of 1827, Art. 15.)

To report information to the Governor, with regard to the family, industry and activity of applicants for augmentation grants of land, belonged to the respective Ayuntamientos and Commissioners; to determine the amount and make the grant, appertained to the Governor: and this was the uniform practice. The information with regard to the family, industry and activity of applicants, was properly derived from the Ayuntamientos and Commissioners; and that with regard to their patriotic services and claims of this nature, from any source satisfactory to the Governor, who was the granting power. The jurisdiction, the power to grant and to augment, was committed by the law, and the practice under it, to the discretion of the Governor; and this discretion was exercised, upon all the information before him, derived from whatever source; and having exercised that discretionary power, his judgment and decision could not, certainly cannot now, be questioned. That the granting and augmenting power was committed to his jurisdiction by the law, is quite too clear to be disputed; and the information and reasons which determined his discretion, cannot now be fully known or inquired into. "It is a universal principle, that, where power or jur-

" isdiction is delegated to any public officer or tribunal, over " a subject matter, and its exercise is confided to his or their " discretion, the acts so done are binding as to the subject " matter; and individual rights will not be disturbed collat- " erally, for anything done by the exercise of that discretion " within the authority and power conferred. The only ques- " tion which can arise between an individual claiming a right " under the acts done and the public or any person denying " their validity, are power in the officer and fraud in the party. " All other questions are settled by the decision made, or the " act done by the tribunal or officer, whether executive, legis- " lative, judicial, or special, unless an appeal is provided for " or other revision by some appellant or supervisionary power " is prescribed by law." (United States v. Arredondo *et al*, 6 Peters, 691; Strother v. Lucas, 12 Peters, 410; De Lassus v. The United States, 9 Peters, 117.)

Leona Vicario was the place of residence of the applicant Bangs; his petition was therefore properly referred to the Ayuntamiento of that city. To have referred it to a remote Ayuntamiento, possessing no information upon the subject, would have been an absurdity. And it could not have been referred to the Ayuntamiento where the land was, which Bangs had selected, for the record shows that none was established there until 1834; and it could not have been referred to the Commissioner of the colony, for the record also shows that one was not appointed until 1834. But the Governor himself decided upon the proper Ayuntamiento, in making the reference; and settled the question. The law did not require that the report or proof should be given with the grant. The report of the Ayuntamiento was indorsed upon the petition, and was copied with it by the Secretary of State, under the order of the Governor to give Bangs a copy of his petition, with the grant: the petition contained the designation of the land. The other evidence, referred to by Bangs in his petition, with regard to his claims for services, consisting of three separate documents and being voluminous, was not copied

with the grant. It was not necessary. (1 Tex. R. 309, Sutherland *et al* v. De Leon; 10 Peters, 474, in Voorhies v. The Bank of the U. S.; 2 Howard, 343, in Grignon *et al* v. Astor *et al;* 2 Peters, 166; 1 Peters, 340; 11 Peters, 473; 16 Peters, 196; 14 Peters, 334; 16 Peters, 228.)

The record shows that the land was surveyed for Bangs as early as 1832, by Thomas H. Borden; and the special Commissioner Lewis, after authorizing and approving the same Surveyor, upon a re-examination had upon the land, of the survey already made, finding it perfectly accurate, approved it, put the party in possession of the land, and, in obedience to the superior order of the executive, issued the title of possession. The Commissioner declares in the title, that the citizen Thos. H. Borden was a "scientific and approved or authorized Surveyor." (The translation of this part of the title is wrong: see original, Record 54, p. 58.) One of the witnesses stated the Bangs survey was run off by Coleman at an early day; at whose instance, it does not appear; and it was also run for Bangs by Lockhart, soon after the grant was made by the Governor; but no proof was deemed to be necessary upon this subject. It does not appear clearly, from the title, by what authority the first survey by Borden in 1832 was made; but the presumption arises that it was made by order of the respective Alcalde, as authority was given to that officer in the grant, to put Bangs in possession of the land; and the special Commissioner Lewis, who was afterwards appointed, declares in the title that Borden was a "scientific and approved Surveyor." Nor does it appear certainly from the title, whether the special Commissioner Lewis caused the survey to be made at the time he issued the title of possession, or simply adopted the one made in 1832, after satisfying himself that it was correct; but the presumption of law arises that the special Commissioner had satisfactory evidence that the first survey was made by proper authority, or that he caused it to be re-examined, and finding it to be correct, approved and adopted it. It matters not which presumption we rely upon; either is

sufficient to sustain the survey; and both would be in accordance with the facts of the case. But it was not considered necessary to produce any proof except the title itself, upon these preliminary proceedings, except that the survey was correctly and faithfully made. These preliminary proceedings of the survey, having been merged and consummated into a title or patent, cannot now be inquired into in this collateral way; at least it cannot be done without the production of positive proof of fraud and illegality in the survey; and none such was or could have been produced on the trial; on the contrary, the proof on the trial sustained the survey, showing it to have been made with perfect accuracy and well defined limits properly marked.

If the principle should now be established by this Court, that, under the colonization laws of Coahuila and Texas, it was necessary that the surveys should have been made under the personal inspection of the Commissioners, at the time the titles were issued, or even expressly for the parties who received the land, nearly all of the old titles of the country would fall beneath its decision. It would be easy to prove that very few of the surveys of Austin's colonies were made under either the orders or inspection of the Commissioners or for the parties who received the titles for the lands. They were made by Surveyors approved or favored by the Empresarios or chosen by the colonists; were returned into the office of some Empresario or Commissioner, and were afterwards adopted by the Commissioners, according to the selections made by the parties interested; and titles were issued upon them. But no apprehension is felt that this Court will make a decision so destructive to the best rights of the pioneers of Texas; so variant from the equitable and conservative spirit of the laws at that time and the practice of the public authorities under those laws; and so little in accordance with the intimations already made by this Court, and with the wise and just decisions of the Courts of the United States on analagous subjects. This Court has already said upon the subject of such surveys

of land, "This is believed to have been a very general prac-"tice by the Surveyors under the Empresarios. If it had been "surveyed before the order of survey, the same Surveyor could "certainly, with propriety, swear to the correctness of his field "notes, as well and with as much truth as if he had waited "to receive the order before he made the survey." (Jones v. Menard, 1 Tex. R. 789; Polk's Lessee v. Wendal, 3 Cr. R. S. C. U. S. 323, 324.) "The laws for the disposal of public "lands provide many guards to secure the regularity of grants, "to protect the incipient rights of individuals and also to pro-"tect the State from imposition. Officers are appointed to "superintend the business, and rules are framed prescribing "their duties; these rules are in general directory; and when "all the proceedings are completed by a patent issued by the "authority of the State, a compliance with these rules is pre-"supposed. That every prerequisite has been preformed is "an inference properly deducible, and which every man has "a right to draw from the existence of the grant itself. It "would therefore be extremely unreasonable to avoid a grant, "in any Court, for irregularities in the conduct of those who "are appointed by the government to supervise the progres-"sive course of a title, from its commencement to its comple-"tion in a patent." The original grant to Bangs is itself locative and descriptive, when taken in connexion with his petition, which forms a part of it. Three distinct, notorious objects are called for; first "the old San Antonio road, above it;" second, "the western margin of the Colorado river;" and third "in Milam's colony:" and if the title of possession had been made on these calls, with terms sufficiently descriptive to be run out by a Surveyor, and rendered certain, it would have been a good grant to hold the land. "The want "of a survey does not affect the right of the party to the land "granted." (13 Peters, 134; 15 Peters, 224; 3 Cond. R. S. C. U. S. 363.)

But it is unnecessary to discuss this doctrine here. The Bangs survey was perfect; and the locative and descriptive

calls in the grant are sufficiently clear to give the title of possession issued in 1834 by the special Commissioner Lewis a relation back not only to the date of the survey made in 1832, but to the date of the original grant on the 21st of May, 1830. Great stress has been laid by opposing counsel, upon the division of the grant, and its location in two distinct places; and several cases were cited to sustain his position; but none of them were applicable to the case now under discussion before this Court. In those cases the grants were confined to specific locations. But Bangs, although his grant was for a designated place, was expressly permitted to make selections any where within the vacant limits of the State, if he could find lands which suited him better than the place he designated in his petition. The law no where prohibited the division of a grant; and sound policy and the custom of the country warranted such division. This was also the custom in Louisiana, Florida and Missouri when the grant was not confined to any designated locality; and a settlement upon any one of the divisions was considered a settlement of the whole grant. (United States v. Sibbald, 10 Peters, 321; United States v. Clark's heirs, 16 Peters, 228; Digest S. C. U. S. 362.)

Great stress has also been laid upon the repeal of the law under which the Bangs grant was made, prior to its completion by the title of possession. But this, if fatal to the Bangs title, I have already shown would be still more so to the Talbot Chambers claims. Bangs claims under the law of colonization of 1825; and so do the Talbot Chambers claimants. But Bangs claims the land on the 20th January, 1830, and received his original grant on the 21st of May, 1830. Haggard made an unauthorized and tempory settlement in 1831 and 1832, but never identified himself with the country by presenting himself before any lawful authority and claiming the land, until the 21st of May, 1835, The proof is positive that Haggard did not come as one of Milam's colonists, but "on his own hook;" if, therefore, he was entitled to anything

under the law of 1825, it was by virtue of Article 1, 2, 3, 4, 16 and 18. But he never complied with any of the requirements of these provisions. The law of 1825 was repealed by that of the 28th of April, 1832, which provided in its 16th Article, that such grants as that of Bangs should be carried out according to the laws under which they were made; but it contained no provisions for such persons as Haggard and Tennill, unless it may be found in Articles 18 and 24: and they never complied with the requirements contained in them. In 1833 the Governor consulted the council of State upon the subject of grants made under the law of 1825; and its decision was that they should be carried out according to the provisions of the laws under which they were made. (Collection old Doc. p. .) And the public records of the country show that the uniform action of all the functionaries of the State of Coahuila and Texas has been in strict accordance with this decision. The law of 1832 was repealed by that of the 26th of March, 1834, which also contains a provision in Article 30, that the grants or what is the same thing the contracts then pending should be carried out according to the law of 1825. All contracts, grants and concessions, made under the law of colonization of 1825, were contracts of colonization.

Those made with Empresarios contemplated a number of persons to be introduced into the country at the expense of the Empresario; those made with individuals under Article 1, 2, 3, 4, 16, 17, 18 and 24 of that law, looked to the individual alone with whom the contract of the grant or concession was made. These classes of colonists were regarded with favor by the law. The hardy and independent immigrant who introduced himself and family into the country at his own expense, was rewarded according to the 16th Article of the law by an additional labor; and, by the 10th Article, Mexican citizens were preferred over all others; and by Art. 10 and 17 the amounts granted to the claimants indicated might be augmented by the Governor, as high as eleven leagues, according to the family, industry, activity and patriotic services of the

party. It cannot, then, be rationally supposed that the Congress of Coahuila and Texas intended to neglect and abandon these favored classes of colonists in the 30th Article of the law of the 26th of March, 1834, where it is provided that the contracts of colonization already made shall be carried out in accordance with the Colonization Law of 1825. It cannot be supposed that its only object was to protect the speculating Empresarios and the helpless and worthless immigrants, who had neither the means nor the energy necessary to bring them to the country, without having their expenses paid by the Empresario; leaving wholly unprovided for, a majority of the new colonists of Texas and the very classes that had been previously regarded by the law with favor: for it is a fact, that a large majority of the colonists then in Texas belonged to those favored classes, being enterprising, independent immigrants, who had borne their own expenses to the country. Even those established in Austin's colonies belonged chiefly to those classes. (Houston v. Perry, 2 Tex. R. 40, Williams' testimony.)

It is therefore a fair construction of the law, that it was intended to cover and provide for all contracts made and pending under the law of colonization of 1825, whether with Empresarios regarding families introduced and to be introduced by them, or with individual independent colonists, regarding only themselves and their own families. This was, in fact, the only rational and just construction which it would bear; and accordingly this was the construction given to it by all the public authorities of the State of Coahuila and Texas, from the lowest to the highest. The Governor Vidaurri gave the construction to it expressly in conferring the appointment of special Commissioner on Lewis, to issue the title of possession to Bangs. The Governor Elguizabal (the Talbot Chambers Governor) gave this construction to it expressly, in conferring the appointment of Commissioner on Talbot Chambers, declaring explicitly at the same time that it was not for the purpose of granting titles to Empresario colonists, but to independent colonists under the 1st Article of the Law of Coloni-

zation law of 1825. And the records of the country show that this was the uniform construction given to the law, in all analagous cases, by the highest functionaries of the State of Coahuila and Texas. And this construction was in perfect accordance with a general principle of the Spanish Law then in force. If the repealing law had contained no provision for carrying out the grants, concessions or contracts made under the law repealed, according to its provisions, still this just construction would have been given to it under that principle. "La ley no dispone sino para lo futuro, y no tiene efecto relvo-"activo, pues de otro modo no habria libertad, ni seguridad, "ni propriedad, respecto de que una ley nueva podria venir "a quitar a los ciudadanos tan sagrados direchos: 'Leges et "constituciones futuris certum est dare formam negotiis; non "ad facta preterita revocare.' Asi es que si muere un pro-"prietario bajo el imperio de una ley que llamaba a tal par-"iente para sucederle, este pariente recogera la herencia, aunque "una ley nueva promulgada poco tiempo despues, del falle-"cimiento llame a otro pariente distinto. Asi es tambien que "si se establesco una ley erigiendo en delito una accion que "antes no lo era, no debe ser castigado el que la cometio "antes de publicarse la nueva ley. Asimismo debe decidirse "por la antigua ley, y no por la nueva, el contrato que se cele-"bro cuando aquella regia aunque se ponga la demanda en "tiempo de la segunda." (Escriche, Diccionario de Legis. Palabra, LEY. p. 373.)

All grants and concessions, made under the Law of Colonization of 1825, were contracts of *compra venta*. The contract of *compra venta* was perfected by the simple consent of the parties. If the case was one in which the law required that the consent should be given in writing, either party could repent until this was done; but, after the consent was given in writing, neither party could repent or revoke the contract. (1 Sala Lib. 11, Tit. X 1, 2, 3, 4 and 5.) In the grant to Bangs, his consent to the contract of *compra venta*, or purchase of the land, was given in his petition, and that of the government in

the concession. The consent of each party having been given in writing, the contract of colonization for the land designated, was perfect, involving mutual obligations; and neither could repent or revoke it. The obligations of the government were precedent, and those of Bangs were subsequent; those of the government were to cause the land to be surveyed, to put Bangs in the possession of it, to have the title of possession issued to him by its proper officer, and to give to him all that protection due from a government to its citizens; and those of Bangs were, to cause the land to be occupied and cultivated, and the stipulated price to be paid to the State, within the time prescribed by law. The issuing of the grant or concession by the government, on the 21st of May, 1830, completed a perfect contract of colonization for the land, between the parties: the consent of each had been given in writing; and the issuing of the title of possession on the 24th day of October, 1834, made a perfect title in the property, the fee, *el dominio*, had passed to Bangs. But if Bangs had failed to perform the obligations devolving upon him from the original contract consummated on the 21st of May, 1830, after the government had discharged its oblgation, in 1834, of issuing the title of possession, the government might, provided it still had continued to give to him the promised protection, have proceeded against him judicially, (not otherwise,) either to compel him to perform the obligations he had taken upon him in the original contract, or to compel him to surrender back the fee, *el dominio*, in the land, as the government might elect. But it could not elect to do both.

Having, then, shown the nature of the contract entered into between the parties, let us return to the question upon the repeal of the law under which it was made. It has been shown that the contract of colonization for the land was perfected on the 21st day of May, 1830; the consent of each of the parties, of Bangs and of the government, had been given in writing, and that neither party could afterwards repent or revoke the contract; but the Law of Colonization of 1825 entered into

and formed a part of the contract; and, so far as it regarded that contract, it could not be revoked or repealed. The repeal looked to the future, not to the past; no further contracts were to be made under it; but those already made were to be determined and carried out according to its provisions. To this extent, the Congress of Coahuila and Texas, by Article 16 of the Law of Colonization of 1832, and Article 23, 24 and 30 of the Land Law of 1834, showed conclusively that it did not intend to repeal it; and, in the place of the contracts being revoked by a repeal of the law under which it was made, the grant has received a direct legislative confirmation by the provisions, above referred to, of the repealing laws. And this construction of these provisions of the laws is also in strict accordance with another general principle of both Spanish and American law: I give the Spanish authorities; the American are already familiar to the Court:

"En las cosas dudosas se debe atender a lo mas verosimil; "y cuando la duda ocurra en alguna palabra, se debe interpretar; contra el que la dixo obscuramente." (Siete Partidas. P. 7, T. 33, l. 2; 2 Sala, Lib. III, Tit. XVII, Sec. 1.) "Las "palabras obscuras de los privilegios se deben interpretar lar- "gamente, ciudandose siempre que concuerden con la voluntad "del concedente." (Siete Partidas, P. 7, Tit. 34, l. 28.) "Cuya "doctrina, en cuanto a que deben interpretarse latamente, "la entienden los autores, cuando se trata de darles inter- "pretacion hacia el que les concedio: pero contra los par- "ticulares a quienes perjudica, son de interpretacion estrecha, "o deben restringirse; como lo prueba Gutierez, Lib. 3, prac. "quest. 22, n. 10; y Lib. 4, quest. 11, n. 2. (2 Sala, Lib. Tit. XVIII, Sec. 23.) Whenever the terms of legislation will bear different interpretations, such construction shall be given to them as shall be most conformable to natural justice and the previous views of the granting power, and most liberal to the party to be benefitted.

Guided by these just and liberal principles, the highest functionaries of the State of Coahuila and Texas held and construed

the provisions, contained in the 16th Article of the Colonization Law of 1832 and the 23rd, 24th and 30th Articles of the Land Law of 1834, to be a legislative confirmation of such grants as the one made to Bangs, and perfected them accordingly. The Supreme Court of the United States has said that "in cases depending on the statutes of a state, and more es- "pecially in those respecting titles to land, this Court adopts "the construction of the State, where the construction is set- "tled and can be ascertained." (Polk's Lessee v. Wendal *et al.*, 3 Peters, Cond. R. 323.) The construction given to the laws of a State by its own functionaries, is never questioned by the Courts of another country. (6 Peters, 691; 12 Peters, 410; 9 Peters, 117; 9 Cranch, 87; 6 Wheaton, 119; 2 Cranch, 358; 1 Cond. R. S. C. U. S. 421; 6 Cranch, 27; 4 Howard 37; 3 Cranch, 1; 2 Cond. R. S. C. U. S. 308; 1 Cond. R. S. C. U. S. 46; 5 Peters, 264; 13 Peters, 519 Holcombe Dig. S. C. U. S. 248, 249.)

The conditions of the Bangs grant were all performed to the letter. This was distinctly alleged in the petition; and the proof fully sustained the allegations. The grant is therefore absolute. (United States v. Clark, 9 Peters, 168.) The receipts presented on the trial show that the payments of the government dues were all fully made prior to the expiration of the term limited by the law and the grant; and the proof was full; and that the land was occupied and cultivated within the legal term, and these conditions, thus fulfilled, were the only ones attached to the grant. The proof shows that Mrs. Burnett, as early as the beginning of the year 1840, occupied the land, cultivated twenty acres of it, made valuable improvements on it, and held actual possession of it, for and in behalf of the Bangs' claimant, who paid her for the same; and that such actual possession was so continued in his behalf, by Mrs. Burleson down to the time of the institution of this suit. These facts were not controverted on the trials below, but some exceptions have been taken to their effect. It has been contended that the land ought to have been cultivated and occupied by

Bangs himself. The record shows that Bangs was a resident citizen of the country, in the employment of the government; and the Constitution of the Republic of Texas (Genl. Prov. Sec. 10,) exonerated him from the obligation (if any there ever was) of occupying the land himself. But no person, at that time at least, ever supposed that he could not have his land cultivated and occupied by his agents and servants, as well as by himself. This was the practice in very many instances in Texas; and this has been held to be sufficient, by the Supreme Court of the United States, in cases where the law required that the grantee should be an "actual settler," to enable him to hold the land. (Hickie *et al.* v. Starke, *et al.*, 1 Peters, 97.) And the general principal of the Spanish Law that, "Lo que uno hace por otro es lo mismo que si lo hiciere por si," is conclusive upon the subject. (2 Sala, Lib. III, Tit. XVIII, Sec. 62.)

It is therefore considered unnecessary to adduce arguments and authorities to sustain the charge of the District Judge, upon the subject of the performance of the conditions, to the effect that they could not be inquired into in a collateral proceeding like the trial below. For, although it is believed that the charge was correct in principle, and that abundant authorities and conclusive arguments might be presented to sustain it, yet as it was volunteered by the Judge, and wholly unnecessary under the proof presented, of a complete performance of the conditions of the grant, if this Court should consider it erroneous, it would not reverse the judgment and set aside the verdict of the jury rendered upon evidence so conclusive. It is evident that the charge could have had no effect or influence with the jury in making up their verdict. It was rendered upon proof of performance of conditions, and not upon the charge. "It can, therefore, afford no cause for "reversing the judgment. A verdict will not be set aside for "misdirection of the Judge, when it is manifest that the par-"ty complaining sustained no injury from the misdirection." (Mercer v. Hall, Adm'x, 2 Tex. R. 287; 23 Wend. R. 79;

Chandler v. The State, 2 Tex. R. 305; Holman v. Britton, 2 Tex. R. 297.)

The laws of limitation were duly pleaded by the Bangs claimant; and it has already been shown that it was proven on the trial, that he had held actual possession of the land covered by his title (though not of the part claimed by the Talbot Chambers titles) for more than five years, with his title duly recorded in the respective county. No actual possession was shown for the Talbot Chambers claimants, with titles duly recorded in the county. This is conclusive in behalf of the Bangs claimant, according to the decisions of this Court.—(Jones v. Menard, 1 Tex. R. 771.)

The Bangs grant being thus shown to be a perfect title, issued in complete accordance with the law, based upon inducements highly meritorious, and made absolute by a full performance of all the conditions, the Haggard claimants, even if they should achive the impossibility of having their title considered valid by this Court, must still rely upon the forlorn hope of establishing the position assumed by their counsel, that their title relates back to the time of the pretended settlement of Haggard. But even if they should succeed in sustaining this doctrine in the case of Haggard, it would apply with still greater force to that of Bangs. The record shows that Haggard squatted on the land in 1831 or 1832 and that he had notice of the existence of the adverse grant; that he abandoned the land in 1832 and never returned, and that his title is dated on the 21st day of May, 1835. It also shows that Bangs applied for the land on the 20th of January, 1830; that it was granted to him by the government, on the 21st of May, 1830, and that the title of possession was issued by the Special Commissioner on the 24th of October, 1834. So that giving Haggard the full benefit of his settlement and the doctrine of relation, they will still fail to sustain the claim; for the Bangs claim is the oldest in every point of view; and Haggard had notice of its existence.

It has already been shown that the contract of Bangs with

the government, for that specific land, (for he designates it in his original petition,) was perfect on the 21st of May, 1830: for the consent of both had been given in writing, and could not be revoked by either without the consent of the other; and the title was perfect on the 24th of October, 1834.

But the doctrines of relation, advanced by the counsel for the Haggard claim, and the cases cited to sustain them, are wholly inapplicable to the one now before this Court. These doctrines depend upon peculiar legislation and customs, and are as variant as the peculiar legislation and customs of the various States in which they originated. They can have no bearing upon the legislation of Coahuila and Texas—scarcely by analogy.

There was no contract between Haggard and the government before the 21st of May, 1835, if at all. His settlement, as he made it, was not only not authorized by the laws of Coahuila and Texas, but it was directly in contravention of those laws. (Laws Coahuila and Texas, p. 15; Law Col. 1825, Art. 1, 2, 3, 4, 16 and 18, p. 191; Law Col. 1832, Art. 18 and 24, and p. 11; duties Pol. Chief, Art. 9.) It is no excuse to say that the Ayuntamiento of Mina was not organized until 1834; he did not then present himself before it to claim the land as the law required, or in any other way; nor had he ever previously claimed it in any of the mother municipalities from which that of Mina was carved. He never set up a claim to it before any officer of the law, before the 21st of May, 1835, if then; nor was it ever until then set off by metes and bounds. But, if the Bangs claim had been even younger than the Haggard claim and Bangs had set it up at any time prior to the consummation of the Haggard title, it must have prevailed by virtue of his being a Mexican citizen and of his patriotic services. These entitled him to a perference over Haggard. (Col. Law 1825, Art. 10; Col. Law 1832, Art. 26.)

It is clear that the Bangs title must prevail over the Talbot Chambers claimants, and that the judgment of the Court below must be sustained here.

HEMPHILL, CH. J., did not sit in this case.

WHEELER, J. It does not appear that Haggard received any concession, or other evidence of right to the land he claimed, previous to the date of the title issued to him by Talbot Chambers, in 1835. His having settled upon and cultivated the land, without having been placed in possession by the proper authority, or having received any evidence of right to it, gave him no title, legal or equitable, which can be recognized in a Court of Justice. Even a survey, without a concession, or order of survey, would not be a legal appropriation of the land. (Howard & Wife v. Perry, 7 Tex. R.; Smith v. The United States, 10 Pet. R. 326.)

The title, issued to Haggard in 1835, bears the same date as his order of survey; and this was the first act of the government setting apart to him the land. It was preceded by no inchoate, or equitable title, on which it could relate back to any antecedent period. It was a title to the land embraced within it, only from its date. The defendant's is the elder title; and, if valid, must prevail. The question of its validity, therefore, is the material subject of inquiry.

The objections to the defendant's title, taken at the trial and now insisted on, are, in effect,

1st. That the Governor had no authority to make the concession, for the quantity of land, and on the evidence on which it was made.

2nd. That the grantee had no right to select the land granted, in two places; or to obtain titles on two distinct surveys.

3rd. That the land does not appear to have been surveyed by a legally authorized Surveyor.

4th. That the law under which the concession was made, was repealed previous to the completion of the title: and that, for these several reasons, it is void.

The 17th Article of the Colonization Law of 1825, under which the grant was made, is as follows: "It shall belong to "the executive, to increase the portions specified in Articles

"14, 15 and 16, in proportion to the family, industry and ac-
"tivity of the colonists, according to the separate reports up-
"on the subject, that shall be rendered by the Ayuntamientos
"and Commissioners; always bearing in mind the provision
"of Article 12, of the decree of the general Congress on the
"subject." (Laws and Decrees of C. &. T. p. 18.)

The Articles 14, 15 and 16, here referred to, are those which provided the quantity of land which should be granted to colonists, and to families and single men, "who, having emigrated separately and at their own expence," might wish to annex themselves to any of the new settlements. The 16th Article provides especially for this latter class, to which the grantee, in this case, belonged.

An authority is thus conferred upon the executive, by the 17th Article, to increase the quantity of land provided for the beneficiary of the 16th Article, to any amount to which, in his judgment, he may be entitled, subject only to the limitation contained in Article 12, of the National Colonization Law, which restricts the quantity to eleven leagues. (1 White, 601.)

Of the authority of the executive, under the 17th Article, to make the grant, there can be no question. The authority to increase the quantity, that is, to grant a quantity, "in proportion to the family, industry and activity" of the applicant, presupposed the authority to judge of the qualifications of the applicant. On this subject he was to receive the reports of the Ayuntamientos and Commissioners. These were designed to afford him the requisite information, on which to exercise his judgment. But they were not binding, upon him, to control it. Their object was not to determine for him the quantity of land to which the applicant was entitled; but, simply, to enlighten his judgment. It belonged to the executive, in the language of the law, to increase the portions of land, in proportion to the family, industry and activity of the applicant. Of these, the executive was to judge. And, although the law afforded him certain means of information, it did not prohibit him from obtaining information from other sources, or from acting upon his own

personal knowledge of the facts, should he be in possession of the requisite information. Such, in some measure, appears to have been the action of the executive in this instance. The applicant resided in Leona Vicario. The Governor, therefore, referred his petition to the Ayuntamiento of that place; on whose report, together with his personal knowledge and certain documentary evidence furnished by the petitioner, he appears to have acted. This certainly was more in accordance with the spirit and intention of the law, than to have referred the petition to the local authorities of the department in which the land was situated, who, probably, possessed no knowledge of the petitioner, or of his merits and qualifications. Where the object contemplated by the law, was information, it is rational to suppose that the intention was, that it should be applied for where it could be obtained, rather than where it did not exist. There is, therefore, we think, nothing in the objection that the Governor acted upon the report of the local authority where the applicant resided, rather than upon that of the department in which the land was situated.

The objection that the evidence upon which the Governor acted, was not sufficient to entitle the applicant to the grant, is not entitled to more weight. That was a question confided by the law to the judgment of the executive; and it is unquestionable, that his decision upon it is not now subject to revision by this Court. With as much propriety might we sit here, to revise the action of the authorities in granting a league, rather than a labor under the 14th Article of the law, or to inquire into the sufficiency of the evidence upon which the Empresarios and Commissioners acted in making a grant in any case. It is scarcely necessary to say that such inquiries would be as unprecedented, as they would be unwarrantable. The fact that the applicant possessed the requisite qualifications was determined by the Governor in passing upon the application; and he was not bound to preserve the proofs upon which that decision was founded; nor could he be compelled to reproduce them upon the trial of this case.

The Supreme Court of the United States applied this principle to cases, in which that tribunal was required to pass directly upon the validity of the concession, upon the application of the grantee for its confirmation under the Act of Congress. In Choteau's Heirs v. The United States, Chief Justice Marshall said: "We think, that, in the spirit of the de- "cisions which have been heretofore made by this Court, and "of the acts of confirmation by Congress, the fact that the "applicant possessed the requisite amount of property to en- "title him to the land he solicited, was submitted to the of- "ficer who decided on the application, and that he is not "bound to prove it to the Court which passes on the validity "of the grant." (9 Pet. R. 153–4.)

What evidence, besides the report of the Ayuntamiento, was before the Governor, when he made the concession, does not appear. In the evidence embodied in the record, there is nothing to induce the belief that the grantee did not present a meritorious claim, or that he was not justly entitled to the grant he obtained. But if, upon the evidence, the merits of the applicant were doubtful, that question is not now open to discussion. The Governor was constituted, by the law, the Judge of the qualifications of the applicant. Having exercised his judgment, and decided upon the question legally submitted to his cognizance, his decision is final. "The only ques- "tions" (said the Supreme Court of the United States in the "case of the United States v. Arredondo) "which can arise "between an individual claiming a right under the act done "and the public, or any person denying its validity, are, pow- "er in the officer, and fraud in the party. All other questions "are settled by the decision made, or the act done, by the tri- "bunal or officer; whether executive, legislative, judicial, or "special; unless an appeal is provided for; or other revision, "by some appellate or supervisory tribunal, is prescribed by "law." (6 Pet. R. 729, and authorities cited.)

It remains to consider the objections taken to the title issued to the grantee by the Special Commissioner, in 1834. And

it is objected that the concession did not give the authority to obtain titles to the lands granted, in two distinct localities.

This question was before the Supreme Court of the United States in the case of the United States v. The Heirs of Clarke *et al*, upon a Spanish concession to land in Florida, similar in its terms to the present: and the Court in that case confirmed the grant to the several surveys. (16 Pet. R. 228; 10 Id. 313.)

But it is not deemed necessary to determine, in this case, whether the concession gave the right to the grantee to select the land in two places or not. For, however, that may be, it certainly gave him the right to select six leagues at the place where that now in question was selected. It will scarcely be denied that the right to select six leagues in a given place, included the right to a less quantity, or that the grant of six leagues conferred the right to obtain a title to a less quantity of the land particularly designated in the concession. And it is not perceived that the having obtained a title to a part elsewhere, even if that were unauthorized and void, would affect tle title of the grantee to the residue of the land actually embraced in the grant, in the place designated by it. With whatever effect this objection might be urged against the validity of the title to the selection made upon the Brazos, it cannot affect the validity of the title to the land here in question, which was selected in the place where granted.

It is further objected to the title, that it does not appear that the survey was made by a legally authorized Surveyor.

The title states that the land was surveyed for the grantee on the 3rd day of March, 1832, by the scientific and approved Surveyor, Thomas H. Borden. The presumption is that it was surveyed by order of the Alcalde, who was authorized by the concession to put the grantee in possession and issue to him the title; and in consequence of whose failure to complete the title, a Special Commissioner was appointed for that purpose. It was in proof that the land had been surveyed; and there is no question that the survey was accurate, and in entire conformity to law. And in the case of Jones v. Men-

ard, this Court held the following language, "We are not pre-"pared to say, nor is it necessary to decide, but that, if the "land had been surveyed by a legally authorized Surveyor, "that is, if the work had been done ready to the hand of those, "who as colonists, might wish to locate it, such survey would "be sufficient, the return being made after the issue of the or-"der. This is believed to have been in very general practice "by the Surveyors under the Empresarios. If it had been "surveyed before the order of survey, the same Surveyor "could certainly, with propriety, swear to the correctness of "his field notes; as well, and with as much truth, as if he "had waited to receive the order before he made the survey." (1 Tex. R. 789.) Here the survey was made long after the date of the concession, which conferred the authority on the Alcalde to put the grantee in possession. The presumption is that there was evidence before the Commissioner, that the Surveyor had been duly authorized to make the survey, either by the Alcalde authorized by the concession, or by another Commissioner for that purpose. With the evidence before him, that there had been a legal survey, by competent authority it was not necessary that the Commissioner should have caused a re-survey; nor was it necessary that he should embody in the title the authority under which the survey had been made.

This, like other objections to the title, is founded on the assumption that it devolved on the grantee to prove that all the prerequisites, to the making of the grant and the issuing of the title, had been complied with. Whereas the reverse of this is true. It devolved on the party impeaching the title, to show their non-performance. "That every prerequisite has "been performed, is an inference properly deducible, and which "every man has a right to draw, from the existence of the "grant itself." (*Per* Ch. Jus. Marshall, in Polk's Lessee v. Wendal, 3 Cond. R. S. C. U. S. 291.)

The presumption is that the officer, authorized by law to issue the title, has done his duty, and has acted in all respects

in conformity to law, until the contrary appears. And it is incumbent on the party who would controvert a grant, executed by competent authority, with the forms and solemnities required by law, to repel this presumption by proof. "A grant "or concession," (said Chief Justice Marshall, in Delassus v. "The United States,) "made by that officer, who is by law "authorized to make it, carries with it *prima facie* evidence "that it is within his powers. No excess of them, or departure "from them, is to be presumed. He violates his duty by such "excess, and is responsible for it. He who alleges that an of- "ficer, intrusted with an important duty, has violated his in- "structions, must show it." (9 Pet. R. 134; Strother v. Lucas, 12 Pet. R. 410.)

The title in this case, having been issued by competent authority, afforded *prima facie* evidence that all the prerequisites of the law had been complied with. And if there was any omission or illegality committed on the part of the officer, of a character to invalidate the title, it devolved on the plaintiff in this case, to show it.

Finally, it is objected that the law under which the concession was made, was repealed by the law of the 28th of April, 1832. (Decree 190, Laws & Dec. Art, 38.) But the 16th Article of the repealing law contains an express reservation of the rights of those who had received concessions as purchasers, or settlers, under the law of 1825. This reservation embraced the concession to Bangs. The 29th Article of the law of the 26th of March, 1834, (Id. Dec. 272,) repealed the law of 1832. There is, however, nothing in the provisions of this law, which evidences any intention on the part of the Legislature, to annul rights acquired under the former laws. On the contrary, the provisions of Articles 30, 33 and 34, manifest a different intention. And to give to the law a retrospective effect to annul rights previously vested, as were those of Bangs to the land designated in his grant, unless that had been the clearly expressed intention of the Legislature, would be opposed to the received rule of construction of both the Common and the Civil Law.

But, it is insisted that there was remaining no provision for completing the titles under concessions to settlers. The granting power, however, remained in the Governor of the State. The law, it is true, had made an entire change in respect to its exercise as to the future. But as to past contracts, there is no evidence in the law of an intention to change it; and there is nothing repugnant to the conclusion that it remained unimpaired. As to colonization contracts, Article 30, while it declares that thereafter "no colonization contracts shall be made," expressly provides that those theretofore made "shall be strictly fulfilled, and in entire accordance with "the law of the 24th of March, 1825." And it is apparent from Articles 32, 33, and 34, that it was the intention, that the equitable claims upon the government, of others than those whose rights were included in the reservation in favor of colozation contracts, should be respected: and, especially, that those persons who had "emigrated separately and at their own expense," and who, as a class, had been provided for by the 16th, 17th, and 18th Articles of the law of 1825, of which class was the grantee in this case, should be secured in their rights, as fully, and to the same extent, as if that law had remained in force.

The instructions to Commissioners were repealed, only in so far as they were opposed to the provisions of the law of 1834, (Dec. 272, Art. 29.) Those of the 4th of September, 1827, (Laws & Dec. p. 70) were, doubtless, mainly intended for the government of Commissioners for the distribution of lands to colonists proper. But their terms are sufficiently comprehensive to embrace, and they were made to embrace other cases of concessions, made under the law of 1825.

The reason of the law, which required that colonization contracts should be carried out in accordance with the law of 1825, undoubtedly applied with equal force to the concession in this case. That law did not, in terms, provide for extending titles to colonists introduced under those contracts. But it could never have been doubted that it was intended to include them. And there can be as little doubt, that it was the then received

construction of the law, that the repeal did not divest the Governor of the authority to complete the titles, where there had been concessions made to purchasers and settlers under the law of 1825. That construction seems more natural and rational than the opposite one, which would require us to suppose that the Legislature intended, indirectly and by implication, to annul pre-existing rights, and contracts guarantied and confirmed by previous laws. We cannot suppose that such a consequence was intended. And the history of the times, it is believed, as connected with this subject, will afford abundant evidence that such was not understood to be the effect of the repealing law.

But, whatever might have been our opinion of the correctness of the construction of the law, adopted and acted upon by the Governor, in appointing a Commissioner to issue the title to the grantee, in this case, we have heretofore decided, that the construction of their powers, and of the laws which conferred them, adopted and acted upon by the former authorities of the country, must be respected, unless it be clearly shown that they have exceeded their powers, or have acted in manifest contravention of law. (Hancock v. McKinney, 7 Tex. R. 384.) Acts done, and rights justly acquired under such construction, will not be disturbed.

By the 36th Article of the law of 1834, settlers, after having received the titles to their lands, were authorized to sell; the purchaser being charged with the performance of the conditions. There is, therefore, nothing in the objection that the grantee, in this case, did not perform, in person, the condition of settlement and cultivation.

The proof showed performance of the conditions of the grant. The instruction, therefore, respecting the right of any one but the government, to inquire into the non-performance of the conditions, whether correct or otherwise, was immaterial, and cannot afford a ground for reversing the judgment.

We are of opinion that there is no error in the judgment and that it be affirmed.

Judgment affirmed.

## Chambers v. Miller and Wife.

No rule of practice is better settled by the repeated decisions of this Court, than that, where the record is silent as to any action asked, or taken upon a demurrer, it will be deemed to have been waived.

Nothing is better settled than that a demurrer admits the truth of the pleading demurred to, only for the purpose of determining upon its legal sufficiency.

It is the undoubted right of either party to abandon or waive his demurrer, at any time before judgment upon it.

It seems, that, where the parties agree that the Judge may file a statement of facts within a given time after the Term, time is of the essence of the agreement, and a statement filed after the time agreed on, is a nullity.

Appeal from Bastrop. This was a suit by Miller and wife, against Chambers to foreclose a mortgage for $1,000, the mortgage being filed as an exhibit. The defendant filed an answer, alleging usury, and partial failure of consideration. There was a demurrer filed, to the answer of the defendant. At a subsequent day the following proceedings were had:

"In this cause came the parties, the plaintiffs by their attorney, James A. Poage, and the defendant, Thomas J. Chambers, in his own proper person, and the parties having waived a jury, submitted the matter in controversy, to the Court, upon the petition and exhibits of the plaintiff and the answer of the defendant. It is therefore ordered," &c., (giving judgment for the plaintiff and ordering a sale of the property.)

Chambers then moved the Court for a new trial, on the ground that judgment had been rendered without disposing of the plaintiff's demurrer to the defendant's answer. The motion was overruled. There was an agreement filed, that each party should within ten days make out a statement of facts and submit it to the Judge, and that the Judge should, within ten days thereafter, make up a full statement of facts and file the same. The Judge filed a statement of facts after the time

stipulated, which was after the expiration of the Term, and both parties concurred in treating the statement of facts as a nullity.

*R. Hughes*, for appellant.

*I. A. & G. W. Paschal*, for appellees.

WHEELER, J. The ground relied on for a reversal of the judgment, is the supposed error of the Court, in rendering judgment for the plaintiff without disposing of the demurrer.

No rule of practice is better settled by the repeated decisions of this Court, than that, where the record is silent as to any action asked, or taken upon the demurrer, it will be deemed to have been waived.

It was said in argument, that the Court was asked to pass upon the demurrer by the motion for a new trial. If the application had come from the party who had a right to insist upon the demurrer, it was then too late. But it was the demurrer of the plaintiff, and if he chose to waive it, surely it is not for the defendant to complain. No right of his was prejudiced by the waiver. Nothing is better settled, than that a demurrer admits the truth of the pleading demurred to, only for the purpose of determining upon its legal sufficiency. When the demurrer was waived, its effect, as an admission, ceased. And it devolved on the defendant to support his answer by proof, if he intended to rely on the matters pleaded, as a defence. True, it was incumbent on the Court to decide all the issues of law and facts presented by the pleadings. But it cannot be assigned as error, that the Court did not decide upon a demurrer which had been waived. It no longer presented an issue for the judgment of the Court.

When the plaintiff consented to waive a jury, without having asked the judgment of the Court on his demurrer, he waived it. He might have been permitted to call it up at any time before the Court had decided upon the issues of fact.

But this he did not do; nor did he at any time ask the judgment of the Court on his demurrer. It was his undoubted right to abandon it, if he chose; and neither the defendant nor the Court could legally control the exercise of this right. The plaintiff's waiver of his demurrer was a virtual withdrawal of his objections to the legal sufficiency of the answer, and, for the purpose of the trial of the facts, an admission by him of its sufficiency in law. It would, indeed, be a novel doctrine to hold, as we are asked to do, in effect, that the Court erred in not compelling the plaintiff to rely on his demurrer; and that it is matter of complaint for the defendant, that the plaintiff was suffered to abandan his objections to the legal sufficiency of the defendant's pleadings.

Both parties agree in treating the statement by the Judge of what transpired at the trial, as not having been made in time, and, as constituting, properly, no part of the record. And in this opinion we concur. But if it were otherwise, it does not present the case more favorably to the defendant. The judgment is affirmed.

Judgment affirmed.

## C. C. De Witt and others v. Miller's Adm'r.

As a general rule, a question, which is in substance a general demurrer to the sufficiency of the plaintiff's petition, should, where the defendant appears, be made in the Court below. The verdict or decree cures all defects, imperfections, or omissions, in the petition or statement of the cause of action, whether of substance or of form, if the issues joined be such as require proof of the facts imperfectly stated, or omitted, though it will not cure or aid a statement of a defective title or cause of action.

Where laches, or lapse of time, is relied on by the defendant in an action for specific performance, it should be set up by plea or special exception, in all cases where the plaintiff has not, in the petition, alleged some grounds in explanation of his apparent laches or delay; in the latter case, the defendant is relieved from the necessity of setting up the mere lapse of time.

Where the contract, for the specific performance of which the suit was brought, was of twelve years standing, and there were no equitable circumstances alleged, to account for the delay, the Court said, The proof must have been of a potent character to have excused so long a delay; but it may have been adduced; and, as there is no statement of facts, we must presume that the proof, if necessary, was made.

A suit against a defendant, in his individual capacity, cannot in any way affect the rights of those interested in an estate of which such defendant may, at the time, be administrator.

Where assets have been fraudulently alienated by an administrator, in collusion with the vendee, they may be pursued by an administrator *de bonis non;* and the fact that a judgment has intervened, if obtained through fraud, cannot affect the principle or vary the rights of the parties.

Appeal from Bexar. The subject of this controversy was a league of land, being one of three leagues granted to Joseph Clements in 1830 or 1831, by the State of Coahuila and Texas, and in which grant Green De Witt was jointly and equally interested. The said Green De Witt, having choice, selected this league, as a portion of his share, and, as the petition averred, sold the same to one Thomas R. Miller—authorizing and requiring, by a written instrument, the said Clements to convey title to the said Miller. Shortly afterwards, the said De Witt departed this life; and Miller perished at the fall of the Alamo, no conveyance having been previously made by

the said Clements in conformity with the written instructions from De Witt, to that effect. In 1840, Sarah De Witt, as administratrix of G. De Witt, filed her petition against the said J. D. Clements, praying among other matters, that he might be divested of all title in the said league of land, and that the same might be vested in her, as the said administratrix. In his answer, Clements averred that this league had been sold by Green De Witt, in his life time, to Thomas R. Miller, and that it then formed a part of his estate. By the Decree, in 1841, it appears that Clements moved that the heirs of Miller might be admitted to appear as defendants, and assert the rights derived through their intestate. The motion was overruled, and it was adjudged that all the right, title, and interest of Clements, be vested in the said Sarah De Witt, as administratrix aforesaid, but without prejudice to, or preclusion of, the rights of the heirs of Miller, if any they had. The land was subsequently sold at public auction, by the said administratrix, and purchased by C. C. De Witt.

The petition, in this case, was filed in 1846, by J. P. Hawkins, *administrator de bonis non* of Thomas R. Miller, deceased, and among other facts, represented that the decree, in 1841, was obtained by fraud and collusion between the said Clements and the said administratrix of the estate of De Witt; that the said Clements was, at that time, the administrator of the estate of the said Miller, and neglected to file a defence for the said estate, in the said suit. The petition prayed that the said Sarah De Witt, as administratrix, the said C. C. De Witt, and the representatives of Clements now deceased, be made parties, and that the title to the said league be fully vested in the heirs of the said Thomas R. Miller.

The defendant Sarah De Witt, among other matters, denied all fraud and collusion between her and the said Clements, in obtaining the decree of 1841. Averred that she knew nothing of any sale or transaction which would authorize a conveyance from the said Clements, of the said league, to the said Miller, and alleged facts inconsistent with any such supposition.

C. C. De Witt denied all collusion in obtaining the said land or any decree in connection therewith; that he had not, nor did he ever have, any knowledge of any title, right, or claim existing in Miller or his heirs, to the said land. It did not appear when C. C. De Witt purchased or went into possession.

A jury being waived, the Court decreed, in effect, that, in the lifetime of all the parties, and before a conveyance was made by the said Clements, the said De Witt had sold the land to Thomas R. Miller, and the Court, believing from the evidence, that the purchase money had been paid by the said Miller, and that C. C. De Witt had notice of the claim of the heirs of Miller at the time of his purchase at the sale mentioned in his answer, decreed that all the interest of the heirs of the deceased Clements and of the deceased De Witt, and also of C. C. De Witt, should be vested in the plaintiff as the administrator of Thomas R. Miller, for the use and benefit of the heirs of the said Miller and others interested in his estate.

It was agreed by the attorneys of the parties, that, in case the Judge had not signed the statement of facts written out by him, (no such statement appeared in the transcript,) the same should be certified as the statement of facts in the case; that it should include all the documents referred to on file, and also the record in the cause of Sarah De Witt, administratrix of Green De Witt, deceased, v. Joseph D. Clements. By agreement, also, the appellants had leave to assign errors in this Court. The following were relied upon, viz:

1st. That the facts set forth in the plaintiff's petition, do not entitle him to the relief prayed, or warrant the judgment or decree of the Court rendered in the cause.

2nd. That the finding of the Court, sitting as a jury, did not determine the issues between the parties.

3rd. That the judgment was not warranted by the finding of the Court, upon the issues of fact formed by the pleadings.

*Webb & Oldham*, for appellants. I. It appears from the

plaintiff's own showing, that the demand set up is a stale demand, and barred by the statute of limitations. The claim of Miller originated previously to the year 1835. The decree in favor of De Witt's administratrix against Clements, was rendered on the 8th day of Octobor, 1841; and this suit was not brought until the 26th day of October, 1846. Over twelve years elapsed, from the origin of the claim, until the institution of this suit, and five years from the rendition of the judgment in the case of De Witt's administratrix against Clements in the Gonzales District Court. The claim had become stale by lapse of time; and the presumption is against its validity. (Sicard v. Davis, 6 Peters, 139; Holt v. Thomas *et al*, 8 Peters, 420; Lupton v. Janney, 13 Peters, 381; Miller v. McIntyre, 6 Peters, 61; Elmendorf v. Taylor, 10 Wheaton, 168; Johnson v. Johnson, 5 Ala. R. (new series) 97; Story's Eq. 1520; Smith v. Clay, 3 Brown's S. C. 639, note.)

It was barred by the statute of limitations. C. C. De Witt did not hold in trust, for the heirs and creditors of Miller's estate, but in his own right and adverse to them. The administratrix of De Witt recovered the land from the administrator of Miller, who pleaded the title of his intestate.

II. The petition showed a former adjudication in reference to the subject matter of this suit, between proper parties to litigate the same. The interest of the heirs of Miller could only be asserted through the administrator; and a judgment against him is binding upon them. (Holt v. Clemmons, 3 Tex. R. 423; Thompson v. Duncan, 1 Tex. R.; Moore v. Morse, 2 Tex. R.)

If the defendant in that suit had not pleaded the claim of his intestate, it was his duty to have done so; and he would have been bound by the judgment, and could not subsequently set up a claim which he had failed to plead in that suit. (Smith v. Power, 2 Tex. R.)

The plaintiff in this suit as *administrator de bonis non*, cannot set up the fraud of his predecessor in the administration of the estate, so as to avoid the judgment and decree ren-

dered in the former suit. He is not only privy to that judgment, but is in law the party against whom it was rendered, that is, the representative of the estate of Thomas R. Miller, deceased. He can no more set up the fraud of his predecessor, than he can that of himself. (Hart. Dig. Art. 1224.)

If the former administrator committed a fraud in allowing a decree to be rendered against him, he and his privies are bound by it; and he is responsible upon his bond for mal-administration. (Blount v. Darroch, 4 Wash. C. C. R. 659; Walker v. Radcliffe, 2 Desau. R. 577; McClelland v. Chambers, 1 Bibb, R. 366; Allin v. Hall, 1 A. K. Marsh. R. 526; Ewing v. Handley, 4 Litt. R. 348.) That was the only remedy. (Evans v. Oakley, 2 Tex. R. 182.)

The saving in the decree of De Witt's administrator v. Clements, of the rights of the heirs of Miller, amounted to nothing. The interest of the administrator and the heirs cannot be severed. The administrator is the proper person to assert the right of the heirs. (Holt v. Clemmons, *supra.*)

III. The finding of the Court, sitting as a jury, did not determine the issues between the parties. Before a judgment could have been legally rendered in favor of the plaintiff, it was essential that the fraud in the judgment of De Witt's administrator v. Clements should have been fully proven and found by the Court. The foundation for the relief sought is the alleged fraud between the parties to the judgment, and upon which the finding is wholly silent. The verdict should affirm the facts which will authorize the judgment; and so a decree. (Burdine v. Shelton, 10 Yerg. R. 41; Bain v. Childs, 1 Root, R. 466; Sampson v. Hart, 1 Root, R. 521; Patterson v. U. S. 4 Cond. R. 98; Phillips v. Hill and wife, 3 Tex. R. 397; 4 Port. R. 198.)

*W. H. Gordon*, for appellee. I. It may be insisted, upon the part of appellant, that the suit between De Witt's administratrix and Clements, is a bar to this suit; but it will be seen by the record of that case, that that suit was brought against

Clements in his individual capacity, and not as Miller's administrator; and it will be further seen by the decree in that case, that the Court refused to permit Miller's heirs to intervene and assert their rights, but rendered a decree in favor of De Witt's administratrix, without prejudice to any interest Miller's heirs might have in and to the land in controversy; and there is no principle better settled than that a judgment can affect the right of no person, except those who are parties to the suit. A decree in a suit in which executors are parties, is not binding upon the heirs of their testator, unless such heirs are also parties to the suit. (Dale v. Rosevelt, 1 Paige, 35; 1 Munf. R. 394, 437, 455, 456, 3 Cowen, R. 622.) A decree in Chancery, against a guardian, touching the real estate of his ward, does not affect the ward, unless he is made a party to the original suit. (2 How. 404.) A decree or judgment neither binds or protects any one but those who are parties to it. (Bailey Eq. R. 284.)

A *cestui que trust* is not bound by a decree rendered against his trustee, in a case where the *cestui que trust* is not a party to the suit. (10 Leigh, R. 5.) A decree is binding and conclusive with respect to the subject matter on which it acts; but does not affect the rights of third persons who were not parties to the cause in which the decree was rendered. (1 Brock. R. 126.)

II. It may be insisted by appellant, that appellee's right of action was barred by lapse of time. But it not being insisted upon in the Court below, by plea or demurrer, it now comes too late. But, admitting that the exception could now be taken, this is a trust estate against which the statute will not bar. If a purchaser has notice of an existing trust, at the time of the purchase, he becomes himself trustee, notwithstanding the purchase money he has paid. (American Eq. Dig. 381, Sec. 25; 1 Johns. Chan. R. 566.)

A trustee cannot dispose of the trust estate, to the prejudice of the *cestui que trust*, unless to a *bona fide* purchaser without notice; if otherwise, it may be followed. (Amr. Eq. Dig. 407, Art. 290; 1 McCord's Chan. R. 119.)

When De Witt's administratrix took the decree, she took it with a reservation of the equity of Miller's heirs, and impliedly in law became their trustee; and when C. C. De Witt purchased the land, he purchased the title of his father's estate, and took the title with all the equities incident to it, and reservations in the face of the deed, and as such became the trustee of Miller's heirs; and had he had no notice of the equity of Miller's heirs, they could have reached the property in his hands as one of Green De Witt's heirs, (4 H. & McH. R. 167, 198,) as their implied trustee, and so standing as their trustee, he could not invoke the statute of limitations to his aid. In general, an equity may be barred by the lapse of twenty years, but the bar of the statute of limitations will not be applied in equity to a cause purely equitable in its nature. (1 Rice, Eq. R. 110.)

Length of time is no bar to a trust clearly established. (Amr. Eq. Dig. 390, Sec. 114; 6 Wheaton, 498.) The claim of Miller's heirs could not be classed as a stale claim. The contract was made in 1834 or '35. The Courts under the Republic opened up in 1836 or '37. The title decreed from Clements by De Witt in 1841, and Miller's administrator commenced suit in 1846; and taking into consideration the unsettled condition of the Western country, from the revolution up to annexation, the death of the parties immediately after the contract, and the loss and destruction of papers and muniments of title, it would not have been in furtherance of justice, for the rights of the parties to have been investigated sooner.

Hemphill, Ch. J. The first ground for reversal is, in substance, but a general demurrer to the sufficiency of the plaintiff's petition. As a general rule, such exception, where the defendant appears, should be set up in the Court below. The verdict or decree cures all defects, imperfections, or omissions, in the petition or statement of the cause of action, whether of substance or of form, if the issues joined be such as require proof of the facts imperfectly stated, or omitted, though it will

not cure or aid a statement of a defective title or cause of action. (1 Chitty, p. 712, 722.) The defendants in this case, appeared and pleaded to the facts, but did not demur, or state in their pleadings the objections, now urged in support of this assignment of error.

The appellants, in their argument on this ground, contend that the demand is stale, and is barred by the statute of limitations, and by the lapse of time. The defence of the statute should have been set up by demurrer or by plea. In equity, the statute may be taken advantage of by either. (Daniel's Chan. Prac. Vol. 1, p. 622.) But there does not seem to be any positive rule as to the mode in pleading, by which the laches of anothor, or the lapse of time independent of the statute, may be set up as a defence. It cannot, according to the cases, be reached by demurrer. (3 Bro. C. C. p. 646; 1 Dan. Chan. Prac. p. 624.) Where the suit is for a money demand, the defence comes in on a plea of payment, on the ground that such facts raise a presumption of payment. (3 Phillips, p. 504; 16 Wend. R. 443.)

In suits for specific performance, and others where the plea of payment is inadmissible, it is believed that the practice is to submit to the Court whether, under the circumstances and the great lapse of time, the defendant ought to be compelled to perform his contract, or whether the relief, prayed in the petition, should be granted. (5 Ves. R. 720; 4 Bro. C. C. 214; Id. 440.) Under our system of pleadings, the defendant should, in all cases, plead the laches and lapse of time, in his defence—provided the plaintiff has not, in the petition, alleged some grounds in explanation of his apparent laches or delay. If so, the defendant would be relieved from the necessity of setting up the mere lapse of time. The pleadings must show that such defence is relied upon, otherwise it must be regarded as waived. Had the defence, now set up, been urged below, it would have deserved very serious consideration. The contract, sought to be enforced, was of twelve years standing. Time had strown its darkening shadows over the trans-

action; and he who requires the Court to grope through the obscurities of the past, for the protection of his rights, must show reasonable diligence, and that it has not been through his laches or neglect, that the matter has now become involved in mystery and ambiguity.

But we will not proceed with the discussion of a point not presented for consideration. Had such defence been urged below, there is a bare possibility that it might have been explained by equitable circumstances. The proof must have been of a potent character, to have excused so long a delay; but it may have been adduced, and, as there is no statement of facts, we must presume that the proof, if necessary, was made. It was agreed that the statement, in the hand writing of the Judge, should be transmitted; but no such document has been certified.

It is further contended by the appellants, that the appellee is precluded, by the former adjudication between the representative of the estate of De Witt and J. D. Clements, from setting up the rights of Miller's estate, to the land in controversy; that Clements was, at the rendition of the said judgment, administrator of Miller; and that the judgment against him is binding on the appellee, as the successor in the administration. This position would be sound, had the former judgment been against Clements in his representative, and not his individual capacity—and had it been of a character to conclude the rights of Miller's estate, to the matter in litigation. But Clements was sued in his individual right and not as administrator. He was sued as the holder of the legal title, and with the view of divesting him, and vesting the title in the estate of Green De Witt. It is true, that he was the administrator of Miller, and that he believed Green De Witt had, in the life time of Miller, sold the land to him. But he was not sued as such administrator, nor were the rights of Miller's estate, in the land, necessarily involved in the controversy. The conveyance of the legal title to Green De Witt or his heirs, did not affect the right of the vendee of De Witt, to the land.

The legal title was transferred to De Witt; but De Witt's obligation to convey the land to his vendee, still remained; and the completion of title in De Witt's heirs, only enabled them to make a perfect conveyance to Miller's heirs, in execution of the covenants of their ancestor. At the most, the judgment in the former suit was but notice that the heirs of De Witt were claiming the land adversely to those of Miller. The record shows, that, though the parties and the Court were apprised of the claim of Miller's estate, by the pleadings of Clements, and by his attempt to have the heirs of Miller made parties, yet they were not permitted to intervene, nor was their claim, or that of the estate, adjudicated. The reverse was the fact. It was expressly adjudged that the decree should be without prejudice to the rights of the heirs of Miller, if any they had.

This reservation would have been nugatory, had the estate of Miller been represented in that suit by the administrator. But it was not represented, and was no party in the suit; and the reservation is but the declaration of the legal principle, that a judgment is binding only on the parties and their privies in the proceeding, and not upon others. No doubt, as a vigilant guardian of his trust, the administrator should, as such, have attempted to intervene in order to prevent a multiplicity of litigation, and to secure the legal title, at once, to the estate of Miller, without passing through the circuitous channel of an intermediate owner. He might have been liable, had the estate suffered from his negligence; but he would not have been, nor was his succession, precluded from the institution of a suit to compel the vendor, who had thus secured the legal title, to make conveyance to the vendee.

It is further urged by the appellants, that the appellee, as an *administrator de bonis non*, could not set up the fraud of the former administrator, Clements, so as to avoid the judgment in the former suit. Had the former decree been against Clements as administrator, and conclusive against Miller's estate, and had it been fraudulently obtained, in collusion with the

then plaintiff, yet I apprehend the land would still be assets of the estate of Miller, and, as such, pass into the hands of the *administrator de bonis non;* and that he might, on showing of the fraud, have the judgment set aside, and the land conveyed to himself. Such is the rule where assets have been fraudulently aliened by an administrator, in collusion with a vendee; and the fact that a judgment has intervened, if obtained through fraud, cannot affect the principle, or vary the rights of parties. (1 Williams on Executors, p. 783, and cases cited.)

That C. C. Ce Witt purchased the land at public sale, cannot, under the facts, operate to the prejudice of the claims of the succession of Miller. The decree under which title was made to the estate of De Witt, reserved the rights of Miller's heirs; and he was thus notified of the probable existence of such rights; and, further, he purchased only such title as the deceased, De Witt, had in the land; and he must, consequently, yield to the paramount title of Miller, the vendee of De Witt. Upon considering the matters in the record, there being no statement of facts, and no sufficient ground to impugn the decree, we are of opinion that the same be affirmed, and it is so ordered.

Judgment affirmed

## Wilhelmina Meyer v. John Carolan.

*Quere*? As to whether, and when, a *mandamus* will lie from the Supreme Court or a Judge thereof, to the Clerk of the District Court, to compel him to approve an appeal bond.

It seems, that property exempt from forced sale is not to be considered in estimating the sufficiency of bail offered in a judicial proceeding.

Appeal from Bexar. Wilhelmina Meyer applied to Chief Justice Hemphill, in vacation, for an alternative *mandamus* against Carolan, Clerk of the District Court of the county of Bexar, to approve a certain appeal bond and send up the transcript of the record, in a certain case wherein said Meyer was plaintiff and two others were defendants. The alternative *mandamus* was issued commanding the Clerk to approve the bond, which was sent with the writ, and send up a transcript of the record in said case, or show cause to the contrary on the first day of the next Term of the Supreme Court to be held at the city of Austin, Carolan made the following return:

"The plaintiff nor either of the sureties who subscribed "said bond, do not possess any property except such as is ex- "empt from execution or forced sale; that one of the sureties "is married and the head of a family and is possessed of no "property except his homestead and a right to three hundred "and twenty acres of land from the German Emigration Com- "pany; that when said bond was presented for approval, this "respondent called said sureties before him, and each declared "upon oath that the only property they possessed was only of "the value of three hundred dollars each, which included "their respective homesteads. Respondent, under these cir- "cumstances, did not feel authorized to approve said appeal "bond, believing that the same was inadequate for the secur- "ity of defendant's rights. Respondent further states that he "was actuated solely by a sense of duty, and of his official

" obligations, believing that he would have been liable to the " party injured, by approving a bond which was insufficient " to secure their rights."

The bond was for $800. It did not appear what was the judgment of the Court, from which the appeal was proposed. There were some affidavits in the case, taken by both parties to this proceeding; but they did not vary the case made by the Clerk's return, except that they proved the property of the sureties to be more valuable than they had themselves represented to the assessor and collector, and to the Clerk as aforesaid, and to be sufficient, perhaps, in the absence of any law exempting property from execution, to make the bond a good one.

*G. W. Paschal*, for relator. The only question which I shall discuss in this case is, the constitutional objection, suggested by the Court, to the jurisdiction.

I believe the 3rd Section of the 4th Article of the Constitution expressly gives the jurisdiction. The Supreme Court and Judges shall have power to issue the writ of *habeas corpus* and writs of *mandamus*, and such other writs as shall be necessary to enforce its own jurisdiction, and also compel a Judge of the District Court to proceed to trial and judgment, in a cause.

This Court, in ——— v. Costley, (7 Tex R.) issued a *mandamus* against the Clerk for refusing to send up a record, where the appeal had been allowed; this was, in fact, a proceeding against the officer of the District Court.

It was after full discussion; and, I had thought, settled the principle, that the *mandamus* would issue in all cases, where it is necessary to enforce the appellate jurisdiction. I can see no difference between this case and the refusal to deliver the record for want of costs.

Several other cases to the same import were referred to, at the last Term. They generally established the principle, that all powers necessary to enforce the appellate jurisdiction will

be exercised, and that such an exercise of jurisdiction is not necessarily original. (State v. Charles, 1 Branch, 298; 7 American Dig. 144, Sec. 711.)

A similar question was raised in Crane's case, (5 Peters, 189,) and decided in favor of the jurisdiction, I beg leave to refer to it the question at bar; the reasoning of Chief Justice Marshall is conclusive.

*Harris & Pease*, for respondent. It is contended for the defendant, that the Court, being one of appellate jurisdiction only, cannot take jurisdiction of this cause. (3 Sec. 4 Art. Const.) It would be the exercise of original jurisdiction.—(*Ex parte* Crane *et al.*, 5 Pet. R. 193; see also, Sec. 10, Art. 4 Const.; Hart. Dig. Art. 2927, 2928.)

Besides, the appeal bond tendered, was not sufficient in law.

Lipscomb, J. The Clerk of the District Court for the county of Bexar, to a rule upon him, issued under the order of one of the Judges of this Court, to show cause why a *mandamus* should not issue to him requiring him to take and receive the bond tendered to him as an appeal bond, from the judgment of the said District Court, has shown cause; and now by his counsel, asks to be discharged, on two grounds: First, that it is not a case as made out by the relator, in which the writ of *mandamus* should or could be legally issued: And secondly, that, if the case, as presented, would authorize the issuance of the *mandamus*, yet, his answer is a full and sufficient one, in law, and the rule should be discharged.

It was said by this Court in discussing the grounds on which a *mandamus* could issue: "It is an undoubted principle of "law, that this writ will not issue against a public officer, un- "less to compel the performance of an act clearly defined and "enjoined by law; and which is therefore ministerial in its "nature, and neither involves any discretion nor leaves any "alternative." (Glasscock v. Commissioner of the General

Land Office, 3 Tex. R. 53; 12 Pet R. 524; 14 Pet. R. 514; 3 How. R. 100.) The same rule is laid down by the Court in Cullem's administrator v. Latimer, (4 Tex. R. 329,) and in the case of the Commissioner of the General Land Office v. Smith. (5 Tex. R. 478, 479.) The language of this Court is: "It has "been, however, by a series of decisions in the Supreme Court "of the United States, decided that a *mandamus* will issue to "an officer of the government only when the duty to be per- "formed is ministerial in its character; but, that, where there "is imposed upon the officer, by law, a duty requiring the "exercise of judgment or discretion, a *mandamus* will not "lie to control the exercise of that discretion. (12 Pet. R. "524, 609; 14 Id. 497; 7 Cranch, 594; 6 Wheaton, 598; "6 Howard, 92, 101; Board of Land Commissioners v. Bell, "Dallam, 366.) Respecting the general rule there does not "appear to have been any question; but the difficulty has "been in making its application to particular cases and de- "termining, in such cases, what acts are to be considered as "merely ministerial and what not. The distinction between "ministerial and judicial and other official acts, seems to be, "that, where the law prescribes and defines the duty to be per- "formed with such precision and certainty as to leave nothing "to the exercise of discretion or judgment, in determining "whether the duty exists, it is not to be deemed merely min- "isteral."

There can be no doubt, that the settled doctrine of this Court is, that, if the officer is required to exercise his judgment or discretion in the discharge of any portion of his duties, so far as relates to those duties, the *mandamus* will not lie to control such exercise of his judgment or discretion. The Clerk is required to take and approve of an appeal or writ of error bond, and send up to this Court a complete transcript of the record of the case, as it is of record in the District Court. (Hart. Dig. Art. 789.) If, after taking the bond, the Clerk should fail or refuse to send up a transcript of the record, the writ of *mandamus* would lie,

because he would have exercised and discharged the only discretion reposed in him by the law; and what remained, the sending up a transcript of the record, would be purely a ministerial act, in which he would have nothing to exercise his judgment upon. The ground upon which the relator, in this case, rested his application for the writ, is the refusal of the Clerk to accept the bond, although it was a sufficient bond, that was tendered to him. Now it is very clear, that the question of the sufficiency of the bond tendered, was a question for the exercise of the judgment of the Clerk. The law has imposed that duty upon him, and not upon the appellate tribunal. If he wantonly disregards the duty required of him, he will be guilty of a malfeasance in office; and the remedy will be against him for it, at the instance of the party injured, but not by the writ of *mandamus*. The sufficiency of the security tendered is always a question of fact, and cannot well be tried by the appellate Court, organized, as it is, without a jury. In this respect the powers of this Court are more circumscribed than the Court of King's Bench; for, although that Court was a Court of appellate or revisionary jurisdiction, it could at all times impannel a jury to try a contested fact.

It would seem, from the views we have expressed, that the relator has failed to show a sufficient ground for the writ of *mandamus*, and that the rule should be discharged. This would have been the result, however, if we had been of the opinion that the petition showed sufficient ground for a *mandamus*, because the answer of the Clerk is full and satisfactory, and establishes beyond all controversy, that the Clerk, so far from having been guilty of a malfeasance in office, has only faithfully discharged the duty required of him by the law; and, had he acted otherwise, he would have wholly disregarded the rights of other parties, intended by the law to be secured by a good and sufficient bond.

We think, therefore, that the rule should be discharged and dismissed, at the costs of the relator.

HEMPHILL, CH. J. Believing the return of the respondent to be sufficient, I concur in the result.

WHEELER, J. The opinion which has been pronounced, expresses the views which I entertain in respect to the principles which must govern the issuing of writs of *mandamus*. It may be proper for me, however, here to add, that I have heretofore expressed the opinion, (Arberry v. Beavers, 6 Tex, R.) which I still entertain, that a public officer, required by law to perform a duty which involves the exercise of discretion, may be guilty of so gross an abuse of the discretion confided to him, or such an evasion of positive duty, as to amount to a virtual refusal to perform the duty enjoined, or to act at all, in contemplation of law; and that, in such a case, a *mandamus* would afford a remedy where there was no other adequate remedy provided by law. A Clerk, for instance, might captiously or wantonly refuse to approve an appeal bond tendered with ample security. In that case, if the fact were made satisfactorily to appear, I entertain no doubt of the power of the Court to compel a performance of the duty. Such extreme cases are not likely to occur, it may afford an occasion for the exercise of the power of the Court to control the action of the officer. The present, manifestly, is not such a case.

Rule discharged.

## Neill v. Tarin and others.

Where the petition refers to and sufficiently designates a former judgment between the same parties, for the purpose of alleging circumstances to destroy its effect, it is not necessary for the defendant to plead such former judgment, formally, in his answer.

There was an agreement in these words, "It is agreed by the parties, that the "jury be withdrawn and the whole matter submitted to the determination of "the Court for the perpetuation of the injunction, and that the defendant, Neill, "shall remove immediately from the possession of the property;" *Held*, That the agreement contemplated a final determination of the matters in controversy, by the judgment of the Court.

It has always been competent for parties to waive a jury and submit the case to the Judge.

Appeal from Bexar.

*I. A. & G. W. Paschal*, for appellant.

*Hewitt & Newton*, for appellees.

Lipscomb, J. In this case, we cannot perceive that there is anything substantial in the appellant's objection to the manner in which the judgment and decree of a former suit, between the same parties, was presented to the Court. The appellant had referred to, and sufficiently designated, the former proceeding between the same parties; and it was for the same subject matter; but averred that the decree was under an agreement of the parties, and that it was spread upon the record, that the injunction was to restrain the appellant, for ten years; that this judgment was rendered at the April Term, 1839, of the District Court of Bexar county. The defendants set this judgment up as a bar to the plaintiff's action. It is true, that it was not as formally pleaded as it would or should have been, if the plaintiff had not referred to it in his petition. We be-

lieve, under such circumstances, it was well pleaded, and that the record of the former suit was properly admitted in evidence, under it.

The plaintiff alleges in his petition, that the agreement of the parties was spread upon the record, and that any decree, not following the agreement, was obtained by fraud and bribery. We belive that the decree does substantially conform to the agreement upon the record; and there was no evidence offered to prove that it was procured by fraud and bribery. The following is the only agreement spread upon the record: "It "is agreed by the parties, that the jury be withdrawn and the "whole matter submitted to the determination of the Court "for the perpetuation of the injunction, and that the defend- "ant, Neill, shall remove immediately from the possession of "the property."

The decree then proceeds: "Whereupon the case came on "to be heard on the petition, general demurrer, joinder in de- "murrer, and answer to the petition; and, it being fully prov- "ed by many witnesses, among the oldest citizens in the coun- "try, that the plaintiffs and those through whom they claim, "have been in the peaceable and uninterrupted possession of "the land in contest and described in the plaintiffs' petition, "upwards of forty years, by virtue of a grant from the old "Spanish government, and which has been continued down by "various governmental orders, concessions and surveys to the "present time, and which is admitted by the terms of the de- "murrer which was overruled, as will appear by reference to "the record and the exhibits in this case and the testimo- "ny adduced, and therefore, the Court being fully advised of "and concerning the premises, from the examination thereof "and the law arising thereupon, from the argument of coun- "sel on both sides, do order, adjudge and decree, that the "plaintiffs have full and absolute rights to their property in "contest, to enjoy the absolute and uninterrupted and peace- "able enjoyment of the same, without any further intrusion "by the said defendant; that defendant be enjoined according

"to the terms of plaintiffs' petition; and that the defendant, "Neill, who is on the premises, be required to remove imme- "diately therefrom; and that the plaintiffs recover of the defend- "ant full costs of suit; and that execution issue for the same, "and the defendant go hence, &c." It was, in the argument, contended by the counsel for appellant, that this was a decree for a temporary injunction only, to enable the present defendants, who were plaintiffs in the former suit, to procure their evidence of title, from Mexico; and that it was intended to continue for ten years only. We find nothing in the record about ten years, nor anything to sustain the argument of counsel that the decree was temporary only and did not adjudicate the respective rights of the litigants. The petition does pray an injunction, to give them time to obtain their titles, or evidence of title, from Mexico; but, further, prays that upon their proving and pleading such title, a perpetual injunction be decreed. The injunction was granted without any specific time for its continuance; and the presumption is, that it effected the object for which it had been asked: for they afterwards went into trial of the case, and a jury had been impannelled to try the case, when, by agreement of parties, it was taken from the jury and submitted to the Judge, which submission resulted in the decree recited. It will also be seen, that, by the agreement as spread upon the record of the case, the question of perpetuating the injunction was explicitly submitted to the Court.

Another objection, taken to the decree, is, that it was in violation of the Constitution, and took away the right of trial by jury. That parties could not be allowed to waive a privilege, and, by consent, submit the case to the Judge instead of the jury, is a proposition so entirely repugnant to the constant practice in our Courts, since the first organization of the government, that it would be reluctantly assented to, even if it had never been denied by the practice of other Courts and the opinions of eminent jurists. The frequent practice in Common Law Courts, of agreeing upon the facts, and submitting the case, as if found on special verdict, to the decision of the

Judge, is evidence that a jury is not indispensable in finding the facts; nor is it different, when the parties, after the introduction of the evidence, agree, mutually, that the Judge shall pass upon both the facts and the law of the case. The trial by jury is a privilege, secured to either party, in the ascertainment of facts; but it is not forbidden to them to renounce the privilege. Mr. Justice Lumpkin, in delivering the opinion of the Supreme Court of Georgia, in the case of the Flint River Steamboat Company v. Foster, (5 Kelly, 208,) says: "Besides, trial by "jury is a privilege which may be waived. For an act to be "unconstitutional, it must prohibit or take away this trial "where it was heretofore used. An act which merely author- "ized a judgment by default to be rendered without the inter- "vention of a jury, is not on that account unconstitutional; "more especially when it guaranties this right ultimately, as "in this case. If the party, therefore, does not demand an "issue and trial by jury, what right has he to complain? (1 Wash. Virg. R. 356.) We believe that the former judgment was rendered by a Court of competent jurisdiction; that it was between the same parties as the present suit; and that it put in litigation the same matters, now sought to be again litigated in this case; and that it is a bar to the present action. (See Sutherland v. De Leon, 1 Tex. R. 250; Houston v. Yates, 2 Tex. R. 433; Foster v. Wells, 4 Tex. R. 101; Weathered v. Mays, Id. 387; Lynch v. Baxter and Wife, Id. 431.

Judgment affirmed.

## Crump v. Secrest.

In the absence of fraud, the surety on a note given as a forfeit in case of failure to run a horse race, cannot resist the collection of the note.

Error from Bexar. The suit was on the joint and several promissory note of Hilburn, Roaker and Crump. The defence was that the note was given as a wager on the result of a horse-race, and that the race was not run; that the defendant Crump was only security for Hilburn, and that he, Crump, had no notice that Hilburn had declined running the race.

The only evidence was that of Secrest and Martin; the former by interrogatories filed, and the latter by oral evidence, to the jury. Secrest, in his answers, said that it was not given as a wager on the result of a horse-race; and to the interrogatory whether the race was run, said that it was not. In answer to the interrogatory whether Crump had notice or was consulted as to failure to run the race, he said he was not. Martin's evidence proved that the note was given as a forfeit for failing to run.

*I. A. & G. W. Paschal*, for plaintiff in error.

*Dooley*, for defendant in error.

Lipscomb, J. The whole evidence offered, excepting the note, was on the part of Crump; and it is all reconcilable. The note was not given as a wager on the result of the race, but was deposited as a forfeiture if the race was not run. The evidence is very unsatisfactory and does not make out the defence set up by Crump, if that was a good defence in law, which, however, is not admitted. If it had been charged in the answer of Crump, that there was a fraudulent combination

between Hilburn and Secrest, that the note sued should be given, and then that Hilburn should fail to run the race, and proof to support the charge, Crump, as the security of Hilburn would have been entitled to relief; and the defence would have been good. But it cannot be perceived how Crump could be relieved from his undertaking and promise, in the absence of any fraud or combination, in which Secrest, the payee, was a participant, whether the note was given as a wager on the result of a horse-race, or was deposited as a forfeiture, should Hilburn fail to run the race. At all events he has failed to prove that the note was given on the result of the race; and the judgment must be affirmed. This case, notwithstanding it was argued at some length, does seem to involve so little difficulty, that, but for the character of the suit, I should feel disposed to consider it a delay case for which damages should be allowed.

Judgment affirmed.

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## T. J. Chambers v. J. Fisk and others.

Where several defendants in an action to recover land, stay waste and for a discovery, sever in their defence, presenting different defences, there should be distinct judgments; and, on appeal, an appeal bond should be given for each judgment: otherwise the appeal will be dismissed.

Appeal from Travis. This suit was brought against forty-six individuals, to recover land, to stay waste, and for a discovery. Many of them holding by different tenures; and some of them claiming to hold in good faith, if not by the best title, set up a claim for improvements, and there would have been different judgments, as various, almost, as the defences set up. Under such circumstances three sets of the defendants asked

for, and obtained leave to sever from the others in their defence. Each of these three was presented separately to the jury; and three distinct verdicts were returned, on which there were three different judgments, or a judgment on each verdict. The plaintiff appealed, and gave but one bond, consolodating the cases in his bond. A motion was submitted by the appellees, to dismiss the appeal for want of a legal bond under the statute.

*W. S. Oldham*, for appellant.

*A. J. Hamilton*, for appellees.

Lipscomb, J. It seems to us, that the record presents three different cases; and as such we are bound to consider them. In actions for damages for a trespass, it is not uncommon for the defendants to sever in their pleading; and some of them may not defend at all; and in cases of joint promissors, some of them may not plead, or plead different from the others: in all such cases, there should be but one final judgment. But in a suit like the present, there must be a distinction, as they, the defendants, would not be jointly liable, and the final judgment could not be joint. We therefore believe that there should have been a bond for each judgment appealed from, and that a bond embracing the different judgments, is not a compliance with the statute, that requires the appellant, in all cases, to give an appeal bond; and consequently, the motion to dismiss must be sustained.

Appeal dismissed.

## Swift v. Herrera.

Where the defendant, who located in 1849, alleged that the person under whom the plaintiff claimed, never did live upon, cultivate nor improve the land, as required by law, and that he afterwards abandoned the country to avoid a participation in the struggle for Independence, whereby said land reverted to the government and became forfeited, which allegations had been stricken out on motion of the plaintiff, the Court said: That individuals cannot, since the adoption of the State Constitution, by location assert any right to lands previously granted, on the grounds simply of forfeiture, was fully decided in the case of Hancock v. McKinney; and the principles of that decision are conclusive in support of the ruling of the Court, now under consideration.

A certificate by the translator in the General Land Office, under his hand, that a document is a correct translation of the original, on file in that office, accompanied by the certificate of the Commissioner, under his hand and seal of the department, that "E. Sterling C. Robertson, whose name is signed above, is the translator and recorder of Spanish deeds in this office, bonded and sworn," is sufficient.

It is the province of the Court, and not of the jury, to determine the legal effect of a grant.

Where a concession to a meritorious, native inhabitant of a frontier town, over forty years of age, purported to have in view the 12th Article of decree 128, and yet directed the officer who should put the grantee in possession, to classify the land to show that which he must pay the State, for which payment the rights designated in the 22nd Article of the law of 1825, were conceded to him; and the Commissioner, who put him in possession, after classifying the land, declared that he was, by virtue of the 12th Article of decree 128, exempted from making any payment or acknowledgment to the State; the Court said: The Governor had no authority, under the facts of this case, to impose as a condition of the grant, the payment of any dues. The assumption of power, in imposing such a condition, was unwarrantable. The grant itself (the concession) was issued by competent authority, in the legitimate exercise of power, and is not vitiated by a condition which, in contemplation of law, is a nullity. The Commissioner did not exceed his power, in failing to embody such condition in the title.

Where a concession in 1831 conceded to the petitioner "the sitio and labor which "he solicits, in the place he has designated or in that which may best suit him, "after the designation of the Commissioner of the general supreme government, "of a sufficiency for the payment of that which the State is indebted to the Fed-"eration;" and the petition of the grantee, founded thereon, to the Commissioner, for the corresponding title, stated that to wait so long would subject him to many inconveniences, and as he believed the probability very uncertain, that the said general Commissioner would select the same land that he claimed, because it was in an unimportant place, wherefore he prayed the Commissioner

that of his powers he would grant him the said sitio and labor, and he would receive it and hold it with the same condition placed upon it by the supreme government; and thereupon the Commissioner extended the title, expressly stipulating therein that it was a perfect, as contradistinguished from an inchoate title, and that it was discharged of the aforesaid condition, by the Revolution.

Appeal from Guadalupe. Action of trespass to try title, by Herrera against Swift.

Swift denied all and singular, &c.; set up title in himself by virtue of locations made in 1849, alleging that the pretended grant to Mansola, under which the plaintiff claimed, was void; that no concession was ever made by the Governor as is stated in said title; that no report of the Ayuntamiento was had as was pretended to be set forth in said title; that the officer pretending to grant the same, was wholly without authority, and that he withheld the original and never did transmit the same to the Political Chief as was pretended; that at the time said grant was made or purported to have been made, there was no law authorizing grants of that character; that the same was fraudulent in this, that it sought to grant land to a new settler, under the 22nd Section of the Colonization Law, when in truth the applicant was only entitled to land under the 24th Section, as a purchaser; that no legal survey was ever made of said land; that the Council of State of Coahuila and Texas never ratified and approved said grant—nor had the Government of the Republic or State of Texas since done so—wherefore said grant or pretended grant was a mere inchoate title; that, even if said grant conveyed any title or interest to Antonio Mansola, the pretended grantee, which was denied, said Antonio never did cultivate, live upon nor improve the same, as required by law, and that he afterwards abandoned the country to avoid a participation in the struggle for Independence, during the war between Mexico and Texas, whereby said land reverted to the government and became forfeited; that defendant, having strong reasons to suspect the fairness and genuineness of said original grant, requires the production of the same; he denied that the same

was genuine and denied that the copy among the archives at the Land Office in Austin, was written on strong paper of the right kind.

On motion of the plaintiff, the Court struck out those parts of the defendant's answer, which set up abandonment of the country by Mansola to avoid a participation in the struggle for Independence, and failure to occupy and cultivate.

There was a verdict and judgment for the plaintiff. Motion for new trial overruled. There was a bill of exceptions, as follows:

Be it remembered, &c., the plaintiff, to support his claim offered in evidence the document marked A purporting to be a translation of an original document existing in the Land Office at Austin, and certified by E. Sterling C. Robertson to be a correct translation of the original, and with certificate of the Commissioner of General Land Office—to the introduction of which document, as evidence, the defendant objected, but which objection the Court overruled, &c.

Document A was as follows:

Third Seal. Tow Bitts.

Qualified by the State of Coahuila and Texas for the Term of 1828 and '29, '30 and '31.

Mr. Commissioner: Anastacio Mansola a native of San Fernando de Bexar, and a resident therein to date, before you in the most proper form of proceeding, would represent, that the supreme government of the State by decree of 12th April of the present year, thought proper to grant to me one sitio of land and one labor, which I asked, as being more than 40 years, availing myself of the provisions of the 12th Article of the decree number 128 of the same State, as appears by the document of concession, which I exhibit on three leaves, by which it will also be seen, that notwithstanding I asked for one sitio of land more, under the character of a settler, having conceded to me only the sitio and labor aforesaid, and then with the condition that they shall be taken after those are designated by the Commissioner of the general government, for the pay-

ment of that which this State is indebted to the Federation; as it desires me to wait so long a time, it will subject me to many inconveniences, and as I believe the probability very uncertian, that the said General Commissioner will select the same land that I claim, because it is in an unimportant place, I pray you in me of your powers you may be pleased to grant me the said sitio and labor, and I agree to receive it and hold it with the same condition placed on it by-the supreme government. Gonzales 16th August, 1831.

At the request of Anastacio Mansola by not knowing how to write I have signed.

JOSE MARIA SALINAS.

Gonzales, 27th August, 1831.

By being presented and admitted on the terms which the present document shows, I have attached in continuation, the document of concession included, on three leaves, to the end, that, in all time, it may have the due effect, to the Empresario, citizen Green De Witt, that, in view of the document he may inform me in writing, if the land claimed by the party interested is entirely vacant and included in the demarkation of this colony, as also if there is any inconvenience in granting to him the aforesaid land, I, Jose Antonio Navarro, Special Commissioner of the supreme government of the State of Coahuila and Texas for the partition and possession of vacant lands in this colony contracted with the supreme government by the Empresario Green De Witt; by this act thus I decree, order and sign with two witnesses assisting, this day of the date, which I certify.

JOSE ANTONIO NAVARRO.

| Assisting. | | Assisting. |
|---|---|---|
| Jose Ramon Bedford. | | Thomas R. Miller. |
| Forth Seal, 3 ⅛ cents. | [L. S.] | For the Term, 1830 and 1831. |

Mr. Political Chief of this Department: The citizen Anastacio Mansola, a native and with a residence of 42 years 3

months and —— days, according to the record of my caption, before you with the due respect, would represent that I desire a tract of land on which I can raise some animals of the cow kind, including some work oxen, and at the same time a few horses, and also, as I have been raised to cultivate the soil as I have informed and proved to you of this date, I present myself to your correct sense of justice, with the object that you may be pleased to grant me one league and labor in the place or margin of the river Guadaloupe on this side, taking in the center of the land which I ask, the pass called San Geronimo, it being my wish to take for boundary, the road of Nacogdoches on the North, and on the South by lands which have been asked for by the citizen Elijio Gortari; which concession I ask, availing myself of the favor of the sovereign decree number 128 of the Honorable Legislature of the State to the citizens of the frontier of this department, respectfully accompanying to you the certificate of the Honorable Ayuntamiento of this city which asks in the said sovereign decree, in its 13th Article attached, that, in the most dangerous time I served as a soldier in the city company of Bexar, and in consequence of the scarcity of money, I was badly paid, almost all the time of my service. In virtue of this and the proof of the indicated certificate of the merits which I possess, I hope that you may have the goodness to give direction to this petition, elevating it to the supreme government of the State for its determination, in the event that you cannot determine upon my petition, which extends in addition to the sitio and labor which I asked for above the previous favor conceded to me, that you may grant me another sitio by way of purchase, which I obligate myself to pay for according to the rule established, and by consequence the expenses of surveying, title, &c., which may be necessary, on which terms I pray you may attend to my petition in which I shall receive favor and grace.

San Fernando de Bexar, 18th of August, 1830.

ANASTACIO MANSOLA.

Bexar, 26th of April, 1830.

To the Honorable Ayuntamiento of this city, with the accompanying document, that they may inform me if the land is vacant, and if there is no inconvenience to its being conceded.

MUSQUIS.

The citizen Miguel Arciniega, only constitutional Alcalde of the city of San Fernando de Bexar. I certify as far as I am authorized by right, that the citizen Anastacio Mansola, is a native and resident of this city; that he is forty-two years of age; that he has given his services voluntarily in all that has been required of him, and when this city was in danger from the incursions of the barbarous Indians, he presented himself freely with arms in his hands to defend it. And by decree of the same Ayuntamiento, and at verbal request of the party interested I give this for the uses that may be necessary. Concluded in San Fernando de Bexar, August 20th, 1830.

MIGUEL ARCINIEGA.

Ignacio Arocha, Secretary of the Ayuntamiento.

Mr. Political Chief of this Department: This corporation being impressed with the foregoing petition of the citizen Anastacio Mansola, and of the decree which you have been pleased to stamp on its margin, in compliance therewith, have obtained the necessary information and find that the land pertains to the colony of the Empresario Green De Witt; that it is vacant, and that the party interested possesses the necessary abilities to settle and cultivate it according to the law. Given in the capital of Bexar on the 2nd of September, 1830.

MIGUEL ARCINIEGA.

Ignacio Arocha, Secretary of the Ayuntamiento.

Leona Vicario, 12th of April, 1831.

According to the provision of the law of colonization of the State, of the 24th of March, 1825, in virtue of the information given by the Ayuntamiento of the city of Bexar in the

accompaying certificate and according to the provision in the 12th Article of decree number 128, issued by the Honorable Congress of the State on the 7th of April of 1830, I conceed to the petitioner the sitio and labor which he solicits in the place he has designated or in that which may best suit him, after the designation of the Commissioner of the general supreme government, of a sufficiency for the payment of that which the State is indebted to the Federation, provided that the land designated by the petitioner is entirely vacant and by no title corresponds to any corporation or person whatever. The Commissioner for the partition of lands in the enterprise to which pertains the land the party solicits, and in his default or not being comprehended in any enterprise, the first or only Alcalde of the respective municipality, will comply with the orders given on the matter, will put him in possession of said sitio and labor and issue the corresponding title, previously classifying the quality of it to show that which he must pay the State, for which payment I concede to him the rights designated in the 22nd Article of the said law. The Secretary will give the party interested a copy of his petition and this decree, that he may present them to the Commissioner for the effects which are to follow.

LETONA.

SANTIAGO DEL VALLE, Secretary.

This is a copy of its original, which exists in the archives of the Secretary's office under my charge, from which it is ordered to be taken by order of the most excellent Governor.

Leona Vicario, 13th of April, 1831.

SANTIAGO DEL VALLE.

Mr. Commissioner: I have seen your decree on the first and second pages of this document, and in reply would say that the land claimed by the citizen of Bexar, Anastacio Mansola, is situated on the South-Western margin of the Guadaloupe river, and I think it is situated in the vicinity of the glen (canada) anciently called the Menchacas, which place pertains to my colony and is vacant to date. In regard to

whether there are any embarrassments in conceding the land to the party interested, I am bound to say that there is none. The title alone, of being a native of Bexar and consequently a Mexican citizen, would give him, in my judgment, a preference over any other; and I, as Empresario of this colony, am anxious to have these citizens. This is as much as I can say to you in the particular. Gonzales, 28th of August, 1831.

GREEN DE WITT.

I have seen the foregoing information of the Empresario, by which it will be seen that the sitio and labor, asked for by the citizen Anastacio Mansola, are entirely vacant, and of those that pertain to this colony. It also appearing by decree of the 12th of April last, contained on the third and fourth leaves of this document, that the Supreme Government of the State conceded to him said lands, as being over forty years a frontier citizen, and in consequence entitled to the *maximum* dispensed to such citizens by the 12th Article of the decree of the same State, number 128, notwithstanding the indicated concession of the government includes the condition of leaving free the exercise of the authority of the Commissioner of the General Government to select those lands that the Federation may require in payment of the debts of the State, considering the qualifications, honesty, good services, and capacity of the party to settle and cultivate the lands which he solicits, in addition to having agreed in his petition to subject himself to the condition with which they were conceded to him by the government; that it is very improbable that the Commissioner of the General Government would claim and select at any time the same land; that it is situated in almost an unimportant place for the formation of any military establishment. In use of the power which the said decree of 12th of April last concedes to me as Commissioner in this colony, I am bound to order and obey the present act I order, in view thereof, that title of possession be given him, that by virtue of it, he may possess and enjoy without any other condition or payment than those expressed, the sitio and labor which he claims by con-

cession which was made to him by the Supreme Government —which I certify and sign for its continuance, with two assisting witnesses, in this said village of Gonzales, on the 28th day of the month of August of the same year of 1831.

JOSE ANTONIO NAVARRO.

Assisting. Assisting.

Jose Ramon Bedford.

In the said village of Gonzales on the 30th day of the same month and year, I, the said Commissioner, in attention to the concession of the Supreme Government of the State, dated 12th of April of the present year, made to the resident native of the city of San Fernando de Bexar, Anastacio Mansola, one sitio and one labor of land, of the two sitios and labor, that this party solicits, one as a purchaser, and the other and the labor which has been conceded to him according to the 12th Article of the law number 128 of the same State, which grants privileges to the frontier citizens, attending to the authority which by said decree of the 12th of April, of the present year is conceded to me, to put him in possession, as it appears that the land which he asked for and claims, is to this date entirely vacant, and that he agrees to receive it under the condition imposed by the same Supreme Government, exhibiting to him at the same time that the Commissioner of the General Government, might select the same land, in consequence of my former act and in the name of the State, I concede, confer, and put in possession, real, actual, corporal and virtual, to the said Anastacio Mansola, of the aforesaid sitio and labor of land, which land having been surveyed all in one body by the scientific Surveyor Byrd Lockhart, previously appointed in the form provided by the law, proved to be in the situation and with the following lines. (Here follows the field notes including the place designated in the petition.) The said land, which by the said notes of survey, the Surveyor believes to be of the pasture class, with four labors of temporal land, which I declare and classify. I, the said Commissioner, in exercise of the power conferred on me by the law, according

to the best of my understanding and belief, in conformity with said survey, which serves as a perpetual proof that the aforesaid Anastacio Mansola has received this sitio and labor of land of the aforesaid class as premium, which corresponds to him according to the said 12th Article of decree number 128, and that by the same he is excepted from making any payment or acknowledgment to the State, and without any other tax or obligation, than those mentioned as aforesaid, the land in the event that the Commissioner of the General Government should select and ask it on account of the Federation, in which event he shall be indemnified according to the law; and that of constructing within the year permanent land marks in each angle of the land, settle it and cultivate it in conformity with the provisions of the law of colonization of the State, of the 24th of March, 1825.

Therefore, using the faculty which has been conceded to me, and consequent instructions, I issue the present instrument and order, that the original be remitted to the Chieftaincy of this Department of Bexar, where it is bound to exist, for its due continuance, previously taking a certified copy of it, that it may be delivered to the party interested, to the end that as legitimate owner he may possess and enjoy freely the land, with all its uses, customs, and appurtenances, which may pertain to it, now and forever, to him, his children, heirs and successors, or whom of him or of them may have cause or right. Which I sign with two assisting witnesses, according to the law, this day of the date.

JOSE ANTONIO NAVARRO.

Assisting.
JOSE RAMON BEDFORD.

Assisting.
THOMAS R. MILLER.

General Land Office, State of Texas. } I, E. Sterling C. Robertson, translator and recorder of Spanish deeds in the General Land Office of said State, bonded and sworn, certify that the foregoing is a correct translation of the original document on file in this Office. Given under my hand at the city of Austin on the 17th day of May, A. D. 1849.

E. STERLING C. ROBERTSON.
T. & R. Sp. D. G. L. O.

General Land Office, } I, George W. Smyth, Commissioner
State of Texas. } of the General Land Office of said State, certify that E. Sterling C. Robertson, whose name is signed above, is the translator and recorder of Spanish deeds in this Office, bonded and sworn.

In testimony, &c.,

[L. S.] GEO. W. SMYTH,
Commissioner.

The following instructions were asked by the defendant and refused by the Court:

1st. It is for the jury to determine from the grant itself, whether it was the intention of the government to grant the land absolutely or in fee simple, or whether the grant was to depend upon a contingent or future event.

2nd. If the grant was to depend upon a contingent or future event, the fee did not pass from the government at the time, and never could have passed without some future action of the government.

3rd. That Antonio Navarro, as Commissioner, had no power to issue a title upon other conditions than those contained in the concession of the government.

There was no statement of facts.

*G. W. Paschal*, for appellant. I. There are two propositions taken by the plaintiff below, in his brief, which I wish to notice. The first is the assumption that the plea of forfeiture was correctly stricken out. The second, that the grant to Herrera cannot be attacked by a locator collaterally, unless it be void upon its face.

On the first point, I do not wish to add a single authority to those presented in Paschal and Perez. But I wish to answer the argument of the counsel It is contended that the party might forfeit his property; but, that, until that forfeiture be ascertained by a judgment, by indictment according to the proceedings of the Common Law, the fact cannot be shown by a locator. And for this 2 Kent, 13; 3 Story on the Constitu-

tion, Sec. 1783; and the case in 6th Cowen's N. Y. Rep., and others of a like class, are relied on.

The 7th Section of the declaration of rights, of the Constitution of the Republic of Texas, may incorporate the general principle of *magna charta*. But, to say that the decisions invoked are applicable, is to foreknow that the Republic would adopt the Common Law. It is also to assume that the eighth General Provision of the Constitution related to a crime, which it did not. It only created a rule of property which extended to future as well as past acquisitions. If the Constitution would thus protect the party, it would extend as well to his note as his property.

The reason given why this could never have been intended, viz: that parties may be continually harrassed by locator after locator, is becoming a theme of popular declamation; but it is exceedingly fallacious. The argument applies as well to a patent from the Republic, as to a Mexican grant. It is an objection to our whole system; and should be addressed to the Legislature. Our system is that of Kentucky and Tennessee, and is in some form or other known in all the States. It does not greatly differ from the Spanish system which we succeeded.

The granting of certificates was a fulfilment of the most solemn guaranties of the government. It is still continued as a means of paying debts, which would otherwise fall upon the treasury. The holder of the certificate can as well locate it upon the patented land as the venerable Spanish grant. But the holders of the patents fear not these consequences, because they fear not scrutiny. It is only the holders of bad titles, like the holders of bad certificates, who complain of the laws. The honest owner of land is rarely harrassed in any country.—And I have yet to hear of the case where a second location has been made, after a judicial decision has been made in favor of a Spanish grant.

II. The next position assumed is, that where a grant or patent has been issued under the great seal, by an officer having jurisdiction or power to make the grant, it cannot be set

aside by a collateral proceeding, except for defects appearing on its face, which render it void. If the array of authorities, presented by the appellee, were to the point, they would indeed be persuasive, and would no doubt cause this Court to consider carefully the grounds on which Russell and Mason stood. I think, however, that a careful review of these authorities will show that the principle does not depend upon any sanctity which may be attached to the great seal, or any solemnity which the parchment inspires; but it grows rather out of the distinctions which exist in remedies in different countries. The iron bars which separate the jurisdiction of Courts of Common Law and the Courts of Chancery, often induce the belief that there is really something in an instrument; when, if the party come in at another gate, or door, he would find no resistance. Fortunately, in Texas, we have no such divisions. Our battles are all fought upon principle. No ammunition is wasted in taking the outposts. And if a citadel be not well guarded, it surrenders to the assailant who has the better right, regardless to the manner of the attack.

The Courts of New York have followed the Courts of England, and place letters patent on the same footing with records: and hence deduce all the consequences which are applicable to a record, viz: that it cannot be attacked collaterally except for palpable want of jurisdiction over the subject matter—or else for fraud, and then only in the Court where the judgment was rendered. This is precisely the argument which was so ably urged in the fraudulent land certificate cases.

It seems to me that the reading of the case of Bragnell and Boderick only needs to be read, to satisfy the Court that the whole question has been one of jurisdiction, and not of principle.

And were there a possibility of mistaking the principle in Bragnell and Broderick, all difficulty is removed when we carefully consider the more recent cases of Stoddard and Chambers and Bissel and Penrose. (2 Howard, 284; and 8 Howard, 317.) These cases leave no doubt that whatever shows

that the patent is void, may be shown dehors the record, by any one having a title. The case of Bledsoe v. Wells, 4 Bibb, 329, is admitted to be different; but it is overruled by this Court in Russell and Mason.

*V. E. Howard*, for appellee. I. The Court struck out the plea, which set up the forfeiture of the land, on the ground that there could be no forfeiture, until Mansola had been regularly prosecuted and convicted of the offence. There can be no doubt, that the decision was correct. Under the Constitution of the Republic, no one can "be deprived of life, liberty or property, but by due course of law." (See Decl. of Rights, Sec. 6 and 7.) The provisions of the Constitution of the State are the same, if not more stringent. (See Sec. 8 and 16, Bill of Rights.) Due course of law means by due course of the Common Law, by which a party must be indicted, and regularly convicted by a jury, before a forfeiture of his property can be had for a political offence. It cannot be inquired into collaterally. (2 Kent's Com. p. 13, note B; 4 Hill, 145, Taylor v. Porter, a well considered case; 3 Story Const. Sec. 1783–4; Id. 1775.)

II. The decision of the Judge, that none but the State could assert a forfeiture, or enter for conditions broken, is amply sustained by the authorities. There must be a regular proceeding in the nature of office found, both by the principles of Common Law, Spanish and Mexican Law. (Mitchell v. United States, 9 Pet. R. 742.)

It is the principle of our Constitution, that no one shall be deprived of his property, but by "due course of law." It is laid down by all the authorities, both English and American, that whenever the subject or citizen is put to his action, the King or government must resort to office found, or some other similar judicial proceeding. If the grantor does not choose to assert the forfeiture by entry, what right has a third party to set it up? Under the rule attempted to be established, a grantee might be ruined by a multiplicity of suits, and yet prevail

in every one of them. If any holder of scrip may locate for conditions broken, the grantee of a Mexican title may have his land located as often as he gains one suit, and be immediately subjected to another location and suit, without any limit as to the number. The law does not tolerate any such monstrosity. It would be altogether destructive of property and the peace of society.

It is equally well settled that where a patent, a grant has passed the great seal, where there is jurisdiction to grant, it cannot be set aside by a collateral proceeding, except for defects appearing on its face, which render it void. (Jackson v. Lawton, 10 Johns. R. 23; Jackson v. Hart, 12 Johns. R. 82; 13 Pet. R. 450; 6 Cow. R. 281; The People v. Mauran, 5 Denio, 389.) The last case was decided in 1848, and is an able review of the authorities. It was alleged that the patent was void, because it did not contain a reservation of mines; because it did not show the notice of the grant required by law; because it was a grant for land under water, which could only be made for purposes of commerce, and was not so granted; because it did not show that the grantee was a party authorized to take under the statute. The Court held that all those matters were dehors the patent, and could not be investigated collaterally. The reason is, that a patent or public grant being matter of record cannot be avoided except by a direct proceeding of record. (Bledsoe's divisees v. Wells, 4 Bibb, 329.)

It would be contrary to every sound principle, to compel a party to be prepared at all times to prove up every thing required by law, previous to the emanation of a patent. Such a proceeding can only be instituted at the instance of the government, and by a direct suit. Such is the uniform language of the decisions.

Defects existing in a grant, which do not render it void on its face, cannot be taken advantage of by a subsequent locator, whose rights did not accrue until after the grant. There must be a previous equity. (Stringer v. Young, 3 Pet. R. 337; Hoofnagle v. Anderson, 7 Wheat. R. 212.)

Mere irregularities, abuse of authority, would not avoid the grant, unless there was a positive law declaring it void for these reasons, although the officer might be personally liable. (Stringer v. Young, 3 Peters, 339; Taylor v. Brown, 2 Cranch, 234; 5 Denio, 389.)

This conclusion is strengthened, with regard to our titles, from the provisions of the instructions to the Mexican Commissioners, which render the Commissioner personally liable for any violation of his duty under the Colonization Law. (See Decrees of C. and Texas, p. 73, Art. 28.) If the Commissioner had jurisdiction to grant, his decision as to all the proceedings necessary to the grant, are final and conclusive, unless fraud can be shown, to which the grantee was a party. (Ross v. Barland, 1 Peters, 658; 7 Wheaton, 218.) If there is any abuse, it is a matter between the government and its officer. (6 Peters, 729.)

III. There are some expressions in several decisions, in which the Judges assert that grants contrary to law, are void. But it will be found in all these cases, that there was no authority to make any grant. There was a want of jurisdiction, not an abuse of authority. Such was the case of Stoddard v. Chambers, 2 Howard, where the patent was held void because the land was reserved from sale and not subject to grant. See the discussion of this subject and a review of Hoofnagle v. Anderson and Polk's Lessee v. Wendal, 6 Peters, 730, and a late New York case, 5 Denio, 389. They all go on the ground, that, when jurisdiction is given to the officer, violations of the law, and irregularities cannot avoid the grant. They all assert the doctrine, that these irregularities are cured by the patent, which merges all previous proceedings. The doctrine of Hoofnagle and Anderson is now the rule of decision in the Supreme Court of the United States as well as in the State Courts.

*R. Hughes*, also, for appellee. The questions in this case, are conclusively settled by the case of Hancock v. McKinney.

The land in contest was granted by Coahuila and Texas, upon the subsequent condition of cultivation and payment of dues; and the defendant claims under locations made in 1849—which is a file closer of the first proposition.

The second is equally closed. For that which is attempted to be set up as a bar by this proposition, is a forfeiture incurred under the 8th Section of the General Provisions of the Constitution of the Republic. (Hart. Dig. p. 37.) And as to this as well as all other forfeitures, the Constitution of the State has provided, that the Legislature are to provide "a method "for determining what lands may have been forfeited or es- "cheated." (Art. 13, Sec. 4, Hart. Dig. p. 80.)

Hemphill, Ch. J. This is an action for the recovery of a tract of land. The plaintiff (who is appellee in this Court) claims under a title issued by J. Antonio Navarro, one of the Commissioners of the State of Coahuila and Texas for the distribution of lands; and the defendant claims by virtue of locations, under land certificates issued since the Revolution. Judgment was given for the plaintiff; and the defendant, having appealed, assigns for error:

1st. The ruling out by the Court, of that portion of defendant's answer, excepted to by the plaintiff. That portion of the answer set up a forfeiture of the land claimed by the plaintiff, on the grounds that the original grantor, Mansola, had not lived upon, cultivated and improved the same, and also that the grantee had forfeited the land by abandoning the country to avoid a participation in the struggle for Independence in the war between Mexico and Texas. We are of opinion that there was no error in this ruling of the Court. The location was made by the defendant in 1849. The Constitution of the State, in Section 4, Article 13, requires the Legislature to provide a method for determining what lands may have been forfeited and escheated. No law prescribing the mode of ascertaining forfeitures has yet been

adopted. The Courts have not been authorized to permit, at the instance of individuals, inquiries into the causes of forfeiture of grants, and to annull them or recall the titles, on proof that the forfeiture has been incurred; and there was no error in striking out such portions of the pleadings as would have let in proof to establish facts of this character. That individuals cannot, since the adoption of the State Constitution, by location assert any right to lands previously granted, on the grounds simply of forfeiture, was fully decided in the case of Hancock v. McKinney; and the principles of that decision are conclusive, in support of the ruling of the Court, now under consideration.

2nd. The next assignment is that the Court erred in permitting the plaintiff to introduce a translated copy of the original title to Mansola on deposit in the Land Office, certified to by E. Sterling Robertson as a correct translation, and with the certificate of the Commissioner of the General Land Office. The only ground in support of this objection, deserving notice, is, that the translation was not certified to by the Commissioner, but only by the translator of the General Land Office. The law declares that translated copies of all records in the Land Office, certified to under the hand of the translator and the Commissioner, attested with the seal of the General Land Office, shall be *prima facie* evidence in all cases in which the originals would be evidence. The instrument in question was certified as a correct translation, by the translator in his official capacity; and the Commissioner certifies to the official capacity of the translator. The statute requires that the translated copies must be certified by both the translator and the Commissioner, but does not prescribe that they shall attest the same facts. The mode in which they have respectively certified to this document is a compliance with the spirit and intent of the law, and as such was sufficient to authorize it to be used as evidence. The rational presumption is—at least the fact might be—that the Commissioner is unacquainted with the Spanish language. There is no law requiring him to have such knowl-

edge; and if he have it not, it would be unreasonable to require him to certify as a fact, that of which he is wholly ignorant. The correctness of the translation must depend on the fidelity and skill of the translator; and his official certificate is the real basis upon which the credit and admissibility of the instrument are supported. This document is certified in the customary mode of authenticating translations from the Land Office; and in the case of Hubert v. Bartlett's heirs, the objection now raised was well considered and adjudged to be without foundation; and we are of opinion that the Court was right, in permitting the instrument to be read in evidence to to the jury.

3rd. The third assignment is involved in the first, and need not be separately considered.

4th. The fourth assignment is the alleged error in refusing to give the jury the first, second and third instructions asked by the defendant.

The first instruction enunciated, in substance, that it was for the jury to determine on the legal effect of the grant or title of the plaintiff. No argument is required to show, that, as a legal proposition, this has no countenance in law.

The second was an abstract proposition, not applicable to the facts of the case, and, if given would have been well calculated to mislead the jury. If the vesting of the fee, under the grant, had depended upon the performance of some precedent condition, then the instruction would have applied.—But the conditions of this grant were subsequent. The fee was vested, though subject to defeat on failure to perform the conditions. The title was perfect, in the sense in which that Term is used in contradistinction to imperfect or inchoate titles —that is, it required no further act of the granting power, to its perfection.

This point was so fully discussed in cases decided at the last Term, that a reference to them will be sufficient without further examination. (Paschal v. Perez, 7 Tex. R. 348; Hancock v. McKinney, Id. 384; Edwards v. James, Id. 372.)

The third instruction asked is that the Commissioner had no power to issue a title, upon other conditions than those contained in the concession of the government. The special variance between the concession and title issued by the Commissioner, is not stated. In the argument, it was contended the title dispensed with the payment of dues required by the concession. There is some confusion relative to this matter, on the face of the proceeding. The party, as it appears from the very obscure statements of his application, petitioned for two sitios and a labor. But one sitio and labor were granted. The executive, in his decree, recites that the concession is made in virtue of the information given by the Ayuntamiento, and in accordance with the Colonization Law of the 24th March, 1825, and with the 12th Article of Decree No. 128.

The information from the Ayuntamiento was to the effect that the applicant was a native and resident of Bexar; that he was forty-two years of age; that he had given his services freely in all that had been required, and when the city was in danger, from the incursions of barbarous Indians, had voluntarily presented himself with arms for its defence. Under the 12th Article of decree 128, (referred to in the concession) the residents of the towns, frontier to the savage tribes, were entitled to a remission of a portion of the dues on the grants of lands; and a resident of forty years was exempted from the payment of any dues. The facts upon which the application rested, and which are recited in the concession, show that the benefits of the 12th Article were asked for and intended to be granted. But notwithstanding such was the manifest intention apparent on the face of the grant, and such the positive requisition of law upon the facts in the petition, yet the executive directs the Commissioner to classify the lands to show what the grantee must pay the State, and for which payment the executive concedes the rights designated in the 22nd Article, of the Colonization Law. The Governor had no authority, under the facts of this case, to impose, as a condition of the grant, the payment of any dues. By the 12th Article of de-

cree 128, in conformity with which the grant was intended to be made, the applicant was exonerated from such payment. The Commissioner, in the title, with reference to the effect of the 12th Article of the said decreee upon the grant, declares that the grantee was exempted from making any payment or acknowledgment to the State.

This declaration was beyond question in conformity with law; and the implied condition in the concession, that the grantee was liable to the payment of dues, was illegal. The assumption of power, in imposing such a condition, was unwarrantable and not authorized by the law of the land. The grant itself was issued by competent authority, in the legitimate exercise of power, and is not vitiated by a condition which in contemplation of law is a nullity, and which should be treated as surplusage and without force or effect. The Commissioner did not exceed his power, in failing to embody such condition in the title; and there was consequently no error, under the facts of the case, in the refusal of the Court to give the fourth instruction.

5th. The fifth ground for reversal is that the Court erred in giving judgment for the plaintiff, upon the papers and facts before the Court at the trial.

This assignment has not been discussed by the defendant. The grounds which might be urged in its support, are not very obvious. The facts and the papers have been considered with some attention; and if there be error in the judgment, it is not apparent. The title to Mansola was perfect, and his interest had, by conveyance, vested in the plaintiff. It was prior in time, and superior in right, to that of the defendant; and, on the facts, there seems no valid objection to the recovery.

There is a point raised in the brief, which may with propriety be considered under this assignment; and it is this, that the title was only conditional and did not pass the fee to the grantee; that the land was specially reserved to the use of the general government, and the grantee accepted it with

this condition, and that the fee, vested in Texas at the Revolution. The words of the concession are, in substance, that the land is granted in the place designated by the petitioner, or in that which may best suit him, after the designation by the Commissioner of the general government, of a sufficiency for the payment of the debts due from the State to the Federation.

From these terms, I should conclude that the land designated by the petitioner, if finally accepted by him, was conceded without reservation; but if his selection was elsewhere, it must be in subordination to the prior right of designation for the use of and in discharge of the debts due to the federal government. But the reservation was not so understood by the party or the Commissioner. The land designated by the applicant was deeded to him by title of possession, but with the express condition that it was subject to selection by the general government, in discharge of its demands against the State. The title conveyed all the right that was in the State to the grantee, subject to defeasance on a most remote and improbable contingency, and which did not arise during the subsequent existence of the government, under which alone its occurrence was possible.

By the Revolution, this possible contingency against the perpetuity of the grant, was brought to an end. The debts from the State of Coahuila and Texas and the demand of the federal government against the State, so far as they affected the Republic or State of Texas, were by the Revolution, alike extinguished. If the State or Republic became a creditor by the Revolution, she became likewise a debtor; and it is not very probable that she would select her own lands to pay her own debts, or that she would enforce any real or supposed liens against this or other lands granted since 1831, in payment of such debts. If it be even granted, that she became a creditor, by the Revolution; yet, no private individual has authority to collect the demands due the Mexican government —or to claim any lands by virtue of any contingent, supposed,

hypothecary interest or right of choice which that government may once have had in such lands, to secure the payment of its debt. To illustrate this point, let us suppose that, the Mexican government had continued to exist, and that the laws, customs and usages authorizing individuals to denounce lands, (once granted,) as subject to re-grant, had remained in force; yet, no individual could have set up any pretension to a re-grant of this land, on the ground that the general government had a right, if it chose, to have the land appropriated to the discharge of its obligations against the State. A denunciation, on such grounds, would have been at once dismissed.

The remaining grounds, that the Court erred in the refusal to grant a new trial, has been disposed of in considering the previous causes for the reversal; and there being no error in the judgment, it is ordered that the same be affirmed.

Judgment affirmed

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JOHN CRAYTON AND OTHERS v. N. H. MUNGER, ADM'R.

There is no principle which can sanction and give legal effect to fraud, by which an innocent person has been deceived to his prejudice, by whomsoever and in whatsoever capacity committed. There is no person, nor class of persons, capable of contracting at all, at liberty to perpetrate frauds upon others, to their injury, with impunity. Not even infants and married women, who, for most purposes, are incapable of contracting so as to bind themselves, are exempt from the obligation to observe, in their dealings with others, the dictates of natural justice and common honesty.

An estate can neither be charged, nor can it charge others, by means of the illegal or fraudulent acts of its legal representative.

Where a party excepts specially to the pleadings of his adversary, the latter has a right to regard all other objections than those indicated, unless to matter of substance, as waived.

*Quere?* As to the extent of a prayer of a defendant who is resisting the collection of a note given for the purchase money of land, that both parties be placed in *statu quo*.

Crayton v. Munger.

The doctrine of *caveat emptor*, in its application to judicial sales, does not extend to a discharge of those who make the sales, from the obligation which obtains in all sales, to act fairly and not fraudulently.

Appeal from Caldwell. This suit was instituted in the Court below, by the appellee against the appellants, to recover the amount of a note executed by them for the purchase money of a half league of land, bought by Crayton, at a sale made by the appellee as administrator of Pettus, and to foreclose the mortgage executed by Crayton to secure the payment of the same.

To the original answer of the appellants the appellee excepted, and his exception was sustained by the Court, giving the appellants (the defendants below) leave to answer over.

The parties, Thompson and McGehee, filed an answer setting forth that they were the sureties of Crayton, and ought not to have been sued.

The party Crayton filed his amended answer, pleading substantially as follows:

1st. Payment.

2nd. That the note sued on was executed by him and his co-defendants, who were his sureties, for the half league of land mentioned in plaintiff's petition, sold by plaintiff to defendant Crayton at administrator's sale; that neither at the date of the sale or conveyance of said land by plaintiff to defendant, (to wit: on the 5th August, 1851, and on the 28th August, 1851,) was there any good and legal title to said half league of land in the plaintiff; that, at the time of said sale and conveyance to defendant, the plaintiff's title as administrator was wholly worthless and defective; that the land was not assets in the hands of the said plaintiff, as administrator of Pettus; and that the plaintiff well new the facts as stated, when he made the sale to defendant; that the said plaintiff, at and before the dates of said sale and conveyance, falsely and fraudulently represented to defendant that his (plaintiff's) title to said land was good and perfect; that plaintiff well

knew at the time that his title was not good; that said plaintiff used false and fraudulent representations to induce the defendant to purchase; and that he, defendant, relying upon these false and fraudulent representations, was induced to purchase the land; that the plaintiff's intestate Wm. Pettus, in his life time, to wit: on the 11th day of July, 1839, sold and conveyed by bond for title, to one George Adams, one league of land covering the half league sold by plaintiff as administrator, to defendant, of all which the said plaintiff had knowledge, when he sold to defendant, and thus knowingly and wilfully committed a gross fraud upon him, defendant; that suit has been instituted and is now pending in the United States District Court sitting at Galveston, by parties claiming under said title bond to Adams, against the plaintiff as administrator of Pettus, to compel him to make title, &c. Defendant prayed that the facts alleged in his answer might be heard and considered, and that the contract between himself and said plaintiff might be cancelled; that defendant be allowed to give up to plaintiff the deed executed to him by plaintiff, for said half league of land and reconveying to him whatever interest he acquired by said deed; that the note sued be surrendered to defendant, and the parties placed in *statu quo;* or, that, if not entitled to this relief, that the plaintiff be restrained from proceeding to final judgment, until the determination of the aforementioned suit against the said plaintiff in the Federal Court at Galveston.

To the amended answer of Crayton, as stated, and the separate answer of Thompson and McGehee, the appellee excepted, specially, and the Court sustained the exceptions and rendered judgment against the appellants. It was not stated as a cause of exception, that the answer was not sworn to, nor that the defendant did not offer to restore the possession.

*A. J. Hamilton*, for appellant. The error assigned is the judgment of the Court below, sustaining the plaintiff's exception to the amended answer of the defendant.

It will be contended here, as it was in argument in the Court below, that the doctrine of *caveat emptor*, in this and all other sales made by administrators, applies as well as in all other judicial sales. It is conceded, that, as a general rule, the doctrine applies in all judicial sales, and that the purchaser takes without warranty express or implied; but it is not a rule without exception—and the exception exists wherever the sale has not been conducted with fairness—certainly where it has been tainted with fraud.

There is no exception to the rule that "fraud vitiates every contract."

In the application of this rule, there is no principle of law or equity, which creates an exception in favor of an administrator. If injury result to the estate, from the fraudulent act of the administrator, he will be responsible to the estate—the party against whom the fraud is perpetrated, is not to be injured by it. (Swenson v. Walker's adm'r, 3 Tex. R. 93.)

The whole extent of the doctrine of *caveat emptor*, as applied to sales by administrators, or others selling under judicial orders or decrees, is, that the sale is without warranty, and the case of Lynch *et al.* v. Baxter and wife, (4 Tex. R. 431,) goes no further. But a Sheriff, or either of the parties, plaintiff or defendant to an execution, may be guilty of such fraud as will vitiate the sale.

The rule of *caveat emptor* applies not to judicial sales merely, but to all other public sales. (1 Story, Eq. Jur. Sec. 200, and notes.)

Thus, then, the rule being the same, anything which would avoid, in favor of the purchaser, a sale at auction, would also be good in a judicial sale.

The misrepresentation and fraud complained of, was greatly to the prejudice and injury of the appellant, and would be actionable even in a Court of law. (1 Story, Eq. Jur. Sec. 203, & 207.) And the same author, still continuing to treat of misrepresentations and concealments, proceeds to say: "But, by "far the most numerous class of cases of undue concealment,

"arises from some peculiar relation or fiduciary character be-
"tween the parties;" among which are enumerated, "execu-
"tors and administrators and creditors, legatees, or distribu-
"tees," &c. (Sec. 218; 13 Ves. R. 51; 5 Ves. R. 485.)

Any concealment or misrepresentation by the vendor, in relation to the title of land, by which the defendant is deceived, is fraudulent. (See Bacon Abr. 4 Vol. p. 388, and numerous authorities cited; 3 Maine, R. 332.)

It would be a reproach to equity jurisprudence, to say that no relief can be had upon the facts presented in the appellant's amended answer, and which are admitted by the appellee's exception. Nor will the principles of equity be satisfied by the personal responsibility of the administrator. The administrator is but the legal agent of the estate, and the principals cannot profit by his fraud. (Amr. Dig. 2 Vol. 240; Hughes, R. 71.)

*N. H. Munger*, for appellee. The demurrer was properly sustained to the second separate amended answer of Crayton.

1st. Because there is no affidavit as required by Article 2505, Hart. Dig.

2nd. An administration sale is a judicial sale; and a defect in the title, and knowledge of that defect by the administrator, would be no defence in a suit on the note. (Lynch *et al.* v. Baxter and wife, Adm'rs, 4 Tex. R. 437.)

3rd. The allegation that "the plaintiff falsely and fraudu-
"lently represented to the defendant that the title to said half
"league of land was a good and perfect title," adds no force and gives no effect to the plea, that averment being a conclusion from facts, or allegations of plaintiff, and not a statement of his representations. The allegation "that the plaintiff used
"false and fraudulent representations to induce defendant to
"purchase, and that he trusted to them," are liable to the same objections. What proof could have been admitted under such averments? Surely no facts or statements of plaintiff. (Mimms v. Mitchell, 1 Tex. R. 443.)

4th. An administrator, as administrator, cannot commit a fraud, or tell a lie. As an individual he may do both, and be responsible in damages therefor. If an administrator, as such, can commit a fraud, then the purchaser can plead in reconvention the injury which he has sustained, and recover damages against the estate. The latter is a sequence of the former.

5th. The plea does not aver that he is disturbed in his possession of the land. (4 Tex. R. 437.)

6th. He does not tender a reconveyance of the land, and he cannot be permitted to hold on to it and resist the payment of the purchase money.

7th. The plea states only conclusions of law and fact, and not facts.

8th. Mere knowledge of an outstanding claim for the land, by the administrator, he having made no misrepresentations, and there being no averment that the purchaser was ignorant of such claim, would not, of itself, make the act of the administrator, in thus selling, fraudulent. A faithless trustee, trying to injure the estate, or by himself or his friends endeavoring to purchase the property, at greatly less than its value, might proclaim defects of title, or depreciate the value of the thing sold. It is not the duty of an administrator so to do. Would an honest one do it? Would the law allow it? Would it not open the door for fraud upon the estate? It is enough that he makes no false or fraudulent representations. Had the purchaser used the diligence before the sale he has since, he could then have known all he now knows. His vigilance is now prompted by a desire to avoid the payment of the money. Honesty, fair dealing, the interest of the estate and its creditors, should have urged him to an earlier investigation, and show the propriety of applying the doctrine of *caveat emptor* to purchasers at administration sales. (4 Tex. R. p. 437, and authorities cited; Art. 1176, Hart. Dig.)

9th. The fact that a suit is instituted against the administrator for the land, affords no defence to the defendant in this

suit, he getting only the title the intestate had. (Art. 1176.)

10th. Again, if the defendant could tender a reconveyance of the land, place things *in statu quo ante bellum*, and be released from the payment of the money, he has not made such a tender of a re-conveyance as is permitted or authorized by law. He must actually bring into Court and tender the reconveyance with his plea. But the doctrine of *caveat emptor* applying, he is not permitted to reconvey and avoid payment.

WHEELER, J. The material question, to be determined, is upon the legal sufficiency of the answer.

It is only necessary to notice so much of the answer as respects the sufficiency of the averments, contained in it, to entitle the defendant to a rescission of the contract it discloses. Its averments are, in substance, that the consideration of the note sued on was a half league of land, sold the defendant by the plaintiff as administrator of William Pettus, deceased; that the plaintiff had no title to the land, either at the date of the sale, on the 5th day of August, 1851, or of the conveyance, on the 28th of the same month—for that the plaintiff's intestate, in his life time, on the 11th day of July, 1839, had sold the land to one George Adams, and made to him his bond to make title; that the plaintiff, well knowing this, falsely represented to the defendant, before and at the time of the sale, that he had a good and perfect title; and that he made such representation, knowing it to be untrue, and with the intent to deceive and defraud the defendant; that the defendant, trusting to these false and fraudulent representations of the plaintiff, was thereby induced to make the purchase; and that the plaintiff's conveyance gave him no legal and valid title to the land. And he prayed a rescission of the contract; and to that end, that the defendant might be allowed to return to the plaintiff his deed, and to re-convey to him the premises; that the note sued on be cancelled, and the parties placed in their original condition, as before the making of the contract. Taken as true, as, for the purpose of considering its suffi-

ciency on the exceptions, the answer must be taken, we cannot doubt that it presents a proper case for the rescission of the contract. It makes out a case of positive fraud; which vitiates and avoids all contracts, when sought to be relieved against by the party defrauded. There is no principle which can sanction and give legal effect to a fraud, by which an innocent person has been deceived to his prejudice, by whomsoever and in whatever capacity committed. There is no person, nor class of persons, capable of contracting at all, who are at liberty to perpetrate frauds upon others, to their injury, with impunity. Not even infants and married women, who, for most purposes, are incapable of contracting so as to bind them, are exempt from the obligation to observe, in their dealings with others, the dictates of natural justice and common honesty.

An administrator, it is true, cannot create a charge upon the estate he represents, by his illegal or fraudulent acts; and it is equally true that the estate cannot derive benefit, or obtain a legal advantage as against innocent third persons, by means of such acts. The estate can neither be charged, nor can it charge others, by means of the illegal or fraudulent acts of its legal representatives. That an administrator, in his representative capacity, cannot derive benefits from frauds, committed by him in that, or any other capacity, is a proposition too plain to require illustration. It is, (says Judge Story in his Commentaries on Equity Jurisprudence) manifestly a result of natural justice, that a party ought not to be permitted to avail himself of any agreement, deed, or other instrument, procured by his own fraud, or by his own violation of legal duty, or public policy, to the prejudice of an innocent party. (2 Story, Eq. Sec. 695.) It would, indeed, be a monstrous doctrine, to hold that estates may speculate upon the fraudulent acts of their legal representatives.

It is objected to the legal sufficiency of the answer, that it is not properly verified. To this and other objections, now first urged to its sufficiency in point of form, it will suffice to say,

that when the plaintiff undertook to except specially to the answer, he ought to have indicated all the grounds of exception on which he intended to rely. Where a party excepts specially to the pleading of his adversary, the latter has a right to regard all other objections than those indicated, unless to matters of substance, as waived. Beyond the grounds of exception specially set forth, the Court will only look to the substance of the pleading.

It is objected that the answer does not aver that the defendant is disturbed in his possession. There is no averment, nor does it appear by the record, that the defendant was in possession of the land. This, perhaps, would be the legal inference from his having purchased and received a conveyance: and if the fact was otherwise, and it was essential to his right, it was for him to show it. The prayer, however, that the defendant might be permitted to deliver up his deed for cancellation, that the contract might be rescinded, and the parties placed in the condition they respectively occupied before the sale, cannot be otherwise considered than as a virtual offer, on the part of the defendant, to deliver up to the plaintiff, not only the deed, but the possession also, if, indeed, he had received it; and this was sufficient as to the matter of the possession. Had the exceptions raised this objection to the answer, it might have been cured by amendment; or a more direct averment, containing either an express offer to restore the possession, or showing a legal excuse for not doing so, might have been required. But as the question is presented, we think the pleading sufficient in substance; and that, to require greater speciality, where the attention of the pleader was not called to the alleged defect, and, especially, where it was diverted from this, by exceptions specially taken to other parts of the answer, would be unjust to the defendant; and might have the effect to defeat the ends of substantial justice, by requiring too great strictness in matters of form.

We are of opinion that the answer presented a valid defence to the action, set forth by averments, in substance, sufficient;

and that the Court erred in sustaining the exceptions. The judgment is, therefore, reversed, and the cause remanded for further proceedings.

Reversed and remanded.

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## Martel v. Hernsheim.

Where the Supreme Court affirmed a judgment in 1849, and in 1852 it was made to appear to the satisfaction of the Court, that, at the time of the affirmance, the appellee was dead, the Court vacated and annulled the judgment of affirmance, revoked the mandate, and continued the case, as on suggestion of the death of the appellee, for want of parties.

Appeal from Fayette. See 5 Tex. R. 205.

*Burns*, for appellant.

Lipscomb, J. In this case, at the December Term, 1849, the judgment of the District Court of Fayette county was affirmed, against the appellant and his securities in his appeal bond; which was certified to the District Court, for its observance. It is now, at this Term, made to appear fully to the satisfaction of this Court, that, at the time of the affirmance of the judgment, the appellee was dead; it is therefore ordered that the said judgment of this Court, in this case, of the December Term 1849, be and the same is hereby annulled and vacated; that the suit be reinstated on the docket of this Court, and be continued on the suggestion of the death of the appellee, for want of parties; and it is further ordered that the mandate, heretofore issued from this Court to the District Court of Fayette county, be and the same is revoked.

Ordered accordingly.

## O'Docherty v. Archer.

There is no mode of revising the judgment of the County Court, under the statute, (Hart. Dig. 919,) in cases of contested elections for county officers; it is therefore conclusive.

Where the District Court properly dismissed a *certiorari*, for want of jurisdiction, in a case of contested election, and proceeded to affirm the judgment of the inferior Court, it was held that the affirmance was merely nugatory, and afforded no cause for appeal.

Appeal from San Patricio. The appellant obtained a *certiorari* to bring up to the District Court, a case decided by the County Court of San Patricio county, in the matter of a contested election between himself and the appellee, for the office of Chief Justice of the county, for the purpose of obtaining a trial of the case anew in the District Court. The Court declined to try the case anew, but proceeded to revise the judgment upon the record of the proceedings in the County Court, dismissed the *certiorari*, and affirmed the judgment. The plaintiff in the *certiorari* appealed.

*Harris & Pease*, for appellee.

Wheeler, J. The statute which confers upon the County Court jurisdiction to try contested elections for county officers, gives no appeal from its decision. (Hart. Dig. Art. 919.) In constituting the tribunal, it was optional with the Legislature to give an appeal or not, as might best comport with their views of public policy. As no appeal was given, the inference must be that none was intended. The terms of office of these officers are of so short duration, that, in many cases, the term would expire before the right could be finally determined, if the parties were allowed to litigate their respective claims through successive appeals to the Court of last resort. Not

only public policy, but the real good of the parties themselves, who are immediately affected by the decision, demands that controversies of the character of the present, should be determined with the least possible delay and expense. Such considerations, doubtless, induced the Legislature to confer the jurisdiction to decide in contested elections of county officers on the County Court, which, from its organization, can hear and determine the controversy at once, rather than upon the District Court whose sessions are less frequent, and where the decision may be delayed by continuances from Term to Term for years. If it had been the intention, that the District Court should take cognizance of the question, in any form, or at any stage of the case, it probably would have been invested with the jurisdiction in the first instance, as in the case of contested elections for State officers. (Id. Art. 944.) The conclusion that no appeal was intended from the decision of the County Court, in these cases, is strengthened by the fact that an appeal is given, in express terms, from the decision of the District Court in contested elections of State officers. (Id. 951.)

The reasons which influenced the decision of the Court on this point, in the cases of Field v. Anderson, (1 Tex. R. 437,) and Cullem v. Latimer, (4 Id. 329,) seem entitled to equal weight in this case.

There having been no appeal given, or other mode of revising the decision of the County Court in the matter of this election, provided by law, the decision is final. (Baker v. Chisholm, 3 Tex. R. 157; Arberry v. Beavers, 6 Id.; 6 Pet. R. 729.)

The Court, therefore, did not err in dismissing the *certiorari*. The affirmance of the judgment of the County Court was merely nugatory. It did not affect the judgment dismissing the *certiorari;* which is affirmed.

Judgment affirmed.

## O'Brien v. Hilburn.

The husband is liable to be sued by the wife, where he violates her marital rights of property.

Where, in consequence of any unauthorized act of the husband, violative of the marital rights of the wife, it becomes necessary for her to resort to suit against a third person, there is no necessity that she should be joined by her husband, nor that she should obtain the permission of the Court to sue alone.

In such a case, if it be necessary that the husband be made a party to the suit, it should be, it would seem, in the character of defendant, rather than in that of plaintiff.

The acts and representations of the wife, in respect to her rights of property, made to deceive, and which do deceive others, to their injury, will be binding upon her; and she will be precluded from asserting her claim, as against those who have confided in and acted upon her representations and admissions, or who have been deceived, to their prejudice, by her fraudulent acts.

Appeal from Travis. This suit was brought by the appellee, a married woman, to recover from the appellant certain negroes, alleged to be her separate property. The petition alleged that her husband refused to join her in the suit.

The defendant, in his answer, denied the averments of the petition; and asserted title in himself, by purchase from the husband. And, in an amended answer, he charged, that, at the time of the purchase, the husband claimed to be the sole owner of the slaves in question, and proposed to sell them to the defendant; and that the plaintiff, knowing that he so claimed and proposed to sell them to the defendant, falsely and fraudulently concealed her right and title, disclaimed all right to the negroes, and pretended that they were the property of her husband and that he had the right and authority to sell them; and, that, being deceived by the representations and concealments of the plaintiff in that respect, he was induced to purchase the negroes.

To this answer the plaintiff interposed a general demurrer; which the Court sustained. There was a verdict and judg-

ment for the plaintiff. There was no evidence before the jury, that the husband refused to join.

*W. S. Oldham*, for appellant.

*J. Hancock* and *J. Sayles*, for appellee.

WHEELER, J. Two grounds are relied on for reversing the judgment, which require notice. 1st. The non-joinder of the plaintiff's husband. 2nd. The ruling of the Court sustaining the demurrer to the answer.

The question respecting the necessity of obtaining the authority of the Court, to enable the wife to sue without joining her husband, was settled in the case of McIntire v. Chappell. (2 Tex. R. 378.) It was there held that the right to sue, in a proper case, is one which cannot be denied the wife; that, where the facts are such as authorize the action, the authority of the Court will always be presumed; and that no express grant of authority is necessary.

But it is insisted that it should appear, expressly, that the husband had "failed or neglected" to join his wife in the suit.

The power of exercising the "sole management" of the separate property of the wife, which the law confides to the husband, is for the mutual benefit of the parties. It does not include the power of absolute disposition over the property; nor does it authorize the husband to make any contract, or do any act in relation to it, inconsistent with the wife's right of property, or with her right, concurrently with him, to the enjoyment of its use, present or prospective. When the husband assumes the power of absolute disposition, or any control inconsistent with the marital rights of the wife, he violates his duty and the trust reposed in him by the law, and is responsible for it. And when, in consequence of any unauthorized act of his, violative of her marital rights, it becomes necessary for the wife to resort to suit, there is no necessity that she should join her husband in the action. His having assumed a power

of dispostion or control over her property, inconsistent with her rights, affords, of itself, a sufficient reason for omitting to join him in an action, which has for its object a restoration or preservation of the rights of which he has sought to deprive her. In such a case, if it be necessary that the husband be made a party to the suit, it should be, it would seem, in the character of defendant, rather than in that of plaintiff. This point was considered, and so determined by this Court, in the case of Porter and Wife v. Miller. (7 Tex. R.) This case is plainly distinguishable from those cited by counsel for the appellant.

The ruling of the Court, in sustaining the demurrer to the amended answer, presents a graver question.

The law, while it affords protection to the marital rights of the wife, in respect to her separate property, requires of her to deal justly, and to respect the rights of others. The law protects the wife; but it gives her no license to commit a fraud against the rights of an innocent party. It will not permit her to practice deception and fraud upon innocent third persons, who come to deal with her husband, and to trust him, on the faith of property. The acts and representations of the wife, in respect to her rights of property, made to deceive, and which do deceive others, to their injury, will be binding upon her: and she will be precluded from asserting her claim, as against those who have confided in and acted upon her representations and admissions; or who have been deceived, to their prejudice, by her fraudulent acts. This subject was considered in the case of Cravens v. Booth. (8 Tex. R.) And that case is decisive of the question we are considering, against the ruling of the Court, upon the sufficiency of the answer.

The judgment must therefore be reversed and the cause remanded.

Reversed and remanded.

## Nathaniel Townsend v. N. H. Munger, Adm'r.

Where a right is claimed by virtue of a proceeding of the Probate Court, it is not necessary, so far as the admissibility of a transcript of the proceedings of the Probate Court, is concerned, that it should purport to be a transcript of all the proceedings.

It is competent for a party to give in evidence such of the proceedings of the Probate Court, as are material to his case; and it is not incumbent on him to introduce more.

Where, in the fall of 1843, the defendant rendered an account to the Probate Court as executor of an estate, which was received and allowed by the Court, the Court held that it was sufficient to charge him as executor at that time, and that the presumption was that a previous order for his removal, in the Spring of 1843, and the appointment of another in his place, which other had qualified and given bond, had been revoked.

The only action which the District Court could take (in 1843) upon an appeal from the Probate Court, was either to dismiss the appeal if not prosecuted in a manner to enable the Court to take cognizance of and try the case, or to proceed to trial and judgment upon the merits.

Where, in 1843, an executor filed an account, denominated by the Probate Court an account current, and the Court gave judgment against him in favor of the estate for the balance due, from which judgment there was an appeal, upon which appeal the District Court ordered, that, because there did not appear sufficient record to enable said Court to proceed to hear and try said cause, the same should be remanded to the Probate Court for further proceedings; *Held*, That the judgment appealed from being final, the only further proceeding which the Probate Court could take, in respect to that judgment, was, to carry it into effect. It could not revise its own final judgment, rendered at a previous Term; and that, having done so, its subsequent judgment was null and void, without appeal.

The general rule is well established, that an executor or administrator shall not be charged with any other goods or assets, than those which came to his hands. An outstanding debt due to the decedent, is not assets in the hands of his executor or administrator, to charge him, where there has not been gross negligence, or where the delay in collecting it has not been collusive, fraudulent or unreasonable.

Appeal from Travis. The petition of Munger, administrator *de bonis non* of the estate of Thomas McQueen, filed September 23rd, 1851, alleged the death of McQueen in 1834, leaving a will; the probate of the will, same year, in the juris-

diction of Austin, where McQueen had resided; the confirmation of Townsend and Jas. Baird as executors; the confirmation of Baird's final account, by the Probate Court of the county of Austin, in 1841, showing a balance due the estate of $112 68, which he was ordered to pay over to Townsend; the resignation of Baird at the same time; the judgment of said Probate Court of the county of Austin, at September Term, 1847, against Townsend in favor of the estate, for $1225 27; the removal of Townsend by same Court, at February Term, 1850; the appointment of Munger administrator *de bonis non*, by the same Court, at March Term, 1850; the loss of a third of a league of land on the Rio Frio, of the value of three thousand dollars, by the neglect of said Townsend to pay the taxes, in consequence whereof it was sold in 1848, to pay taxes of 1846. The petition prayed judgment against said Townsend for all the sums above mentioned and interest.

The answer of Townsend, filed October 16th, 1851, denied that Munger was administrator; and contained a general denial.

The jury found a verdict in favor of the plaintiff for principal and interest $1923 61, and in damages for neglect of duty, $922 50. Judgment accordingly. Motion for new trial, on the grounnd, 1st That the verdict was contrary to law and evidence. 2nd. Damages excessive. 3rd. Improper admission in evidence, of the transcript of the proceedings of the Probate Court of Austin county; 4th. That the Court erred in instructions to the jury. September 13th, remittitur of the $922 50, damages for neglect of duty. Motion for new trial overruled, September 13th. Notice of appeal.

There were a statement of facts, and bills of exceptions, from which it appeared that the defendant excepted to the admissibility of the transcript of the proceedings of the Probate Court of Austin county, offered by the plaintiff, on the ground that it did not purport to be a transcript of all the proceedings, the certificate of the Clerk merely certifying that such papers (naming them) as the transcript contained, were true and per-

fect transcripts from the originals. The objection was overruled. It appeared from the transcript, that the allegations of the plaintiff's petition were true, except as to the land sold for taxes.

But it also appeared from the same, that Townsend had rendered an account in 1841, showing a balance against himself, of $932 46, for which judgment was rendered against him in favor of the succession; also another account in 1843, showing a balance against Townsend, of $596 31, upon which was the following order:

Republic of Texas, } Having examined the foregoing ac-
*County of Austin.* } count current, it is ordered, adjudged and decreed, that the same is allowed and received, leaving a balance due from the administrator, in favor of the estate of Thomas McQueen, deceased, of five hundred and ninty-six 31-100 dollars; and the foregoing account is ordered of record.

San Felipe, December 25th, 1843.

J. K. McCREARY, Probate Judge, A. C.
JOHN WOODRUFF, Associate.

Filed December 25th, 1843. J. Hillyard, P. C. A. C.

Nathaniel Townsend presented his account current as one of the executors of the estate of Thomas McQueen, deceased, which was received and allowed as per decree on file. Appeal taken by N. H. Munger attorney for heirs, December Term, 1843.

Then occurred the following:

Republic of Texas, } District Court, Austin county, April,
*County of Austin.* } Spring Term, 1845.

N. H. Munger, appellant, } On the twelfth day of April,
v. } in the year of our Lord one
N. Townsend, apppellee. } thousand eight hundred and forty-five, the annexed stated cause came on to be heard, and therein our District Court made its decree in the words, to wit: "In this case, there not appearing sufficient record to enable

"the Court to proceed to hear and try said cause, it is ordered, "adjudged and decreed that the same be remanded to the "Probate Court for further proceedings therein; and it is fur- "ther ordered that the appellant pay the costs of suit in this "behalf."

Upon the receipt of the above mandate, the Probate Court, at May Term, 1846, appointed auditors to re-state the account. On the 28th of April, 1847, the auditors reported, showing a balance due the estate, of $1225 27, for which the Probate Court entered judgment against Townsend in favor of the estate. This was the judgment sued on in this case. It appeared that Townsend was removed in 1850, on the ground that he had been absent form the State for more than three months without the permission of the Court.

The defendant then introduced what purported to be a more complete transcript; to which the plaintiff excepted; but for what cause, did not appear. It disclosed, that, on the petition of the heirs of McQueen, there had been an order for the removal of Townsend in April, 1843, and for the appointment of N. H. Munger administrator with the will annexed—Munger's oath April 24th, 1843; his bond approved May 30th, 1843; and order for letters to Munger same date.

The Court charged the jury as follows, to which the defendant excepted:

That if they believed from the evidence, that Townsend filed an account for settlement as executor, and which the Probate Court received and acted upon, after the time it appears he was removed as such by the Probate Court of Austin county, it was evidence that he was executor, at the time of filing such account, and that he is chargeable as such in this suit.

That N. H. Munger, as attorney for the heirs, was authorized to take an appeal to the District Court, from the judgment confirming said account; and that the mandate from the District Court, in the case of N. H. Munger against N. Townsend, copied into the transcript, read by the plaintiff, remanding said cause to the Probate Court for further pro-

ceedings, was sufficient to authorize the Probate Court to re-state the account of Townsend, as executor, and to charge said Townsend with notice of such re-statement, and of the judgment of the Court thereon, or at least, that the recital in the transcript from the Probate Court of Austin county, that the appeal had been remanded from the District Court, was evidence of that fact and raised the presumption of notice to Townsend of the proceedings had thereon.

The errors assigned were:

1st. In allowing the plaintiff's transcript to be read to the jury.

2nd. The charge of the Court to the jury, was wholly erroneous.

3rd. The refusal of the Court to grant a new trial.

4th. The Court rendered judgment in favor of the appellee, whereas it should have been rendered in favor of the appellant.

*Oldham & Marshall*, for appellant. I. The first assignment is submitted to the Court.

II. The Court charged the jury, that Munger, as attorney for the heirs, was authorized to take an appeal from the decree of the Probate Court confirming Townsend's account.

Townsend's account was filed and confirmed under the Act of February 5th, 1840. That Act (Hart. Dig. Art. 1019) provides the manner in which such accounts shall be filed and confirmed, and for the allowance of exceptions to the account. No exceptions whatever appear to have been taken to the account at the time. The Act also provides (Hart. Dig. Art. 1037) for an appeal to the District Court, and that the appellant shall give bond. The right of appeal is given to any person, who "shall think himself aggrieved," and manifestly means a person interested in the estate as heir or creditor, &c.

The Court charged, secondly, that the mandate of the District Court authorized the Probate Court to open and re-state the account. Allowing the District Court acquired jurisdic-

tion, the power of that Court was limited to a trial of such appeal, and the allowance of additional testimony to that taken in the Probate Court. The District Court did not try the cause on appeal, nor did it either affirm or reverse the decree of the Probate Court, but simply remanded the case for further proceedings.

The power of an appellate Court is either to try a cause *de novo*, under the statute, or, as a Court of error, to reverse, affirm, or re-form, the judgments of inferior tribunals; and, in case there is no final judgment, to remand the cause for further proceedings until final judgment shall be rendered. The order of the District Court simply dismissed the cause, leaving the judgment confirming the account in full force. Upon the return of the mandate of the District Court to the Probate Court, the latter possessed no power over the order of confirmation other than to give it execution. That Court possessed no power to set aside or reverse a previous decree, and to give a new judgment. (Chambers v. Hodges, 3 Tex. R. 517.) The order of the District Court does not vacate or annul the decree of confirmation; it does not even refer to it, but simply remands the cause for further proceedings.

III. The District Court erred in overruling the defendant's motion for a new trial, upon the grounds stated in the motion.

And first, the verdict is contrary to the evidence and the law.

The petition charges Townsend upon a judgment and decree rendered in 1847, which, as has been shown, was totally void—and was void for the additional reason, that, at the time such judgment was rendered, Townsend was not executor, but Munger was administrator; and the Court had no further jurisdiction over him; but he was bound to account to his successor.

The petition alleges that the defendant was removed as executor and plaintiff was appointed administrator, &c., at the February Term, 1850, whereas the evidence shows that a similar appointment and removal were made in 1843.

The petition charges Townsend upon a judgment of the Pro-

bate Court adjusting his accounts as executor in 1847, when the evidence shows that he was removed as executor four years before that time.

The verdict and judgment charge Townsend with the amount found due from Baird upon the settlement of his accounts, and which he was ordered to pay to Townsend, and also with interest upon that sum, when there was no evidence showing that the same ever came into his hands. (2 Williams on Executors, 1548.)

*N. H. Munger*, for appellee. I. Not having appellant's assignment of errors before me, I cannot, perhaps, take up the questions in the order in which the assignment will present them. I will, however, take up the questions that were raised in the Court below, as they occurred before that tribunal.

The first question made by the defendant, (appellant,) was as to the admissibility of the transcript, read by plaintiff, from the records of the Probate or County Court of Austin county, on account of the alleged insufficiency of the Clerk's certificate attached to the same. The objections urged, were not that the transcript does not contain true copies of all the papers and proceedings that it purports to be a transcript of, but that it does not contain a copy of every paper, judgment, decree, &c., in the succession of Thomas McQueen, deceased. It is conceived that this objection was not well taken, and that there is neither law, sense, or reason in compelling a party to cumber up his transcript with copies of a mass of irrelevant papers, consisting of petitions, writs, attachments, orders of sale, accounts, &c., from the year 1835, (the time when Townsend was appointed executor,) up to the year 1852. The plaintiff's transcript contained all that was thought necessary to sustain his suit. It was the defendant's privilege to obtain an additional transcript, which privilege he availed himself of, and produced a transcript, alleged to be a copy of the entire proceedings, in the succession of said McQueen, taken from the Probate records of Austin county, but only read a portion

of it as evidence. It will be seen by reference to the statement of facts, which contains the Clerk's certificate to both transcripts, that the two certificates are similar in their nature. Neither one certifies that the foregoing transcript is a true copy of all the papers and proceedings in the succession of Thomas McQueen; but, each one certifies that the copies of papers, decrees, judgments, &c., contained in the foregoing transcript, are true copies from the record of said succession. The transcripts are not at all contradictory; but the transcript read by the defendant, contains something more than that read by the plaintiff.

II. The defendant in the Court below did, and I presume will in the appellate Court, in his argument, object strenuously to the validity of the two judgments rendered in the Probate Court, which now form the cause of action. The first judgment mentioned in the petition, was in favor of Townsend, as executor, and against James Baird, a co-executor, upon a final settlement of said Baird's accounts. Townsend, in his last account, did not account for this judgment or any part of it. In a former account he charges himself with amount received from James Baird $65 00, but this was prior to the rendition of the judgment against Baird. It is to be presumed that Townsend collected the judgment for the estate of McQueen; but, whether he did or not, he is liable for the judgment and interest, from the time of its rendition, as he has neither shown nor attempted to show any reason why it was not collected.

The other judgment will be considered more at length. It will be seen by reference to the statement of facts as contained in the transcript, that Nathaniel Townsend, on the 25th day of December, 1843, came into the Probate Court of Austin county, and filed his account as executor of Thomas McQueen; that said account was acted upon by the Court and a judgment or decree rendered thereon; that N. H. Munger, as attorney for the heirs of McQueen, appealed to the District Court; that the judgment of the Probate Court was reversed

and remanded to the Probate Court for further proceedings; that auditors were appointed by the Court to examine said account and report thereon; that, by the report of said auditors, said Townsend was found to be indebted to said estate in the sum of $1225 27; and that the Probate Court thereupon rendered judgment against said Townsend for the sum of $1225 27. It will doubtless be contended by appellant, that this last judgment of the Probate Court was an ex-parte proceeding; that Townsend had no notice of it, and that no process was served on him to bring him into Court. But it will at once be seen, that this argument is futile: for he brought himself into the Probate Court by filing his account; when the appeal was taken he went into the District Court with the appeal; and when the case was remanded, he went back to the Probate Court with the mandate, and was in Court, a party to the proceedings, when the judgment was rendered.

The appeal, taken by Munger from the first judgment of the Probate Court on Townsend's account, was in accordance with the law then in force, which says, "That if any person "shall think himself aggrieved by the judgment, sentence, de- "cree, or determination of any Probate Court, such person "shall be at liberty to appeal therefrom to the District Court." (Hart. Dig. Art. 1037.) The appointment of auditors and their report upon the account was in strict compliance with the law. (Hart. Dig. Art. 1019.)

It is believed that the judgment, under consideration, conformed to the law in force at the time of its rendition, in every particular; at any rate, it is the judgment of the Probate Court; and the Supreme Court of this State has settled this question no less than on four different occasions. In the case of Tolliver and Dewees, Administrators of Peters, v. Hubble, decided January Term, 1851, the Court said: "The assign- "ment presents the single question, Can the judgment of the "Probate Court be set aside and held to be invalid, upon a "collateral inquiry into its sufficiency?" The negative of this proposition was laid down by this Court in Sutherland v.

De Leon, first Texas Reports, and in Lynch & Clements v. Baxter, last Term of the Court, and in Neal v. Hodge at the present Term, so that the doctrine is now finally settled, that such judgment is binding until it has been reversed or set aside by a proceeding having that object directly in view.

III. The defendant in the Court below mainly relied for his defence upon a judgment of the Probate Court, rendered on the 24th day of April, 1843, by which he was removed from the executorship and N. H. Munger appointed administrator of the estate of said McQueen. But it will be seen by Townsend's last account, (see statement of facts,) filed on the 25th day of December, 1843, that he was executor, or at least acting as such, eight months after the order, or judgment of the Probate Court, by which he was removed, was made. He is therefore estopped from denying that he was executor at the time of filing his account, for he thereby did an act which the law will not permit him to gainsay or deny. (3 Tex. R., Swenson *et al.* v. Walker's Adm'rs; 1 Greenl. on Ev. Sec. 22, and the doctrine of estoppels generally.) By filing his account as executor, he thereby admitted that he was executor at the date of that account. (Id. Sec. 195 and 527 a, and the doctrine of admissions generally.)

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

Wheeler, J. The objection to the admissibility, in evidence, of the transcript of the record of the Probate Court, introduced by the plaintiff, because not certified to contain all the proceedings of the Court relating to the admissibility of the succession, is not well founded. It was competent for the plaintiff to give in evidence such of the proceedings as were material to his case; and it was not incumbent on him to introduce more.

The principal questions in the cases are, in relation to the validity of the judgment of the Probate Court, rendered in

1847, which constitutes the principal cause of action; and the sufficiency of the averments and proof, to authorize a recovery on the smaller demand embraced in the petition—the judgment in favor of Townsend, as executor, against Baird, rendered by the Probate Court in 1841. And, first, as to the validity of the judgment rendered in 1847.

The Court held, and we think rightly, that the rendering of his account in the Probate Court, as executor, by the defendant, and the judgment of the Court upon it, after the order for his removal in 1843, was evidence sufficient to charge him as executor at the date of the rendition of the account and judgment. The presumption is that the order for his removal had been revoked; or that he was afterwards re-instated in his office: and this presumption is strengthened by the subsequent order removing him, in 1850.

A more serious objection to the validity of the judgment, is the apparent want of jurisdiction; the Court, at a previous Term having rendered a final judgment in the case, which remained in force, and there having been no notice to the defendant of the subsequent proceedings and judgment in the Probate Court.

Upon the appeal from the judgment of the Probate Court, the law evidently required that the District Court should proceed to try the case anew, upon the merits. (Hart. Dig. 1037.) The only action which the District Court could take upon the case, was, either to dismiss the appeal, if not prosecuted in a manner to enable the Court to take cognizance of and try the case, or to proceed to trial and judgment upon the merits.—The Court, however, declined to try the case, because of the defectiveness of the record, and remanded it to the Probate Court for further proceedings, at the costs of the appellant. The judgment appealed from being final, the only further proceedings which the Probate Court could take in respect to that judgment, was, to carry it into effect. It could not revise its own final judgment, rendered at a previous Term. (3 Tex. R. 517; 4 Id. 200; 5 Id. 487.) That judgment remained in

force, until reversed or annulled by some proceeding having that object directly in view. (Ib.) No such proceeding in the Probate Court is pretended; and if its judgment, subsequently rendered, had been upon such a proceeding, it was void for the want of notice to the defendant. The District Court neither affirmed nor reversed the judgment of the Probate Court, appealed from, but simply remanded the case, leaving its merits untouched. It did not exercise its jurisdiction, upon the merits of the judgment; and, of course, it left it remaining in force. If the jurisdiction of the District Court attached for any other purpose than simply dismissing the appeal, the limit of its legitimate exercise was to try the case, and either affirm the judgment, or reverse and render its own judgment in the premises. It could not delegate its power; that is, it could not, by remanding the case for further proceedings, confer upon the Probate Court the jurisdiction which the law had conferred and enjoined upon the District Court; or, by its mandate, authorize proceedings in the Probate Court, which the law did not authorize. Nor could its mandate amount to notice to the defendant, that the Probate Court would proceed to take such further proceedings not authorized by law. The action taken by the District Court had no other effect than simply to dismiss the appeal, and determine the *supercedeas*. (Lubbock v. Vince, 5 Tex. R. 411.) We conclude that the Probate Court had no authority to render the judgment now in question, having, at a previous Term, finally adjudicated the same subject matter; and having no jurisdiction of the person of the defendant, by notice either actual or constructive; and, consequently, that the judgment is void.

This conclusion would require that the case be dismissed if this were the only cause of action contained in the petition. It, however, remains to consider the sufficiency of the averments and proof to authorize a recovery upon the other cause of action set forth in the petition—the judgment of the Probate Court in favor of the defendant in this case as executor, against his co-executor. And here it is to be observed that

there was neither averment nor proof that the judgment was collected by the defendant, or that it might have been collected by the use of reasonable diligence; and this, it seems, was necessary to a recovery. The general rule is well established, that an executor or administrator shall not be charged with any other goods, as assets, than those which come to his hands. (2 Williams on Ex'ors, p. 1419.) An outstanding debt due to the decedent, is not assets in the hands of his executor or administrator, to charge him, where there has not been gross negligence, or the delay in collecting it has not been collusive, fraudulent, or unreasonable. (14 Johns. R. 446.) An executor is not chargeable with a note in his hands as assets, until it is actually collected, unless he makes himself so chargeable by some act of gross negligence or fraud. (8 S. & M. 682; 2 Williams on Ex'ors, 3 Am. from 4th London Edition, p. 1348 to 1435 and notes.) In the treatise of Mr. Williams, above referred to, it is said: "With respect to that part of the "estate of an executor or administrator, which consists of choses "in action, the law has long been settled, that although debts "of every description due to the testator, are assets, yet the "executor or administrator is not to be charged with them, "till he has received the money. So if the executor or ad- "ministrator recovers at law or in equity, any damages or "compensation for any injury done to the personal estate of "the testator before or since his decease, or for the breach of "any covenant or contract made with the testator, or with "himself in his representative character, all such damages "thus recovered shall be assets in his hands, the costs and "charges of recovering them being deducted: but he shall "not be charged with them, until he has reduced them into "possession. Thus, in Williams v. James, (1 Campb. R. "364,) in order to prove assets in the hands of the defendants "who were executors, an account rendered by them, was given "in evidence, in which they stated that £1000 had been award- "ed, as due to the testator's estate, from a person who had "been jointly concerned with him in underwriting policies of

"insurance. But Lord Ellenborough held, that this was not "sufficient proof of assets; as it did not show that any part of "the sum awarded had been received by the executors."—(Id. 1421.)

It seems, therefore, that, to have entitled the plaintiff to a recovery upon the cause of action in question, it must have been averred and proved, either that the defendant had collected the money, or, at least, that he might have done so by the use of reasonable diligence. Had the proof been sufficient in this respect, possibly the insufficiency of the averment might have been cured by the verdict. As, however, there was not sufficient proof, the verdict must be set aside and the judgment reversed, as to to this cause of action also. But as the defective statement of the cause of action may be cured by amendment, and the omission in the proof may be supplied upon another trial, the cause will be remanded to afford that opportunity.

Reversed and remanded.

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## Horan v. Wahrenberger.

Where the District Court renders judgment upon the merits, in a case in which it has no jurisdiction, for example in case of an appeal from a Justice's Court, its judgment is a nullity; and where the Supreme Court renders judgment upon the merits, on appeal from the District Court, in such a case, although, in the instance cited, such judgment be to reverse the judgment of the District Court and affirm that of the Justice's Court, the judgment of the Supreme Court is a nullity.

The principle that a judgment of a Court acting without authority, is null, seems to be of universal application. The only difference in its effect on the judgments of Courts of general, and Courts of specially limited jurisdiction, is that, in support of the former, jurisdiction is presumed, while, to sustain the latter, jurisdiction must be shown.

A sale under execution on a judgment in a case in which the Court had no juris-

diction, whether it be the judgment of a Justice's Court, of the District Court, or of the Supreme Court, confers no right where the judgment creditor is the purchaser; but *Quere*? As to the equities in case a third person should be a purchaser.

Nor are we, by this opinion, precluded from sanctioning such equitable doctrines, consistent with the principles of law, as will protect officers enforcing process under a void judgment, and will meliorate the harshness of the rule as to the effect of jurisdictional mistakes.

Appeal from Travis. This was an action for the recovery of a lot, or parcel, of land. The plaintiff, (who was appellant in this Court) claimed under a judgment of the Supreme Court and by virtue of an execution and sale under said judgment. The suit, in which that judgment was rendered, was between the parties to this action; and it originated before a Justice of the Peace, whose judgment was taken by appeal to the District Court; the judgment of the District Court being brought to the Supreme Court for revision, was reversed, and the judgment of the Justice of the Peace affirmed with damages for the delay. The defendant (who was the appellee in this Court) set up in his answer, that the judgment of the Supreme Court, and all subsequent proceedings under it, were null and void; and, on exception, the answer was sustained, and the petition dismissed.

*A. J. Hamilton*, for appellant. It is no objection to the title of the appellant, that the law by which the appeal was had from the Justice's Court and final judgment in the cause by this Court, was pronounced unconstitutional. (1 Morris, R. 467, and authorities cited.)

The judgment of the Supreme Court was an exercise of jurisdiction, and its mandate obligatory; and being the highest judicial tribunal in the State, no Court can ever look behind its judgment. (3 Peters, 193; 6 Cranch, 267.)

This Court had jurisdiction of causes coming up from Justices Courts; and the mode of bringing them up, is but a question of error, which must be brought to the notice of the Court before pronouncing its final judgment, or it is too late.

The difference between judgments of this Court and inferior Courts, in respect of alleged want of jurisdiction, is, that in the one case the rendition of judgment is an assertion of jurisdiction that cannot be called in question, and, in the other, that may be called in question, directly or collaterally.

The repose of property, and the protection of rights based upon or arising from judicial proceedings, requires that parties denying the jurisdiction of this Court, in the rendition of its judgments, should make the objection of want of jurisdiction before the rendition of judgment—for the same reason that parties complaining of erroneous judgments of inferior Courts, are required to prosecute appeals and writs of error within a given time. In the last case, if no appeal or writ of error has been prosecuted, the judgment is final and the rights secured under such judgments cannot be disturbed. So in the former case, if no objection is made to the jurisdiction until the Supreme Court has pronounced judgment, such judgment is the law of the case, and rights acquired under it will be protected. (3 Peters, (above cited,) 202.)

There is no power or authority in this Court to re-examine a decision of an inferior tribunal, as to its jurisdiction in a case in which its judgment is final. The proposition that the decisions of a Court in a case beyond its jurisdiction are void, although true in the abstract, is practically false. Such decision must stand unless there is power in another Court to reverse them. (Case in 3 Peters, above cited, p. 202.)

The judgment in this case, by this Court, put at rest the subject matter of the suit. The judgment being good, the purchase under it was good.

This Court will not undertake to revise or set aside its own judgments after the Term at which they were rendered has elapsed. (Chambers v. Hodges, 3 Tex. R. 517.)

This Court's "jurisdiction is exclusively appellate—but its "revisory power is to be exerted, not over its own judgments, "but over those of inferior jurisdictions." (Ib.)

If the judgment rendered by this Court under which the

appellant purchased was a nullity, the officer making the levy and sale was a trespasser. (3 Peters, 193.)

The question is, Was the Sheriff in this case bound to obey the mandate of this Court, or the process authorized by the mandate?

*W. P. & T. H. Duval*, for appellee. I. It is manifest that Horan's claim to the property could not be maintained under the present action. It was derived under a judgment of the Supreme Court, upon an appeal coming up from a Justice's Court, when no such appeal was permitted by the Constitution of the State. The District Court had no jurisdiction. (Titus v. Latimer, 5 Tex. R. 433.) If the Court *a quo* had no jurisdiction, the Supreme Court had none. (Aulanier v. The Governor, 1 Tex. R. 653.) The Supreme Court having no jurisdiction over the case, their judgment in the premises was absolutely null and void, and consequently the execution issued under the same, the levy upon and the sale of the lot in question, and all other subsequent proceedings were equally void. A void judgment can confer no rights. (Dean *ex dem.* Fisher v. Harnden, 1 Paine, C. C. R. 55.)

II. To obtain a reversal of the judgment of the District Court, the appellant relies upon three decisions. The first is reported in 1 Morris, R. 467. This case certainly goes to great lengths. But it is at war with all the authorities bearing upon the question now presented to this Court. Its reasoning with regard to the validity of judgments of Courts rendered without jurisdiction, or under unconstitutional laws, is wholly unsupported by the very cases, which the learned Judge cites in his opinion. (See 10 Peters, 471; 16 Pick. R. 87.)

The case which seems to be mainly relied upon here, and which is also cited in the case reported in 1 Morris, is that of "*ex-parte* Tobias Watkins." (3 Peters, 193.) This case has no application here. The Court will see by reference to it, that a judgment was rendered against Watkins, on a criminal prosecution, in the Circuit Court of the United States, in the Dis-

trict of Columbia. A petition was filed in the Supreme Court of the United States for a writ of *habeas corpus*, to inquire into the legality of his confinement, &c. The petition was founded on the allegation that the indictment charged no offence, of which the Circuit Court could take jurisdiction, and that consequently its judgment was *coram non judice*, and totally void. The writ was refused on the grounds:

1st. That the Supreme Court had no jurisdiction in criminal cases.

2nd. Because the writ was sought upon a judgment rendered by a Court of competent jurisdiction, and which judgment was withdrawn by law from the revision of the Supreme Court, even upon a writ of error.

The case is totally unlike the one at bar; but, giving the greatest possible effect, to every portion of the learned opinion therein pronounced, it nowhere establishes the principle that a judgment rendered by a Court without jurisdiction, is merely voidable, and not absolutely void.

But it is said, that the want of jurisdiction in this case, should have been alleged, and brought to the notice of this Court, before its judgment was rendered. In answer to this we say, that when this Court had, itself, solemnly decided that appeals from Justices Courts were unconstitutional, and that it had no jurisdiction over the same, it was time enough to plead that fact, when the judgment in this case was sought to be enforced, by bringing an action of ejectment against Wahrenberger.

In the case of Delafield v. The State of Illinois, (2 Hill's R. 159,) the Court says, "It is never too late to object to the "jurisdiction, where the want of power to hear and determine "appears upon the face of the proceedings." Again, in the case of Lathan v. Edgarton, (9 Cowen, 227,) it is said, "The "want of jurisdiction makes a record utterly void and unavail-"able for any purpose." * * * "The want of jurisdic-"tion may be always set up against a judgment when sought "to be enforced, or when any benefit is claimed under it."

And in Bloom v. Benedick, (1 Hill, 130,) it is said that "whenever it appears that there was a want of jurisdiction, the "judgment will be void, in whatever Court it was rendered."

The third case relied upon by the appellant, is that of Chambers v. Hodges. (3 Tex. R. 517.) It is there stated that the jurisdiction of this Court "is exclusively appellate, but its revisory power is to be exerted, not over its own judgments, "but over those of inferior jurisdiction." In this, the Court only asserted what is true as to the general powers and duties of a Court simply appellate. It was not meant thereby, that this Court should be excluded, under all circumstances, from a revision of its own judgments.

The case of Skillern's Ex'ors v. Mays' Ex'ors, (6 Cranch, 267,) referred to in the case *ex parte* Tobias Watkins, has no bearing upon this. That was a case in which the jurisdiction of the Circuit Court had not been alleged in the pleadings. The Supreme Court reversed the judgment, and remanded the cause for further proceedings. After being sent back, it was discovered that the Circuit Court had not jurisdiction of the cause. But the Judges were divided in opinion, whether it could be dismissed for want of jurisdiction, after the Supreme Court had acted upon it. The matter being referred to the latter Court, they decided that their mandate should be carried into execution, although the jurisdiction of the Circuit Court had not been alleged in the pleadings.

Now, if the District Court had refused to carry the mandate of this Court into execution, it would have been erroneous and illegal under the above authority. But this was not done. The mandate was obeyed by issuing an execution upon the decree of this Court, under which Wahrenberger's property was sold. The question here is, as to the effect of this mandate. As soon as it was attempted to eject the defendant, Wahrenberger, from the property, by an action in the District Court founded on the proceedings had under the mandate, then the question as to the jurisdiction of the Supreme Court, in rendering the decree on which the mandate was based, properly arose.

Besides this difference, the Supreme Court of the United States had jurisdiction in the case above mentioned. Here the Supreme Court of this State had none. Neither had the District Court. It was utterly wanting in both.

Hemphill, Ch. J. In support of the position that the judgment, under which the sale was effected, is a nullity, the appellee refers to the decision of this Court, in Titus v. Latimer, (5 Tex. R. 433,) in which it was held that the District Court had no power, by appeal, to take cognizance of judgments rendered in inferior jurisdictions, with the exception of judgments in inferior tribunals exercising jurisdiction in matters pertaining to the estates of deceased persons; and that the law, vesting such appellate power in the District Court, was unconstitutional.

On the principles settled in this case, it is very clear that the District Court acted without authority, in revising the magistrate's judgment, upon its merits, and that the judgment of the Supreme Court was equally without authority. For if the District Court, or the Court *a quo* had no power the appellate Court had none. (Aulanier v. The Governor, 1 Tex. R. 653; 3 Tex. R. 157.) And it is equally clear, that this judgment without lawful power, is a nullity and cannot be used as evidence in support of the title set up by the appellant. (Cowen and Hill's Notes, 4 Vol. p. 12.)

The principle that a judgment of a Court acting without authority, is null, seems to be of universal application. The only difference in its effect, on the judgments of general and of specially limited jurisdictions, is that, in support of the former, jurisdiction is presumed, while in the latter, it must be shown; but whenever the want of power is made to appear, its legal effect is the same, whatever may be the character of the jurisdiction. (Cowen and Hill's Notes, 4 Vol. p. 206, 214, and the cases cited.) The cases are numerous in which the effect of a want of authority is enunciated; and it is thus perspicuously stated in Elliot v. Piersol. (1 Pet. R.

328–340.) "Where a Court has jurisdiction it has a right to "decide every question which occurs in the cause; and "whether its decision be correct or otherwise, its judgment, "until reversed, is regarded as binding in every other Court. "But, if it act without authority, its judgments and orders are "nullities. They are not voidable, but simply void, and form "no bar to a recovery sought, even prior to a reversal, in op- "position to them."

The appellant contends that a judgment of the Supreme Court, having general appellate jurisdiction, is conclusive, unless set aside before the expiration of the Term, and that no Court can look behind it: and, in support of this position, refers to the case *exparte* Tobias Watkins. (3 Peters, 193.) There are some strong expressions in the opinion, as to the absolute conclusiveness of judgments by Courts of general jurisdiction, unless they be reversed on error or appeal. Whether they are reconcilable with other cases in the same tribunal, I shall not attempt to discuss. There are repeated recognitions in the opinions of that Court, of the general rule as to the legal consequence of the want of power, whether the jurisdiction be general or special. In Voorhies v. The Bank of the United States, (10 Peters, 474,) it is said, in substance, that the only difference between the Supreme Court and other Courts, is, that no Court can revise the proceedings of the Supreme Court, but that that difference disappears, after the time prescribed for a writ of error or appeal to revise those of an inferior Court of the United States or of any State: they stand on the same footing in law. If not warranted by the Constitution or law of the land, the most solemn proceedings of the Supreme Court can confer no right, which is denied to any judicial act, under color of law, which can properly be deemed to have been done *coram non judice*, that is by persons assuming the judicial function in the given case, without lawful authority. In Williamson *et al.* v. Berry, (8 Howard, 540,) it was declared, in the opinion of a majority of the Court, to be a "well settled rule in jurisprudence, that the jurisdiction

"of any Court exercising authority over a subject, may be in-"quired into in every other Court, when the proceedings in "the former are relied upon, and brought before the latter, by "a party claiming the benefit of such proceedings. The rule "prevails, whether the decree or judgment has been given in "a Court of Admiralty, Chancery, Ecclesiastical Court, or "Court of Common Law, or whether the point ruled has "arisen under the laws of nations, the practice in Chancery, "or the municipal laws of States." (3 Dall. R. 7; 4 Cranch, 241; 13 Peters, 499; 3 Howard, 750.) The rule thus stated is sufficiently broad to cover the judgments of all Courts—unless indeed there be a Court whose jurisdiction is unlimited.

Another position assumed by the appellant, is, that it is no objection to his title, that the law by which appeal was had from the Justice's Court, and final judgment in this Court, was unconstitutional—or, in other words, that where a law, though unconstitutional, gives jurisdiction, the judgment is not a nullity. In support of this view, the case of Webster v. Reed, (1 Iowa, R. 466,) is cited. This case was revised on error in the Supreme Court of the United States, and the judgment of the lower Court was totally reversed. The judgments which had been supported by the lower Court, were, by the Supreme Court, declared nullities; and it was also held, that, when a judgment was brought collaterally before the Court, as evidence, it may be shown to be void on its face, for the want of notice to the person against whom it is recovered, or for fraud.

The principles of law being conclusive against the validity of the judgment relied upon, we are of opinion that there was no error in overruling the exception to the defendant's answer and dismissing the petition.

In the case before the Court, the plaintiff in the execution purchased the property sued for, but had not gone into possession. The facts of this case are not such as to authorize a discussion or decision relative to the equities which might have arisen, and the terms which might have been imposed,

had the appellant, under a fair sale, gone into possession; or had a third person been the purchaser, and the appellee was by suit attempting recovery of the premises. Nor are we, by this opinion, precluded from sanctioning such equitable doctrines, consistent with the principles of law, as will protect officers enforcing process under a void judgment, and will meliorate the harshness of the rule as to the effect of jurisdictional mistakes. (Howard and Wife v. North, 5 Tex. R. 315, 316, 317; 5 Wend. R. 176, 177; 11 Mart. R. 610; 7 Mon. R. 615; 8 Da. R. 183.)

Judgment affirmed

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## The State v. C. C. Ake.

In testing the sufficiency of an indictment, under the Act of 1848, for permitting in one's house, &c., the playing of a game with cards upon which money was bet, Articles 1474 and 1475, Hart. Dig., must be taken in connection with Article 1479; and it is not necessary to allege or prove what was the particular game of cards played.

In an indictment for a statutory offence, it is sufficient if the language of the statute be substantially followed.

Appeal from Williamson. Ake was indicted by the grand-jury of Williamson county, for permitting divers persons, to the grand-jurors unknown, to play at a certain game with cards upon which money was bet, in a house kept by him for the retail of spirituous liquors, in violation of the Act of 1848. (Hart. Dig. Art. 1479.)

The defendant moved to quash the indictment for the following reasons:

1st. The said indictment did not specify the game or games therein alleged to have been permitted to be played.

2nd. That the same was not a good indictment under Article 1479, Hart. Dig., and that the indictment was not cured by Article 1475.

The motion being sustained and the indictment quashed, the State appealed.

*Attorney General*, for appellant.

*Oldham & Marshall*, for appellee.

Lipscomb, J. The only point presented for our consideration, in this case, is the sufficiency of the indictment. It was drawn under Article 1479, Hart. Dig., for permitting playing at a game of cards. The District Judge quashed the indictment, because, it did not allege any particular game at cards. We believe, that, in testing the sufficiency of the indictment, the Articles 1474 and 1475 must be taken in connection with Article 1479, and that it was not necessary to allege or prove what was the particular game at cards played; that, in alleging that it was a game at cards, the language of the statute is substantially followed, which, in these statutory offences, we have always held to be sufficient. The judgment is reversed, and the cause remanded.

Reversed and remanded.

## David Thomas v. The State.

The Constitution, in making the grant of jurisdiction to the District Courts to control inferior jurisdictions, not in general terms, but by the issue of writs for that purpose by said Courts or the Judges thereof, confines the exercise of the supervisory power of the District Courts, to those cases in which it is believed by the Court or Judge thereof, that wrong has been done by the inferior tribunal; consequently the Legislature cannot provide for the removal of a cause from a Justice's Court to the District Court, without a previous exercise of the judgment of the District Court or Judge thereof, as contemplated by the Constitution; and therefore the Act of February 10th, 1852, which attempted to make a *certiorari* a writ of right, issuable in specified cases by the Clerks, was unconstitutional.

This was a prosecution for forcible entry and detainer, in a Justice's Court. The defendants, Thomas and Chapman, were tried in said Court by a jury, and defendant Thomas fined $50 00 and Chapman $10 00, and costs. The defendant Thomas obtained a *certiorari* from the Clerk of the District Court, under the Act of 1852. In the District Court, the District Attorney moved to dismiss the *certiorari* for reasons which appear in the argument, which motion the District Judge sustained.

*E. R. Peck*, for appellant. I. The first point raised by the District Attorney, in District Court, on motion to dismiss *certiorari*, in this cause, and which motion District Judge granted, to wit: "That the law under which the *certiorari* was granted is unconstitutional," is erroneous for the following reasons:

1st. A law is unconstitutional only in the following particulars:

1st. Where it contravenes the letter and spirit of the Constitution;

2nd. Where it creates rights and confers powers, directly or impliedly forbidden by that instrument.

This law does not cantravene the letter or spirit of the Constitution; nor does it create any new rights or confer any new powers on the District Court: but only declares the manner in which said Court is to proceed, in the exercise of powers conferred upon it by the Constitution. (Sec. 10, Const. Judicial Department; Vol. 4 Laws 1852, p. 60.)

II. In relation to the second objection, "That the Clerk of "the District Court had no authority to issue said writ, be- "cause the same was not authorized by any Judge of the Dis- "trict Court having jurisdiction," the defendant's counsel contends,

1st. If the law of the last Legislature is Constitutional, the Clerk has such authority. If unconstitutional, the issuance of the writ is without the positive authority of statutory Law; nevertheless it was properly issued for the following reasons:

1st. The issuance of the writ is a ministerial act; it requires the exercise of no judicial powers or functions; it is analogous to the citation. The former acquires jurisdiction over the inferior Court, the latter over the person; it is only the exercise of powers given to the Court in order to acquire the right to exercise the jurisdiction given to the District Court. It being a ministerial act, any officer of the Court designated by the Legislature or not, has a right to perform that act, unless the exercise thereof is confined by the Constitution to some particular officer of that Court. In the issuance of process, the law makes no distinction between the act of the Clerk and the act of the Court. It is the act of the Court. The expression "and the said Court or the Judges thereof," in Section 10, Constitution, is not to be confined exclusively to the Judges. The term Court includes within its signification, not only the Judge or Judges, but also the Clerk. (Bouv. Dict. Courts.)

2nd. The Constitution does not confine the issuance of the writs, to a particular branch or officer of the Court, or require the previous allowance of a Judge. It invests the Court with power by means of writs to enforce its supervisory power given by Section 10 of Constitution, over inferior tribunals, a right

which it possesses at Common Law, by virtue of the original jurisdiction thus conferred. The granting or creation of a right carries with it power to acquire that right.

III. As to the third objection, that the "petition does not set forth any grounds for the issuance of the writ,"

1st. There is no provision of law requiring it should be done.

2nd. If the 1753 (67) Article, Hartley's Digest, is not in effect repealed by the law of last Legislature, and is still in force and effect, it cannot be contended that it applies to criminal proceedings, but only to civil cases. The language of this Section, and the provisions therein contained, in relation to the execution of bond to adverse party in double the amount in controversy, previous to the issuance of the writ therein mentioned, clearly settles the character of proceedings to which this Section applies.

IV. In relation to the fourth objection, that these proceedings "are in the nature of an appeal from Justice's Court," the defendant's counsel assumes the following:

1st. That the premises are erroneous. They are not in effect an appeal. The distinguishing feature in cases of appeal and *certiorari* consists in the mandate of the writ and the character of the proceedings commanded to be certified, and not the manner of disposition of the cause in the superior Court. In the former, the whole proceedings in the cause are to be certified; in the latter, nothing but the record. This writ only commands the latter. This is a Common Law proceeding. Criminal proceedings at Common Law were removed only by *certiorari* and writ of error. Appeal is a proceeding created by statute. Criminal cases, at Common Law, where removed by *certiorari*, were always tried in superior Court at bar or *nisi prius*. (Chitty, Crim. Law, 4th Amer. Ed. 371.)

2nd. It does not appear upon the face of the papers, to be an appeal. It does not appear that defendant's counsel asked or claimed a right of trial *de novo* in the District Court; therefore the objection, if legal, was premature, and without force. The counsel for the State could not raise any objections except

for matters appearing upon the record. The record does not show proceedings to be an appeal, and therefore this objection is founded upon an unwarrantable assumption.

V. There is no rule of law which would authorize a Court to declare an Act of the Legislature unconstitutional, unless it be clearly so. (1 Tex. R. 350.)

VI. The writ of *certiorari* was properly and legally issued notwithstanding the law of the last Legislature may be unconstitutional. The defendant was entitled to it as a Common Law writ. It was sued out in accordance with Common Law practice; and the Constitution contains nothing in derogation of that right, or in conflict with that practice.

1st. Because the District Court is a Court of original jurisdiction, having general superintendence and control over inferior jurisdictions, (Sec. 10, Const.,) and as such possesses supervisory powers over Justices' Courts, and by virtue of those powers carries with it the right to enforce its jurisdiction by writ of *certiorari*. (Chit. Crim. Law, 4 Amer. Ed. 376, 371, 374; Bacon Abr. CERTIORARI, 182, K.; Barb. Crim. Law, 341, 346; 6 Wend. R. 564; Hale's Pleas of the Crown, 209 and 10; 20 Johns. R. 430; 16 Id. 49; 14 Id. 323; Art. 126, Hart. Dig.)

It was sued out in accordance with Common Law practice. It could issue after verdict and conviction as well as before. (Bac. Abr. 182, K., CERTIORARI.)

It was not necessary it should be applied for upon affidavit, or that authority of Judge should be obtained previous to its issuance. (7 Cow. 103; Id. 538; 4 Id. 91; Id. 533; 21 Jac. 1, Chap. 8, Sec. 6–7, D., and 5 W. & M. p. 168, 169; Bac. Abr. Ed. of 1848.)

This is a case of forcible entry and detainer at Common Law; and therefore the writ was grantable of course. (6 Johns. R. 334.)

This is a Common Law offence; it is unknown to our statute. Therefore the Common Law practice applies. (Art. 125–6–7, Hart. Dig.)

*Attorney General*, for appellee. I. Did the District Court err in dismissing the *certiorari* obtained by defendants? for the action of the District Court in that regard, was its only action in this cause, and is, of course, all that can come under revision here. We insist that this action was right upon two grounds:

1st. That there are no sufficient reasons stated in defendant's written application for the writ, as shown in the District Attorney's second cause for dismissal. The Act concerning Writs of *Certiorari*, &c., (4th Vol. State Acts, p. 60,) upon which alone defendants rely, requires in its 7th Section that such applications as this should show "that he (the party convicted) believes that injustice has been done him by the judgment," &c. This application contains neither this nor any equivalent allegation, but instead it says that "said conviction ought not to be had, and that the said defendants ought "to have been acquitted in the trial of said cause." If this new *certiorari* Act be constitutional, it is certainly a very easy law to follow; and the very little it exacts of applicants ought to be said and done.

II. That the *certiorari* Act in question is not warranted by the Constitution.

It is a familiar subject of reflection to this Court, that our District Court is one of the very few inferior Courts whose jurisdiction and powers are limited and fixed by the Constitution, except their probate jurisdiction. They are all stated in general terms, in Section 10, Article 4, of that instrument. The only power left to the Legislature, is to regulate their exercise. When this provision was framed, it was known that the Common Law was, in general, the law of the land. The State Constitution found it so, and so left it. When this power was given to District Courts or the Judges thereof, "to issue "all writs necessary to give them a general superintendence "and control over inferior jurisdictions," it must have been intended to accord in its exercise, with the system of jurisprudence in force, and intended to be left so—the Common Law—

and, testing the meaning of the clause in question by that system, even Courts or Judges never issue or grant remedial writs or writs to control inferior Courts, unless upon applications, stating in a manner suited to the exercise of judicial discretion, reasonable grounds for their interference: and this Act requires, even for the consideration of the Clerk, no facts or grounds known to legal practice, to be stated in the application. It is sufficient for the purposes of this case to refer to the title CERTIORARI, 1 Chit. Crim. Law, Cap. 9, p. 371, *et seq.*, and especially to mode of applying for certificate by defendant, stated in margin at pages 382-3.

But there is another view to be taken of this point, which we deem conclusive in favor of appellee. The power to "issue" or grant the writs in question is clearly judicial, as is every power imparted in this Section; and if this can be conferred upon the Clerks, so can every other contained in it, and the Courts or Judges can be dispensed with as useless and the cause of unnecessary expense—As clearly can these Clerks be authorized "to have original jurisdiction of criminal cases," &c., &c.; for as clearly are these powers granted to the "District Courts" or "Judges" as the one now claimed for the Clerks, and no more so. In the very same manner and in the very same clause, with the power under consideration, the District Courts or their Judges are authorized to "issue writs necessary to enforce their own jurisdiction;" that is, to grant, or order, such writs to issue. If this Act be constitutional, the Clerks could with equal propriety be authorized to exercise this judicial function, and indeed any or all others intended to be conferred only on the "District Courts" or "Judges thereof," and so conferred in express terms. It may be assumed as universally true, that, in all our American Constitutions the grant of a power to any department or officer of government, is the exclusion of it from all others, unless it be concurrently granted to several. Here "*expressio unius est exclusio alterius*," most emphatically and precisely. If the power claimed by this Act can be exercised by the Legislature,

then they had better authorize their Clerks to legislate. It would save much time, breath and money, if attended with no other public benefit. To decide this question it is only necessary to determine whether or not the power in question is judicial, for if it be, all must agree that it cannot be conferred on the Clerks. That it is judicial we insist, because the Constitution which creates it makes it so by giving it to the "District Courts" or "Judges thereof," in express terms—and this excludes it from all other persons, tribunals, or officers, or else the Legislature can grant away all the other jurisdictions of the District Courts, and thus abrogate a tribunal which the Constitution has expressly created with unusual particularity. There can be no mistake about the meaning of the term "issue," in the clause under consideration. It is not used in the mere clerical sense, for if it had been, it would have been given to the Clerk (who is provided for in the very next Section, 11th,) and not to the "District Courts" or "Judges thereof." It means "grant" or "order," and being conferred on "Courts" or Judges, from its very character and nature, it could not have been intended to be exercised even by them "as a matter of course," but only in conformity with well understood practice, "for good cause shown." But, after all, this Act is intended to reach the force of "Titus v. Latimer." I have no personal objection to its success; but can it succeed without opening a door for other and more dangerous interferences with constitutionally granted and defined powers and jurisdictions? This Court must answer.

There is really no other question in this case. I care not how irregularly the conviction may have been obtained before the Justice of the Peace, if the District Court acquired no jurisdiction of the cause by force of the *certiorari;* it had none otherwise; and this Court, in such a case, has decided that it would have no jurisdiction if that Court had none.

*J. A. Green*, also, for appellee. The Constitution, 10th Section, Judiciary Department, giving jurisdiction to the Dis-

trict Court, provides among other things, that "the said (Dis-"trict) Courts, or the Judges thereof, shall have power to "issue all writs necessary to enforce their own jurisdiction, "and to give them a general superintendence and control over "inferior jurisdictions." This Court has decided, under this clause of the Constitution, that there is no appellate power given by the Constitution, to the District Court, over the judgment of a Justice of the Peace; that the power must be exercised, according to the Constitution, by means of such writs as may issue from the Courts or the Judges thereof. The question then arises, who under the Constitution are meant by "the said Courts."

A Court is a forum where justice is administered. It is composed of the Judge and such ministerial officers, as are necessary to record its decisions, and enforce its orders. And such is the distinction taken in the Constitution; because the Judges of the said Courts, are given the same power by means of writs, to control the jurisdiction of inferior tribunals, which is possessed by the Court itself. The object in giving the Judge the same power, was to afford a more speedy remedy to the party injured, than that of the Court itself, which could be only periodical; it was to make the means of relief more extensive and convenient.

It cannot be pretended, that the Constitution ever intended to make the word District Court, mean the Clerk thereof; it gave no power to him, but to the Court alone. If such be the construction, then the Clerk has power, without a *fiat* of the Judge, to issue an injunction, grant writs of *mandamus*, prohibition or other mandatory writs, the granting of which must be the act of judgment, by a superior over an inferior.

The words "control and superintendence" imply power. The exercise of power is an act of judgment by a superior. Under the law of 1852, no exercise of power is provided for; on the contrary, the Legislature commands the Clerk of the District Court to issue the writ without any judgment of the superior; without the previous exercise of constitutional power.

In the Constitution, the issuance of the writ is an act of judicial power. This act of power must be exercised according to the provisions of the Constitution; and by an officer having constitutional authority. The issuance of the writ by any other person is a void act.

This case is an act of appellate and not of supervisory power. The true distinction between them is, that an appeal is the result of the act of the party himself under the regulations prescribed by law. And the exercise of control and superintendence by means of writs, is the action of the Court itself, upon the application of the party. One is the act of the party, and is a matter of right; the other is the act of the Court and dependant on its judgment.

In this case, the party, under the law of 10th February, 1852, claims the benefit of the writ of *certiorari* as a matter of right; claims his trial *de novo*, as such, because the law only requires him to state that "he believes that injustice has been done him." This is clearly an appeal. No discretion is left to the Judge, or the Court, in granting the writ, which grant is the act of power conferred in the Constitution on the Court. Nor is there even any discretion left to the Clerk, except the approval of the bond. It is strictly a ministerial act, to be performed by him at the instance of the party aggrieved. Thus it is evident that the Legislature has attempted to usurp power, which, in the Constitution, is alone conferred in the judiciary; inasmuch as it assumes to decide what shall constitute sufficient grounds for the issuance of such writ.

We take it as clear, that this was an appeal; it matters not by what name the Legislature may choose to call it. The operation and effect is the same as an appeal, and it is wanting in that most essential quality, an act of judgment, to constitute it a supervisory writ from the District Court. Assuming then that this is in effect an appeal, it is obnoxious to the Constitution as defined by this Court in Titus v. Latimer. (5 Tex. R. 433.)

The argument of that case is, that the District Court, being a creature of the Constitution, could not exercise any power, except what was conferred upon it, by that instrument; that the Legislature could neither confer, nor take away its jurisdiction; that, if the jurisdiction cannot be exercised because the mode has not been expressly provided in the fundamental law, it would be competent for the Legislature, to regulate the manner in which it should be exercised; but if the mode has been expressed contemporaneously by the same authority which created the jurisdiction, it would not be competent for the Legislature to direct a different mode; and further, that the exercise of jurisdiction over Justices of the Peace, must be by the issuance of some writ, by the Court, or by one of the Judges thereof; that appeals were not within the intention of the framers of the Constitution.

It seems clear from principle, and the authority of the above cited case, that there is no error in the judgment of the District Court, and that the case ought to be affirmed.

Lipscomb, J. The only point presented for our consideration, in this case, is on the constitutionality of the Act of the last Legislature, conferring on the Clerks of the District Court authority to issue writs of *certiorari* to bring a case from a Justice's Court into the District Court. In the well considered decision of this Court in the case of Titus v. Latimer, (5 Tex. R. 433,) it was held that the Act of the Legislature giving an appeal to the District Court, from a judgment of a Justice of the Peace, was repugnant to the Constitution, (see 10th Section, Judicial Department,) and was therefore void. We are fully satisfied with the correctness of that decision; nor shall we attempt its vindication, by any additional reasons to those contained in our opinion given at the time the decision was made. That it was to evade the effect of this decision, the Act of the Legislature at its last session was passed, we are fully aware. From some real or supposed inconvenience attending the procuring the writ of *certiorari* from the District

Court or one of the Judges thereof, the authority was attempted to be conferred on the Clerks of the District Court; and it seems that the Legislature intended that it should be a writ of right, and should not be a question for judicial action, whether it should be issued or not. Now, if the Constitution had, in conferring the controlling jurisdiction upon the District Court, been silent as to the mode or manner in which it should be carried into effective operation, it would scarcely be doubted that it would have been competent for the Legislature, in regulating the mode in which the jurisdiction should be brought to act upon the subject, to have employed the writ of *certiorari* as the medium, with such modifications of its Common Law attributes, as might have been thought expedient; but this is not the case. The Constitution, in making the grant of jurisdiction to the District Court to control inferior jurisdictions, is not silent, but directs that it shall be, by the use of a writ to issue from the Court, or one of its Judges; and by rejecting the term appeal, and using that of control, clearly, indicates that it is not a writ of right, but dependent on the judicial discretion of the Court, or one of the Judges thereof; because it would not control or superintend the judgments of the inferior jurisdiction, unless it should be believed by the Court or Judges exercising such control or superintendence, that wrong had been done by the inferior tribunal; and it cannot be supposed that they were to exercise this control and superintendence wantonly and capriciously, without regard to what had been done, right or wrong. The clear meaning of the Constitution is, that whatever wrong has been done to the litigant in the inferior tribunal, should be righted, on showing to the satisfaction of the District Court, or one of its Judges, that such wrong has been inflicted. The term District Court, as used in the Constitution, means the Court in session for the exercise of its judicial functions, and cannot mean a ministerial officer of that Court; yet, by the Act under discussion, the Legislature assumes to confer upon such ministerial officer a judicial function given by the Constitution *to* the Court, or

one of the Judges thereof. By including the last, it was designed to enlarge the remedy for the redress of a wrong, by enabling the injured party to make his application to one of the Judges, if the Court was not in session.

If the Legislature were permitted to confer one judicial attribute upon the Clerks, they could another; and in the language of the Attorney General, authorize him to issue injunctions, *quo warranto* and *mandamus*, and thus to strip the District Court or Judges thereof, of their highest judicial functions, and transfer the same to a mere ministerial officer. It is unpleasant, at all times and under any circumstances, that there should be any collision between any of the departments of our State Government; but it is affectation to say that the Judges should never decide an Act of the Legislature to be unconstitutional, unless they clearly thought it to be so; and it means nothing more than that unless the Judge believed the Act to be contrary to the Constitution, he ought not to decide that it is so. No honest Judge, with ordinary capacity, would do so; therefore the caution against it ought never to have found a place in a law book.

If I believe that so much of the Act of the Legislature, giving the right to the Clerk of the District Court to issue writs of *certiorari*, is repugnant to the Constitution, I am bound to say that it is void; and it is hoped, if that time ever should arrive, when the Judges will either want integrity or nerve to declare an Act of the Legislature void on this ground, when they honestly think it to be so, that the time is removed far distant in the future. Believing, as we do, that the Act, so far as it assumes to confer such powers upon the Clerks of the District Courts, is repugnant to the Constitution, we affirm the judgment of the District Court.

Judgment affirmed.

## O'Shea and others v. Twohig.

All that a reasonable construction of the statute (Hart. Dig. Art. 817) requires, in order to authorize the introduction of a deposition taken *de bene esse*, is a reasonable presumption that the witness is beyond the limits of the county: it is not necessary that there should be an affidavit stating the fact absolutely.

Acts of the Legislature, which create new counties, do no more than to provide for their organization; and until the new county is actually organized, the territory remains subject to the jurisdiction of the old county; and the circumstances of the inclusion of the new county by name in another judicial district, and in an Act apportioning Senators and Representatives among the several counties of the State, do not affect the question.

It is our practice, to join all who are supposed to be liable, although their liabilities may have accrued in different ways; and, if the evidence should not fix the liability of one or more so joined, such defendant would be entitled to a verdict in his favor. And this practice prevails in actions *ex delicto*, where the subject matter of the suit is one.

Where the plaintiff sued for specific property, alleging its value to be fifteen hundred dollars, and the damages for its detention to be three thousand dollars, and prayed for the specific property and damages for its detention, without a general prayer; *Held*, That it was not necessary in order to sustain the action, to prove that the property was in the possession of the defendants at the date of the suit. And the verdict and judgment having been in favor of the plaintiff for the value of the property; *Held*, There was no error.

See this case for what is said respecting analogies to the actions of detinue and trover.

Where an assistant Quarter Master of the United States Army received wood from a contractor, under a contract made in the usual way after publication for proposals, and paid over the price after he had been notified by the owner of the land from which the wood was tortiously taken, not to do so, it was held that the officer was liable to the owner of the land, for the value of the wood.

Appeal from Bexar. Suit by John Twohig against F. B. O'Shea, John Rich, B. Callaghan, F. Gilbeau and J. B. Plummer, for entering upon the premises of the petitioner in said county, and cutting and carrying away, without plaintiff's permission, five hundred cords of wood of the value of fifteen hundred dollars, which they had in possession and detained from said plaintiff, refusing to deliver it to him, although requested, which refusal to deliver and detention of said wood

by said defendants, was to the manifest injury of the petitioner and to his damage three thousand dollars; wherefore the plaintiff prayed process, that the Court would decree him possession of the wood specifically, and damages for the unlawful detention of the same.

Gilbeau demurred, because the allegation of a trespass did not set forth the metes and boundaries nor specifically describe any tract of land on which the trespass was committed, without which defendant could not defend; further defendant denied all and singular, &c., and said he had no wood of the plaintiff's in his possession, &c.

O'Shea and Rich alleged that they did not reside in the county of Bexar, and were not legally served with process; but did not state where they did reside. They also answered same as Gilbeau.

Callaghan alleged that he was not legally cited, because he was not in the county of Bexar, and the Sheriff of Bexar had no authority to cite him; and further answered same as Gilbeau.

Plummer answered same as Gilbeau, and further that "whatever wood he has in his possession or control, he holds "as the agent of the United States government, being an as- "sistant Quarter Master of the United States Army, and as "such he is not liable to be sued in the ordinary tribunals of "the country;" that he was not an inhabitant of Bexar county, but resided in Kinney county.

The pleas to the jurisdiction coming on to be heard, it was admitted that the defendants O'Shea, Rich and Plummer were all living in the district of country, defined and declared by the Legislature of this State, in 1850, as Kinney county; and that they and defendant Callaghan were in said county when process was served on them, by the Sheriff of Bexar county; and that the wood sought to be recovered and the land from which it was taken, were within the limits of Kinney county, which was originally a part of Bexar county and had never been organized. The Court decided that the jurisdiction of Bexar

county extended over the country until the county of Kinney should be organized, and therefore overruled the pleas.

The proof was that O'Shea and Rich were engaged in business at Eagle Pass, in partnership with Gilbeau and Callaghan, who were engaged in business at San Antonio; that O'Shea and Rich took a contract to furnish the United States Quarter Master's Department at Fort Duncan, near Eagle Pass, six hundred cords of wood at $4 50 per cord; that they cut the wood, say 500 cords of it, off the land of Twohig the plaintiff, and delivered it to Plummer the assistant Quarter Master at that place; that Plummer had notice from Twohig before the wood was all delivered and before any of the price was paid over, to O'Shea and Rich, that the wood belonged to him, Twohig; that O'Shea and Rich professed to be the agents of Twohig, but their agency was not proved; that the timber left standing on Twohig's land, where the wood was obtained, was very much injured by the careless and extravagant manner in which the wood was cut.

The deposition of George Craig, offered by plaintiff, was objected to on the ground that he resided in Bexar, and there was no affidavit that he was at the time out of the county; it was proved that he had left for El Passo about twenty-five days before; that the road passed through Medina county; that, although 350 miles distant, he might yet be in Bexar county. The Court overruled the objection; and defendants excepted. Verdict for 500 cords of wood at $3 per cord, and judgment accordingly. Motion for new trial.

*I. A. & G. W. Paschal*, for appellants.

*H. P. Brewster*, for appellee.

Lipscomb, J. The first point presented for our consideration, by the appellants' brief, is the admissibility of the testimony of a witness taken by interrogatories, whose residence

was said to be in Bexar county, but who had left for El Passo. It is contended that his testimony being only *de bene esse*, it should not have been received without affidavit that the witness was without the limits of the county at the time it was offered in evidence. The objection is predicated upon the proviso to Article 817, (Hart. Dig.;) it is in the following words: "Provided, that no deposition of a witness, except "when the witness is a female, shall be permitted to be read "in evidence, unless the party offering the same, his agent, "attorney, or some competent person, shall first make oath "that the witness is without the limits of the county where "the suit is pending, or that such witness is dead, or that, by "reason of age, sickness, or official duty, such witness is un-"able to attend the Court." If the literal meaning of the language of the statute is to be taken, without looking to the spirit of it, many cases might occur where it would not be possible to make the deposition of an absent witness available, because it would not be safe for a conscientious man to swear positively to the fact of the witness being, at the time of the trial, without the limits of the county, however small and circumscribed those limits might be; and the uncertainty would be greatly increased, where the county covered a great extent of unsettled territory. In this case it was proved that the witness might be in the county, on his way to El Passo, and be distant from the place where his evidence was offered, three hundred and fifty miles; and that he might be out of the county, by passing to Medina county in his rout, not more than the distance of thirty miles. Such circumstances would claim a very liberal construction of the statute. We believe that all that a reasonable construction of the statute requires, is a reasonable presumption that the witness was without the limits of the county. It was in evidence that he had left San Antonio, for El Passo, about twenty-five days before. And it therefore would not be a violent presumption, that he had passed beyond the limits of the county; and therefore there could be no objection to receiving his deposition in evidence.

The question of the jurisdiction of Bexar county, is not free from difficulty. This suit was commenced on the 18th of March, A. D. 1851. By an Act of the Legislature, to take effect from its passage, approved 28th of January, 1850, the county of Kinney was created out of the territory belonging to the jurisdiction of the county of Bexar. The Act is silent upon the subject of organization; it only defines certain territorial boundaries which shall "constitute the county of Kinney," "and that the town of Eagle Pass shall be the County Seat." By the Act of January 29th, 1850, the twelfth Judicial District was created, and the county of Kinney was included therein. This Act was to take effect from and after the 1st August, 1850; and by the Act of 8th February, 1850, the time of holding the District Court for the county of Kinney was fixed, to be the first Mondays in March and September, in each year. The only general Act upon the subject of the organization of new counties, where there is no mode pointed out by the Act creating them, that we have found, is contained in the Act of 16th March, 1848. (Art. 925.) It is as follows: "That, in all cases where a county is not organized "and there is no officer in the same authorized by law to or- "ganize such county, the Chief Justice of the nearest county "which is organized, may order elections for county officers "in any such disorganized county, and appoint the presiding "officers and managers and clerks of election, as prescribed "by law in other cases." We have shown that ample provision has been made by legislation, to organize the county of Kinney; that its territorial limits have been defined, and provision made for holding the District Courts; but, that its organization was left to the Chief Justice of the nearest county. Until this organization, there could be no Courts of any description. The District Court could not be holden until by the county organization, a Sheriff and a Clerk had been elected. What is the condition of the citizens embraced within the limits defined as the boundary of the new county, during the time between the passage of the Act creating the county,

and its complete organization, as to their rights and remedies? and to what local jurisdiction are they amenable, on the one hand, and on the other, to look for the enforcement of their rights? are grave questions, presenting some difficulty, as we said at the commencement of our discussion on this branch of the case. We believe, however, that a satisfactory conclusion can be obtained, by fixing on the point of time when the jurisdiction of the mother county, Bexar, ceased, or will cease, to exist over the citizens of the territory designed to form the new county. Was it, from the date of the passage of the Act of the Legislature, creating and defining the boundaries of Kinney county? We think not. If it ceased to exist at that time, it would be in the power of the Legislature, to deprive a portion of the citizens, for a time, of all protection of the laws of the State, and to let crime go unpunished and lawless violence wholly unrestrained. If it were true, that during the time between the legislative Act creating a new county, and its organization, it would be beyond the jurisdiction of the old county, those who wished to avoid contributing to the support of the government, by the payment of taxes, and to obtain an immunity from the performance of the various public duties imposed upon the citizens: and, in fine, all those whose crimes had rendered them obnoxious to law, would combine and prevent an organization, and thereby defeat the administration of the law. The Legislature never believed or intended, that such would be the result, where the Act creating the new county was passed; and by the expression used, that it should take effect from its passage, it did not mean, that the jurisdiction of Bexar county should cease; it only meant, that it should so far take effect as to authorize immediate measures for organization being taken, and authorized the Chief Justice of the nearest county to proceed to complete the organization. Until that was completed, the jurisdiction of the mother county remained in full force. This is the result of necessity, and grows out of the principles of our Constitution, that guarantees to every citizen equal privileges. We believe, therefore,

that the old jurisdiction remained in full force, until the organization of the new one; and that the severance of the new county from the old, was not completed, until the organization of the new one: the jurisdiction of Bexar county continued unimpaired, until the organization of Kinney county was completed.

We can perceive no objection to the joinder of the several defendants in this action; it is our practice to join all who are supposed to be liable, although their liability may have accrued in different ways: and if the evidence should not fix the libility of one or more so joined, such defendant would be entitled to a verdict in his favor. The jury in this case rendered a verdict against all of the defendants.

The appellants contend, that, as it was in proof that the defendants had parted with the wood before the suit was commenced, to the United States, there was such a variance between the allegations and the proof, that the plaintiff was not entitled to a recovery. The suit was brought for the wood; and the doctrine of the action of detinue, must govern it.—Although we do not acknowledge the Common Law forms of action, yet, when property is sued for, the principles of law, defining and governing that action, must be resorted to: we having adopted the Common Law, without its forms of action. It was once held, that detinue could not be sustained, except in cases where the property had been possessed originally, lawfully by the defendant, and he unlawfully detained and held the possession: it was generally brought against a bailee, for holding over. It subsequently grew to be the rule of decision, in England, and has been followed in the United States, that this action could be sustained when the possession has been tortiously obtained by the defendants: that the plaintiff might waive the tort, and sue for the property. And there is no doubt but, by the ancient Common Law, that it was essential for the plaintiff to prove that the defendant was in possession of the chattle, at the institution of the suit. This rule has also been changed, and a strong array of authority goes to

sustain the action, if the property of the plaintiff had been in the possession of the defendant at any time before the commencement of the suit; and all whose hands it had passed through, were liable, thus breaking down all distinction in the proof of this action and the action of trover and conversion, and even carrying it beyond the latter. In all cases, however, it is usual to allege the possession in the defendant; but the proof of that possession is not confined to the time of bringing the suit. According to these rules, the *allegata* and the *probata*, are not perceived to be variant, or discordant. How far the more modern decisions, on the action of detinue, are consistent with either principle or sound policy is questionable; and we do not wish it to be understood that we adopt them without modification. This is not considered a case in which we are called upon to say what modifications we may, at some time and in a suitable case, discuss and adopt. The finding in this case is the amount of the value of the wood sued for, and is no more than could have been recovered in an action of trover and conversion at Common Law. Had the suit been for property, the use of which would be valuable, and the jury had given a verdict against a purchaser for a valuable consideration, without notice, for the use and also for its value, it would, then, have become our duty to say how far such a finding could be sustained. But, from the finding of the jury, they only gave the value of the property sued for. The Judge charged the jury, at the request of the appellants, that the defendants must be in possession at the institution of the suit. If he erred in this respect, it was at the instance and on the side of the appellants, and they received no injury from it; and the verdict is as it would have been, had the charge been more in accordance with the modern rulings of the Courts; because neither of the appellants, stands as an innocent purchaser, without notice.

We can see no error, on the other points of law presented by the record, and assigned by the appellants. The judgment is therefore affirmed.

Judgment affirmed.

## Robertson's Adm'r v. Teal's heirs.

It is not proper for the District Court to render judgment *pro forma;* but such a judgment will be revised, on appeal.

The recognition of a colonist by the issue of a certificate to him, by the agent of the Empresario, in the usual form, raises the presumption that the land on which he settled was within the limits of that colony.

The fact that a particular Section of country was comprehended within the limits of the colony contract of Austin and Williams, until the rights of Robertson were established by the decree of the 29th April, 1834, is public and notorious. It is a matter belonging to the public history of the times. It exists, or should exist, for perpetuation, among the public archives. It was involved in the litigation prosecuted against the government, by the Empresarios of what is generally known as Robertson's colony, and of the colony of Austin and Williams; and it, as a fact, is as much entitled to judicial recognition, as any other matter on the records of history.

The fact that Teal was settled within the limits of the colony of Austin and Williams is clear; and, that he settled on this land in good faith, and without objection on the part of the Empresarios Austin and Williams, who alone had the right to object, must be presumed until the contrary is shown; that he had no survey, order of survey, amparo, or title of possession, was not his fault. The certificate of the agent of the Empresarios shows inferentially, and the fact is historically true, that no Commissioner had, up to the change of Empresarios, been appointed for the extension of titles in the colony of Austin and Williams; and consequently no steps could be taken for the severance of the land from the public domain.

*Quere?* Whether the extension of a title to one colonist was conclusive against the equities of another claiming by prior settlement; but, if this were so, it would not apply to a preference given to the Empresario himself; because of the confidential relations which existed between him and the Commissioner for extending titles, and because of his duty to respect the rights of settlers.

In all colonization contracts there was a stipulation, either express or implied, that the rights of individuals, previously acquired, should be respected; and, although, where a Commissioner had been appointed, such stipulation might be restricted to titles inceptive or complete, issued by the lawful authority; yet, where no Commissioner had been appointed, in consequence whereof no title inceptive or complete could have been obtained by prior occupants, such stipulation would be extended to equities derived from settlement alone.

A claim of priority by virtue of settlement was not susceptible of transfer, so as to prevent a third party from taking the land subsequent to its abandonment by the first settler.

*Quere?* Whether an Empresario was capable of receiving a grant of land, as a colonist, in his own colony.

Teal settled within the limits of Robertson's colony, on the land in controversy,

in 1831; on the 24th of May, 1834, a certificate was issued to him by the agent, of Empresarios Austin and Williams; he continued to occupy the land until the present time, but never received a title, claiming to hold the land by virtue of his occupation and of the location of his headright certificate, obtained after the Revolution: On the 29th of April, 1834, prior to the recognition of Teal as a colonist by the agent of Empresarios Austin and Williams, the decree No. 285 was made, restoring Robertson to his rights as Empresario, and in 1835, a title for the land in controversy was extended by the Commissioner of Robertson's colony, to Robertson himself, as a colonist. *Held*, That the land belonged to Teal.

Appeal from Robertson. This was an action for the recovery of a league of land. The allegations of the plaintiff, S. C. Robertson, were in the usual form.

The defendants filed an original, and three amended answers. Among other matters, it was alleged that their ancestor, John Teal, was received and accepted as a colonist by the Empresarios Stephen F. Austin and Samuel M. Williams; and that the said Teal selected and pointed out the tract of land in controversy, for his headright; and that the said selection was allowed him by the said Empresarios; and that he had retained possession thereof ever since; and had never, for a moment, abandoned his claim; but owing to the fluctuations of government and the strife between said Empresarios and the Empresario S. C. Robertson, he had been unable to obtain title; that on the 29th April, 1834, the said S. C. Robertson was recognized by the government of Coahuila and Texas as the Empresario of the district of country in which the land is situated; and that he was acting as such Empresario, when the title under which he claims was, on the 5th January, 1835, extended to him as a colonist. The defendants filed as an exhibit, a certificate of the agent of the Empresarios Austin and Williams, recognizing their ancestor John Teal as one of their colonists, introduced under their contract with the government for the settlement of eight hundred families; that he was a married man, and his family consisted of six persons; and that he might receive the quantum of land allowed him by the law, as soon as there should be a Commissioner appointed for

that purpose by the government, provided he should present himself to the Commissioner in proper time after his arrival, dated at Texoxtitlan, 24th May, 1834, and signed by Spencer H. Jack, agent for the Commissioners. By agreement between the parties it was admitted that the land claimed was comprehended within the Empresario—contract of Leftwick in 1825; that this was afterwards transferred to the Nashville Company, and subsequently to Sterling C. Robertson as Empresario according to the terms of the decree of the Congress of the State of Coahuila and Texas, No. 285, on the 29th April, 1834; that Wm. H. Steele was the Commissioner of the said colony; that the title, under which the plaintiff claims, was made by the said Commissioner; and that the said plaintiff Sterling C. Robertson exercised the functions of Empresario of the said colony, from the 29th April, 1834, until the Revolution in November, 1835; and that by virtue of this title, the said Sterling C. Robertson took possession of the land and had tenants residing on the same until the commencement of this suit. It was further agreed that one Hiram Friley was the first settler and occupant of the league of land claimed by plaintiff; and that the plaintiff bought Friley's location and settlement right to said league of land, and paid him a valuable consideration for it; Friley's improvement and settlement was made in 1824; it was in virtue of this purchase, that Robertson claimed said land when it was granted to him; Friley located in another place, where it was granted to him; that John Teal, the defendant's ancestor, settled upon the land in 1831; that, on the 24th May, 1834, the said Teal received the certificate (the substance of which is previously stated) from the agent of the Empresarios Austin and Williams; that he remained on the land from the time of his settlement in 1831, till his death; "and that his heirs continue to reside on the land and have made some improvements;" that, when the Land Office was opened in 1838, Teal obtained a certificate for a league and labor of land, as the head of a family; that the said certificate was placed in the hands of the County Sur-

veyor to be located and surveyed on said land; that said location was at first refused, but that the survey was finally made, and the field notes approved; that Friley had left the land some year or more when Teal settled thereon, previous to which one Dail had lived there, but without any claim or title; and, that, when the land was surveyed, Teal claimed the land and demanded the field notes. Upon the agreed state of facts, judgment was given for the defendant *pro forma*, for the revision and adjudication of the Supreme Court. To which judgment the plaintiffs excepted and prayed an appeal.

*H. J. Jewett*, for appellant.

*Gillespie & Sayles*, for appellees.

Hemphill, Ch. J. The entry of judgments *pro forma* has been heretofore the subject of animadversion; and the objection is still stronger, when the judgment is expressed to be thus given, that the matter may be revised and adjudicated by the Supreme Court. An appeal from a judgment is the right of a party. It is not in the power of a Court, to reserve a matter without judgment thereon, for revision by the appellate tribunal; nor to send it up, of its own motion, even after judgment, for review and adjudication. But, as an appeal was formally taken in this case, this entry in the judgment may be treated as surplusage, and as not affecting the right of the cause to be in this Court, or our jurisdiction over the same.

There are some facts affecting the rights of the parties in this cause, which are omitted, or which are left to inference when they should have been distinctly stated. For instance, it may be inferred that the territory within which the land lies, was once embraced in the Empresario—contract of Austin and Williams; otherwise, how could Teal be recognized as one of the colonists of that enterprise? His recognition as one of the colonists, raises the presumption that the land on which he settled was within the limits of the colony. But this is not

specifically agreed upon. The fact that this Section of the country was comprehended within the limits of their contract, from February, 1831, until the rights of Robertson were established by the decree of the 29th April, 1834, is public and notorious. It is a matter belonging to the public history of the times. It exists or should exist, for perpetuation, among the public archives. It was involved in the litigation prosecuted against the government, by the Empresarios of what is generally known as Robertson's colony, and of the colony of Austin and Williams; and it, as a fact is as much entitled to judicial recognition, and to become the basis of judicial action, as any other matter on the records of history.

The fact that Teal was settled within the limits of the colony of Austin and Williams is clear; and, that he settled on this land in good faith, and without objection on the part of the Empresarios Austin and Williams, who alone had the right to object, must be presumed until the contrary is shown. And, that Robertson had no claim as Empresario or otherwise over this land, until more than two, perhaps three years after the settlement by the defendant, is equally beyond question. That Teal had no survey or order of survey, amparo or title of possession, was not his fault. The certificate of the agent of the Empresarios shows inferentially, and the fact is historically true, that no Commissioner had, up to the change of Empresarios, been appointed for the extension of titles in the colony of Austin and Williams; and consequently no steps could be taken for the severance of the land from the public domain, and the appropriation of it by legal formalities, to himself.

The question, upon this state of facts, is whether the defendant had such an equity in his possession, as should have been respected by the Empresario Robertson, in proceeding to fulfill his contract of colonization, and especially whether the attempt of the latter, to appropriate the land to his own use, was not so subversive of the first principles of Justice, and in such diametric opposition to the rule of conduct prescribed to him in the premises by his official situation, as to divest him of

any right in the land, or any power to set up his title against the superior equities of the defendant. Had any one of the colonists of Robertson claimed and secured a grant of this land, the right of the defendant, and his equities, would have been doubtful—at least the decision against Teal might not have been subject to revision, or open to examination. The Empresario, in such a controversy, would be presumed to have been impartial, and to have used no unauthorized means to secure the land to either party. It is true that the Empresario did not have the power to issue titles. That belonged to the Commissioner. But he was consulted prior to the issue of a grant, and as a general rule was requested to report whether the applicant was a colonist, and, if a particular tract had been designated, to report also whether the land was vacant. In Austin's colonies there were cases in which the Empresario's report that lands once granted had been forfeited, was deemed sufficient to authorize a re-grant of the said lands. By virtue of his official situation, he had a vast influence in the distribution of lands within the limits of his colony; and the exercise of his power, especially when in favor of himself, must, to be lawful and operative, be not obnoxious to the charge of having violated the legal rights or the strong equities of others.

But the right of the defendant, to this land, will be still more clear and conclusive, when we consider that it was a general if not a universal stipulation of colonization contracts, that the rights of individuals, to lands, previously acquired, should be respected; and, without any violation of law, we may presume that such was one of the stipulations of Robertson's contract. This duty was simply a declaration of obligation of Empresarios, as resulting from the principles of law. It was generally expressly enjoined on Empresarios; and it is not probable that in Robertson's case there was an exception. If such had been the stipulation, as it was the law, would not the Empresario have been compelled to respect the equitable claims of the colonists introduced by the Empresarios Austin

and Williams, whose want of surveys and titles was exclusively owing to the failure of the Government to appoint a Commissioner? The fact that they had neither surveys, nor titles was well known to the executive; and a stipulation in their favor was susceptible of no other construction; than that their possessions acquired in good faith as colonists, should be respected by the succeeding Empresario. A stipulation in favor of legally acquired rights would, under such circumstances, be extended to equities derived from settlement, though under other circumstances, where there had been a Commissioner, it might be restricted to titles inceptive or complete, issued by the lawful authority for that purpose. In this view, the rights of Teal should have been maintained against those of subsequent colonists introduced by Robertson; and more especially should it have been preferred to a claim for Robertson's own benefit and advantage.

But it appears that Hiram Friley was at one time settled on this land, and that his right to its location was sold to Robertson. The mere fact of settlement cannot of itself, under the law as it then existed, give any right. Under special circumstances and relatively to the rights of others (as we have seen in the case of the defendant) it may raise an equity. But the facts in this case are against the claim under the settlement by Friley. It is not shown, nor can we presume from any thing in the record, that he was introduced in the country or in the colony by the lawful authorities. And further, his settlement had been discontinued for more than a year, before the occupation by the defendant; and if he ever had any right, it was lost by his selection elsewhere; and whether his right were good or not, it was not susceptible of transfer so as by the transfer itself to impart any right to another.

The appellees have rested their rights principally on the ground that an Empresario had no right to a grant of land as a colonist within the limits of his own colony. We do not deem it necessary to decide on this point. The right is not free from doubt; but one thing is certain, that if such a grant

be supported at all, it must not be justly chargeable with the sacrifice of the legal or equitable rights of third parties. It must have been obtained partly through the official instrumentality of the Empresario himself, and must not be vitiated by the infliction of wrong. Under all the facts of this case, we are of opinion that the defendant Teal had, at the time of the grant to Robertson, a superior equity, or right, to the land; that his claim was such as was entitled to respect by Robertson and the officers employed in carrying this Empresario contract into execution; and especially is his claim to be preferred to that of the plaintiff, as a colonist in his own Empresario contract, and to a title issued to him as such colonist, he being the Empresario in the active exercise of his powers, as such.

The claim of the defendant has never been abandoned. He has pursued it and attempted in despite of all opposition to secure a title in form. His original equities have been maintained in their freshness and vigor, and they are as much entitled now to regard, as they were in the commencement of the struggle between these parties. We are of opinion that there is no error in the judgment; but as it was informally entered below, it is ordered, adjudged, and decreed, that the same be reversed, and such judgment be rendered as should have been entered below.

Reversed and re-formed.

# SUPREME COURT OF TEXAS.

## GALVESTON TERM, 1853.

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### McCoy's Heirs v. Crawford and another.

The mode of obtaining personal service of process, upon the defendant, in 1839, was by delivering to him a copy of the writ and petition; and therefore, where the Sheriff's return was, "served by reading the within," it was held that all the subsequent proceedings, including a sale under execution, were null, notwithstanding that the defendant was represented by a curator *ad litem*.

No person is bound by any decree or judgment to which he has not become a party, in some of the modes known to the law.

Where an administrator purchases land at a judicial sale made to satisfy a claim in favor of the estate which he represents, and causes the purchase money to be credited on the claim, the purchase inures to the benefit of the estate; and, after the close of the administration, the heirs may recover the land, notwithstanding the administrator may have accounted for the purchase money in the final settlement of his accounts, and sold the land to a third person having notice of the facts.

It seems that the objection of nullity, when apparent on the record, may be taken at any time, and by any person.

Appeal from Gonzales. The appellants brought suit against the appellees, on the 17th of February, 1846, to establish their

title to a third of a league of land, granted to their ancestor. The ancestor, Samuel McCoy, in his life time, sold the land to one Grigsby, for $1,111; of which Grigsby, at the time, paid $239 50, and gave his promissory notes for the balance, payable when McCoy and his wife should make to him a title: they, at the same time, giving their bond to make title upon payment of the notes.

The petition set forth that the administrator of McCoy recovered judgment against Grigsby, on the notes given by him for the purchase money; that the defendant Crawford afterwards intermarried with the widow of McCoy, and was appointed *administrator de bonis non* of the estate; that he and his wife executed to Grigsby a conveyance of the land, but without the authority of an order or decree of any Court of competent jurisdiction; and that the conveyance was ineffectual and void; that Crawford, while acting as administrator, took out execution on the judgment in favor of the estate against Grigsby; caused the land to be levied on and sold as the property of Grigsby to satisfy the judgment, and became himself the purchaser, taking the deed in his own name, but pretending to purchase for the benefit of the heirs of McCoy, the now plaintiffs; that he paid nothing to the estate, and that whatever he may have pretended to pay, was the money of the plaintiffs; and that he afterwards sold the land to the defendant Threadgill, who purchased with a knowledge of the facts.

The prayer of the petition was that the levy and sale of the land be annulled; that the defendants be decreed to convey to the plaintiffs, and for general relief.

The answer of Crawford admitted the contract of sale between McCoy and Grigsby; the conveyance by himself and wife; the levy and sale to satisfy the judgment against Grigsby, and that he (Crawford) was the purchaser; but said he had fully accounted to the estate for the amount of the purchase money. The defendant Threadgill admitted his purchase from Crawford; averred that it was made in good faith, for a valuable consideration; and denied that he knew of any defect in the title of Crawford.

The plaintiff gave in evidence the record of the proceedings in the suit by the administrators of McCoy against Grigsby, for the residue of the purchase money contracted to be paid for the land; from which it appeared that the suit was instituted in July, 1839, in Gonzales county; citation issued to Jefferson county, where the defendant resided, on which the Sheriff of that county made the following return: "Served by reading the within, August 22nd, 1839." At the Fall Term thereafter, the defendant not having appeared, the Court appointed a "*Curator ad litem*" who pleaded to the jurisdiction. The Court overruled the objection, and gave judgment that the contract between the intestate and Grigsby be specifically performed; that the plaintiffs recover of the defendant the residue of the purchase money; and that they execute to him a conveyance of the land. It was in proof that Crawford, having intermarried with the widow of McCoy, was appointed *administrator de bonis non* of the estate, in September, 1841, and in November thereafter, jointly with his wife, executed the conveyance to Grigsby in conformity to the decree of the Gonzales District Court, and filed it among the papers in that case; that he thereupon took out execution upon the judgment, which was levied on the land. There was a sale, at which Crawford was the purchaser, in December, 1841. He, being at the time administrator of the estate, had the amount of his bid credited on the execution. There was no evidence that Grigsby ever accepted, or had any knowledge whatever of the conveyance to him by Crawford and wife. Crawford sold the land to Threadgill at more than double the amount at which he purchased, and in his account for final settlement as administrator, credited the estate with the amount at which he had purchased.

It was in evidence that Threadgill was present at the Sheriff's sale; that he made inquiries whether Crawford could make a good title by virtue of his then purchase. He was apprised of the facts, and advised that if he bought, he would take his title subject to litigation. The material averments

of the petition, not admitted by the answer, were proved substantially as averred. The case was submitted to the Court, (a jury being waived,) upon the petition, answer, and evidence: whereupon it was adjudged by the Court, that the petition be dismissed, and that the defendant Threadgill be quieted in his possession, &c. The plaintiffs appealed.

*A. Neill* and *J. Sayles*, for appellants.

*A. H. Philips* and *G. W. Paschal*, for appellees.

Wheeler, J. The plaintiffs rested their claims to relief on two grounds:

1st. The nullity of the judgment against Grigsby, and the invalidity of the proceedings thereon.

2nd. A trust resulting to them, upon the purchase by Crawford.

The mode of obtaining personal service of process, upon the defendant, in 1839, when the citation in the suit against Grigsby purports to have been served, was by delivering to him a copy of the writ and petition. There was no authority of law for serving process by simply reading it. There was, therefore, no legal service of process upon Grigsby. He had not legal notice of the suit, and, consequently, was not affected by the judgment. No person is bound by any decree or judgment to which he has not become a party, in some of the modes known to the law. (3 U. S. Cond. 312; 9 How. R. 350; 15 J. R. 142; 1 Hill, (N. Y.) R. 139, 141; 1 Barb. R. 289; 2 B. Monr. 455; 11 N. Hamp. 191.) The judgment, as to Grigsby, was void. His rights were in no way affected by it, or by the proceedings under it. Those proceedings neither invested him with the title to the land, nor did they divest that of the heirs of McCoy. But the acts of the defendants were calculated to cast a cloud upon the plaintiff's title; and they might well maintain the action to remove the adverse claims asserted, and to be secured in the possession and en-

joyment of their property. (Hatch v. Garza, 7 Tex. R. 60.)

Moreover, the administrator, Crawford, purchased with the funds of the estate; and, if the judgment against Grigsby had been valid and the sale legal, still the purchase would have inured to the benefit of the estate. It is well settled, that, where one buys land with the money of another and takes the deed in his own name, a trust results in favor of the person whose money was employed in making the purchase. The latter is the equitable owner of the land; and the purchaser is a mere trustee and holds for the benefit of him who paid the purchase money. (Neill v. Keese, 5 Tex. R. 23.)

The defendant Threadgill bought with a knowledge of the facts. He is chargeable with notice of the title of the plaintiffs; and his purchase was subject to their rights. He acquired no better tittle than his vendor possessed. The conduct of the administrator was a fraud upon the rights of the heirs of the estate which he represented; and Threadgill, by his purchase from the administrator, with a knowledge of the facts, became *particeps criminis* in the fraud. As between the parties to this suit, the title to the land, both legal and equitable, appears to be in the plaintiffs. They clearly were entitled to maintain the action; and the Court erred in giving judgment for the defendants. The judgment must be reversed and the cause remanded for further proceedings.

Reversed and remanded.

## Wm. M. Cook v. Antonio de la Garza.

Where, in an action against Cook and Harper, for forcibly dispossessing the plaintiff of the house and premises where he resided, the jury found a verdict as follows: "We, the jury in the case of Antonio de la Garza v. William M. Cook, find for the plaintiff in the sum of six hundred dollars damages," whereupon judgment was rendered against Cook and Harper, from which Cook alone appealed; *Held*, In answer to the objection that the verdict was against Cook alone, that the verdict was general against both; the attempted statement of the case being mere surplusage.

At Fall Term, 1850, verdict for plaintiff, and new trial on motion of defendant: Spring Term, 1851, continued on affidavit of the defendant; Fall Term, 1851, case called and laid over one day, at the request of the defendant; next day motion by the defendant for change of venue, and time asked to prepare the affidavits: after waiting what the Judge considered a reasonable time, and no affidavits being presented, the case was ordered to proceed; *Held*, That, the application for a change of venue came too late to entitle it to favor, or to consideration as a matter of right.

As the jury, in an action of trespass, are not restrained in their assessment of damages, to the amount of the mere pecuniary loss sustained by the plaintiff, but may award damages in respect of the malicious conduct of the defendant, and the degree of insult with which the trespass has been attended, the plaintiff is at liberty to give in evidence the circumstances which accompany and give character to the trespass, although distinct actions might have been maintained in respect of such circumstances: but the jury are not to award damages in respect of the distinct injuries involved in the circumstances accompanying the principal trespass, but only in respect of the principal trespass itself.

Where, the plaintiff being absent from home, the defendants requested his wife to go out of the house, which she refused to do; whereupon they removed the furniture and effects, which were in the house, into the yard, and then took hold of the plaintiff's wife, each taking her by an arm, and led her out of the house, she having an infant in her arms, and resisting; and then pulled down one side and end of the house; and the cow pen and let out the cattle; the house and cow pen being of little value; and remained in possession for a time, after which the plaintiff went again into possession; *Held*, That a verdict for six hundred dollars damages was not so excessive as to warrant setting it aside.

Appeal from Victoria. This was an action brought by the appellee, against the appellant and H. and E. S. and G. F. Harper, for a trespass, committed by forcibly dispossessing the plaintiff of the house and premises where he resided. The

plaintiff discontinued as to two of the defendants, H. and G. F. Harper. At the Fall Term, 1850, there was a verdict for the plaintiff and a new trial granted. At the Spring Term, 1851, the cause was continued on affidavit of the defendant Cook. At the Fall Term, thereafter, the cause being called for trial, the plaintiff announced himself ready, whereupon, the defendants asked that the cause be postponed until the next day, which was accordingly done. When the cause was again called for trial, on the following day, the defendant, Cook, moved the Court for a change of venue and asked time to prepare an affidavit in support of his motion. The Court gave what the Judge deemed, under the circumstances, a reasonable time; but no affidavit was offered: and the Court directed the trial to proceed. A witness for the plaintiff testified that early in 1849, he was present at a trial of the right of possession of the premises on which the plaintiff resided, between the plaintiff and the defendant Cook; that the decision having been adverse to the right of Cook, he said it was useless to try to get justice done in the Courts of this country, and that he intended to take the matter into his own hands and to take possession of the land; that the plaintiff had promised to give him possession of the land, if he did not show him a good title; that he had shown none; that the land was his, (Cook's) and he intended to have it, and that he would put Harper in possession. The plaintiff was then living on the land on which he had built two small houses, and a cow pen, and had made some other improvements. It was in evidence that the defendant Cook, in company with others, went to the house of the plaintiff, and asked him if he would give him possession; to which the plaintiff replied, he would not. The defendant then left; but returned in the evening with the witness and the three Harpers. The plaintiff being absent, they requested his wife to go out of the house; which she refused to do. They then removed the furniture and effects, which were in the house, into the yard. Cook and one of the Harpers then took hold of the plaintiff's wife, each taking her

by an arm, and led her out of the house; she having an infant in her arms, and resisting. They then pulled down one side and end of the house; they also pulled down the cattle pen and let out the cattle. The house and cow pen were of little value. The Harpers remained in possession for a time; since which the plaintiff has been in possession.

The defendant asked instructions, to the effect, that the jury were restricted, in their estimation of the damages, to the injury actually sustained; which the Court refused; and instructed the jury that in their estimation of the damages, they were at liberty to take into consideration all the circumstances of the case. The jury returned the following verdict: "We, "the jury in the case of Antonio de la Graza v. William M. "Cook, find for the plaintiff in the sum of six hundred dollars "damages." The defendants moved for a new trial, which the Court refused, and gave judgment upon the verdict against both defendants; and the defendant Cook appealed. The errors assigned were:

1st. The not giving time to perfect the application for a change of venue.

2nd. The instructions to the jury.

3rd. That the verdict was not authorized by the evidence, and is contrary to law; and that the damages are excessive.

*J. A. Mitchell* and *W. Alexander*, for appellant.

*A. S. Cunningham*, for appellee.

Wheeler, J. The objection, now urged to the judgment, that the verdict was against Cook alone, and did not authorize judgment to be rendered against his co-defendant, is not embraced in the assignment of errors: and this might be a sufficient answer to the objection. It is succeptible of the further answer, that if an error, it has operated no injury to Cook, and his co-defendant has not appealed. There is, however,

nothing in the objection. The verdict is general, for the plaintiff. The attempted statement of the title of the case was mere surplusage. The verdict possesses the essential requisites of intelligibility and certainty; and it is not vitiated by the misdescription of the case, which it contains.

The application for a change of venue came too late to entitle it to favor, or to consideration as a matter of right, especially as the delay in presenting it was not explained. It is the right of a party, on compliance with the requirements of the law, to have a change of venue: but this like every other right must be asserted within a convenient and reasonable time. This does not appear to have been done in the present case. And, under the circumstances, we cannot say that the Court did not exercise a sound discretion in refusing to give further time.

In the instructions to the jury, the Court, in effect, ruled, that the case was one in which they were authorized to give exemplary damages. And in this there was no error. (Smith v. Sherwood, 2 Tex. R. 460; Graham v. Roder, 5 Id. 141.) The evidence showed a premeditated, wilful trespass, comitted under circumstances of aggravation and outrage which called for exemplary damages. The conduct of the defendants, evinced a spirit of insubordination to law, a determination to accomplish their purpose irrespective of the rights of the plaintiff, and regardless of the consequences. It was characterized by such acts of lawless violence and oppression, as rendered it a proper case for the giving of damages, not merely to compensate, but to punish. There were in evidence no extenuating circumstances. There can be no pretence that the alleged promise of the plaintiff, to give the defendant possession if he did not show him a title, could avail the defendant, either in justification of the trespass, or in mitigation of damages. The plaintiff was under no obligation to make such a promise; and if made, it was without consideration, and, consequently, without legal effect—a mere *nudum pactum*.

It was competent to prove the circumstances which attend-

ed and gave character to the trespass. "As the jury, in an "action of trespass, are not restrained in their assessment of "damages, to the amount of the mere pecuniary loss sustained "by the plaintiff, but may award damages in respect to the "malicious conduct of the defendant, and the degree of insult "with which the trespass has been attended, the plaintiff is "at liberty to give in evidence the circumstances which ac- "company and give character to the trespass. If the defend- "ant, while he is an actual trespasser in the plaintiff's house, "or on his land, commit any other trespass to the person of "the plaintiff, or to the person of his wife, children, or ser- "vants, then, although distinct and substantive actions of "trespass might have been maintained in respect of such tres- "passes, or actions on the case might have been supported for "the consequential damage in respect of the loss of service, "or expense of cure, &c., yet, such acts of trespass and their "consequences may be alleged and proved in aggravation of "the damages." (2 Stark. Ev. 813.) The defendant's conduct and expressions, whilst he was in the act of committing the trespass, are always evidence to show his malice, and the degree of insult offered to the plaintiff, although where they afford a distinct ground of action, upon which a recovery may be had, in another suit, the jury are not to award damages in respect of that distinct injury or its consequences, but only in respect of the principal trespass. (Id. 814.) Although the jury were not at liberty to give damages in this action for any injury sustained by the wife of the plaintiff, for which she might sue jointly with her husband; yet the conduct of the defendants towards her, while committing the trespass complained of, was admissible in evidence to show the motives by which they were actuated in committing the trespass, and the insult and injury sustained by the plaintiff. It does not appear that the jury exceeded their province in estimating the damages.

To authorize the setting aside a verdict on the ground of excessive damages, in a case like the present, they must be so

extravagant as to induce the suspicion of improper conduct. (1 Wash. C. C. R. 152.) There is nothing in the present case to induce such suspicion.

There is no error in the judgment, and it is affirmed.

Judgment affirmed.

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## McCoy's heirs v. Jones.

Where the judgment of the District Court is for specific real estate, the bond on appeal or writ of error, is not required to be for a greater amount than is sufficient to secure the costs of the suit.

A continuance to a future day of the Term cannot be claimed as a matter of right; when a cause is called for trial, in its order, it is incumbent on the parties to try, or continue for the Term.

An objection to the admissibility of evidence comes too late in arrest of judgment; even where the trial was *ex parte*. But *quere?* Whether the trial could be said to have been *ex parte* in this case.

Repeated decisions of this Court have settled, that, where the defendant has pleaded in reconvention, the plaintiff cannot deprive him of his right to an adjudication upon the matters embraced in his plea by taking a nonsuit. And this rule applies to a case where the plaintiff sues to rescind a contract for the sale of land, and the defendant admits the contract and prays for its specific performance.

Error from Gonzales. This was an action by the widow and heirs of Joseph McCoy, against Levi Jones, to rescind a contract for the sale of McCoy's headright league. It was before the Supreme Court on a former occasion; and the facts, so far as they were disclosed by the pleadings, will be found in the report of the case in 3 Tex. R. 349. It was agreed by the attorneys of the parties, by agreement filed October 18th, 1849, that S. B. Conley should act as special Judge, or in case of his failure or refusal, that A. S. Cunningham or W. H. Stewart should do so—the District Judge being incompetent

to sit in the case. The next entry was at April Term, 1850.

"Come the parties by their attorneys, and William H. "Stewart, Esq., special Judge by agreement, having taken "the seat as Judge, His Honor Fielding Jones, District Judge, "being interested in the cause; whereupon the defendant "asked and obtained leave to file an amended answer; upon "which being done the plaintiff's attorney asked leave of the "Court to set the cause for a particular day, to enable him to "examine the answer and file amended pleadings if necessary; "which the Court refused, but granted him half an hour to "examine the pleas and file others, and ruled the parties to "trial thereafter; whereupon the plaintiffs by attorney asked "leave to take a nonsuit, which the Court refused; to all "which rulings the plaintiff's attorney excepted, and the party "defendant proceeded *ex parte* with the case before the follow-"ing jury, to wit:" &c. It appeared also that the case was called in the afternoon of the first day of the Term.

The defendant then read all the pleadings in the case; gave in evidence the original contract, by which McCoy sold to Jones the league of land in controversy, and another half league to which McCoy undertook to perfect his title, in consideration of which Jones paid $1000 in hand and gave his note for $1625, payable to McCoy at the house of Logan and Raguet at Nacogdoches, sixty days after date. The note and agreement were both dated 17th day of April, 1836. The contract stipulated that the $1625 should be payable sixty days after date or as soon as a good and indefeasible title for the said lands should be made; for the execution of general warranty deeds; that, in case the title to the half league could not be perfected by McCoy, Jones was to pay him $1000 instead of the $1625. The plaintiff then proved by two depositions of Oscar Farish, taken in answer to two sets of interrogatories, of only one of which notice appeared to have been given to the opposite party, that Jones left Columbia about the 1st of June, 1836, for Nacogdoches to pay his note to McCoy and receive his titles; that he had the money; that he, Farish, accompanied him; that they arrived at Nacogdoches

before the 17th of June; learned that McCoy was dead; and that there was no one authorized to receive the money. The defendant then proved, by several witnesses, that the land was sold at its full value at the time; that Jones was in the country at the date of the Declaration of Independence, and has been here ever since. He then proved that at his instance, in 1840, Fielding Jones, his brother, called on Mrs. McCoy and stated to her that Levi Jones was anxious to close the contract, and was prepared to pay the money, and wished her to take the proper steps to make the title; that Mrs. McCoy replied that she was unwilling to make the title or complete the contract. There was a verdict for the defendant; and a decree to the effect that the contract be cancelled as to the half league; that if Jones should pay the $1000 and five per cent. per annum interest thereon, from the 17th of June, 1836, within ninety days, to the plaintiffs, or deposit the amount with the Clerk of the Court for them, he should have the land; otherwise the defendant should recover from the plaintiffs one thousand dollars and interest thereon at five per cent. per annum from the 17th of April, 1836, and the contract should be rescinded at the plaintiff's costs.

There was a motion in arrest of judgment on the ground,

1st. That the Court erred in not continuing the case, as requested, to a future day of the Term.

2nd. That the Court erred in not permitting the plaintiff to take a nonsuit.

3rd. That the Court erred in allowing the deposition of Oscar Farish, taken on the interrogatories of which the plaintiffs had no notice, to be read to the jury.

The plaintiffs prosecuted a writ of error, nearly two years after the final decree had been rendered, giving a bond in the sum of $500. The defendant in error moved to dismiss, on the ground that the bond was for too small an amount.

*A. Neill*, for plaintiffs in error.

*A. H. Phillips*, for defendant in error.

WHEELER, J. The undertaking of the sureties upon an appeal or writ of error bond, is for the prosecution of the appeal or writ of error with effect. If this be done and the judgment reversed, the sureties have performed their undertaking and are discharged. The said bond is *functus officio*. It is the affirmance of judgment, which fixes the liability of the sureties; and it is only in that case, that the sureties are bound for the performance of their principal.

If, as assumed on the part of the appellees, as it is, perhaps, to be inferred, the appellees have complied with the decree of the Court on their part, by paying the money adjudged to be paid by them, they were entitled merely to a writ of possession, to recover the land in controversy. And there was no necessity that the bond should be in an amount more than sufficient to secure the costs of the suit. (Hart. Dig. Art. 790.) In this view the bond is deemed sufficient. And we are of opinion that the motion to dismiss be overruled.

In respect to the merits, it is to be observed, that there is no rule of law or practice, which required the Court, at the request of the plaintiffs, to set the case for trial at a future day. It might have been proper, under the circumstances, to make such an order: but the plaintiffs could not demand it as a matter of right. When the cause was called for trial, in its order, it was incumbent on the plaintiffs to try or continue. If they required further time to prepare for trial, they should have moved a continuance. Not having done so, the Court did not err in requiring them to proceed to trial.

The objection to the admissibility of evidence was not entitled to consideration, when first taken on a motion in arrest of judgment.

The only remaining objection to the judgment, deserving of notice, is the refusal of the Court to permit the plaintiffs to take a nonsuit. The defendants had pleaded in reconvention; and repeated decisions of this Court have settled, that where the defendant has thus pleaded, the plaintiff cannot deprive

him of his right to an adjudication upon the matters embraced in his plea, by taking a nonsuit. The judgment is affirmed.

Judgment affirmed.

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## Pridgen v. Cox.

In order to sustain an action against the drawer of an order payable in merchandize, it must be proved, at least, that the order was presented and not paid.

Appeal from Victoria. This action was brought for the recovery of the amount of a promissory note, and of an order drawn by appellant, on one McMullen, requesting him to pay fifty-one dollars and seventeen cents, in his store, to the appellee. The order was drawn on C. McMullen; and the petitioner averred that he had used due diligence in presenting it to J. H. McMullen, the person for whom it was intended; and that the said J. H. McMullen had protested the same, by indorsement thereon; and that, by reason of the said order and protest, the defendant had become liable to pay fifty-one dollars and seventeen cents; and that the petitioner had given due notice to the defendant, that the order had been protested by McMullen. The note and order were read in evidence. An objection was made to the reading of the indorsement of protest signed J. H. McMullen; but was overruled, the Court ruling that it was not necessary for the plaintiff to prove that the order was ever presented to the drawee. Judgment was given for the amount of the note and order, with interest from their respective date; and on appeal it was assigned for error, that the Court erred,

1st. In overruling the exception of the defendant to the plaintiffs evidence.

2nd. In overruling the motion for a new trial.

*W. S. Glass*, for appellant.

HEMPHILL, CH. J. The appellee has not appeared in this Court; and the brief of the appellant goes no further than simply to present what are deemed the errors of the judgment, but without argument or reference to authorities.

The principal question is whether the plaintiff was bound to prove that he had used some diligence in presenting, or attempting to collect the order, from McMullen, the drawee. This order being for payment in the store—equivalent to payment in store goods—is not a bill of exchange as known to commercial law; and the payee would not be bound to the same diligence, in presenting and attempting its collection, in order to enforce the secondary liability of the drawer: but certainly he was bound to use some efforts to make it available against the drawee. Whether it be a commercial instrument or not, the undertaking of the parties is that the payee will make some attempt at collection. If the law be that the drawer, in an order not commercial, is liable on the original claim, unless he can prove that he was injured by the neglect of the payee to present, and subsequent failure to use legal diligence in collection, the suit should have been brought on the original claim, and not, as in this case, on the order, with all the allegations pertinent and necessary in an action against a drawer on a mercantile bill of exchange.

The plaintiff having alleged the facts of presentment, refusal and notice, it was incumbent on him to prove those facts; or at least, that the drawer was, not injured by his neglect. The defendant could not have supposed, that, under such allegations, he was bound in his defence, to prove that the order had not been presented, and that by such failure he had suffered injury.

The defendant, it seems, would have been satisfied with

proof of the signature of the drawee, to what is called his protest; and we are of opinion that the Court erred in overruling the objection to the want of such proof. The plaintiff was not under the necessity of proving the identity of J. H. with C. McMullen. This had been impliedly admitted in the amended answer of the defendant.

Judgment reversed and cause remanded for a new trial.

Reversed and remanded.

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THE STATE v. BOCK AND OTHERS.

The Act of 1846, (Hart. Dig. p. 933,) to raise a revenue by direct taxation, in so far as it levied a tax on the retailing of merchandize, retailing of spirituous liquors, and keeping of ten pen alleys, was constitutional.

Appeals from Galveston. Suits were brought by the State, against Bock, for keeping a house for the retail of spirituous liquors in quantities less than a quart, and for keeping a ten-pin alley, and against Labadie for selling goods at retail, without having paid the occupation tax imposed by the Act of 1846. (Hart. Dig. p. 933.) The defendants demurred to the several suits; the demurrers were sustained; and the State appealed.

*Attorney General*, for appellant.

*Alexander & Atchison*, for appellees.

LIPSCOMB, J. In support of the judgment of the District Court, it is contended that the Act imposing a tax on the oc-

cupation of retailing goods, of retailing spirituous liquors, and of keeping a ten-pin alley, is repugnant to the Constitution and void.

In the case of The State v. Stephens, (4 Tex. R. 137,) we decided that "there can be no doubt, that the quarterly re-"turn could be legally required from the defendant, as an oc-"cupation tax, if he was engaged in buying and selling mer-"chandize or receiving the same for sale as an agent or auc-"tioner." This decision applies to each of the above cases. The Court therefore erred in sustaining the demurrer; and the judgment is reversed and the causes remanded in each of the cases stated.

Reversed and remanded.

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## The State v. A. J. Ward.

An indictment for gaming, which, after describing the public place, alleges that the defendant did, then and there, in the house aforesaid, play at a game with cards with one Charles Manor, upon the result of which said game a sum of money was then and there bet, to wit: the sum of five cents, contrary, &c., substantially follows the language of the statute, and is sufficient, without any averment that the defendant bet the money, or knew that any was bet.

Appeal from Brazoria. This was an indictment for playing cards at a public place, as follows:

The State of Texas, } In the District Court of Brazoria
*County of Brazoria.* } county, Fall Term, A. D. 1851.—

In the name and by the authority of the State of Texas, the grand-jurors, elected, drawn, impannelled and sworn to inquire in and for the body of the county of Brazoria in the State of Texas, upon their oath present, that, on the first day of August in the year of our Lord one thousand eight hundred and fifty-

one, there was situated in the town of Columbia, in said county, a certain house, which said house was then and there a public house and known as the grocery of one George Rounds, and which said house was then and there used and employed as a house for retailing spirituous liquors, and that Andrew J. Ward, late of the county aforesaid, yoeman, on the day and year aforesaid, with force and arms, in the county aforesaid, did then and there, in the house aforesaid, play at a game with cards with one Charles Manor upon the result of which said game a sum of money was then and there bet, to wit: the sum of five cents, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State. J. C. McGONIGAL, Dis't. Att'y.

When the case was called the defendant moved *ore tenus*, to quash the indictment on the ground that there was no averment in the indictment, that the defendant bet any sum of money on the game, or knew that any was bet; which motion was sustained; to which ruling of the Court, the District Attorney excepted, &c. There were three other cases in which the indictments were precisely similar; and which were disposed of by the same opinion.

*Attorney General*, for appellant.

*J. B. Jones*, for appellee.

Lipscomb, J. The above stated and numbered cases were all indictments, under the statute of 20th March, 1848, (Hart. Dig. Art. 1474,) for playing at a game of cards, upon which money was bet,

The District Judge quashed the indictments, supposing that the offence was not sufficiently described. We believe that the indictments substantially follow the language of the statute; and we have uniformly held that to be sufficient. The judgment of the District Court, in each case, is reversed, and the causes remanded.

Reversed and remanded.

## Wheeler v. Moody.

The existence of Martin De Leon's colonial contract, and that Fernando De Leon was the Commissioner of that colony, are facts so notorious in the history of the country, and so fully recognized and established in its legislative and judicial proceedings, as to have become matters of judicial cognizance.

The protocol, or first original, would unquestionably be primary evidence. As between the *testimonio* and Land Office copy, the former, on general principles, would be the best evidence. The latter would be but secondary; and, in order to its admission, it would be necessary for the party offering it, to account for the non-production of the *testimonio*. But since the statute has elevated the Land Office copy to the same grade as the original, it is no longer secondary, but is primary evidence, and consequently is admissible without producing or accounting for the non-production of the *testimonio*. But *quere?* Under particular circumstances of suspicion.

In order to constitute an abandonment of the country, within the intent of the colonization laws of Coahuila and Texas, the removal must have been voluntary.

Conditions subsequent, (annexed to original titles,) which were inconsistent with our institutions, such as the payment of a certain sum to be applied to the erection of churches, were discharged by force of the change of government effected by the Revolution.

The 10th Section of the General Provisions of the Constitution of the Republic, dispensed with the performance of the condition of settlement annexed to titles for town lots.

Possession, to be effectual either to prevent a recovery or to vest a right under the statute of limitations, must be an actual possession, attended with a manifest intention to hold and continue it. It must be, in the language of the authorities, an actual, continued, adverse, and exclusive possession, for the space of time required by the statute. It need not be continued by the same person; but when held by different persons, it must be shown that a privity existed between them.

It is proper to refuse to give instructions which are based upon assumptions of fact either contrary to, or not warranted by, the evidence, without regard to whether they are correct, as abstract propositions, or not.

Appeal from Victoria. This was an action brought by the appellee against the appellant, to recover a town lot in the town of Victoria. The plaintiff claimed under a title issued by Fernando De Leon, as Commissioner of De Leon's colony, to Eugenio Benavidas, in 1835. The defendant pleaded "not guilty." He also claimed title in himself derived from the

government of the Republic of Texas, through the corporation of the town of Victoria. He further pleaded the statute of limitations of three and ten years.

The plaintiff gave in evidence a translated copy, from the General Land Office, of the original title issued by the Commissioner De Leon to Benavidas, bearing date on the 17th day of March, 1835; to the admission of which the defendant objected on the ground that there was no evidence of the authority of Fernando De Leon to issue titles to land; and on the further ground that there was no evidence that a *testimonio* had been issued; the defendant objecting that the copy was not admissible without proof of the loss of the *testimonio*. The Court overruled the objection. The title introduced purported to have been issued conformably to the provisions of the colonization law of the 24th of March, 1825, and the instructions of the 4th of September, 1827. Annexed to it were the conditions of occupancy and cultivation, and the payment of one dollar, "by way of acknowledgment, as provided in the 36th Article of the aforesaid law of colonization."

The plaintiff also gave in evidence a conveyance from Benavidas and wife to himself, and proved the identity of the lot. He further proved that Benavidas was a colonist in De Leon's colony, the head of a family, and a resident in Victoria at the date of the grant, and until June, 1836; he never lived upon or improved the lot in question; that he and his family were among those who were sent to New Orleans by the military authorities of the country in June, 1836; that he went to Louisiana against his will, and did not return until in 1848, since which time he has resided in that county.

The defendant gave in evidence a deed to himself to the lot, from the town of Victoria, dated June 23rd, 1847. He proved that, immediately after the date of this deed, he erected a house upon the lot in question, which was generally occupied by his tenants until he sold it to one Rosell, on the 6th day of April, 1850. Rosell in a few days thereafter, in the same month, removed the house off the lot. There was no enclosure, or

other improvements made upon the lot. The defendant further proved that one Hicks, claiming by deed from the town, built a house on the lot in 1840, which remained there three or four years; that Hicks' house was removed, and the lot was uninclosed and unoccupied until the defendant built upon it in 1847.

At the request of the plaintiff, the Court instructed the jury, that if the plaintiff's vendor, Benavidas, did not voluntarily abandon the country, his title was good without showing a compliance with the conditions annexed to his grant. That the three years possession, necessary to bar the plaintiff's right of action, must have been an actual, visible, and notorious occupation of the land in controversy, commenced and continued adversely to the plaintiff for the period of three years under a title, or color of title; and that it was incumbent on the defendant to prove the fact of such adverse possession; that the mere assertion of a claim to the land is not such possession; and that the defendant cannot attach his possession to that of others having no privity of estate with him, so as thus to make out the period necessary to bar the right of action.

The defendant asked the following instructions, which the Court refused:

That if the defendant did not intend to abandon the possession when he sold his house, and this was generally known, his possession was continued; that an actual possession commenced, continues until there is some evidence of an intention to abandon it; and that the fact that a party who had been in the actual possession left the premises and was not actually upon the land is not conclusive evidence of his intention to abandon the possession.

There was a verdict and judgment for the plaintiff; a motion for a new trial overruled; and the defendant appealed.

*A. S. Cunningham*, for appellant.

*A. H. Phillips*, for appellee.

WHEELER, J. The grounds relied on for a reversal of the judgment, are,

1st. The admission of the plaintiff's evidence of title.

2nd. The instructions of the Court on the subject of abandonment of the country, and proof of performance of the conditions of the grant by the original grantee, under whom the plaintiff claimed.

3rd. The instructions of the Court and the finding of the jury in reference to the defence of the statute of limitations.

1. The objection that there was no proof of the authority of the Commissioner De Leon to issue the title is not now relied on, and need not be noticed, further than to remark that the existence of Martin De Leon's colonial contract, and that Fernando De Leon, who issued the present title, was the Commissioner of that colony, and as such authorized to issue titles to colonists, are facts so notorious in the history of the country, and so fully recognized and established in its legislative and judicial proceedings, as to have become matters of judicial cognizance. (Robertson v. Teal, *ante*.)

In the Act of the 10th of December, 1841, (6 Stat. 15.) confirming the title to certain lands in the corporation of the town of Victoria, under which the defendant claims the lot in question, these facts are recited. The official character of Fernando De Leon and his authority are expressly recognized: and we are of opinion that proof of his official character was not necessary in this case.

The translated copy of the title from the General Land Office, is made by the statute (Hart. Dig. Art. 744) *prima facie* evidence, of the same grade as the original, or protocol of which it is a copy. That, unquestionably, would be primary evidence, and as such, admissible. As between the *testimonio* and the Land Office copy, the former, on general principles, would be the best evidence. The latter would be but secondary, and, in order to its admission, it would be necessary for the party offering it, to account for the non-production of the *testimonio*. But since the statute has elevated the

Land Office copy to the same grade as the original, it is no longer secondary, but is primary evidence, and consequently, is admissible without producing or accounting for the non-production of the *testimonio*. Perhaps, under particular circumstances, of a character to cast doubt and suspicion on the title, it might be necessary to prove that a *testimonio* had been delivered, or had existed. No such circumstances, however, appear in the present case. On the contrary, it was in proof that the grantee was a colonist, and the inference is that he was justly entitled to the grant which he received. Upon the principles maintained by repeated decisions of this Court, the evidence in question was, we think, admissible. (Houston v. Perry *et al.*, 3 Tex. R. 393; and see cases recently determined at Austin and Tyler.)

2. The Court rightly ruled that to constitute an abandonment of the country, the act must be voluntary. This principle was settled in the case of Hardy *et al.* v. De Leon. (5 Tex. R. 211.) Such a doctrine as that a party shall forfeit his title and suffer disfranchisement, in consequence of an involuntary act, done by coercion and compulsion of the constituted authorities of his country, civil or military, would be too revolting to the common sense of justice of mankind to find a place in any just or enlightened code. There certainly is nothing in the laws of this country, which can give sanction or countenance to such a principle.

The title issued to Benavidas was a perfect title. The conditions annexed to it were conditions subsequent. That imposed under the 36th Article of the colonization law of 1825, which required the payment of a certain sum, to be applied to the building of churches, if not previously performed, was discharged by force of the change of government effected by the Revolution of 1836, and the principle of religious liberty incorporated into the organic law of the Republic, by which freedom of conscience was secured, and religion was emancipated from the civil authority. (Const. Rep. Dec. of Rights, Sec. 3; Blair v. Odin, 3 Tex. R. 288, 300–1.) The condition

of occupancy and cultivation, in respect to titles of the class to which the present belongs, was dispensed with by the 10th Section of the General Provisions of the Constitution of the Republic, and the 24th Section of the Land Law of the 14th of December, 1337. (Hart. Dig. Art. 1860.) There was, therefore, no error in the instruction of the Court in question.

3. It remains to inquire whether there was error in the judgment in reference to the defence of the statute of limitations. To bar a recovery by one having title, under the 15th Section of the statute, (Hart. Dig: 2391,) the defendant must have been "in possession under title, or color of title," during the period of three years. The possession, to be effectual, either to prevent a recovery, or vest a right under the statute, must be an actual possession, attended with a manifest intention to hold and continue it. It must be, in the language of the authorities, an actual, continued, adverse, and exclusive possession. (9 Serg. & R. R. 26; Angell on Lim. Chap. 31, Sec. 12.) There must be an actual occupation of the premises, continued for the space of time required by the statute. (Ib.; 1 Marsh. (Ky.) R. 106; Id. 207; 3 Id. 366; Adams on Ejectment, Amr. Ed. App. n. A.) That there was not such occupation or possession in the present case, is manifest. At the date of the defendant's deed, there was no occupancy of the lot, and, consequently, there was at the time no adverse possession by those under whom he claimed. It is clear that he could not connect his possession with that of Hicks, for the reason that Hicks had long before relinquished the possession and ceased to occupy the lot; and for the further reason that there was no privity between them. The possession need not be continued by the same person; but when held by different persons, it must be shown that a privity existed between them. (Id.; Winn v. Wilhite, 5 Mart. N. S. 524.) The defendant's possession commenced with the erection of the house, which he afterwards sold to Rosell; and it was discontinued when the house was removed from the lot, and it was thereby stripped of the only improvement upon it. Three

years had not then elapsed. The possession of the defendant, therefore, was not continued for the space of time required by the statute to render it effectual in bar of the plaintiff's action; and it is too clear for controversy, that the statute of limitations could not legally avail the defendant in any aspect in which the law might have been presented in the instructions. Whether the instructions refused were correct or not, as abstract propositions, is immaterial. They were rightly refused for the reason that they were based on assumptions of fact, either contrary to, or not warranted by, the evidence in the case. The verdict and judgment were in accordance with the evidence and law of the case; and the judgment is, therefore, affirmed.

Judgment affirmed.

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## Bell, Governor v. Daniel McDonald and others.

It is no objection to an amendment, That it sets up a distinct cause of action: although the defendant may make any defence which would have been available, had a separate suit been brought.

A bond, entered into on the 19th of February, A. D., 1841, by a Sheriff, in the form prescribed by the 18th Section of the Act of 1840, (Hart. Dig. Art. 3990,) bound his sureties for the faithful payment over of taxes collected by him, without regard to whether they were assessed in 1840 or 1841.

Where a defendant is sued for a balance of account, receipts produced by him, if properly proved, should be admitted in evidence, leaving it for the jury to say upon a comparison of the receipts with the credits allowed in stating the account, whether the corresponding credits had not been already allowed; the remedy, in case the jury decide clearly against the weight of evidence, being to grant a new trial.

See this case for circumstances under which the jury would not have been warranted in finding that the amounts corresponding to receipts produced by the defendant, had not been allowed in stating the account.

Where the sureties of a delinquent tax collector (Sheriff) produced an order directing the Commissioner of Revenue to receipt to the Sheriff on account, &c.,

for four thousand three hundred and fifty-three 87-100 dollars, signed by J. C. KLOFTENBURG, C. C. T. D., it was held that the official capacity of Kloftenburg should have been proved.

Acts of officers of the government done may years ago, should be liberally construed in favor of rights claiming their support.

As this suit is prosecuted against the sureties alone, the principal having been dismissed, and as a long period (nearly nine years) elapsed before the commencement of the action, the fullness of proof requisite to support the defence, had the proceeding not been unreasonably delayed, could not now be hoped for or exacted.

Appeal from Victoria. The defendant Daniel McDonald, and the sureties on his official bond as Sheriff and Tax Collector of the county of Victoria, were sued for his alleged dereliction in not paying over four thousand one hundred and seven 88-100 dollars, taxes assessed for the year 1841, and collected, as alleged by the said McDonald. And, by an amended petition, they were further charged with the alleged default of the said McDonald in not paying over the sum of four thousand nine hundred and sixty-five 21-100 dollars, collected by him in 1841 from the delinquent tax payers of 1840. The bond was dated 19th February, 1841, and was in the form prescribed by the 18th Section of the Act of 1840. (Hart. Dig. Art. 3000.)

From the statement of the accounts of McDonald, as made out from the archives in the Comptroller's office, he appeared to have been charged with eleven thousand two hundred and seventy-seven 83-100 dollars, the whole amount of direct taxes assessed for the year 1840, and to have been credited with payments made at various times from December, 1840, to December, 1841, which, together with his commissions, reduced the balance unaccounted for, to the amount claimed in the amended petition. The list of delinquent tax payers for the year 1840 was introduced in evidence, showing a delinquency amounting in the aggregate to more than six thousand dollars.

McDonald was charged for the year 1841, with the whole amount of taxes assessed for that year, amounting to the sum claimed in the original petition, and was credited with payments

reducing, together with his commissions, the sum to two thousand three hundred and eighty 88-100 dollars. No list of delinquent tax-payers for that year was furnished; and there was no evidence of the amount of such delinquency. The suit during the course of the proceeding was dismissed as to the principal, McDonald, and as to Creaner, one of the sureties. Beck, one of the defendants failed to appear; and Pridham, the only defendant who answered, set up among other matters that the bond sued upon had been rescinded and a new one given by McDonald, and other sureties. The matter involved in this ground of defence was not acted upon by the Court.

On the trial, the plaintiff read in evidence the bond, and the statements from the Cromptroller's accounts for the years 1840 and 1841, also the delinquent list for the year 1840. (There was an omission, no doubt clerical of a line or two in the statement of facts. It should read, to be intelligible and as was manifest also from the statement of facts in the case of Wood, Governor v. McDonald, *et al.*, that,) "he then offered in evidence" executions marked exhibits E & F, and many on file of a similar character, which were objected to and ruled out by the Court.

The defendants offered in evidence receipts H & J, which were objected to by the District Attorney; but the objections were overruled, and they were read to the jury. The exhibits E & F were executions against delinquent tax payers for the the year 1840; on one of which, the defendant McDonald had collected twenty dollars; and the other, amounting to three hundred and fifty-four 24-100 dollars had been satisfied.

The exhibits H & J were documents from officers of the Treasury Department, authorizing credits to be entered in favor of the defendant McDonald. The first, viz: exhibit H was an order from the Secretary of the Treasury, directing the Treasurer to receive from McDonald twenty-six hundred and fifty-three 17-100 dollars in audited drafts, it being money received by him in collection of the revenue from direct taxes for 1841, and an acknowledgment by the Treasurer that he

had received the said sum of money. The order and receipt were dated December 6th, 1841.

The exhibit J consisted of an order, directing the Commissioner of Revenue to receipt to McDonald on account of direct taxes for 1840 and '41, for four thousand three hundred and fifty-three 87-100 dollars, signed by J. C. Kloftenburg, C. C. T. D. The jury found for the defendant; and the plaintiff appealed and assigned for error.

1st. The exclusion of the exceptions offered in evidence by the plaintiffs; and,

2nd. The admission of the exhibits H & J, offered by the defendants.

*Attorney General*, for appellant.

HEMPHILL, CH. J. There has been no appearance for the appellees; and we have had no argument in support of the judgment of the Court. We have no means of ascertaining the views upon which the Court acted in its various rulings; and this is to be regretted, as the principles which must have been the basis of some of the decisions, are not obvious. With regard to the alleged error in the rejection of the executions it appears that the original petition claimed only the taxes assessed for the year 1841, but the amended petition claimed also the amounts collected by McDonald in 1841, from the delinquent tax payers of 1840; and the executions offered and others which would have been introduced, were for the purpose of showing the amounts which had been collected from this list of delinquents.

The claim set up in the amended petition, was distinct from and additional to the original cause of action; but no exception was taken on that ground: and if taken, it could not have been supported, although the defendants might have set up any defence which would have been available, had a separate suit been brought. But the amendment remained on file

among the papers in the cause; issues were taken upon its averments; and the plaintiff having the right of introducing proof in support of its allegations, we can see no ground for the rejection of the executions which conduced to the establishment of the facts as averred, and were legal and competent evidence for that purpose.

The defendant, in his amended answer, excepts to the sufficiency of the amended petition to charge him upon the bond which is the foundation of the suit. No action was taken on this exception; and it must be regarded as waived: and had it been considered, it could not have been sustained, as the obligation of the bond is to save the State harmless from any dereliction of McDonald in failing subsequently to discharge his official duties and to pay over taxes, collected by him without regard to whether they were assessed in 1840 or in 1841.

These executions were issued in September, 1841; and the Sheriff and his sureties were liable for the amounts made on them. Had they been received in evidence, they would have shown what these amounts were; and the exclusion of them was unquestionably erroneous.

The second ground of error is in the admission of the exhibits H & J, offered in evidence by the defendant. There is no doubt that the document marked H would be good evidence for the defendants of payment, provided it had not been already allowed as a credit in the statement of the account furnished from the office of the Comptroller. The exhibit H is styled a deposite warrant, No. 824, and dated December 6th, 1841. Now, the exact amount of this warrant was on the same day entered to the credit of McDonald for taxes assessed for the year 1840; and the number of the receipt is identical with that which is styled the warrant, viz: No. 824. These coincidences are so remarkable as to place it almost beyond doubt that the sum mentioned in the account as stated, and that in the order of the Secretary are identically the same.

But the Secretary states in the order, that the money was received by McDonald in collection of the revenue from the

direct taxes for 1841; and this expression of the Secretary, that the money was received from the taxes for 1841, may raise a shade of doubt as to the identity of the sum credited in the account of taxes for 1840, with that mentioned in the warrant, and the doubt is sufficient to authorize the submission of the document to the jury, who are by law Judges of the weight of evidence; and, under this view, there was no error in refusing to exclude the paper from their consideration. If no doubt existed as to the identity of the credit and the warrant, the paper should not have been received in evidence; and if on its admission, the jury should decide clearly against the weight of evidence, the remedy is by the grant of a new trial. As, on the rejection of the executions, there was no evidence to charge the defendants with collections of the taxes for the year 1840, it became doubly important to them that the credit should be entered on the taxes assessed for 1841, and the identity of the credit given with the warrant adduced, not being so clear as to justify its exclusion, we are of opinion that there was no error in authorising its reception—though additional circumstances or explanatory evidence should have been offered to justify the jury in giving effect to the instrument, as an evidence of payment which had not been allowed.

On behalf of the State, it is contended, that the exhibit J should have been rejected on the ground that it does not appear to have emanated from any officer of the government having authority to make the allowance claimed under it. This position we believe to be sound. The official capacity of Kloftenburg should have been proven. His office is not even designated on the face of the paper. His signature is followed by the initials, C. C. T. D. This may mean that he was Chief Clerk of the Treasury Department; and if so, orders emanating from him should, at this distance of time, be liberally construed in favor of rights claiming their support. But if it be admitted that Kloftenburg had authority to make the order of allowance, the defendants, in attempting to make it effectual in evidence, experience difficulties of a like charac-

ter, though not quite so formidable, as those which militate against the effect of the document just discussed. The statement of the accounts of '40 and '41 show, that McDonald was credited on the 6th December, 1841, with several sums amounting in the aggregare to four thousand three hundred and fifty-three 87-100 dollars, being the precise sum which was directed by the order to be allowed. There are the sums of two thousand six hundred and fifty-three 17-100 dollars, under receipt No. 824, and the sum of sixty dollars part of the receipt No. 825, both credited on the account of taxes, for 1840, and the sum of sixteen hundred and forty dollars and seventy cents, (balance of the receipt No. 825) credited on the account of taxes assessed for 1841. These together make the sum claimed under the order. There is no date to the order; but the coincidence in its amount, with that of the credits given at a particular day, leads strongly to the conclusion that the credits were constitutent portions of the order; and if they be such, to allow them again would be to give a double credit for the same payment. But the identity of the credits with the order is not so clear as to have on that ground justified its exclusion, though there was error in its admission without proof of the capacity of Kloftenburg. The remark in relation to the necessity of explanatory evidence in support of the preceding document will apply equally to the one under consideration.

As this suit is prosecuted against the sureties alone, the principal having been dismissed, and as a long period (nearly nine years) elapsed before the commencement of the action—the fulness of proof requisite to support the defence, had the proceeding not been unreasonably delayed, could not now be hoped for or exacted.

The longest period of limitation known to our laws in suits between individuals had nearly expired before the filing of the amended petition; and though, from motives of public policy, there is no prescription against the State, yet nature in her operations recognizes no distinction between States and individuals. The destructive effect of time upon the recollections

and the lives of witnesses and the written memorials of past transactions, is not stayed by the consideration that the State is one of the parties to a claim, and that the suit is prosecuted by the sovereign power.

Long continued enjoyment raises the presumption of a grant from the State; and great laches should have the like effect of presuming the satisfaction of claims for money, and should relieve defendants from the necessity of full proofs, many of which, in all probability are entombed in the obscurities of the past.

Judgment is reversed, and cause remanded for a new trial.

Reversed and remanded.

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## Hunt and others v. Turner and others.

Where the defendant, in an action of trespass to try title, pleads not guilty and gives in evidence facts which go to confess and avoid the plaintiff's right of action, the plaintiff has the right by way of rebutting evidence, without any previous corresponding allegations, to prove any facts which answer the facts proved by the defendant.

That special matters of defence may be given in evidence under the plea of not guilty in the action of trespass to try title, is no sufficient reason for objecting to those matters being specially pleaded. It is certainly a better mode of presenting them, and more in harmony with our general system of practice; as it advises the opposite party of the grounds of defence, and prevents a surprise by the introduction of evidence not anticipated; and therefore can not be objected to by the plaintiff.

It is an acknowledged principle in equity, that Courts exercising equity jurisdiction will sustain the equitable title against the legal title; and such is the rule here, where the jurisdiction of the Courts is without regard to any distinction between law and equity.

A contract may be void under the statute of frauds; yet, if the conduct of the party setting up the invalidity of the contract, has been such as so raise an equity outside of, and independent of the contract, and nothing else will be adequate satisfaction of such equity, the sale will be sustained, though not valid under the statute of frauds.

Hunt v. Turner.

A party to an illegal contract will not be permitted to avail himself of its illegality, until he restores to the other party all that has been received from him on such illegal contract; as long as he continues to hold on to enjoy the advantages of the contract, he will not be allowed to set up, to his advantage, its nullity.

Where heirs, after coming of age, voluntarily put it out of their power to do equity by restoring a party to his original rights, against whom they claim a rescission of a contract made with their ancestor, it will be considered as a virtual ratification of the ancestor's contract.

See this case for circumstances under which the Court will decree a conveyance of land, notwithstanding that the contract of sale or exchange under which the equitable circumstances arose, was null and void, because made in violation of law.

The Supreme Court will not go beyond the judgment of the Court below, where the defendant has not appealed, to grant relief to the defendant, which he has not prayed for; although the facts would have warranted further relief.

Appeal from Colorado.

*J. B. Jones* and *N. H. Munger*, for appellants.

*R. J. Rivers* and *W. J. Jones*, for appellees.

Lipscomb, J. This suit was brought by the appellants, to recover a league of land, granted by the government of Coahuila and Texas to William R. Hunt, as a colonist in Austin's colony, the plaintiffs claim, one of them to be the widow, and the others, the children of the said William R., the grantee. The defendants claim under one Robinson.

The following are the material facts, collected from the record. The land sued for was granted to Hunt, who in a short time sold it to Robinson, and received in exchange for it six hundred and forty acres of other land, one hundred dollars, and a horse, the value of which was not in evidence. Hunt went into possession of the land sold to him by Robinson. This was on the 14th December, 1832; and Robinson went into possession of the league and made a small improvement upon and then left it, and resided at his old place until his death. There was no evidence of any continued possession, until 1838, though it had been frequently occupied in the mean

time and considerable improvements made on it; but under what title was not in proof. From 1838, down to the trial, it was claimed under Robinson. It was in evidence that the present defendants, at the time they purchased, about 1841, had notice that it was claimed by the plaintiffs. The plaintiffs remained upon the land received from Robinson, making improvements on the same, down to 1843, and exercised ownership by renting it out, down to the 12th of February, 1850, when they sold it to one Carter, after they had commenced this suit. It was in evidence, and not controverted, that the land received by Hunt from Robinson, was worth more than Hunt's league.

A deed, purporting to be for the consideration of three hundred dollars, for six hundred and forty acres of land from Cummings to the plaintiffs, dated 1st April, 1841, was read in evidence by the plaintiffs; but no evidence was given to show that it was the same land that Robertson had deeded to Hunt.

The record is so very imperfect, that it is impossible to ascertain from it, what were the issues that went to the jury. It is, however, understood to be admitted by the counsel for the parties, that all were stricken out by the Court, upon the plaintiffs' exceptions, but two, one being the plea of not guilty, and the other, possession in good faith and valuable improvements made. There are only two errors assigned that we regard as material to be noticed.

First, admission of special matter in avoidance, under the plea of not guilty; and second, the rejection of the evidence of the plaintiffs', to prove the coverture of one of the plaintiffs and infancy of others, to bring them within the exceptions to the statute of limitations. The plaintiffs offered this testimony by way of rebutal to the evidence of the defendant, to sustain the bar of the statute. This they clearly had a right to do; and it is not perceived why it was rejected: and for this error, we would be bound to reverse the judgment, if we rested our opinion on the statute of limitations. But it will be seen, hereafter, that this ground of defence is thrown out

of our consideration; and it may be admitted that the defendants did not make out that defence. With this admission, if the judgment cannot be sustained it ought to be reversed.

The appellants object to the ruling of the Court admitting special matter of defence, under the plea of not guilty. This being an action to try titles to land, there can be no question, that, under the Article 3235 of the Digest, the evidence was admissible. It was so decided by this Court in Punderson v. Love. (3 Tex. R. 60.) The material facts in this case were specially pleaded by the defendants; but their plea was stricken out by the Court below, on the exception to the plea, taken by the plaintiffs. We presume that the Court was influenced by the consideration that those facts could be given in evidence under the plea of not guilty. That such matters could be so given in evidence, is no sufficient reason for objecting to those matters being specially pleaded. It is certainly a better mode of presenting them, and more in harmony with our general system of practice; as it advises the opposite party of the grounds of defence, and prevents a surprise by the introduction of evidence not anticipated, and therefore could not have been objected to by the plaintiffs.

We will now proceed to examine those matters of defence, and see if they sustain the verdict and the judgment, in this case, which we are called upon to revise. The statement of facts has already been recited and will not again be repeated, only so far as may be necessary to make our views of the law, applicable to and resulting from them, more clearly understood. The contract of sale and exchange between Hunt and Robinson, by which Hunt sold to Robinson the land in controversy, and received from him in payment, six hundred and forty acres of other land, which was conveyed to him by deed, and the further consideration of one hundred dollars, and a horse, so far as it related to the land in controversy, was illegal and void; because it was entered into at a time when Hunt was forbidden by law to alienate the land. It was so held by this Court in Hunt's heirs v. Robinson's heirs. (1 Tex. R. 748.)

The record of that suit has been made a part of the evidence in this case; from which it appears that Hunt, at the time that he entered into the contract of sale, did not give Robinson a deed for the land, but gave his bond for title. The suit was brought by the heirs of Robinson, to compel a specific execution of this contract. This Court, on an appeal, refused a specific performance, on the ground that it was in contravention of law, and void; and the decision and judgment were based solely upon the ground, that the bond for title was illegal, because the sale was forbidden by law. The Court did not assume to pass upon the equities that may have arisen between the parties; because no such were presented in the case: at most, it only determined the legal title to be in the heirs of Hunt. Now the legal title may be in one, and the equitable title, growing out of the acts of the parties, in another. It is an acknowledged principle in equity, that Courts exercising equity jurisdiction will sustain such equities, against the legal title, and suspend the enforcement of such legal title, or hold that the legal title shall be considered as in trust for the benefit of the one holding the equitable title. And if the equities are made out, it will always, require them to be satisfied, before the legal title can be enforced. A contract may be void under the statute of frauds; yet, if the conduct of the party setting up the invalidity of the contract, has been such as to raise an equity outside of, and independent of the contract, and nothing else will be adequate satisfaction of such equity, it will sustain the sale, though not valid under the statute of frauds. It was so ruled by this Court at Tyler, Spring Term, 1852, in the case of Dugan's heirs v. Colvell's heirs. (8 Tex. R.) Again, the rule is well established, that a party to an illegal contract will not be permitted to avail himself of its illegality, until he restores to the other party all that had been received from him on such illegal contract; that, so long as he continues to hold on to enjoy the advantages of the contract, he shall not be allowed to set up to his advantage its nullity. And it is held that this rule is operative against *femes covert*

and infants. (Womack v. Womack, Tyler, April Term, 1852, 8 Tex. R.; Means v. Robinson and Wife, 7 Tex. R. 502; Powell v. Cummings, 8 Tex. R.)

We will now apply these principles to the facts, that Robinson and his heirs were permitted to take possession of the land, and to make large improvements, and not a word said about enforcing the legal claim to the land, by Hunt nor his heirs, until 1841, about nine years from the contract, and eight after the death of Hunt; and that Hunt went into possession of the land conveyed to him by Robinson, immediately, and died upon it about a year after; that his heirs continued to live on it as their own, until 1850, and then sold it, and in their deed to the purchaser, described it as the same land deeded to Hunt by Robinson in 1832. And the further fact that this land is worth more than the Hunt league, the subject of this suit. Will not these facts, under the principles laid down, raise an equity that will override the legal title to the plaintiffs to the land sued for? We have no hesitation in saying that it does. And it does seem to us, that the moral sense of what is enjoined by equity and good conscience must be exceedingly obtuse, to suppose that such flagrant injustice could receive the slightest countenance from any judicatory, however organized.

We believe, that the deed from Cummings to the plaintiff, is not entitled to any consideration, even if it had been shown to be for the same land conveyed by Robinson to Hunt. It was not made until long after the death of Robinson, and after the plaintiffs had been near nine years in possession under Robinson's deed. And, in the conveyance made by the plaintiffs to Carter, they do not describe the land as the same conveyed by Cummings, but as the same conveyed by Robinson, to Hunt; and they never offered to re-convey the land to Robinson, in his lifetime nor to his heirs after his death.

There is another point presented in this case, that we consider equally conclusive against the plaintiffs, that is, that by the sale of the land received by Hunt in payment for his head

right, after the parties were all of age, they have deprived themselves of the ability to restore it and place Robinson's heirs in the same condition they were in before the contract was entered into. This cannot be regarded in any other light than a virtual ratification of the contract, after all legal disability had been removed; and, although the legal title to the league in controversy, might be still in the plaintiffs, yet it was as trustees for Robinson's heirs, and those claiming under them. Had of all these facts been alleged in an answer in the nature of a cross bill, and had the defendant prayed that the plaintiffs should be decreed to convey the title, and those facts found by the jury, we should, without any hesitation, have held that they were entitled to such decree. But the defendants have not asked such decree, and remained upon the defensive only, and by the verdict of the jury in their favor, have obtained all that could have been awarded to them, under the pleading; and it was only by becoming the actors, that they could have obtained more. It cannot, however, be very material where the legal title is; as it is only held in trust, wherever it may be, for the benefit of the defendants.

Judgment affirmed.

THOMPSON, ADM'R, v. MCGREAL AND OTHERS.

It seems that no formal order is necessary in order to enable an administrator to continue the prosecution of a suit commenced by his intestate; and where, after a motion to dismiss for the want of prosecution, the administrator filed a petition praying for the revival of the suit in his name, and the cause was continued for several Terms, the administrator being all the while recognized as a party, and the motion was then taken up and sustained, the Supreme Court reversed the judgment.

Error from Brazoria.

*N. H. Munger*, for plaintiff in error.

*J. B. Jones*, for defendant in error.

LIPSCOMB, J. This suit was instituted by Blakely, on the 27th day of January, A. D. 1848; and on the 9th May thereafter, the death of the plaintiff was suggested, and case continued for parties to be made. At the Fall Term, 1848, it was continued by the general order of the Court made at the end of the Term. On the 22nd March, A. D., 1849, the defendant McGreal filed his petition, stating the death of Blakely, and that Hiram M. Thompson had been appointed administrator, and had failed and neglected to make himself a party, and praying that a *scire facias* might issue to him to make him a party; which was issued and served upon Thompson on the 28th of March. At the Spring Term, 1849, the defendants moved to dismiss the suit for want of prosecution, which motion was continued from Term to Term, till the Spring Term, 1851, when the motion was granted. In the mean time, i. e. at the Fall Term, 1849, the case appears to have been entitled Hiram M. Thompson, administrator of

Blakely, against Peter McGreal *et al.*; and Thompson, the administrator, appeared in Court and prayed to have the suit revived in his name as administrator; and on the same day an agreement signed by the counsel for the parties, to take testimony in the case; and from this time down to the dismissal of the suit, the case is uniformly styled Thompson, adm'r, v. McGreal *et al.*, and as such notice was served upon (him) of taking testimony by interrogatories on the part of the defendants; and on the 18th of October, A. D. 1850, the defendant McGreal, in an amended answer, styles the case as H. M. Thompson against Peter McGreal *et al.;* and subpœnas were issued, at the instance of the defendants, for witness to attend and give evidence in the suit so entitled.

The case has been brought before us by a writ of error; and it is alleged that the Court below erred in dismissing the suit for want of prosecution, on the motion that had been so long pending. The counsel for the plaintiff in error has urged various grounds upon which the error assigned should be sustained; but we do not think it material to notice them in detail, as we believe, that, from the time that Thompson appeared in Court and asked to have the suit revived in his name, that he became a party to the suit, and such must have been the opinion of the defendants; because, from that time he was treated and recognized as such. Again, there being no ruling of the Court, refusing this permission, it is to be taken as granted. Again, it does not appear from the record, that the defendants urged the motion to dismiss the suit at the time that Thompson appeared; and it must therefore be presumed that they waived the motion. This is confirmed by their various acts in the progress of the suit, after such application had been made. The case of Alexander v. Barfield *et al.*, decided at Tyler, April Term, 1852, is not like the present. In that case there was no administration granted; and after a lapse of three years, the Court abated the suit for want of parties. In the case under consideration, the acts of the defendants, in treating the suit as pending with proper

parties, are wholly inconsistent with any other hypothesis, than an abandonment of the motion to dismiss; and the judgment must be reversed and the cause remanded.

Reversed and remanded.

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## Hope v. Alley and another.

In an action for damages by reason of the loss of the services of two slaves, proof of the value of cotton that year—the plaintiff being a cotton planter—is too remote and speculative to serve as a measure of damages.

Where a breach of contract is proved, the law gives some damages, though it should be merely nominal.

Consequential damages resulting from a breach of contract, may be proved, provided they be immediate and specific.

Where the terms of a public sale are that the bidder shall give a note with good personal security for the payment, the person conducting the sale, after knocking off the property, has no right to refuse to take the note with the security offered, unless there be a reasonable ground to believe that the security is not sufficient to ensure the payment; but in this case it was proved that the sureties were solvent.

Error from Colorado.

*J. B. Jones*, for plaintiff in error.

*N. H. Munger* and *R. J. Rivers*, for defendant in error.

Lipscomb, J. This suit was brought by the appellant against the appellees. The petition and the amendment thereto show that the appellees, as administrators, had been ordered by the Chief Justice of Colorado county to hire out, for one year, to the highest bidder, two slaves that belonged to the succession of which they were the administrators, after advertising the

time and terms of the hiring; that the appellees did so advertise the said slaves for hire, and give notice that the person so hiring, must give a note with good personal security for the payment; that such hiring took place, and the appellant giving the highest bid, the slaves were knocked off to him; that he tendered his note with two good securities for its payment, according to the conditions of the hiring; that the appellees refused and failed to give up to him the said two slaves; that, in consequence of the failure to get the slaves, he was greatly injured; that, in the expectation of having the labor of the slaves for that year, he had incurred great expense by enlarging his plantation and splitting a great many rails, which was a total loss to him.

There does not appear to have been any evidence of the special loss sustained by the plaintiff, excepting an effort to prove the value of cotton that year, which was ruled out by the Court. We do not believe that the Court erred in ruling out such evidence, under the allegations in the petition. The probable loss of such profits from the cotton crop, was too remote, and depended upon too many contingencies, and was too speculative in its character, to have authorized its reception as evidence of any specific and certain loss. The loss should be certain; such as the value of his preparation for the crop, in the anticipation of the labor of the two slaves, if such had been proven, would have been.

The contract of hiring was, however, fully proven; and the Court charged the jury, that, unless some loss was proven, they could not give damages at all. This, we apprehend, was error. The law is, that, if the contract is proven to be broken, the law would give some damage, sufficient to authorize a verdict for the plaintiff, although, in the absence of proof of special loss, the damages would be nominal only.

The Court, too, ruled that consequential damages could not be allowed in this action. In this we believe the Court to have erred; but, as there was no evidence offered of such, this error would not authorize a reversal of the judgment. We be-

lieve that such immediate and specific loss resulting from the breach of the contract, as we have before mentioned, could, if proven, be allowed by the jury, in this suit.

The Court also charged the jury that the defendants were the judges of the solvency of Hope and the securities tendered, and had a right to reject them if they believed they were insolvent; now, there was no fact offered in evidence, in support of such a belief, as the insolvency of the securities tendered; but, on the contrary, all the evidence placed the solvency of the parties to the note beyond question. The charge was therefore not applicable to the evidence, and was calculated to mislead the jury; and the presumption is, that, but for this charge, the jury would have found the breach of the contract, and of course some damages. The charge, if any, should have been, that, if the jury found from the evidence, that there was a reasonable ground for such an opinion that the security was not sufficient to ensure the payment of the note for hire, then they had a right to reject the security offered. If the security was not sufficient, it would not have been difficult to prove it, to a reasonable certainty. But the grounds of such belief were facts that should have gone to the jury. Suppose that the defendant had said the securities were not sufficient, could they have set the slaves up again, for hire, at the risk of the plaintiff who had first bid them off, and if they did not hire for so much at the second trial, under Article 1175, Hartley's Digest, could they have recovered the difference in the bids, from Hope, and excluded him from the privilege of showing that he had, upon his bid, tendered sufficient security, and well known to be so? Clearly he would have a right to make such defence.

The authority of the administrators to hire the slaves, is found in Article 1179, Hartley's Digest. The judgment is reversed and the cause remanded.

Reversed and remanded.

## Stewart v. Insall.

*Quere?* Whether an instrument made by a married woman, and intended for a last will and testament, although bad as a will, could have the effect to repudiate a previous contract inconsistent therewith, made during minority.

The Court will not enforce the payment of a promissory note given in consideration of the sale of land, where the sale has been made by virtue of a power of attorney which had been revoked by the death of the principal.

Where land is sold by attorney, and part of the purchase money paid and notes given for the balance payable to the attorney himself, in a suit by the payee of the notes, the vendee may plead fraud and failure of title in reconvention, and recover back the purchase money paid.

Where there is fraud or misrepresentation as to title, in the sale of land, the vendee is not obliged to wait until evicted or disturbed by paramount title, although the deed contain a general warranty.

Appeal from Colorado. Suit by the appellee against the appellant, on a promissory note for $120. The note was made payable to the plaintiff or bearer. Answer by the defendant that the note was given by the defendant to the plaintiff, in part payment of the purchase money for land sold to the defendant by the plaintiff, representing himself to be the attorney in fact of O. K. Winn; that the plaintiff falsely and fraudulent represented to the defendant that the land belonged to Winn, and that he, the defendant, had good authority to convey, whereas the fact was, that the land belonged to the heirs of one Sarah Kelsey, from whom and her husband, Winn purchased during her minority, and who had by her last will and testament repudiated said sale, by devising the land to her husband; and that the Probate Court had cancelled the will, and decreed the land to belong to the sister, and heir, of the said Sarah Kelsey; and, that, at the time of the sale to defendant Winn, the pretended constituent was dead, and the said plaintiff's power of attorney thereby revoked; that the price of the land was four hundred dollars, two hundred and eighty of which had been paid by the defendant, for which amount

the defendant prayed judgment against the plaintiff in reconvention, and further that, the plaintiff being a resident of Louisiana, as appeared from his petition, and having no other property in this State, the same be decreed to be a charge against the land, &c. The deeds and power of attorney were all made exhibits. The deed from Winn by his attorney Insall to Stewart, was a bargain and sale, with covenant of general warranty. There was also a general denial. The plaintiff excepted to the special pleas of the defendant on the ground that they contained no averment of eviction or disturbance; that the deed contained a general warranty, but no covenant of seizin; that the plea of infancy of a previous grantor was a matter of privilege, and could not be claimed without offering to restore the consideration paid, &c.

The Court sustained the exceptions. The case was then submitted to the Court, without a jury, on the issue raised by the general denial. Judgment for the amount of the note and interest and costs.

*R. J. Rivers*, for appellant. The defendant in the Court below pleaded failure of consideration; because the power of attorney under which Insall acted was, at the time of the sale of the land, revoked by the death of Winn. This plea was excepted to; and the exception sustained. On this ground I confidently rely for a reversal, and do not deem it necessary to refer to a single authority.

*J. H. Robson*, for appellee. There was no error in the Court below, in sustaining plaintiff's exception to defendant's pleas, and in overruling all his pleas except the general denial, for the following reasons:

1st. Because it is nowhere alleged in the original or amended answers of defendant, tha the was evicted from the premises by one having paramount title, or that he was even disturbed in the possession or enjoyment thereof. (Dallam's Dig. 624; 6 J. J. Marsh. R. 182; 4 Id. 187, 188; 6 Mon. R. 290.)

2nd. The conveyance of the land for which the note was given, was not the only consideration of the note. The covenant of warranty in the deed formed the principal consideration. (5 Litt. Sel. Cas. 248, 249.)

3rd. There is no covenant of seizin in the deed; and consequently there was no breach of warranty till eviction. See distinction between covenant of warranty and covenant of seizin. (4 Kent, 470, 471, 472; 2 Blackstone, 245.)

4th. So far as the plea of infancy is concerned, it was inadmissible for the above reasons, and also because it is strictly a personal privilege and cannot be taken advantage of by the representative of the infant. (2 J. R. 279; 5 Id. 161; Chitty on Cont. 155; 2 Kent, 236.)

Besides the acts of an infant are only voidable, not void; and unless it had been stated in the defence, that the conveyance of the land was detrimental to the interests of the infant, the plea was bad. (Comyn on Contracts, 794; Chitty on Cont. 155; 2 Kent, 234; 1 Story, Eq. Jur. 246; 10 Pet. R. 70–71; 5 Mon. R. 340, 353; 2 Blackstone, 234.)

Again the plea was inadmissible, unless the consideration received by the infant, for the land, had been restored. (2 Kent, 239.)

Lipscomb, J. Of the several defences set up by the pleas of the appellant, in the Court below, and ruled out on demurrer, we propose to consider but three of them. The appellant pleaded that the note sued on was given in part consideration for certain land, owned by Sarah Kelsey, as one of the heirs of the original patentee of the land; that she had conveyed it to O. K. Winn; that the plaintiff, as attorney in fact of Winn, had conveyed it to the defendant; that, at the date of the conveyance, the said Sarah was not of age; that she had subsequently, after she came of age, by her will devised it, the said land, to her husband, A. W. Kelsey, and thereby expressed her dissent to the conveyance to Winn; that the will was set aside and annulled by the Probate Court, and the title

decreed to be in the sister as heir of the said Sarah, &c. Now the will may have been invalid as to the devise, and yet would be good as a disclaimer of the deed made during her minority, and evidence of a repudiation of such deed. We do not decide that it had that effect; nor could we do so, unless it had been set out in the plea: but these suggestions are thrown out, as worthy of consideration, should the question be again presented by a more perfect plea.

The defendant pleaded that at the time that the plaintiff executed the conveyance to him, as the agent and attorney of Winn, Winn was dead, and consequently his authority to act had ceased to be valid. The object of this plea was to show the entire failure of the consideration of the note, and to bar a recovery upon it, and not a mere abatement of the suit: and no principle of law is better settled than that the authority of an agent to act ceases to exist, by the death of his constituent. (Story on Contracts, 1 Ed. Sec. 342.) The demurrer admits the truth of this plea; and we believe that the Court erred in sustaining it, and ruling the defence to be bad; because it could not bind the heirs of Winn, and consequently ought not to bind the other party to the contract. It was not merely voidable, but it was void.

Again, the defendant pleaded in reconvention, the money that he had paid upon the purchase of the land, prayed judgment for the same and that the land should be decreed subject to the satisfaction of the amount so paid. The last part of the plea, i. e. the last prayer in it, was unquestionably bad; because, from his own showing, the land was not subject to such decree; but this might have been stricken out, and the plea would remain good. The suit, it must be recollected, is in the name of the very person who, without any authority, had made the contract of sale of the land, and received the note. Under such a state of facts, we can perceive no valid objection to the plea and that it ought to have been sustained. Again, the defendant avers that the plaintiff had practiced a fraud upon him, by misrepresenting himself to be the author-

ized agent of Winn, and able to make a good and valid title to him, to the land so conveyed, when he knew that the land did not belong to O. K. Winn, but to the heirs of Sarah Kelsey, or those claiming under them. The demurer admits this to be true; and if so, the fraud certainly tainted and annulled the contract. The Court below therefore erred in sustaining the demurer. For the errors we have noticed, the judgment is reversed and the cause remanded.

Reversed and remanded.

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## Bridge v. Young, Ex'or.

Where a note is given for the purchase money of land, payable at a day certain, and a bond is taken to convey upon payment of the note, the payment of the note is a condition precedent to the right to demand the title. But *quere?* How far the principle is applicable, in our system.

Where a vendor has given a bond for title and then died, the vendee cannot refuse to pay the purchase money until a title is tendered, notwithstanding that the covenants may be dependent; but, in such a case, either party may go into the District Court for a specific performance; or the vendee may obtain a decree of specific performance from the Probate Court. (No question of costs was made in this case.)

*Quere?* Whether a vendee with bond for title with covenants of general warranty, can claim a rescission of the sale on the ground that the vendor having since died, it is impossible for him to obtain a title with general warranty.

Where a vendor sues for purchase money for which he retains the vendor's lien, he is entitled to an order for the sale of the property to satisfy the judgment, and for execution for any balance remaining unpaid.

Appeal from Colorado. Suit by the appellee, executor of one Nelson, against the appellant, on a note of hand payable at a particular day. Answer by the defendant that the note was given in part for the purchase money of a tract of land, to convey which, with general warranty, the defendant held

the bond of the testator; and that he was always ready to pay the money, upon receipt of the title, and offered to pay the money into Court; that the covenants of the bond were material and dependent, and that plaintiff had never tendered a deed to the defendant. The bond was made a part of the answer. The condition read: "Now when the said Bridge "shall pay the said note, with interest, and the said Nelson "shall make a good and sufficient warranty title to the land "before described, to the said Bridge, his heirs, &c., then the "above obligation to be void," &c. The plaintiff amended, admitting that the note was the same, and praying for the enforcement of the vendor's lien upon the land; or in case the Court should rescind the contract because of the impossibility of giving the vendee a general warranty title, then praying for rent, &c., and for general relief. The plaintiff also files exceptions to the answer of the defendant; which were overruled by the Court. One of the grounds of exception was, because the defendant did not offer to rescind the contract.

"It was agreed that the plaintiff, by his attorney George "Smith, called on the defendant for the payment of the pur- "chase money; that defendant offered to pay the same if a "title was made to him; that the attorney of plaintiff re- "sponded that the executor could not make him a title, but "that he, Bridge, must apply to the County or District Court "of Fayette county for a title; whereupon said Bridge de- "clined paying the purchase money. Bridge did not tender "the money; but said he would pay, on getting the title. "Letters testamentary were granted plaintiff in Fayette coun- "ty, on the will of Nelson. It was admitted that the title to "the land mentioned in the bond, was in Nelson, at his death. "When plaintiff's attorney told defendant to apply to the "County Court of Fayettee county, and get an order for a "deed to be made to him, and plaintiff would make it forth- "with, the defendant then said if a deed should be made, "it would not embrace the land he thought it should. And "he refused to pay the money as specified. Plaintiff never

"tendered a deed to defendant." The foregoing was agreed to be a statement of all the facts.

There was a verdict for the plaintiff, and a decree adjudging the money to the plaintiff and the land to the defendant, and ordering a sale of the land to enforce the vendor's lien, &c. Motion for a new trial, on the ground, 1st. That the jury found contrary to the charge of the Court. 2nd. That the decree was not prayed for. Overruled.

The errors assigned were,

1st. In not granting a new trial.

2nd. In permitting the action to be sustained, the covenants being mutual and dependent.

*R. J. Rivers*, for appellant. We contend that the covenants were mutual and dependent, and suit could not be maintained without tendering a deed. The defendant was always willing to pay the note, on recovering a deed. Then, if the covenants were mutual, the judgment should be reversed.

Lipscomb, J. The suit was brought on a note of hand, made by the appellant, payable to appellee's testator, for five hundred and seventy-four dollars, on or before the first day of January next, with interest from the 2nd day of January, 1845, and dated 18th February, 1847. The answer of the defendant shows that a penal bond in the sum of two thousand dollars, for title to the land for which the note was given, was, on the date of the above promissory note, executed and delivered by the testator Nelson, to the defendant Bridge. And the defendant contends that according to the conditions of this bond, the payment of the note was dependent upon the execution of title. We believe that this is not the true construction of the condition of the bond, and that its forfeiture was only intended to occur on the failure to make the title after the payment of the note. Its condition is as follows, i. e.: "Now, when the said Bridge shall pay the said note with in-

"terest, and the said Nelson shall make a good and sufficient "warrantee title to the land before described, to the said "Bridge, his heirs, &c., then the above obligation to be void," &c. It seems that the payment is first to be made; else why take the note payable at a particular day at all? Why, if payment and title are to be made simultaneously, was it not provided for in the bond expressly? The bond was intended as a security to the defendant and to compel the vendor to make title, on the receipt of payment of the note. In this case, the death of the vendor has left no one capable of making title until the vendee shall take the initiative step, by applying to the Probate or District Court, and asking for a decree of title, upon the bond of the deceased vendor. See Art. 1162, Hart. Dig. And, by Art. 2270, it is provided, that a bond of this description, when duly proven and recorded, shall be notice to all subsequent purchasers, of the existence of such bond. The vendee might then be safe, in holding back and reposing upon his bond for title, and would do so, if he could not be called upon for payment, until title was made. It would seem, therefore, under this aspect, even if the payment of the money depended upon the simultaneous making of title, that the representative of the deceased vendor would have a right to bring suit, (when the vendee would not become the actor,) and ask a judgment for the money due to the succession. The District Court would have ample power to protect the rights of both parties, by securing the vendee in his title, and giving judgment for the purchase money. The amended petition admits the validity of the bond, and that it was given for the same land, for which the note was given in part consideration; and the vendee, by his plea, declares his readiness to pay the money in the note specified, upon his obtaining title for the land: and under such circumstances, the Court might well have entertained the suit and made, as it has done, a decree vesting the title to the land in the vendee, even if the covenants in the bond had been dependent.

The evidence shows that the vendee never had tendered the

payment, and demanded title; but, when the money was demanded, said that he was ready to pay when the title should be made to him, but refused to apply to the Probate or the District Court to have such title decreed, saying that he could not get such title as he expected to get. This fear, or supposition, that he would not get as good a title as he expected, could not be founded on any defect of the title; because it is admitted that the title to the land was in the vendor, at the time of his death. If he expected to hold the land under the bond, as he could have done, and avoid the payment of the purchase money, by claiming a literal fulfilment of the conditions of the bond, by having a warrantee title made from the vendor, after his death, an expectation so repugnant to right and the principles of equity, can never be realized.

We believe that there is no error, and that the judgment and decree ought to be affirmed, which is so ordered.

Judgment affirmed.

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TINSLEY v. RYON, ADM'R.

*Quere?* Where, under a plea of payment, evidence of a set-off is admitted without objection, and the plaintiff's demand is thereby reduced to a less amount than one hundred dollars, which party shall recover costs; or in case the evidence be objected to, but, the District Court giving judgment for the plaintiff for costs, he fails to appeal, and the defendant appeals.

A payment may be made in other articles besides money; and, if properly pleaded and the claim of the plaintiff be thereby reduced to a less amount than one hundred dollars, the defendant will recover his costs.

Appeal from Brazoria. Suit for work and labor, bed and carpenters tools, $440. Plea of payment as appeared by account annexed and prayed to be taken as part of the answer.

The account consisted of items of goods, payments to others on account of plaintiff's intestate in his lifetime, &c. The testimony tended to prove that the items of the account were received as payments on account of the work. The proof as to the bed and tools failed. Verdict for the plaintiff for $9 04. Judgment for plaintiff for the amount of the verdict, and costs. Defendant appealed.

*Harris & Pease*, for appellant.

*P. McGreal*, for appellee.

Lipscomb, J. The only error relied upon, by the counsel for the plaintiff, is, that the judgment ought not to have been rendered against him for costs, on the verdict of the jury, it being for a sum under the jurisdiction of the District Court. The suit, in this case, was for work and labor, done and performed by the plaintiff's intestate as a carpenter, for the defendant, at his special instance and request, and for the value of a bed and some tools. The defendant pleaded that he had paid, and over paid, the defendant's intestate, and prayed judgment for the balance in reconvention. The verdict and judgment were in favor of the plaintiff below, for nine dollars and four cents. If the amount sued for was reduced by payment, the judgment under our statute, (Hart. Dig. Art. 609,) should have been for the nine dollars and four cents in favor of the plaintiff, and in favor of the defendant for costs. It was so held by this Court, in Cochran v. Kellum, *et al.*, (4 Tex. R. 120,) and in Watts v. Harding, (5 Tex. R. 386,) and Hall v. Hodges, (2 Tex. R. 330.) In the two cases first cited, the judgment was for the balance found and costs. We refused to set aside the judgment and correct it, because it was uncertain, under what plea the jury had reduced the demand claimed, whether set-off, or payment, and there was no statement of facts sent up in the record, and the presumption was in favor of the judgment.

In this case, there was no plea, but the plea of payment; and there was no exception taken to the admissibility of the evidence offered by the defendant in support of his plea.

If, however, it had been objected to, we believe it was properly received, as the evidence tends to prove that the goods and other things received by the intestate, were received in payment, and there is no conflict in the evidence. The rule of law is believed to be, "that payment must ordinarily, be "made in money; but a delivery of other things, if accepted "as payment by the other party, will discharge the debt, in "respect to which it is made." (Story on Contracts, 1st Ed., Sec. 671; Comyn Dig. Accord B. 1, B. 2; Bac. Abrdg. Accord and Satisfaction, A.)

We believe, therefore, that the Court erred in rendering judgment for costs against the defendant in the Court below, for which error the judgment must be reversed, and rendered as the Court below ought to have rendered it, that is in favor of the plaintiff, for the nine dollars and four cents, and in favor of the defendant for his costs, which costs must be certified to the Probate Court, to be paid in the due course of administration.

Reversed and re-formed.

## YENDA AND OTHERS v. WHEELER AND ANOTHER.

The power of the officer to sell land for the non-payment of taxes, is a naked power, not coupled with an interest; and in all such cases, the law requires that every pre-requisite to the exercise of that power, must precede its exercise; that the agent must pursue the power, or his act will not be sustained by it.

The statute of 1848, (Hart. Dig. Art. 3145,) does not dispense with a compliance with the requirements of the law, by the officer making a sale for taxes, nor relieve the purchaser from the effect of a non-compliance; but only changes the burden of proof, from the purchaser to the party impeaching his title; it is as necessary to the validity of the title now, as it was before that statute was enacted, that all the pre-requisites of the law shall have been complied with.

It is not necessary, here, to determine whether the Assessor's deed is *prima facie* evidence, under the Act of 1848, (Hart. Dig. Art. 3145,) of the existence of the facts on which his power to sell depended: for, if it be so, it may be impeached and invalidated by showing the non-existence of those facts, or that the requirements of the law have not been complied with.

Where an assessment under the Act of 1848, purported to be made in the name of the owner, but the name was not that of the owner and did not appear to be so, except from the county map, the tax sale was invalid, although the records of the county did not contain anything to show who was the true owner, other than the map as aforesaid.

Where the name of the owner was unknown, the Act of 1848 required lands to be assessed by a description thereof, one of the essential particulars of which, was the name of the grantee.

A falsity, which might probably mislead the owner, in the designation or description in the assessment of lands not rendered for taxation, runs through and invalidates all subsequent proceedings.

Where a tax law requires copies of the assessment roll to be posted at certain places, a failure on the part of the Assessor or Collector to post the copies as required, will invalidate the tax sale.

Where a tax deed assumes to convey the title of the unknown owner, without reference to its derivation or the person under whom he claimed, and the proceedings have been otherwise regular, it may be effectual; but where the officer undertakes to convey a particular title, the purchaser takes the title so conveyed: none other will pass by the deed.

Appeal from Victoria. The plaintiffs brought their action of trespass to try title to a league of land. They claimed as heirs of Manuel Yenda and his wife Caciana Sambrano, under a title issued to the latter by the Commissioner of De-

Leon's colony in 1833. The defendants claimed under a purchase made at a sale of the land for taxes in 1850.

The plaintiffs gave in evidence the grant to Caciana Sambrano; and proved that they were the heirs of the grantee, and that her husband, Manuel Yenda, died in 1828 or 1829.

The defendants introduced, as evidence of title in themselves, the deed of the Assessor and Collector of the county, bearing date on the 22nd day of August, 1850, made in pursuance of a sale for the taxes for the year 1849. The deed recited that the levy was made "upon the following property "of the said M. Yenda, to wit: 4428 acres of land lying and "situated on the Garcitas creek, adjoining the land of R. "Rios and F. DeLeon, as will appear by reference to the map "of the county of Victoria." The deed purported to convey "all the right, title and interest of the said M. Yenda, or of "any other owner or claimant of the same unknown, under "him, in and to the obove described premises."

The Assessor testified that he sold the land as the property of M. Yenda, a non-resident delinquent tax payer, from information derived from the map of the county; that the land was marked on the map as belonging to M. Yenda, and did not appear by the records to be claimed by any one else. He further testified, at the instance of the plaintiffs, that he levied on the land by virtue of his tax list, of which he had three copies, that he had a rough draft of the non-resident delinquent tax payers, not on his alphabetical list, but on a separate piece of paper: that his three rolls were not exact copies of this list; that he had forwarded to the proper office at Austin one of the copies, and had deposited one in the County Clerk's office, retaining one himself—he did not recollect whether he had kept or destroyed the rough draft. The plaintiffs objected to the introduction in evidence, of the Assessor's deed; but their objection was overruled. After the Assessor had given his testimony, they moved the Court to exclude the deed, which the Court refused.

The plaintiffs asked, among others the following instructions, which were refused by the Court, viz:

1st. "That the requirements of the assessment law must be "strictly complied with, and that any material variance there- "from, when proved, is fatal to a deed made by virtue of a "tax sale."

2nd. "That, where it is shown that the Assessor failed to "state in his assessment roll the number of acres, and the "patentee or person for whom the original survey was made, "it is a fatal defect in the sale made under such assessment."

There was a verdict for the defendant; a motion for a new trial overruled; judgment on the verdict; and the plaintiffs appealed.

*Lytle* and *Stockdale*, for appellants. I. It has been, we believe, generally held, both by the Courts of the different States and of the Confederacy, that under the ordinary provisions of the tax laws, it is necessary for the party claiming under the tax deed, to show outside and independent of the deed, that all the requirements of the law have been complied with, by the officer making the deed, before it becomes evidence of title. This Court has, we are informed, so decided in the case of Hadley v. Tankersly. The only difference in this regard, between the law of 1848 and those generally in force elsewhere, is that clause of the sixteenth Section, (Hart. Dig. Art. 3145,) which provides that the Assessor's deed shall be *prima facie* evidence, that all the requirements of the law have been complied with, in making the sale.

II. The obvious meaning and intention of the Legislature was, to make the deed evidence, *prima facie*, of the Assessor's compliance with the law, in regard to those things that relate directly to the sale. That is, of the notice, the sale, the purchase, and payment of the consideration money by the grantee. It is not evidence of these facts, unless they be stated in the deed itself; for if the deed upon its face shows that the law has not been complied with, or omits to state the specific facts necessary to constitute a regular sale; it is, in the first case fatal to the deed, and in the second creates the neces-

sity for other proof of the facts omitted. The Court would not certainly presume the facts to be otherwise than stated, or take the mere general assertions of the Assessor, in the deed, of conformity to the law, as evidence of that conformity.

The tax deed, then, under this law, we think, is evidence, *prima facie*, of the specific facts set forth in it, so far as they relate directly to the sale.

III. It is not intended by this clause of the statute, to make the deed, any evidence whatever of the power of the Assessor to sell. (Tallman v. White, 2 Comst. N. Y. R. 66, *et seq.*)

By the New York statute, upon which the decision in the case referred to was made, the Comptroller's deed is made conclusive evidence of the regularity of the sale, and conveys an absolute title *in fee simple*. The Court held that it was evidence of the regularity of the sale, but not of the Comptroller's power to sell.

The strongest case we have been able to find in favor of the deeds, (Martin v. Lucey, 1 Murph. R. 311,) gives the deed no higher degree in evidence, than a Sheriff's deed for land sold under execution; making it evidence of conformity to the law in making the sale, but not of the power to sell.

Our statute specifically makes the assessment roll the authority of the Assessor to sell; (Hart. Dig. Art. 3143;) it is by virtue of it that the levy is made; it stands in the stead of the judgment and execution; without it, there can be no levy, no sale, no deed of any validity.

The law further requires before the levy is made, that the Assessor should make out a delinquent list, posting one copy of it on the Courthouse, depositing one with the County Clerk, and forwarding one to the Comptroller. (Hart. Dig. Art. 3150.) The making out and publication of these lists are necessary to constitute the assessment roll a judgment or execution, and without them there is no power in the Assessor to sell.

These are, both the assessment and delinquent lists, easily susceptible of proof; they are preserved in the archives of the

State and county; they are the best proof of themselves; and constituting as they do, the authority of the Assessor to sell, they become as necessary concurrent testimony to the admissibility of the tax deed, as a letter of attorney is to the deed made under its authority. Without these, the deed marked D, in this case, is, we respectfully submit, no evidence of title whatever in the defendants.

The Supreme Court of the United States hold, (4 Wheat. R. 77,) that the authority of the officer to sell is a power, not coupled with an interest, and therefore, that it is necessary for the purchaser to show strict conformity to the law giving the power.

IV. If this Court should hold, that the law makes the deed *prima facie* evidence of the performance of all the requirements of the law, both in regard to the things relating directly to the sale, and those precedent to the levy; we submit it, that the Court below erred, in not, upon motion, striking out from the evidence the deed, upon the testimony of plaintiffs' showing the non-conformity of the Assessor with the law, in making the assessment and assessment roll.

The assessment of the property of non-residents, to be regular, must be made in the name of the owner if known, if not, then it must be assessed by a description of the property; if lands, it must be described by the number of the tract, the quantity of acres, and to whom patented, or to whom surveyed for patent. (Hart. Dig. Art. 3137.) The object of the law in thus requiring the land to be described, is, by the assessment roll and delinquent list, to notify the owner, that the taxes are due and unpaid; and further, that if they remain unpaid the land will be subject to sale. It is the peculiar object of the delinquent list to do this; and as that list follows and is copied from the assessment roll, it is necessary to the proper notification of the owner, that the description should be so certain and true as not to mislead. A mis-description in the assessment will run through all the subsequent proceedings to subject the land to sale, and the very means intended,

in the delinquent list and notices of sale, to put the owner on his guard and notify him of the danger of a sale of his property, will operate an injuiry to him in misleading him by a false notice. Then, if the description or designation of the land is false, or if it be not such a complete description as the law commands, it is fatal to the deed. (2 Comst. R. 66 *et seq.*; Dike v. Lewis, 4 Denio, R. 287.)

In this case, the only description of the land, in evidence, is that contained in the deed, which, it is to be presumed, followed and was copied from the assessment roll. That description of the land shows, that it was assessed in the name of M. Yenda, that it contained four thousand four hundred and twenty-eight acres, that it is situated on the Garcitas creek, adjoining the land of R. Rios and F. DeLeon, referring to the map of Victoria county.

This is not a sufficient description of the land, if true; for it does not state that the land is situated in Victoria county, a fact upon which the power and authority of the Assessor depends. (Hart. Dig. Art. 3143.) The description is false and calculated to mislead, for it names M. Yenda as the known owner, when from the whole proof, it appears, that he was not the original grantee, in whose name the assessment should have been made, or at any time the known owner of the land. It is insufficient, for it does not give the number of the tract. It is again false, for under a similar assessment for the taxes of 1846, this same Assessor, had sold aud conveyed, so far as he had power to do so, all the title of this M. Yenda, whom he described as the known owner, to these identical defendants; who, thence became, to him, the known owners of the land.

It was held in the case in 4 Denio, that a mere mistake in the number of the tract, where all else in the description is correct and true, is a fatal falsity, rendering the deed of no validity whatever. This is a much stronger case, for from the whole facts, suspicion of fraud is thrown upon the last assessment, sale and deed. The Assessor is bound to take notice of his own act, the records of his own office and of the County

Clerk's office. It is the same assessor, and these defendants purchase in both cases. There is no pretence that there has been any redemption from the first sale. Does this not show a strong probability, that the last sale and assessment were made with the intention to bolster and strengthen the first deed?

V. The sale of lands of non-residents for taxes is a rigorous proceeding, divesting the owner of his title without his consent and in this state generally, for a trifling and wholly inadequate consideration. It is certainly not the object or intention of the law, that this should be done, without the means which are used, to make known to, and notify him of the probable or intended sale, are so certain and true, that upon inquiry he shall be correctly informed. The proceedings under this law, to subject the property to sale, are even more rigorous and less formal, than by the laws of the United States and the States, under which the Courts have established the principle, that the officer should strictly conform to the law, and that such conformity should be shown by the claimant under the sale. A false description defeats the just object and purpose of all the notices. We think that in this case the description of the land, in the deed, delinquent list, and assessment roll is so uncertain, so false, and so inadequate under the law, as to be fatal to the deed.

The law requires one original and three copies of the assessment roll; neither a copy or the original were introduced, and from the testimony it is a matter of doubt as to the existence at all of the original, and a matter of certainty, that the copies were not exact, and that the original was not an alphabetical roll as required.

We do not think it necessary to discuss the correctness of the ruling of the District Court, in refusing the instructions or new trial, as this is dependent, in the main, upon the principles already considered.

*J. N. Mitchell*, for appellees. It does seem to me most pal-

pable, that, by the requirement of our statute on this subject, approved ————, 1848, all the prerequisites to a valid sale of land for taxes, are, (1) that these taxes shall be due and unpaid, (2) that they shall be advertised for a specified time, (3) in the name shown by the records of the county where the land lays, (1) in the Clerk's office, (2) on the county map,) (4) at three public places in the county, the Courthouse being one. And all this the petitioners proved in this case by witness Pridham: but were this not all, he also proved (5) that he had made three copies of his assessment roll, keeping a separate list of delinquents, non-resident of the State, (6) returned two of them to the proper offices, retaining one for his own use; and after this, could it harm any one, that he did also make out and keep a fourth copy, a rough draft or set of memorandums from which the three required copies were in whole or in part made? The proposition is purely unreasonable.

When the Legislature declared that the tax deed should be *prima facie* evidence of title, did they intend that a purchaser should file a bill in chancery to perpetuate the evidence requisite to support the title? Or did they require that he should file an information against the tax collector, for a failure to do his sworn duty? Is the Legislature authorized by the Constitution to pass revenue laws—to levy and collect taxes? If so, have they not passed a law for the collection of taxes; and when her officers have complied even strictly with the requirements of that law; and sold and conveyed to citizens resident, lands claimed by non-residents, or even aliens, shall not the purchasers of those lands hold by sound, indefeasible title? To assert the contrary by judicial sanction, were to override the legislative authority, set aside the organic law itself, and wholly dissolve the State Government.

To the first six assignments of error the defendants reply: the Act of the Legislature expressly makes the tax collector's deed *prima facie* evidence of title, and of all proper recitals contained in it: and it is not necessary, nor is it contemplated by the law, that those recitations should be stated with that

legal, technical certainty, which is not required by our law, even in pleadings in Court; but only by the English law in pleas in abatement: still more especially is this the case, where there is no ground shown or even squinted at by the evidence, tending to show illegality or unfairness of either the tax collector or the purchasers. But if, in this case, the recitals in the deed of the prerequisite acts of the officer to make a valid sale of land, are not sufficient of themselves, the testimony of Pridham, (the tax collector,) is ample to cure the defect: and the petitioners may not gainsay that evidence on any ground of illegality, because introduced by themselves.

Again, if the deed be not sufficiently precise and specific to identify the land sued for, with that the defendants had trespassed upon, it is the fault of the petitioners and not of the defendants—(1) because the deed has all the descriptive certainty contemplated by the statute in such a case; where the only evidence of ownership that could be found was the name of M. Yenda, marked upon the land on the county map: but, (2) by the petitioners' pleading the defendants are acknowledged upon the record to be in possession of the very land for which they sue; and so after verdict in favor of the defendants that their title to the land sued for is better than that of the petitioners, any want of sufficient descriptive certainty in the deed is cured—the pleading and the verdict dispels every mist of doubt as to the identity.

The first instruction asked for by petitioners ought to have been refused by the Court, as being, in part, contrary to the evidence, in part without evidence, and against the law.

To the second instruction the answer is: precise certainty is not required as to quantity in acres, but a general description is good, because where there is no deed of record in the County Clerk's office, the county map is to give the description; and if that be only a name marked upon the survey of a league and labor, or other dimension of tract as commonly known in the country, to require more, would be to require an impossibility which the law never does, *ad impossibilia*

*lex coget neminem;* this instruction was therefore properly refused.

WHEELER, J. The question to be determined is as to the validity of the title of the defendants, acquired by their purchase at the sale of the land for taxes.

To vest a title in the purchaser, the officer must have the power to sell, and the requirments of the law must have been complied with in making the sale. The power of the officer to sell land for the non-payment of taxes, is, in the language of the Court in Williams v. Peyton, (4 Wheat. R. 77,) "a "naked power, not coupled with an interest; and in all such "cases, the law requires that every pre-requisite to the exer- "cise of that power must precede its exercise; that the agent "must pursue the power, or his act will not be sustained "by it."

This principle was recognized in the case of Hadley v. Tankersly. (8 Tex. R.) And it was held, that, under the Act of 1840, which did not make the deed *prima facie* evidence of the regularity of the sale, the party claiming under it, must prove that all the pre-requisites of the law had been complied with.

The Act of 1848, (Hart. Dig. Art. 3145,) provides that the deed, when duly recorded, "shall be *prima facie* evidence "that all the requisitions of the law have been complied with "in making such sale." This statute does not dispense with a compliance with the requirements of the law by the officer, or relieve the purchaser from the effect of a non-compliance; but only changes the burden of proof from the purchaser to the party impeaching his title. It is as necessary to the validity of the title now, as it was before this statute was enacted, that all the pre-requisites of the law should have been complied with. The principle that the officer must exercise his authority strictly in conformity to law, or his act will be invalid, and will vest no title in the purchaser, is not affected by the statute.

But it makes the deed *prima facie* evidence of the regularity of the sale, and throws upon the party impeaching the title, the burden of proving that the requirements of the law were not complied with in making the sale.

A distinction has been taken in argument, by counsel for the appellant, between the power to sell, and the regularity of the sale; and there manifestly is a clear distinction. The proceedings in making the sale may be regular, and the sale be ineffectual to pass the title, for the want of power in the officer to make it. This distinction has been recognized by the Supreme Court of New York in the cases cited by counsel: and it is there held, that the statute of that State, which makes the deed conclusive evidence of the regularity of the sale, and declares that it shall vest in the grantee an absolute estate in fee simple, applies only to cases in which the officer has power to sell: that though the deed is conclusive evidence of the regularity of the sale, it is not so of the power to sell, and that the statute applies only to the proceedings to be had after the right and power to sell are acquired. (2 Comstock, 66; 18 Johns. R. 441.) To empower the Assessor to sell, there must have been a legal assessment of the taxes, and a failure to pay them: and there are other provisions of the law, which must have been complied with, before the right and power to sell will have been acquired. (Hart. Dig. Art. 3133, 3136, 3137, 3138, 3150.)

It is not necessary, here, to determine whether the Assessor's deed is *prima facie* evidence, under the Act of 1848, before cited, of the existence of the facts on which his power to sell depends: for, if it be so, it may be impeached and invalidated by showing the non-existence of those facts, or that the requirements of the law were not complied with: and the decision of this case turns upon the inquiry whether the evidence establishes such non-compliance with the requirements of the law. That it does, will, we think, be apparent by a comparison of the provisions of the law with the acts done by the officer in one or two essential particulars.

The statute provides that all property shall be assessed "in "the name of the owner, if known; and if not, then it shall "be assessed by a description of the property; if lands, it "shall be described by the number of the tract, quantity of "acres and to whom patented, or for whom surveyed for pat-"ent." (Hart. Dig. Art. 3137.)

The statute thus plainly requires that the land shall be assessed in the name of the owner if known; but if he be unknown, it must be assessed by a description of the land; it provides what that description shall contain, and one of its essential constituents is the name of the grantee. The assessment in this case was made in the name of the supposed owner, M. Yenda. This, however, was a mistake. Manuel Yenda, was neither the owner, nor the grantee. He had died several years before the grant was made. Caciana Sambrano was the grantee; and the owners were her heirs, the present plaintiffs. It is manifest, therefore, that the land was not assessed, either in the name of the owner, or by such a description as the statute requires; that is, one embracing, among other particulars mentioned, the name of the grantee. That it should have been in the one mode or the other, clearly was necessary to the validity of the assessment. It may be said that it was the fault of the plaintiffs that their title was not recorded in the county: and it is true that it should have been so recorded. But if this afforded an excuse for not knowing who the owners were, it afforded none for not giving a correct description of the land, by the name of the grantee. This could have been easily ascertained by reference to the abstract of original titles. The owners are not accountable for mistakes made in the county map, in causing which they had no agency.

In the case of Tallman v. White, (2 Comstock, R. 66,) a case in point, the Court of appeals of New York held this language: "An accurate designation or description of the "land assessed, is essential to the validity of the assessment. "The assessment of non-residents' lands is made with the ul-

"timate view of collecting the tax by advertisement and sale "of the land if it should not be voluntarily paid. The Comp- "troller's sale is a rigorous proceeding. It divests the owner "of his title without his consent, and often for a very trivial "consideration; and the Legislature has therefore shown a "cautious solicitude that it should not be done without his "knowledge."

The assessment must contain a true description of the land in order that the purchaser may be enabled to know what land he is purchasing, and that the owner may know from the advertisements required to precede the sale, that his land is exposed to sale, and that he may save it by paying the tax. If the land be mis-described in the assessment, it will, of course, be mis-described in the Comptroller's and County Clerk's offices and in the notices and advertisements. The mistake and falsity of description in the assessment necessarily runs through and invalidates all the subsequent proceedings. In the case cited it was said: "An assessment of non-resident land is "fatally defective and void, if it contain such a falsity in the "designation or description of the parcel assessed, as might "probably mislead the owner and prevent him from ascertain- "ing by the notices, that his land was to be sold or redeemed. "Such a mistake or falsity defeats one of the obvious and just "purposes of the statute—that of giving to the owner an op- "portunity of preventing the sale, by paying the tax." It is obvious that the misdescription of the land in this case was calculated to mislead. It is not to be supposed that an advertisement of the land of M. Yenda would apprise those claiming title under a grant to Caciana Sambrano, that theirs was the land intended. To hold their title divested by a sale under such circumstances, would be to defeat the manifest intention of the Legislature in the various provisions made to protect the rights of the owners of land liable to be sold for the non-payment of taxes.

The statute further requires of the Assessor, to make out "three descriptive lists of all taxable property in his county,

"on which the taxes remain unpaid, belonging to non-resi-
"dents, who shall be named, if known; if unknown, shall be
"so described; one of which lists shall be filed in the office
"of the Clerk of the County Court of his county; another
"shall be posted up at the Courthouse door of said county,
"and the other shall be transmitted to the Comptroller of pub-
"lic accounts." (Id. Art. 3150.) The Assessor testifies that he made out three copies of his tax list; one of which he forwarded to the proper office at Austin, one he deposited in the County Clerk's office, retaining the other himself. It appears, therefore, that instead of posting up one copy at the Courthouse door, as the law required, he retained it in his possession. This was a material departure from the requirement of the law, one object of which was to apprise the owner that his land was to be subjected to sale for the taxes, and to afford him an apportunity of preventing the sale by prompt payment.

But if the title were not obnoxious to these objections, there is another which must be held fatal, to the right of the defendant, under his deed from the Assessor. The deed professes to convey only the "right, title and interest of M. Yenda, or of "any other owner or claimant of the same, unknown, under "him." If the deed had assumed to convey the title of the unknown owner without reference to its derivation or the person under whom he claimed, and the proceeding had been otherwise regular, it might have been effectual. But when the officer has thus undertaken to convey a particular title, the purchaser takes the title so conveyed: none other will pass by the deed. That manifestly conveys only the title of M. Yenda and those claiming under him. But the plaintiffs do not claim under Manuel Yenda; and, consequently, the deed does not profess to convey to the purchaser, their right. We conclude that the Assessor's deed was inoperative to divest the plaintiffs of their title; not only because of the invalidity of the assessment; but because the deed did not convey the title of the plaintiffs: and, consequently, that the Court erred in refusing to exclude it from the jury. The Court also erred in

refusing instructions asked by the plaintiffs, and in overruling the motion for a new trial.

The judgment must, therefore, be reversed and the cause remanded.

Reversed and remanded.

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## Close v. Fields.

The possession by the acceptor, of a draft drawn with a blank for the name of the payee, and without indorsement, is *prima facie* evidence that the draft had been in circulation and was taken up by the acceptor. But, upon proof of a custom to leave drafts for acceptance, or other fact tending to controvert the presumption arising from the possession of the instrument, the failure of the acceptor to prove to whom he paid it, would leave the question of "payment or not" to be found by the jury, subject to the power of the Court to grant a new trial, as in other cases, if the verdict should be against the evidence.

Error from Galveston. The defendant appeared and read in evidence a draft drawn upon him by the plaintiff, in the following words:

Hiram Close, Esqr., Trustee:

You will please pay ———— or order, four hundred dollars par funds, when collected of the proceeds of a note now in your hands drawn by Robert Rose and Robert D. Johnson, and made payable to me for six hundred dollars, par funds.

WM. FIELDS.

Galveston, March 24th, 1841.

Accepted, Hiram Close.

The defendant's counsel asked the Court to instruct the jury, that the possession by the defendant, of this draft, was *prima facie* evidence of the payment of the same by him; which instruction the Court refused to give.

The Court was further asked to instruct the jury, that possession by the defendant, of the draft, was *prima facie* evidence of payment by him, and raised a presumption in his favor, of that fact, which, if not rebutted, would be taken as true; which instruction the Court refused to give.

The refusal of the Court to give the instructions asked, was assigned as error.

*J. B. Jones*, for plaintiff in error. It is very clear, not only from the authorities cited on the former investigation of this case in the Supreme Court, but from many others, that an instrument like the one under consideration, is equivalent to one payable to bearer, or like a blank indorsement on a promissory note or bill of exchange. (Story on Prom. Notes, Sec. 37, 39; Van Staphorst v. Pearce, 4 Mass. R. 258.)

The filling up the blank was not necessary. (8 Ala. R. 628; U. S. Dig. for 1847, 412, Art. 53; Gilham v. State Bank, 2 Scam. R. 245; Chewning v. Gatewood, 5 How. Miss. R. 552; McDonald v. Bailey, 2 Shep. R. 101; 2 Sup. U. S. Dig. 616, Art. 323; Sawyer v. Patterson, 11 Ala. R. 523; U. S. Dig. for 1848, 318, Art. 58.)

*Sherwood & Goddard*, for defendant in error. The blank draft with Field's signature was evidence only of the fact that he drew it. But in that state, it contains nothing to raise a presumption that Fields ever received it back, or had it in his possession, or that it was ever put in circulation, after it was accepted. The words of acceptance, on the face of the draft, were not evidence for the defendant without proof that the paper, so accepted, had been put to use by plaintiff.

Had the blank been filled, the presumption might have arisen, perhaps, in certain circumstances, that the draft had been in the hands of a *bona fide* holder, to whom payment had been made. But the blank never having been filled, there was no bill or draft in existence, calling for payment to any

body: it was merely waste paper: it is neither a draft, bill, note, check, nor any other instrument or contract known to the law, or recognized by mercantile usage. (Story on Bills, Sec. 54; Chitty on Bills, p. 62, Ch. 5; Bayley on Bills, Ch. 1, Sec. 10.)

The only presumption that could arise in such case is, that the draft was drawn by Fields and sent to Close for acceptance, with the view of putting it to use when accepted and returned. (2 Campb. R. 439.)

It cannot be presumed that the paper was ever put in circulation with Close's acceptance on it. Had it been, it was no draft until the name of a payee was inserted; and then it could only pass so as to authorize Close to pay it under the indorsement of the payee.

The presentation of the paper to Close, by a third person, without the name of a payee being inserted or indorsed, would have afforded to Close no other presumption than that the person presenting it came by the paper wrongfully. If he paid and took up a piece of paper of that kind, he paid it in his own wrong: for Fields had not ordered him to pay it to any one.

To allow this paper to stand as evidence of payment, would be to permit a party to manufacture evidence in his own favor. It would, moreover, violate, practically and in effect, all the rules adopted in mercantile usage to protect parties interested in bills of exchange. The mercantile law knows no usage allowing drawees of bills to pay blank paper.

It is also submitted whether the failure on the part of Close to show a payee, does not, in this case, raise a strong presumption that there was none: on the principle that the omission to produce evidence, peculiarly within the knowledge of a party, turns every doubt against him.

"Possession of a bill which has been in circulation by the "acceptor, is *prima facie* evidence of its payment by him." (Baring v. Clark, 19 Pick. R. 220.) The inference is left for the Court to draw. (*Vide*, also, Wilkinson *et al.* v. Phelps, 16 La. R. 304.)

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

LIPSCOMB, J. This case was before the Court on a former trial between these parties; and the judgment was reversed and the case remanded to the Court below for a new trial. (2 Tex. R. 232.) There has been another trial, and the cause brought up again by a writ of error. In the former trial, the error relied upon was the refusal of the Court to admit this draft in evidence; and, on that assignment of error, we reversed the judgment, ruling that it was admissible as evidence of payment, when offered by the defendant, upon whom it had been drawn; and we expressly ruled, that, under the circumstances, it was *prima facie* evidence of payment. If *prima facie* evidence is not explained and rebutted, it must be taken as true. We believe that the question of law, now presented, was fully discussed and decided upon in our former decision; and we do not feel ourselves again called upon to reiterate the grounds upon which that decision was predicated. We were, perhaps, not sufficiently explicit, and may not have been correctly understood, in discussing the manner in which the presumption in the defendant's favor, arising from his possession, might be rebutted, and should have said, that, if this presumption had been controverted by other evidence, that the fact of the defendant's not showing to whom he had paid the order, might be a presumption against him; and, if it had been in proof by the plaintiff, that, according to the course of business, it was not an unusual thing to leave such orders in the hands of the person on whom it had been drawn, or any other testimony going to rebut the presumption, that the failure of the defendant to show to whom payment had been made, would be a circumstance calculated to weaken the presumption arising from his possession of the order; but, until some such evidence, calculated to weaken the presumption of payment, has been offered, the defendant cannot be called upon to fortify it by additional proof. If it had been the intention of the maker of the order, to negotiate this order after its ac-

ceptance, it would have been more business like to have made it payable to his own order, and only indorsed it when he had negotiated it; and it is not believed to be the custom of those dealing in such paper, to leave an order like the one we have been considering, in the hands of the person upon whom it is drawn; and if so done, he should be prepared to show by proof, that it had been so left, without payment.

The judgment must be reversed and the cause remanded for a new trial.

Reversed and remanded.

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## McGreal v. Wilson.

A petition which alleged that the defendant contracted to pay the plaintiff a certain amount, for aiding and assisting in seizing certain slaves, belonging to and in possession of one —— Stafford and guarding them after such seizure, and that he did assist, &c., without averring any right or authority in law for such seizure, was held bad, on general demurrer, because it disclosed a contract to do what purported to be an illegal act.

Where the petition alleges a contract to pay a specific amount for services to be rendered, the plaintiff cannot recover so much as the services may reasonably be worth; and this too, notwithstanding testimony as to the value of the services, may have been admitted without objection.

An instruction which submits to the jury whether a certain important fact has been proved, when no evidence of it, whatever, has been introduced, is calculated to mislead the jury, and is error for which the judgment will be reversed, unless it appear that the jury were not misled.

Error from Brazoria. Suit by Wilson against McGreal for services "rendered in aiding and assisting the said Peter Mc- "Greal in procuring possession of certain negro slaves belong- "ing to, and in possession of one —— Stafford, and further "in bringing said slaves to the town of Brazoria and in guard- "ing the possession of the said slaves; for which services your

"petitioner represents that the said Peter McGreal undertook "and faithfully promised your petitioner to remunerate him "by allowing him the free use and control of two valuable "negro slaves, when in the possession of the said Peter Mc- "Greal; the said McGreal binding himself to furnish to your "petitioner two slaves worth one hundred and fifty dollars "each," &c. "Further, your petitioner represents that the "said McGreal undertook and promised to pay to your peti- "tioner the sum of three hundred dollars, in the event of his "failure to comply with his contract to deliver to your peti- "tioner two valuable slaves, as aforesaid." That McGreal did fail, &c.

The defendant demurred generally, and filed a general denial. The defendant's demurrer was overruled. The plaintiff proved that the defendant contracted to let him have the use of two of the best negroes in the lot, as alleged in the petition, if he would assist him as stated in the petition, assuring him that he had authority to seize the slaves; that defendant represented that the service would be accompanied with considerable hazard; that plaintiff performed the service; that the defendant refused to comply with his contract; and that the services of such negroes were worth one hundred and fifty dollars each, per year; but did not prove that the defendant promised to pay the three hundred dollars, in case of his failure to let the plaintiff have the slaves.

The defendant proved by a witness that he, witness, accompanied the defendant and E. F. Lenard, a Deputy Marshal of the United States, and aided in seizing about seventy slaves—same as alluded to in the petition—that the slaves were carried to the town of Brazoria and there delivered to the defendant; that the whole time occupied was five days; there were seven or eight other persons in company assisting; some of the company were armed; others seemed to think there was danger; witness did not; witness went at request of defendant; he was paid twenty-five dollars by the defendant for his services and considered the compensation ample. It appeared that the de-

fendant had been acting as receiver in a case pending in the United States District Court for this district.

The defendant asked the Court to charge the jury, in effect, (charges 1st and 3rd,) that a receiver had no authority to make a contract to dispose of property placed under his care, and that such a contract would not be binding upon him; which charge the Court gave, with the modification, that although such a contract would not be binding, yet that he would be bound by a promise to pay a specific sum of money, in case of his failure to deliver the property, as agreed on.

Verdict and judgment for the plaintiff for three hundred dollars. Motion for new trial overruled.

*J. B. Jones*, for plaintiff in error.

*J. H. Bell*, for defendant in error.

Lipscomb, J. The petition, in this case, is bad and shows no legal cause of action. It sets out a parol contract for certain and fixed compensation, to do what appears on the face of the proceedings, to be an illegal act. It was for aiding and assisting in seizing certain slaves "belonging to and in pos- "session of one —— Stafford, and guarding them after such "seizure;" and the petition avers no right or authority in law, for such seizure: and it was manifestly a trespass, and in violation of law, to make such a contract, and absolutely void. The demurrer, therefore, ought to have been sustained, and the Court below erred in overruling it.

But this is not the only error. The suit was brought upon an express contract to give the services of the two slaves for one year, or the alternative of paying three hundred dollars, and the recovery of this three hundred dollars, was the direct object and gist of the action; and it will be seen by reference to the statement of facts, that there was not the slightest scintilla of evidence of such a contract to pay the three hundred dollars; yet, the jury found a verdict for the

plaintiff for three hundred dollars, on which, the judgment was rendered; and the Court overruled a motion to grant a new trial. The verdict was without any evidence to support it, and ought, most clearly to have been set aside. If there has been anything settled by this Court, it is that the *allegata* and *probata* must correspond and agree; and no verdict or judgment can be sustained, unless there has been an averment, to let in such evidence. (Mims v. Mitchell, 1 Tex. R. 443; Harrison v. Nixon, 9 Peters, 503.) The express contract being the only one set out and averred in the petition, evidence to support an implied contract, could not be received. It would be a variance from the *allegata*. (Story on Contracts, Sec. 12, 13 and 16; Chitty on Contracts, 25; Harrison v. Nixon, 9 Peters, 503.)

The modification given by the Court to the first and third charges prayed by the defendant, was predicated upon the supposition that there had been a contract stipulating a certain sum of money to be paid by the defendant, on condition of his not giving the property, and was calculated to mislead the jury, and no doubt produced their verdict for the three hundred dollars; when, in truth, there was no such contract proven. Had there been an allegation in the petition, similar to the *quantum meruit* count of the English declaration, the evidence would not have authorized a verdict for more than twenty-five dollars; but there being no such allegation, the verdict ought to have been for the defendant. The judgment is therefore reversed and the cause remanded.

Reversed and remanded.

## Shihagan v. The State.

The term "public" may be applied to a house, either on account of the proprietorship, as a Court House, which belongs to the county, or the purposes for which it is used, as a tavern, storehouse, &c. The statute against gaming appears to have had especially in view houses of the latter class.

Whether any specified house is public, within the meaning and intention of the statute, is a question of law; but whether a place be public, will be, in general, a question of fact.

An indictment for gaming, which described the place as "a room in the Court House, the said Court House being a public place," was held bad in arrest of judgment, on the ground that there was no averment that the room was public.

Appeal from Walker. The appellant was indicted and convicted of playing at cards under Article 563 of the Digest. The indictment charged the offence to have been committed "in a room in the Court House, the said Court House being a public place." There was a motion to quash the indictment, a motion for a new trial, and a motion in arrest of judgment; which, in their order, were considered and overruled. The proof was that the defendant had rented the room, in which the playing took place, from the County Court, and that he used it as a tailor's shop in the day time, and a sleeping room at night. The upper or Court room was a public place, but the witnesses testified that they considered the room occupied by the defendant as a private room.

*Theodore Shihagan*, appellant. The errors assigned are the overruling the motion to quash; for new trial; and in arrest of judgment. The indictment is clearly defective; it does not aver that the room is a public place, where the playing is alleged to have occurred; nor is it alleged that the playing took place in any house or other place specifically prohibited by the statute. (2 Vol. Tex. L. 230, Sec. 67.) And the evidence clearly shows that the room in which the playing

occurred, was not a public place, within the meaning of the statute, if the indictment had even averred it. All the witnesses concur in this. Under a similar statute in the State of Alabama, the following decision was made: "Where a physician and a few friends, present by invitation, played cards "or dice at night, with closed doors, in his office where he "exhibited his medicines, received professional calls at all "times, and, being unmarried, ate and slept, it was held that "the office was not a public place, within the statute of Ala-"bama against gaming." (Clarke v. The State, 12 Ala. 492, Sup. Aikin. Ala. Dig. 239, Sec. 8; U. S. Dig. for 1849, 257.) In this case the evidence is equally as strong or stronger than in the Alabama case, and it is submitted that it would be invidious to make a distinction between a tailor's and a doctor's shop, in point of publicity, if no principle requires it. It is therefore respectfully submitted that the judgment should be reversed and cause dismissed.

*B. C. Franklin*, also, for appellant.

*Attorney General*, for appellee.

WHEELER, J. The term "public" may be applied to a house, either on account of the proprietorship, as a Court House, which belongs to the county, or the purposes for which it is used, as a tavern, storehouse, house for retailing spirituous liquors, &c. The statute appears to have had especially in view houses of the latter class. Whether any specified house is public, within the meaning and intention of the statute, is a question of law; but whether a place be public, will be, in general, a question of fact. Because a Court House is public, it does not necessarily follow that every room in it is so. Where, as in this case, the County Court have rented a room to an individual, that room may, doubtless, be used as a private dwelling. It would seem, therefore, that it was not sufficient to aver that the Court House was a public

place; but the averment should have been that the room in which the defendant played, was so. The house may have been public, in a certain sense, and the room private. We, therefore, think the indictment insufficient in that it did not contain the averment that the room was public. But if the indictment were sufficient, the proof appears scarcely to have warranted the finding of the jury, upon the question of fact. It is, however, unnecessary to determine that question. The objection to the sufficiency of the indictment, was well taken by motion in arrest of judgment; the Court, we think, erred in overruling the motion, and the judgment is, therefore, reversed.

Reversed and remanded.

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## Ahrens v. Giesecke.

That the petitioner had a meritorious defence, and that he was prevented by sickness from appearing before the Justice's Court, at the trial, is a sufficient showing for a *certiorari*, without disclosing the nature of the defence.

It is error for the District Court, on dismissing a *certiorari* for insufficiency in the petition, to affirm the judgment of the Justice's Court.

*Quere?* Whether there is any limitation to the right to obtain a *certiorari* to a Justice's Court. And see this case in favor of the writ of *certiorari* generally.

Appeal from Brazoria. The appellee, Edward Giesecke, administrator of the estate of Christian Schwarze, caused a writ to be issued from a Justice's Court in Brazoria county, commanding the appellant, Henry Ahrens, to appear and answer a charge of detaining unlawfully in his possession, goods and property of the estate of Christian Schwarze, of the value of ninety-five dollars, attaching to the said writ an inventory of the property alleged to be so wrongfully detained. This

writ and inventory issued from the Justice's Court on the 7th day of February, 1847. After many continuances of the cause, in the Justice's Court, judgment was rendered, the defendant in said Court failing to appear, decreeing that the plaintiff recover of defendant the sum of ninety-five dollars with interest from that date and costs of suit.

This judgment was rendered on the 16th of October, 1847. The defendant appealed to the District Court. The proceedings in the Justice's Court were sent up to the District Court and filed 28th October, 1847. The District Court dismissed the cause for want of jurisdiction, and gave judgment against the appellant for the costs of the appeal.

The Court also ordered that its judgment be certified to the Justice's Court, and that the original papers be sent down to the Justice's Court. More than a year having transpired since the judgment of the Justice's Court was rendered, and execution never having issued, a suit was brought on the 15th day of June, 1850, to revive the former judgment. On the 31st day of August, 1850, both parties appeared and judgment was rendered against Henry Ahrens, by the Justice who tried the cause, for ninety-five dollars and interest at eight per cent. from the date of the former judgment. On the 8th of November, 1850, the appellant Ahrens filed his petition in the District Court praying for a writ of *certiorari* to revise the judgment rendered by the Justice's Court on the 31st August preceeding. In the District Court, at the first term, Giesecke demurred to the petition for a *certiorari*, and answered. Afterwards, at the same Term, he moved to dismiss. At the Fall Term, 1851, of the District Court, the Court rendered its judgment, quashing the *certiorari*, dismissing the defendant's petition and affirming the judgment of the Justice's Court and for costs.

The petition for the *certiorari* represented "that the record "of the said judgment, (the first judgment,) if it was ever "made of record, was not produced by the said Giesecke, nor "was its absence accounted for, upon the trial of the cause

"before the said W. C. C. Lynch. He further represents that "the said Lynch permitted the said administrator to prove "the said original judgment by a paper which had been of "file in the District Court of Brazoria county, signed by the "said Aycock (before whom the first judgment had been ob- "tained) as Justice of the Peace, and which said paper nei- "ther purported to be the original judgment in said cause, "nor a certified transcript of said judgment; and that your "petitioner was wholly prevented from proving upon the trial "of said cause, before the said Lynch, that he owed the said "Giesecke, administrator as aforesaid, nothing at the time the "said original judgment was rendered against him as afore- "said." In a preceding part of his petition, he had represented that he had been unable, from illness, to attend the trial at which the first judgment was rendered, and that he had a just and meritorious defence to the said action, and that he was not indebted to the said Giesecke, administrator as aforesaid, nor to the said deceased.

*P. McGreal*, for appellant.

*J. H. Bell*, for appellee.

Lipscomb, J. In this case it is alleged that the District Court erred in quashing and dismissing the *certiorari*, and affirming the judgment of the Justice of the Peace.

In the case of O'Brien v. Dunn, (5 Tex. R. 571,) the course of proceeding in the District Court, upon a case being brought before it, by a writ of *certiorari*, from a Justice's Court, was distinctly and clearly defined. If the petition shows no sufficient ground, nothing of which the petitioner could justly complain, it ought, on the motion of the adverse party, at the first Term, to be dismissed; but if there is a sufficient ground for its issuance, apparent upon its face, it will be retained and set down for trial *de novo*, on its merits.

The petitioner in this case, alleges in his petition, that he

did not owe anything to the plaintiff in the suit against him in the Justice's Court; that he was prevented from making his appearance and defence before the Justice, at the time of the trial, by severe sickness. Here is a showing upon oath, of merits, and a reasonable excuse for not making his defence before the Justice. This is sufficient ground for overruling the motion to dismiss, and retaining the case for a trial on the merits, disregarding the previous trial in the Justice's Court. The Court below erred, therefore, in quashing and dismissing the *certiorari*, for which error the judgment must be reversed.

There is another error presented, that would have made it our duty to reverse the judgment, even if there had been no sufficient ground shown for the issuance of the *certiorari*, and it had been properly dismissed. The Court below, after quashing and dismissing the *certiorari*, proceeded to affirm the judgment of the Justice of the Peace. This it had no right to do. All that could be done, in such case, would have been to have awarded a *procedendo* to the Justice of the Peace, to proceed to have his judgment executed. For the reasons given, the judgment of the District Court is reversed, and the cause remanded with instructions to try the case anew, upon the merits.

Reversed and remanded.

## Mays and another v. Forbes.

The dismissal of a writ of error for informality, will not bar the prosecution of another.

Where the seal of the Court below is not impressed upon wax over the tie of the transcript, the practice is to dismiss; unless the appellant or plaintiff in error should take measures to perfect the transcript.

A *certiorari* is the proper remedy where a transcript is defective for want of a seal over the tie.

Error from Colorado. Motion to dismiss on the ground, (1) that there had been a former writ of error in same case, which had been dismissed, and (2) that there was no seal of Court over the tie of the transcript. Motion by the plaintiffs in error for a *certiorari* to perfect the transcript.

*R. J. Rivers* and *N. H. Munger*, for plaintiffs in error.

*E. M. Pease* and *W. Alexander*, for defendants in error.

Wheeler, J. The practice of the Court has settled that the having prosecuted a writ of error, which has been dismissed for any informality or defect in prosecuting it, will not bar another writ of error. The first writ having been dismissed, it was competent for the plaintiff in error to proceed anew by petition for a second writ.

The requisition of a seal upon the tie of the transcript, is for the purpose of preserving the record from the possibility of change or mutilation. Without it the record is incomplete; and the practice has been to dismiss the writ; unless the appellant or plaintiff in error will take measures to perfect it. But a record thus imperfect has been held sufficient to authorize the awarding of a *certiorari* for the purpose of obtaining a complete transcript. The application for a *certiorari* will therefore be granted.

Ordered accordingly.

## Bennett v. Hollis.

See this case for the construction of a contract for the sale of land, made by letter, the purchase money to be fixed by a third person.

A being in debt to B by two notes of hand and an account assigned by C to B of which A had notice, sold two lots of ground to B to be settled for when the title to the lots then in litigation should be clear; afterwards A sued B for the purchase money, alleging that the title had been cleared within two years last past; B pleaded the notes and account in reconvention; *Held*, That the account, being due more than two years was barred by the statute of limitations.

Where there is a sale of land which is in litigation, and the terms of sale are that the purchase money shall be paid as soon as the title is clear, the vendee cannot claim an abatement of the amount on the ground that he paid a certain sum to compromise the suit in which the title was in controversy.

Error from Galveston. Suit by the defendant in error against the plaintiff in error, for the purchase money of two lots in the city of Galveston. Petition filed June 14th, 1851. The following letter from the defendant to the plaintiff, was filed as a part of the petition:

T. F. Hollis, Liberty. Galveston, March 24th, 1849.

Dear Sir: I am just in receipt of your much esteemed favor under date of the 14th inst., and contents noted. I am willing to take three lots, for which the enclosed is a deed, at a price to be named by our mutual friend F. H. Merriman, to be settled for when my title is clear to the property. If this will suit you, sign the deed before a notary and two witnesses, and send it down with a letter directing Mr. Merriman to set the price upon them that he considers as a fair valuation for them at this time. If the judgment is confirmed at the Supreme Court, I account to you for the price he (Mr. M.) states; but, if not, then of course the bargain is annulled, and you still remain in my debt. There is no telling what the result will be at the Supreme Court. I am under the impression that it was carelessness on their part, that enabled you to get a judgment, at all. But Frank will no doubt do his best and we must wait the result.

I will, on the receipt of your deed, send the furniture according to your direction. I would like to see you here soon, if you can make it in your way to come down, that we may have every thing arranged satisfactorily, that there may be no misunderstanding between us. Hoping to hear from you immediately on receipt of this, I remain,

Yours, very respectfully,

JNO. H. BENNETT.

The petition alleged that the plaintiff accepted the proposition contained in the above letter, and executed the deed as requested and sent the same to the defendant; that the defendant's title to the lots had, within two years last past previous to the commencement of this suit, been made entirely clear and perfect in every respect, according to the terms of the aforesaid letter; and that said F. H. Merriman, in said letter mentioned, had fixed the price and value of said lots at the date aforesaid, at the sum of two hundred dollars each; and that said lots were well worth that sum, &c.

The defendant answered December 25th, 1851, (1) by a general demurrer; (2) for special causes, that the petition contained no averment that the plaintiff had assented to refer the price to Mr. Merriman, nor that said Merriman had set the price of said lots at the date of said letter; (3) by general denial; (4) by pleading two notes of hand of the plaintiff, payable to the defendant, one for $54 86, due January 1st, 1848, bearing ten per cent. per annum interest from that date until paid; the other for $91 67 due 30th March, 1848; (5) that defendant was on 2nd day of August, 1848, justly indebted to Wm. A. Gold, on account, in the sum of $120, which said Gold for value assigned to the defendant, of which both then and since plaintiff had due notice; (6) and the said defendant further averred that on the —— day of ——, A. D., 18—, said plaintiff, who declined to accept the proposition made by defendant, in his letter, a copy of which is annexed to petition, and never gave his assent to the terms and conditions thereof, and who never performed the same, executed a deed to defendant for

said lots, upon a totally different understanding from that attempted to be set up in said petition, to wit: upon the terms contained in the following letter of the plaintiff to the defendant, which was sent with the deed:

JOHN H. BENNETT, Esq. Liberty, April 2nd, 1849.

Dear Sir: I received your letter with the blank deed; and I will send it down by Dutch Dan, who starts to-morrow. As for calling in uncle F. H. Merriman, your word is enough; although Frank's word is good; but you have always been just to me. But, John, I want those two lots to pay you and Briggs & Yard; and I want you to pay them, or keep the lots for to secure yourself and them; or pay them and yourself, and I am satisfied. The deed will be down by Dan and you will please send the furniture to him and take his receipt in good order and send it to me.

Tell Briggs & Yard, if you will pay them, that you will pay them. Write to me, on the receipt of this letter, what you will do. Nothing more, but remain Yours,

T. F. HOLLIS.

That the actual value of the lots at the time did not exceed $220, which was the valuation placed upon them by plaintiff as appeared by the following memorandum in plaintiff's own handwriting, left by him with the defendant on the 30th of November, 1847:

Mr. J. H. Bennett: Mr. J. L. Darragh sent P. G. Merritt to propose to compromise with me about the three lots close to Presbyterian Church; if they will pay you two hundred and twenty dollars, make the trade.

That (7) having so obtained the claim or alleged title of said plaintiff, to said lots, and knowing that the title of said lots was in controversy in a suit wherein said plaintiff was plaintiff v. —— defendant, he, the defendant, on the 4th of May, 1849, paid unto John L. Darragh the sum of $200 by way of compromise and final settlement of said suit, and thus perfected and cleared the title to said lots; that Darragh was the real party in interest in said suit, although he was not a party

to the record. That plaintiff, himself, paid the account of Briggs & Yard, referred to in plaintiff's letter, amounting to about $120; and that defendant settled and paid and received assignment of the account of said Gold, as aforesaid, the same being about equal in amount to the debt due by said plaintiff to Briggs & Yard. Wherefore the defendant pleaded the matters aforesaid in reconvention, prayed an account, and for judgment for any balance found due the defendant.

The Court overruled the demurrer of the defendant, and sustained exceptions of the plaintiff, to defences (5) and (7) in defendant's answer, overruling exceptions as to the residue.

The plaintiff gave in evidence the letter of the defendant referred to in the petition; proved by F. H. Merriman, same referred to in letter annexed to the petition, the lots to have been worth $200 each, at the time; that the suit which had been pending between Hollis and Jones, in which the title to said lots was involved, was gained by Hollis, below, and was at the December Term of the Supreme Court, A. D., 1849, disposed of by a dismissal of the appeal, upon suggestion of settlement; it was agreed that Hollis had had nothing to do with the compromise. The execution and delivery of the deed on the 2nd April, 1849, was agreed to.

The defendant introduced in evidence the notes, memorandum, and letter annexed to his answer; proved the lots to have been worth, at the time, from $125, to $150 each.

Plaintiff then proved that Hollis, just after April 2nd, 1849, wrote to Briggs & Yard that Bennett would pay them on account of the lots in the petition mentioned, the amount of his account, which was about $150; that Briggs called on Bennett who declined to pay it, because he said he had heard that the cause had been reversed in the Supreme Court.

There was a bill of exceptions as follows:

Be it remembered, &c., the Court, *ex mero motu*, charged the jury that the letter, annexed to defendant's answer, when coupled with the execution of the deed and delivery of it, was, in legal effect, an acceptance of the proposition contained in

the letter annexed to plaintiff's petition; to which the defendant excepted.

C. W. BUCKLEY,
Judge 7th Jud. Dist.

*N. D. Fenton*, for plaintiff in error. In behalf of the plaintiff in error it is contended:

First, The Court erred in ruling out the account purchased of Gold. That it was assignable. (*Vide* Hart. Dig. Art. 612; Story's Eq. Ju. Sec. 1047, 1056–7; 2 Lead. Ca. in Eq. 205, 577.) Properly pleaded in re-convention. (Walcott v. Hendrick, in Ms.)

Secondly, That the Court erred in not allowing the $200 paid Darragh to clear the title. (Newland on Con. 227; Story's Eq. Ju. Sec. 799 a and b, and note 3, 1237, n. 4.)

Thirdly, That the Court erred in making a contract for the parties. (Hart. Dig. Art. 753.)

Fourthly, Admitting the right of the Court to decide the question of acceptance or non-acceptance, the construction made of Hollis's letter was wrong, although accompanied by a deed.

*Alexander & Atchison*, also, for plaintiff in error.

*H. N. & M. M. Potter*, for defendant in error.

Lipscomb, J. We will not discuss the errors assigned, in the order in which they were made. The defendant in the Court below, filed a demurrer to the plaintiff's petition, and assigned special exceptions, to support the same. It was overruled by the Court; and we believe, that, in so doing, the Court below did not err. The exceptions taken are not supported by a reference to the petition; and the supposed defects in it do not exist.

The plaintiff's exceptions to the answer of the defendant, were properly sustained, because they refer to parts of the defendant's answer, that contained no defence to the action.

There is no error in the construction given by the Court, *mero motu*, to the letter of the defendant containing the proposition to purchase the lots. And it is clear that it was accepted by the plaintiff. This is evidenced by the deed being forwarded to the defendant, according to the terms of the proposition made by him; and the letter of the plaintiff did not modify the terms; and the defendant did not act upon the terms of that letter; he did not pay the plaintiff's debt to Briggs & Yard. Whenever written evidence is offered to the jury, it is the province of the Judge to charge the jury as to the legal effect of such evidence, whether he is asked to do so or not. The account of Gold against the plaintiff, alleged by the defendant to be assigned to him and pleaded in reconvention, was properly ruled out; because the plea showed that it was barred by the statute of limitations. If this had not been the case, although it was not assignable at law, yet, the assignment would have been sustained upon principles of equity, and could have been set up in re-convention. But the statute of limitations is as valid in equity as it is at law. The objection to receiving the other claim of two hundred dollars, in reconvention, is clearly sustainable. The defendant, by his plea, shows that it was paid by him, to compromise a difficulty in the title to the lots sold to him by the plaintiff; and he does not show any authority from the plaintiff to pay one cent for the compromise; nor is there any evidence of his having sanctioned such payment. Under such circumstances, it was clearly a voluntary and an unauthorized payment by the defendant, for which he could have no claim against the plaintiff. We can perceive no error in the judgment, and it is affirmed.

Judgment affirmed.

Note.—The written argument of the counsel for the appellant, in support of his application for a re-hearing in this case, has been considered. We believe that the material part of it is based upon a mistaken hypothesis: "That the lots conveyed, by the appellee, were to pay a debt due to the appellant, from appellee,

and further to pay the amount of appellee's indebtedness to Messers. Briggs & Yard." This was the proposition of the appellee, as perferable to appellant's proposition, that he would take the lots at the valuation of Mr. Merriman. The appellee did not reject appellant's proposition, but only expressed a preference. That this was not accepted by appellant is manifest from his receiving the deed from the appellee, and declining to pay Briggs & Yard; and his failure to do so, was an election to hold on to his own proposition, that the lots should be valued. We therefore adhere to the opinion already expressed in affirming the judgment.

LIPSCOMB.

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## KELLERS v. REPPIEN.

Under our system, all distinctions as to forms of actions are wholly disregarded, in bringing suits in the District Courts; and still less regard to forms is required in bringing suits in Justices Courts.

It is wholly immaterial by what name a Justice of the Peace may call an action, if the facts entitle the plaintiff to a judgment.

In determining whether a *certiorari* shall be issued to remove a civil case from a Justice's Court to the District Court, substance only, and not form should be regarded: if justice has been done between the parties, the judgment should not be disturbed.

The proceedings of the Justice's Court will be looked to for the purpose only of determining whether the *certiorari* was properly issued; that being determined in the affirmative, the case must be tried *de novo*.

Error from Galveston. This was an action originating in a Justice's Court, and commenced by attachment. The demand on which the attachment issued, was as follows:

"Mr. Carl Reppien to John Kellers, Dr.
"For one gold watch and chain to you delivered
"for repair, and not returned but wrongfully de-
"tained— $100 00."

The demand mentioned in the citation issued at the same time with the attachment, was as follows:

"To answer the complaint exhibited against him by John "Kellers plaintiff, suing to recover one hundred dollars for the

" wrongful detention and conversion of said Reppien of a cer-
" tain watch and chain, the property of said plaintiff."

A motion was made in the Justice's Court, and also in the District Court, to quash or set aside the attachment, on the ground that it could not issue in the case of a tort. The motion was overruled in both Courts, and exception taken.

On the trial in the District Court, it appeared in proof—(the parties were both sworn, as well as other witnesses)—that a watch and chain had been delivered to plaintiff in error, to repair. It further appeared that a burglary had been committed upon the shop in which plaintiff in error conducted his business, and the watch and chain stolen. The Court admitted evidence offered to prove negligence in keeping the property, with a view to charge defendant below on a contract of bailment, and charged the jury that if the watch was stolen by the negligence of the defendant the plaintiff was entitled to recover.

*Sherwood & Goddard*, for plaintiff in error. The points in this case are: First, There is no evidence to sustain the cause of action, as the same is set forth in the citation.

Second, The attachment should have been quashed and set aside: the demand being one on which an attachment could not issue.

Third, The action being for the wrongful conversion of the property, it could not be changed on the trial into an action on the contract of bailment—no notice having been given that such was the nature of the action. The Court below erred in admitting the testimony, and in the instructions to the jury, on this point, as well as in the refusal to charge the jury as requested.

Article 1695, (Hart. Dig.) provides that the Justice shall keep a docket, in which shall be entered, among other things, " a brief statement of the nature of the plaintiff's claim or " demand." This was done, as appears by the statement filed,

and also as recited in the process. This was the judicial notice to the defendant below as to what he had to meet.

*H. N. & M. M. Potter*, for defendant in error. The record shows no cause why the judgment should be reversed. The case presented is one of bailment, and the bailee (the defendant) was a paid agent, and as such was bound to use ordinary care about the safeguard of the property placed in his charge. (Seck v. Maesteer, 1 Campb. R. 138; notes to case of Coggs v. Barnard, 1 Smith's Leading Cases, top page 173, *et seq.*)

The action against a paid agent may be either assumpsit or case. The contract, on the part of the bailee, is for the performance of a legal duty. (Bank of Orange v. Brown, 3 Wend. R. 158; McCahan v. Hirst, 7 Watts, R. 175.) The affidavit on which the attachment issued swears to a debt due, and states a case proper for an attachment. (Hart. Dig. Art. 25; Hunt v. Norris, *et al.*, 4 Mart. R. O. S. 517, we ask the attention of the Court to this case, as it grew out of a bailment.) And we do not presume that the particular form or words used by the Justice in the citation to be served on the defendant, so long as a cause of action is stated, can vary or take away the plaintiff's remedy—More especially as the plaintiff has nothing to do with making out or issuing the process, and a petition stating the plaintiff's case was not necessary. This Court has decided that the distinctive forms of action known to the Common Law are not in force in this State—that, "every action is a special action on the particular case." (Caldwell v. Haley, 3 Tex. R. 319.) Certainly greater precision is not necessary in a citation from a Justice's Court, than in a petition in the District Court.

Lipscomb, J. The objections of the appellant upon which he seeks to reverse the judgment of the District Court, in this case, are all predicated upon the supposition, that the suit is for trover and conversion, and that the evidence is such as

shows it to be a bailment. The objections to the refusal to quash the attachment, to the evidence, to the charge of the Court, and to the verdict, are all rested upon that predicate. If this suit had been instituted in the District Court, and it had been subjected to the Common Law forms, where the distinction between the different forms of action are strictly guarded and enforced, there would be soundness in the objection. But, under our system, all those distinctions are wholly disregarded in the bringing of a suit in the District Court, and still less regard to forms as required in the Court of a Justice of the Peace. This suit was instituted in the Court of a Justice of the Peace, and, a verdict and judgment were given in favor of the plaintiff. It was then taken by a writ of *certiorari*, to the District Court, and tried by a jury, and a verdict again for the plaintiff: and the whole proceedings show that the suit was for the same cause in both Courts. It was for the value of a gold watch; and it is wholly immaterial by what name the Justice of the Peace thought proper to call the action, if the facts entitled the plaintiff to a judgment. In the proceedings before inferior tribunals, of such limitted jurisdiction, in civil suits, all that a revising Court will look to is the substance of their acts, and not to forms; and, if justice has been done between the parties, will very rarely disturb their judgments. And, furthermore, where a case, after judgment in the Justice's Court, is taken, by a writ of *certiorari* to the District Court, the regularity of the proceedings will only be looked to for the purpose of determining whether there was sufficient grounds shown to support the *certiorari*. This question settled and sustained, the case is again tried upon its merits; and the irregularities of the Justice's proceedings cannot be noticed. We believe that there is no error in the judgment and proceedings of the District Court, and that the same ought to be affirmed.

Judgment affirmed.

## William Reeves v. The State.

In order to convict, under an indictment for playing at a game of cards on which money was bet, at a house for retailing spirituous liquors, the betting must be proved as alleged.

An indictment charging that on &c., at &c., in &c., the defendant did play at a certain game with cards on which money was then and there bet, is sufficient, without alleging that the defendant bet the money or knew that it was bet.

Appeal from Walker. This was an indictment for playing at a game with cards on which money was then and there bet, in a house for retailing spirituous liquors. There was no proof that money was bet.

*J. P. Wiley*, for appellant. But, admitting for the present, that it sufficiently appears by the proof, that the three first ingredients exist in this case, (proof of the playing, place, and time,) yet as to the fourth ingredient, to wit: the betting of money on the game, there is no proof whatever. This, it is presumed, is a fatal infirmity in the proof, and will be decisive of this case, so far as a reversal and new trial are concerned; but for the purpose, if possible, of having a final disposition of the case, it is respectfully submitted that the indictment is too defective ever to sustain a conviction, in this, to wit: that it does not charge that the defendant bet, or knew that others bet upon the game played. The necessary *scienter* is wanting in the charge, to make the defendant accountable to the criminal law. If others bet without his knowledge, the proof of the fact would sustain the charge, and yet he would be guiltless, a proposition which can never be predicated of a good indictment. (See Howlett v. State, 5 Yerg. R. 146, 153; Smith v. State, 5 Humph. R. 163–4; 2 Yerg. R. 273.) It is submitted that a fair construction of Article 564, Hartley's Digest, in connection with the preceding Section, will not au-

thorize the conclusion that the Legislature meant thereby to dispense with the usual requisites in indictments, further than to dispense with the necessity of describing in the indictment the particular kind of game played, which, in many cases, would be difficult. The general rule that it is sufficient to follow the language of the statute is admitted; but this rule is to have a reasonable construction, and not such a construction as would do away with the Common Law requisites of an indictment, and in many cases lead to injustice and absurdity. (See Hart. Dig. Art. 563–4.)

*Attorney General*, for appellee. These cases (Royal v. The State and Reeves v. The State) are settled by the opinions of this Court in the cases of Prior v. The State, Cole v. The State, Sublett v. The State, The State v. Ake, except that in Reeves v. The State, there is an omission in the statement of facts, to show that "money was bet" on the game proven. This was probably an oversight in making up the statement; but we apprehend it is decisive against the State in this Court, and must result in the award of a new trial.

Lipscomb, J. All the grounds taken by the plaintiff in error, have been decided against him by previous decisions of this Court, with the exception of one. From the statement of facts, it is not shown that money was bet upon the game that was proven to have been played. The indictment contained an averment that money was bet upon the game. This is a material averment, and ought to have been proven. Without proof to support this allegation, the verdict in this case is unsupported by evidence; and a new trial ought to have been granted. The judgment is reversed and the cause remanded.

Reversed and remanded.

## Peter Royal v. The State.

An indictment for playing at a certain game with cards, on which money was bet, "in a certain house for retailing spirituous liquors, known as" &c., is sufficient, without any more specific averment that the house was at the time used for the sale of spirituous liquors.

Appeal from Walker. This was an indictment as follows: "that Peter Royal, late of said county, yeoman, in a certain "house for retailing spirituous liquors, in the town of Hunts-"ville, and county of Walker, known as Harvey Randolph's "grocery, on the first day of March, in the year one thousand "eight hundred and fifty-two, did play at a certain game with "cards, upon which money was then and there bet, contrary," &c. Verdict of guilty. Motion in arrest, on the ground that the indictment did not sufficiently allege that the house was used at the time for retailing spirituous liquors.

*Wiley & Baker*, for appellant. The indictment, in this case, charges the playing to have been "in a certain house for retailing spirituous liquors"—adopting the precise words of the statute, in describing the place. But it is submitted that following the language of the statute, in this particular, is not sufficient. A house may be for a purpose and yet not so used. Nothing can be taken by intendment in favor of an indictment. (Wharton, Am. Cr. L. 91.) We may readily suppose a state of facts which would admit every word in this indictment to be true, and yet no infraction of the law would occur. There has been erected a "house for retailing spirituous liquors," and after its completion, but before the business is commenced, a game with cards, upon which money was bet, is therein played. Or the house may have always heretofore have been used for retailing spirituous liquors, but unoccupied or used for

that purpose at the time the playing is alleged to have taken place. In these cases the indictment is true and no violation of the law. The indictment should charge that the house was, at the time, used or occupied as a house for that purpose. Or that it was a house in which spirituous liquors were then and there retailed.

This view of what is a necessary averment in this indictment, is sanctioned by this Court in case of Prior v. The State. (4 Tex. R. 383, 385.)

The 68th Section of the Act of 1848, (Hart. Dig. Art. 564,) only has reference to the name of the game played—and dispenses with the averment and proof, this only: but, in every other respect, the indictment must conform to the general rule for certainty. Indictments for offences *mala prohibita*, must be strictly construed. (Wharton, Am. Cr. Law, 92.)

*Attorney General*, for appellee. (See preceding case.)

Lipscomb, J. The judgment in the two cases above stated must be affirmed. The questions of law presented in them, were settled in the cases of Cole v. The State, and The State v. Ake, at Austin, the last Term.

Judgment affirmed.

## Peter Laturner v. The State.

Where the law respecting proceedings in the District Court, requires a recognizance, as on an appeal by defendant in a criminal case, a bond is not sufficient.

The 4th Section of the Act of 1846, (Hart. Dig. Art. 471,) imposes as a condition upon the right of the defendant, to appeal in criminal cases not capital, that he enter into recognizance in the terms therein prescribed.

Although the jurisdiction of the Supreme Court in criminal cases, is with such exceptions and under such regulations as the Legislature shall make; yet, it seems, that, whatever may be the interpretation of those words, when they qualify other grants of authority, they cannot, as used here, be so construed as to make the right of appeal dependent wholly on the action of the Legislature.

*Quere?* Where a defendant is convicted of an offence not capital, and his inability to give the recognizance in the terms of the 4th Section of the Act of 1846, (Hart. Dig. Art. 471,) is manifest, whether he may not claim an appeal without recognizance, standing committed, as in capital cases, to abide the event of the appeal.

Appeal from Brazoria. The appellant was convicted of murder in the second degree, at the Spring Term, 1852, and the punishment assessed at ten years confinement in the penitentiary. He prayed an appeal; and it was ordered that he be discharged upon giving a bond with good securities in the sum of $2,000, and his own bond in the sum of $5,000, conditioned for his faithful appearance from Term to Term, &c. The bonds were given and approved by the Clerk. The appellee moved to dismiss the appeal, because the appellant had not entered into recognizance as required by the statute. (Hart. Dig. Art. 471.)

*R. Hughes*, for appellant. We think the motion should not prevail. The appeal was taken upon the overruling the motion in arrest of judgment, and by taking it, it was, at the same time, perfected. This is shown, as we think conclusively, by the 1st, 3rd, and 4th Sections of the Act regulating appeals in criminal cases. (Hart. Dig. Art. 468, 470, 471.)

We take it, the recognizance is no part of the record for the

Supreme Court, because given after the appeal is taken; and it is not for the appearance of the defendant in the Supreme Court, but for his appearance in the District Court, from Term to Term; and if in this he fails, the Section says the recognizance may be forfeited. Where? Of course in the District Court; for the simple and satisfactory reason, that, he is not bound to appear elsewhere, and of course cannot be in default elsewhere. But if he fails to appear in the District Court as required by the recognizance, the 10th Section of the same Act directs what proceedings are to be had in that Court, to enforce his appearance, after judgment in the Supreme Court—the 4th Section prescribing the rule before judgment in the Supreme Court.

But it is insisted, that the appeal is not perfected, without a recognizance, in cases not capital. It is true the Section says a recognizance shall be given; and we admit, that, if the word "shall" is to be an imperative command, and cannot be construed into "may," then it will import a requirement, not to be disregarded, and until the recognizance be given, the Court will not permit the appeal to be taken; and the consequence is, that the appeal is not a matter of right, but is made to depend upon the ability of the defendant to give the recognizance required, and if of ability, subject to the contingency of being dismissed for the mistakes, irregularities, or ignorance of the District Courts.

But this cannot be the construction of the statute, for another reason. As has been seen, the appeal was taken in Court. But says the Attorney General, you applied for bail and it was granted upon terms, and no recognizance has been given, as required by the law, and the consequence is that the appeal has not been perfected. We would say, the consequence, instead of being that insisted upon, is, that the defendant to the prosecution stands in the predicament he did before applying for his discharge; and then, the question again recurs, can he have the benefit of the appeal without giving the recognizance required by the 4th Section. It would

be strange indeed, if the result of the legislation on this subject should be, that, he who is supposed to have committed a capital offence, and who has been convicted by the judgment of his peers, should be entitled to an appeal of right, and the defendant convicted of a less enormous offence, should be entitled to no appeal, because he cannot, or will not, give a recognizance as required by the 4th Section of the Act.

We can see no reason for the requirement of a recognizance in cases not capital, as a condition precedent to the right of appeal. The whole scope and object of the Act under consideration, is, the dispensing with the appearance of the defendant to the prosecution, in all cases in the Supreme Court. (Hart. Dig. Art. 471, 479.) By the Common Law, no proceeding could be had in any case, against an individual prosecuted for an offence, for which he might be imprisoned, unless he was present in Court; and the consequence is, that in the States where the Common Law rule prevails, the defendant who appeals has either to be committed, and in due time sent up, with the record, to the appellate Court, or recognized to appear. The rule, however, on the subject, being changed here, by the Act regulating appeals in criminal cases, no satisfactory reason can be given, why this Court may, upon the record, inquire upon the appeal in criminal cases, whether the defendant has been, in capital cases, committed, and in those not capital, recognized to appear in the District Court, as required by the statute, or if any such reason could be given, in what satisfactory conclusion such an inquiry might result. The appeal is only taken from the conviction, and in such case, the Court, by the express terms of the statute, is to affirm or reverse the conviction, and order such judgment to be given in the Court below, as the case may require. And this Court, in no sense, has any power or control over the person of the defendant, that being left to the Court below.

But, suppose the Court will look into the record, and upon an examination of it, finds a bond or bonds, given by the appellant, payable to the Governor of the State, and instead of

being executed as required by the order of the Court, the securities were not justified before the Clerk; then will this Court be justified in coming to the conclusion that the defendant below has been discharged upon such bonds? The record contains no evidence upon which to base such a conclusion; and such conclusion would be in conflict with the presumption usually indulged, that all officers do their duty, until the contrary is shown, it being the duty of the Sheriff by the order referred to, to discharge the possessor only on compliance with the order. Should this be thought to be the correct view, then the question comes up, is the prisoner entitled to his appeal, being in custody, no recognizance having been given in a case not capital? This, we think, has been sufficiently argued, and here we close.

*P. McGreal*, also, for appellant.

*Attorney General*, for appellee.

Hemphill, Ch. J. The appellant was ordered by the District Court, to be admitted to bail, on entering into bond with good and sufficient sureties; and he subsequently gave a bond which was approved by the Clerk of the District Court: and the appellee now moves to dismiss the appeal, on the ground that the appellant did not enter into recognizance, as required by law. The point, presented by this motion, was decided in the case of Hammons v. The State, Tyler Term, 1852; (8 Tex. R.;) and it was there held, that the want of a recognizance was fatal to the appeal. In that case the question raised—we may infer from the opinion—was as to the validity of the bond, which was in the ordinary form of one given in civil cases; and it was said, in substance, that the act regulating appeals in criminal cases having required a recognizance, the law would not be satisfied by the substitution of an instrument having the form of an ordinary bond.

In the case now under consideration, it is admitted that the

bond is not a compliance with the law; but it is contended that the right to prosecute the appeal does not depend upon the giving of the recognizance, but upon the notice or taking of the appeal; and that, by such act alone, the appeal is perfected. That this position cannot be maintained, will appear by reference to the provisions of the law and the Constitution, securing and regulating the right of appeal in criminal cases. The fourth Section of the Act of May 18th, 1846, declares, in substance, that the defendant on appeal, in all cases not capital, shall enter into recognizance with sufficient security in such sum as the District Court may require, conditioned that the defendant shall appear at the next Term of the District Court, and from Term to Term thereafter, to abide whatever judgment the Supreme Court may render, &c. The terms of this Section embrace appeals in all cases not capital; and in all of them a recognizance is required. This is a condition imposed upon the right of appeal, and it must be performed; and if, in any case, the performance may be excused, it must depend upon considerations not to be deduced from the words in which this Section is expressed.

The terms of the Article 789, requiring an appellant in civil cases to give bond with sureties, are not more peremptory than the words used in the Section we have cited; and yet it has been always held, that the spirit of the Article must be enforced, and the bond required, substantially given, before the appeal can be prosecuted. Under certain circumstances, appellants in civil cases, are relieved from the necessity of giving bond with security to perform the judgment, and are required only to secure the payment of costs and damages.

It is the misfortune of defendants claiming the right of appeal in criminal cases, that no exception is made to the general rule: no distinction is made between the rich and the poor —between him who has commanding influence and popularity, and the forlorn and unbefriended stranger. All are required to give recognizance with security in such sum as may be required.

Where the Legislature, in the exercise of legitimate authority, prescribes a uniform rule applicable to all cases, it would be hazardous to permit any departure from its terms—unless the deviation be more apparent than real, and the substance and spirit of the law be not infringed, but faithfully maintained and enforced. It is not to be denied, however, that such construction may be given as will preserve the substance, although the letter may not be strictly adhered to. The Article 789, for instance, requires appellants, within twenty days after the Term of the Court, to enter into bond, with two or more sureties, in double the amount of the debt, &c.; and yet an appeal will not be dismissed on the ground of insufficiency of the bond, where the appellant will immediately give one that is sufficient; nor will it be dismissed for the want of the signature of the principal in the bond, he being already bound by the judgment. (4 Tex. R. 149.) The substance of the law is enforced, though the strict letter may be disregarded. It has been contended with great ingenuity of argument, that this doctrine is applicable to the case under consideration—that, as the only object of a recognizance is to secure the appearance of a party, this would be effected by his commitment to custody, and that, where this is done, and the purposes of a recognizance answered, the defendant's right of appeal should not be defeated, and that we must presume, as no lawful recognizance was given in this case, that the appellant is now in custody.

It must be recollected that no departure has been permitted from the terms of the law, in relation to bonds in civil cases, except where no possible prejudice could arise to the other party. This is not the case where a commitment is substituted for a recognizance. Under the former, the charges of custody and support must be borne by the public, from which, when the latter is given, it is relieved. But independent of this, no provision is made for commitment in case of failure or neglect to recognize. The possibility of such failure was not contemplated; and no provision is made for the contingency. Where

it occurs, no other alternative is left to the Court, if the terms of the Act be merely consulted, than to pronounce sentence; and any construction which would authorize the District Court, as a general rule, to defer sentence against an appellant who has failed to recognize, and which would regard his commitment as equivalent, would be too loose to receive judicial sanction.

But there may be cases in which the refusal of the right to appeal, unless on recognizance, would be a denial of justice. The defendant might be wholly unable to procure sureties to join in the recognizance; and the refusal of appeal, under such circumstances, would make the remedy depend not upon the right but upon the ability of the party. In the first Section of the Act, the right of appeal is granted in all criminal cases, except in cases of contempt of Court; but what does this avail a defendant, if it is accompanied with an impossible condition. If he cannot give the recognizance, as required by law, the right of appeal will be, to him, but an empty sound, without substantial benefit. But, if the right were given by the statute alone, the Legislature would have the power to interpose any conditions or restrictions upon the exercise of that right. The conditions would accompany the grant, and could form no ground of complaint. But, in this State, the right of appeal flows from a higher source. It is guarantied by the Constitution. It is true that the grant of appellate jurisdiction over criminal cases, is with such exceptions and under such regulations as the Legislature shall make. Whatever may be the interpretation of these words, when they qualify other grants of authority, I cannot admit, that, as used here, they can be so construed as to make the right of appeal dependent wholly upon the action of the Legislature. The right exists under the Constitution; and had the Legislature failed to pass any law regulating its exercise, it could not, if claimed, have been denied: and if legislative action has been such as entirely to defeat the right, in cases where they did not intend to make exception, by imposing conditions impossible to be performed,

such legislation would contravene the spirit of the Constitution, and should not be supported and especially where the object to be accomplished by the condition, can be effectually secured in another mode, the pains and rigors of which the party is willing to encounter, in order that his right of appeal may not be lost. In all cases, then, in which the party's inability to give the recognizance in the terms of the law, is manifest, I should be disposed to hold that the District Court would have competent authority to commit the party to custody, there to abide the judgment or decree of the Supreme Court. But, in this case, it is not necessary to absolutely decide this question. There is no evidence here, of the inability of the party; and, if such were the fact, yet we must presume from the record, that he is not now in custody; and it is clear that he has not been discharged in virtue of a recognizance executed at the time and in the manner required by law; nor, in fact, upon a recognizance executed at any time. He is clearly, then, without the pale of the provisions of the law regulating the subject matter, whether it be construed strictly or liberally, or be so enlarged as to effectuate the guarantees of the Constitution, but in a mode which will accomplish the purposes intended by the regulations of the statute.

In imposing upon appellants the condition of recognizance, the Legislature intended to confer a benefit, and not inflict a burthen. The fact that there might be parties too feeble to grasp the advantages offered for their acceptance, escaped attention, or, doubtless, provision would have been made for cases of inability, and a committal would have been directed, until recognizance was given in such sum as may be required. In the Act supplementary to the Act regulating appeals in criminal cases, it is provided that if the defendant neglect to give recognizance, the Court shall commit him until recognizrnce be given, or until he be discharged by the due course of law. (Art. 572.) But this provision embraces only cases in which appeal is taken by the State. As yet, it has not been extended to cases where the appeal is on behalf of the defendant.

There being no recognizance given in this case as required by law, it is ordered that the appeal be dismissed.

Appeal dismissed.

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## Harlan's heirs v. Haynie.

Where there is a statement of facts signed by the Judge alone, the presumption is that the attornies of the parties, disagreed. Special Court.

The plea of not guilty, in the action of trespass to try title, puts in issue the plaintiff's right to recover; and a recovery cannot be sustained, if the title upon which the plaintiff relies, is invalid. Special Court.

Where a Mexican title is claimed to have been issued under a certain Article of the Colonization Law, the question arises, to what class of persons was the Article intended to apply, and what was the character of the bounty intended to be bestowed; and upon the concordance of the facts proved, with the result of the inquiry, depends the validity of the title. Special Court.

Article 17 of the Colonization Law of 1825, did not authorize a grant to any persons who were not introduced in connection with some special enterprize of colonization, or who, having emigrated separately and at their own expense, had not connected themselves with some colony; and no grant to any other class of persons can be sustained under this Article. Special Court.

The 17th Article of the Colonization Law of 1825, was confined to the grant of augmentations to those who had already obtained grants as colonists or settlers, and who by virtue of the size of their families, their superior industry and activity, were entitled to additional bounty from the government; an original grant, not purporting to be an addition to a grant of the ordinary quantity previously made, cannnot be sustained under that Article. Special Court.

In order to entitle an applicant to a grant under the 17th Article of the Colonization Law of 1825, the concurrent reports of the Commissioner and Ayuntamiento in his favor, were necessary. Special Court.

Mexicans by birth alone, were capable of receiving a grant of land by way of sale. Special Court.

Nothing is to be presumed in favor of a superior acquaintance of the former authorities with the laws then in force; nor is the issue of a grant at all conclusive of either the authority to grant, or the capacity to receive. Special Court.

Appeal from Grimes. This was an action of trespass to try title. The appellee brought the suit against the ancestor and

intestate of the appellants. He based his claim to the land in controversy, upon a deed alleged to have been executed by William H. Steele, a Special Commissioner, appointed to expediate the title in conformity with a grant or concession made by Viesca, Governor of Coahuila and Texas, on the 20th of April, 1830. The deed of Steele was without date, but the petition stated it was made in February, 1835.

The appellee's original application for the grant was dated October 6th, 1829. It represented that he was a merchant residing in Bexar, and finding himself in possession of the necessary capital for agriculture and stock raising, he prayed that there be granted to him a league of land, in conformity with Article 17 of the Colonization Law of 24th March, 1825, which he offered to settle and cultivate.

The Commissioner, General Padilla, reported that the petitioner was a citizen of the State by a special letter granted to him by the Honorable Congress, with property of his own with which he carried on a clothing store; and that he was a widower with one daughter, who was with her relations in the United States, to be educated.

Upon this representation, the Governor conceded to the petitioner the league, which he solicited, in the place where it may best suit him, and directed "the Commissioner General that this government has appointed," to put him in possession, and expedite the corresponding title.

On the 1st of December, 1834, the appellee addressed a petition to Steele, in which he says, that not having received a title to the sitio of land conceded to him on the 20th of April, 1830, and which he had selected since the year 1832, on the East margin of the river Brazos, "commencing at the upper corner of a sitio of John Teal," he prayed that he (Steele) would order the land to be surveyed, and put him in possession of it personally, and expedite the title—saying that the Governor had appointed him Special Commissioner for that purpose.

On the 20th December, 1834, Steele directed J. B. Chance to survey "the sitio which the party interested solicits on the

indicated land," and to make return, &c. Chance made a survey of a league of land "beginning on the upper corner of the eleven leagues of George Antonio Nixon," and returned the field notes, in accordance with which, the deed was made by Steele.

There was no evidence in the record, that Steele was appointed Special Commissioner, except the recitals in Haynie's petition and in Steele's deed; or that he had any authority to make the deed. The proof showed that Padilla was the General Commissioner, who was directed to expedite the title, and that he remained General Commissioner for some time after Haynie received his concession.

The title set up by the appellants, consists of a headright certificate issued to Harlan by the Board of Land Commissioners of Robertson county, on the 3rd of May, 1838, and a survey on the first of August following; the approval of the certificate by the Board of Investigating Commissioners, and a patent from the government on the 6th of October, 1846.

It was in proof that Harlan settled the land in 1837, and that he and his family had resided on it ever since, and made valuable improvements.

The deed to Haynie, if recorded at all in the county, was not presented for record until the 16th August, 1838.

Special Court composed of WHEELER, Justice, and Robert C. Campbell and Samuel Yerger, Special Judges.

*J. Webb*, for appellants.

*Gillespie & Sayles*, for appellee.

CAMPBELL, S. J. Preliminary to the examination of Haynie's title, an objection, urged by his counsel, makes it necessary for us to ascertain whether it is properly before us. It is objected, that, inasmuch as the record does not show a disa-

greement of the counsel conducting the cause in the District Court, the Judge had no right to certify a statement of facts. To this I cannot assent. It is true, that counsel must disagree before the Judge is authorized to make out a statement; but it is not therefore true, that such disagreement should appear of record. The latter part of the 135th Section of the District Court Act of 1846, provides that, where counsel disagree, they shall respectively furnish statements of the evidence to the Judge, "who, from the statements so furnished him and his own "knowledge, shall during the Term at which the trial was had, "make out a correct and exact statement of the facts of the "cause, as given in evidence, and shall sign and seal the same "and cause it to filed." In this case, the statement sent up does not affirmatively show that a disagreement took place between the respective counsel; but, as the Judge's name alone is signed to it, the presumption is irresistible that it did.

But, had the record contained no such statement, it is believed that the appellants' bill of exceptions brings up the appellee's title. It is true, that its authentication was alone objected to; still, as it is in the record and makes part of it, it is in for all purposes, and the right to pass upon it, cannot, I conceive, on any satisfactory ground, be denied.

As it would occasion this opinion to be extended to too great a length, a discussion and determination of the many errors assigned, will not be made. The chief and leading point this Court must determine, is, whether Haynie's title is a valid subsisting title or not; and that point, it is believed, the 4th, 10th and 11th errors assigned, raise.

Although, in the argument, Haynie's counsel is understood to have resisted the attacks, or many of them, made upon the title, because the objection, urged in the District Court, only extended to the certificates of authentication; still, I am of opinion those attacks are legitimate, and that it is proper to assail it, if, on its face, the grant is open to objection. Special pleas were not necessary. The general denial put the appellee upon proof of his right to recover the land in controversy;

and that proof must be sufficient for the purpose. The Supreme Court, in the case of Mason v. Russell, 1 Tex. R. 726, not only determined that such was the effect of the general denial, in actions of trespass, but that, under it, proof having relation to objections *dehors* the grant, was admissible.

With these remarks the examination of the question, whether the grant to Haynie is a good and valid grant, will be proceeded with.

Haynie, the title shows, represents that he is a resident and citizen (special letters of citizenship having been granted to him by the government,) of Bexar; that it is his intention to settle himself in the country; and asks that there be conceded to him, in virtue of the 17th Article of the Colonization Law of March 24th, 1825, one league of land of the vacant lands of the State. It also shows that Padilla represents Haynie's application to the Governor favorably; and states that he is a widower with one child, absent with her relations in the United States of the North. It also represents that the Governor, on the 20th of April, 1830, in virtue of the law of 1825, concedes the land petitioned for, and authorizes Padilla to put Haynie in possesion of the land he may select and extend to him the necessary title. And it also shows, that, upon Haynie's petition, preferred in 1834, to William H. Steele, represented to have been specially commissioned for that purpose, the latter deeded to Haynie the land in suit.

Haynie's title, his counsel warmly maintains is good and valid under the 17th Article of the law of 1825.

"Article 17. It appertains to the government to augment "the quantity indicated in 14th, 15th and 16th Articles, in "proportion to the family, industry and activity of the colon- "ists, agreeably to the information given on these subjects "by the Ayuntamientos and Commissioners; always bearing "in mind the provision of Article 12 of the decree of the "general Congress on the subject."

The inquiry arises, to what class of persons was the above provision intended to apply, and what was the character of

the bounty intended to be bestowed? Colonists were to be the beneficiaries, but not in a restricted sense. The word was designed to embrace the character of emigrants described in the 14th, 15th and 16th Articles of the law, that is, married and single men introduced in connexion with some special enterprize of colonization, and similar persons who may "have emigrated separately and at their own expense." These two classes constituted colonists, in the meaning of the Section; and a destinguishing characterestic that they were colonists, was their being attached to some new town, or in better understood language, some Empresario colony. No other character of colonist, if any there was, it is believed, was in the contemplation of the Article cited.

But, and the other branch of the inquiry comes up, what was the character of the bounty intended to be bestowed on colonists? The words of the Article are: "It appertains to "the government to augment the quantity indicated, &c., ac- "cording to the family, industry and activity of the colonists." Now, what are we to understand by augmentation? Is it an original concession of some certain quantity, or an increase allowed in addition to a quantity already given? Lexicographers define augment to mean, "an enlargement by addition," "to enlarge in size," "to swell." (Webster.) And so I understand it. Then, I do not take the Article 17, as authorizing an original grant of land, even to a colonist. Other Articles apply to that description of grants, and not the 17th. It, in my judgment, must necessarily be understood as assuming that the colonist, claiming the benefit of its provisions, has already obtained land. It does not, it will be seen, warrant concessions to colonists, as mere colonists; but, to colonists who, in consequence of either their family, industry or activity, are entitled to greater consideration. I presume it will not be claimed that one having neither a family or any special industry and activity, would, under this Article, have any claim on the bounty of the government.

But we are not without an almost contemporaneous con-

struction of this Article. In the instructions of 1827, to the Commissioner, this Article is found:

"Article 25. Should any colonist solicit, in conformity with "the 17th Article of the law, an augmentation of land, beyond "that designated in the preceding Articles, on account of the "size of his family, industry or capital," &c. Here, we see that the augmentation is to be beyond that designated in the 14th, 15th and 16th Articles of the law of 1825, and is to be regulated by the size of the family, &c.

It may be said, too, that it has received a construction at the hands of the Supreme Court. In the case of Norton's succession v. The Commissioner of the General Land Office, (2 Tex. R. 357,) it was decided that the Board of Land Commissioners were not authorized to confirm an augmentation. Their province simply was to adjudicate headrights.

So simple, apparently, is the language of the 17th Article, that I might, I think, rest satisfied with what I have said in relation to the character of the concession it was intended to encourage: but I will adduce another.

Colonists so called, that is those introduced by a contractor, it will be remembered, did not derive their titles from the government proper. They held no communication with it. A Commissioner ascertained their qualifications, and with the approbation of the Empresario of the colony, put them in possession of their lands, and extended to them their titles. A settler, after attaching himself to a colony, was admitted by the political authority, who made their report to the government; and the last either put them in possession or ordered it to be done by a Commissioner. But, under the 17th Article, this course was not adopted. The words of the Article are: "It appertains to the government to augment the quantity," &c. Here, we see, the grant was the act of the government, and was limited by its discretion. It was to one requiring no examination, by a Commissioner, as to his religion and moral character, but to one entitled by merit to the public liberality.

These grants came from a source, the others did not, and hence are in their nature different.

But a further analysis of the 17th Article may with propriety be made. The government, it appears, could augment the quantity, &c., "agreeably to the information given by the Ayuntamientos and Commissioners." Here the two authorities are connected by the word "and;" and it is believed that the concurring and conjoint representations of the two were necessary.

It may be said that this view is too strict, and that a Commissioner alone was competent to make the required representations to the government. Whether it is, can be best ascertained by an examination of the Colonization Law, in its general scope.

By the 5th Article, colonists were required to prove their christianity, morality and good habits, by the production of a certificate from the place whence they came, which certificates the Commissioner was required scrupulously to examine, and which were to be passed to the Empresario; and, unless the two concurred, the colonist could not obtain the land he asked for. Similar strictness was made necessary as to settlers. They were made to report themselves to the political authority. And the last reported them to the government. Now, here we see a colonist or settler could not obtain land upon the simple unsupported opinion of one functionary. Several had to authenticate their qualifications. There had to be, in the one case, the concurring approval of the Empresario and Commissioner; and in the other, that of the political authority and the government. Why was this extreme caution observed? As stated in the 2nd Article of the instructions of 1827, it was that the State might not be imposed on by "false recommendations." Although the government may justly be said to have acted with great liberality in the disposition of its domain, still we see that it observed every precaution to avoid imposition.

Now, would there not have occurred as great a probability

of imposition under the 17th Article, as any other? It seems to me that greater caution should have been observed in regard to grants made under it, than under any other. The quantity contemplated was beyond a colonist grant, and the representations leading to them were made to the government located, as we know, remotely from the place at which the Commissioner and colonist were established, and from which remoteness, the government, without great trouble, would have found it impracticable to learn whether a meritorious demand had been made or not. A corrupt Commissioner, acting alone and without any check, could have carried into execution frauds of no inconsiderable magnitude.

But, give to the Article the interpretation assumed, and the liability to imposition would not be likely to occur. The Ayuntamiento being composed of several, the chances of imposture would be correspondingly diminished. This body, too, was in frequent communication with the government.

Such is the construction to which the 17th Article of the law of 1825 is, in my opinion, entitled; and it only remains to be ascertained, whether the facts disclosed by the appellee's grant can be brought within its shelter.

Was Haynie a colonist, either in connection with any Empresario contract, or a settler in the sense of the 16th Section? It cannot be pretended that he was. If the first, his title would have emanated from the Commissioner of a colony, with the consent of the Empresario. The government would not have appeared connected with the grant, it not being an augmentation. If the last, the grant would have issued directly from the government or a Special Commissioner, the political authority of the place to which he had attached himself having first admitted him and put him in possession of his lands. Neither as a colonist or settler, as understood by the 14th, 15th, 16th and 18th Articles of the law of 1825, is he shown to be by his title.

Is Haynie's grant an augmentation? It will not be pretended. Every statement in his title shows that he had received

no antecedent grant of land. He does not, in terms, ask for an augmentation; and the facts stated by him and Padilla, in relation to his circumstances, set up no right to demand any thing of the kind. He is represented as a clothing merchant, resident in San Antonio de Bexar, and not a colonist settler. No one fact is alleged, calculated to identify him as of the classes of settlers described in the 14th, 15th and 16th Articles of the Colonization Law.

Neither does it appear that his application had been submitted to the government by the Ayuntamiento and Commissioner; and as it was not, though it could be considered an augmentation, the government was without authority to concede the land under the 17th Article.

Under this view of the 17th Article, then, it will be seen, Haynie can find no protection. And it is believed that he is equally unprotected by the other Articles of the law. He has disclaimed taking as a purchaser; and properly, inasmuch as Mexicans by birth could alone, in that way, acquire lands. And it has not been claimed for him, that his grant is good under the 3rd and 4th Articles.

As the opinion given must be decisive of the title, there could be no propriety in discussing the other errors assigned. They will therefore not be noticed.

I deem it due to myself to say, that it has been my anxious desire to affirm the judgment; for it may be that Haynie had just claims upon the bounty of the State, but regardless of that desire, my views of the Colonization Law of 1825 have not allowed me to do so. Let the judgment ne reversed and the case dismissed.

Reversed and dismissed.

Wheeler, J., dissented.

## Stewart v. Jones, Adm'r.

Where a petition in the nature of a bill of review, or original bill to set aside the judgment of a former Term, for fraud, is filed, and judgment is rendered, setting the former judgment aside and granting a new trial, such judgment is interlocutory, and will not be revised on error or appeal, until after final judgment; nor, in such a case, will a writ of error lie to the first judgment, after it has been thus set aside.

Appeal from Matagorda. Stewart brought suit against Jones and wife, as administrators of Kingston, to recover two hundred acres of land, and obtained a decree in his favor entered up the 7th of October, 1848. Afterwards, Jones was appointed administrator, *de bonis non*, of the estate of Kingston; and, on the 6th of September, A. D., 1849, filed his petition, to set aside the decree before mentioned. The grounds on which the petitioner sought to set the decree aside and have a new trial granted, were, that it was obtained by the fraud and collusion of the counsel representing the administrators of Kingston, and Stewart, in whose favor it was rendered, and without any authority from the administrators; that it was made by the consent of the counsel, without any defence or hearing. There was a verdict in favor of the petitioner, on the issues presented; upon which, the Court entered up a judgment in the following terms: "It is therefore "considered by the Court, that the decree of this Court.ren- "dered on the 7th day of October, A. D., 1848, in the case of "Warner Watson Stewart against Phineas James, and his wife "Catherine James, administratrix of the estate of William "Kingston, deceased, numbered seven hundred and twenty- "seven, be and the same is hereby set aside and held for "naught; and that a new trial in the said suit is hereby "granted; and that the said Henry Jones, administrator of "the estate of the said Kingston not administered, be and he

"is hereby allowed to make himself a party defendant, in said "suit; and that the said suit be docketed in favor of Warren "Watson Stewart against Henry Jones, administrator of the "estate of William Kingston, deceased, not administered, and "proceed in that style; and that said Jones be and he is al- "lowed to defend said suit; and, by consent of parties, said "suit is continued to the next Term; and it is further order- "ed, that plaintiff recover of the defendant Stewart his costs, "for which execution may issue." The records showed that there was a motion for a new trial, which was overruled and notice of appeal given. The administrator of Kingston also prosecuted a writ of error to the former judgment; which is disposed of by the opinion in this case. The writ of error was prayed, after the judgment in this case was rendered.

*Dennison* and *Alexander*, for appellant.

*McGonigal* and *Harris & Pease*, for appellee.

Lipscomb, J. A preliminary question, we believe, is decisive of this case. Can we take jurisdiction, and revise the judgment rendered in these proceedings, setting aside the former judgment, and granting a new trial? We believe we cannot; because it is an interlocutory, and not a final judgment. That the District Court had jurisdiction, in this way, to grant a new trial, was decided by this Court, at Tyler, April Term, 1852.

If error has intervened in the proceedings, it cannot be revised and corrected, until after the case has been disposed of by a final judgment in the Court below. It is not perceived that the plaintiff is placed in a worse condition, by setting aside the judgment or decree, in this case, than if a new trial had been granted in the ordinary way, before the adjournment of the Court. In the proceedings to set aside the first decree, which we have been considering, the record in that case, is made a part of the proceedings in this; and the record shows

that it is the same that is now before the Court, in the case of Jones administrator v. Stewart, which was brought up by the plaintiff in error, after he had obtained an interlocutory decree setting the judgment aside and granting a new trial, as his counsel alleges, out of abundance of caution, least his proceedings to set aside the decree should ultimately prove unsuccessful, and that the first decree should be sustained, after the time for bringing it up by writ of error had been barred. Whatever the consequences to him ultimately may be, he has deprived himself of the opportunity of having that judgment, or decree, revised, by procuring it to be set aside, and having a new trial granted. It is not now a judgment remaining in force, in the District Court; no more so, than if it had been set aside and a new trial granted to him, in the ordinary way, before the adjournment of the Term at which it was rendered. The conclusion therefore is, that both cases must be dismissed. We have no jurisdiction, until after final judgment; and consent cannot confer jurisdiction. Whether the proceedings under which the first decree was set aside, be regarded as a bill of review, or an original bill to set the former judgment aside, on the ground that it had been fraudulently and surreptitiously procured, is not material at present, and cannot, now, be inquired into. Its effect was to vacate and set it aside, by proceedings having that object directly in view; and it cannot now be considered as a final decree, remaining of record in the Court below, and subject to revision. If it was erroneous, to set it aside, such error can only be revised after the final disposition of the case in the Court below, where the suit is still pending. Both cases must be dismissed at the cast of the party bringing them into this Court.

Appeal dismissed.

## Hubbell v. Lord.

It seems that a general demurrer ought to be entertained at any time.

The judgment will not be reversed because the Court refused to entertain a general demurrer after answer to the merits, where the demurrer could not have been sustained.

A note payable at a particular place in the State of Louisiana, need not be presented at that place in order to bind the maker *prima facie*.

Appeal from Galveston. This was an action on a promissory note, made by Hubbell, payable to Thos. Medley, & Co., or order, at their office in the city of New Orleans, in the State of Louisiana. There was no averment of presentment for payment at the place indicated. The entry of judgment read: "This day came the parties by their attorneys—the de- "fendant offered to file a demurrer by way of amendment, "which the Court refused to permit, he having previously "pleaded in bar to the merits of the cause," &c. Verdict and judgment for the plaintiff. The errors assigned were,

1st. The refusal of the Court to entertain the defendant's demurrer.

2nd. The failure to allege and prove a presentment of the note at the place where it was made payable.

*Sherwood & Goddard*, for appellant. The note being made payable in New Orleans, the law of Louisiana must govern so far as the incidents are concerned on which the right of action is based. In other words, if the matters set forth in the petition would enable the plaintiff to recover under the laws of Louisiana, they could recover here—otherwise, not.

Neither the State of Texas, in its legislative capacity, nor its Judiciary, by any construction, could dispense with any of the conditions imposed by the law of the place where the contract was to be executed, and which attach as conditions precedent, to be performed before action could be brought. (Story on

the Const., Vol. 3, p. 250; Green v. Biddle, 8 Wheat. R. 1–84; McCullough v. State of Md., 4 Wheat. 316.)

The principle of the Common Law, as settled in England in the House of Lords, is, that when the bill or note is made, or accepted, payable at a particular place, "the declaration must aver presentment at that place, and the averment must be proved. (Rowe v. Young, 2 Brod. & Bing. 165.)

Mr. Justice Story discusses this subject in his treatise on Promissory Notes, page 257, Sections 227–8–9; and also cites the case of Wallace v. McConnell, 13 Pet. R. 36. That was a case where the note was payable at United States Branch Bank, at Nashville, Tennessee. By the law of the State of Tennessee, at the time that note was made, demand at the place of payment was not necessary as a condition precedent to an action against the maker, as is seen by the cases of McNairy v. Bell, 1 Yerger's Rep. 502, and Mulhevrin v. Hannum, 2 Yerger, R. 81.

The learned commentator, in the note referred to, by way of remark, says: "It may not be improper for me to add, that "being a Judge of the Supreme Court of the United States, "when both the case of the U. S. Bank v. Smith, 11 Wheaton, "172, and the case of Wallace v. McConnell, 13 Peters, 136, "were decided, I was not present at the argument of the former, and in the latter case, I dissented from the opinion of "the Court, although my dissent was not expressed in open "Court."

The Judge also alludes to the note in 3rd Kent's Com. 97 and 99, where the commentator holds the English rule to be the true one, and adds: "This is the plain sense of the con-"tract, and the words, 'accepted, payable at a given place,' "are equivalent to an exclusion of a demand elsewhere." Even in the case alluded to in the House of Lords, (Rowe v. Young,) it is impliedly conceded that the King's Bench had maintained that on a note, payable at a particular place, demand at the place must be averred and proved: Lord Elden observing, that he could not "understand the good sense of

"the distinction of the King's Bench, that if a promissory "note be made payable at a particular place, the demand "must be made there, because the place being in the note, is "a part of the contract;" "but if a bill be accepted, payable "at a particular place, it is not a part of the acceptance, and "the presentment need not be there."

The law of Louisiana, where the note in this case was made payable, is settled beyond any question to the effect, that where the note is made payable at a particular place, demand at the place must be averred in the petition and proved at the trial. (Muller v. Croyhan, 3 Martin, N. S. 423; Erwin v. Adams, 2 La. R. 318; Warren v. Briscoe, 12 Id. 472; Gale v. Kemper's heirs, 10 Id. 208; Warren v. Allnutt, 12 Id. 454; Stillwell v. Bobb, 1 Rob. La. R. 311.)

This last case was brought up for a re-hearing, as appears from Deslix' Index. See also Deslix' Index, p. 357, Sections 70, 74.

*H. N. & M. M. Potter*, for appellee.

WHEELER, J. The precise question, in this case, was determined in the case of Andrews v. Hoxie. (5 Tex. R. 171.) The note was made payable in New Orleans; and we held that it was not necessary to aver presentation of the note for payment, at that place. Repeated decisions have settled the law of the Court on this question adversely to the appellant.

The refusal of the Court to entertain the demurrer, can afford no ground for reversing the judgment; for the reason, that, had the demurrer been considered, it was not well taken and must have been overruled. It could not have benefitted the defendant, if it had been entertained; and he, therefore, cannot have been prejudiced by the refusal to entertain it. The refusal to entertain, instead of having considered and overruled it, is a mere irregularity, not of a character to authorize a reversal of the judgment.

Judgment affirmed.

## Fessenden, Adm'r, v. Barrett.

The doctrine of Bennett v. Gamble, (1 Tex. R. 124,) referred to, but not insisted on—not being essential to the decision of the case. But *quere?*

The statute of limitations does not fix any period within which a *scire facias* to revive a judgment or an action of debt upon a judgment, must be brought, where an execution has been issued and returned, within the year. The rules, then, by which the period within which this action may be brought, are to be found, not in the statute, but in acknowledged legal principles, in relation to the subject matter: and one of the best established of these rules, is, that where a statute has fixed a bar to one action in a particular case, the remedy in analogous cases, not provided for by the statute, should be restricted to the same period.

The principle upon which our Courts apply the analogies of the statute of limitations, to bar equitable remedies, also authorizes the Court to fix a bar to a legal remedy, where none has been fixed by the statute.

An action upon a judgment of any Court in this State, upon which execution has issued within the year, will be barred after the lapse of ten years from the last act of legal deligence.

Where there is no time fixed by the statute, within which suit shall be brought upon a particular sort of claim for money, payment will be presumed, unless rebutted by circumstances, after the lapse of the period fixed for the commencement of actions upon claims of a like nature.

Appeal from Austin. This was an action of debt, on a judgment. Among other matters, the defendant pleaded,

1st. That neither had he, nor had his intestate, at any time withing ten years next before the commencement of the suit, undertaken or promised to pay, in manner and form as the plaintiff had complained.

2nd. That, the deceased intestate of the defendant had, in his life time, paid the sum, in the petition mentioned, together with all interest and costs.

3rd. That the deceased intestate of the defendant had, after the accrual of the cause of action to the plaintiff, become a bankrupt, according to the statute in such cases made and provided.

The plaintiff excepted to the first and third pleas of the de-

fendant, viz: the pleas of limitation and bankruptcy. His exceptions were sustained, and this ruling of the Court was, among others, assigned as a ground for the reversal of the judgment. In reference to the first plea, viz: the plea of the lapse of ten years, it appeared that the judgment, sued upon, was recovered in October, 1838; and that, during the said month, an execution issued, which was, on the 24th December, returned, "no property found." On the 24th June, 1840, another execution, issued as an original, without any reference to the first or previous execution; and this, in October, was also returned, "no property found."

The petition, in this case, was filed on the 28th August, 1850: so that nearly twelve years had elapsed since the date of the first, and more than ten since the date of the last execution.

*N. H. Munger*, for appellant.

*Holland & Hunt*, for appellee. The plea of ten years limitation, in bar of a judgment, is applicable only in those cases in which execution was not issued in twelve months; and not to cases in which execution was issued, and return made, within twelve months from the rendition of the judgment.

The statute has made provision for a case in which execution has not issued within twelve months after judgment, and also for a case in which execution has issued and no return made thereon. But for this case, in which, execution was issued and return made within twelve months, no statutory provision can be found. (Hart. Dig. Art. 2378.) It is therefore contended that no lapse of time will bar the judgment in the above stated case. And if barred by any lapse of time, it can only be done by the Common Law rule, by raising an artificial presumption, in analogy to the statute of limitations, of payment. If a bond or other specialty was not demanded for twenty years, and there has been no circumstances to show that it was still acknowledged to be in existence, payment is to be presumed. (Ang. on Lim. p. 95 Sec. 15.)

If the defendant's intestate were now alive, could he avail himself of the statute of limitations? Or would not the plaintiff be entitled to his execution, on application to the Clerk of the District Court of Brazoria county? By the Spanish Law the personal action, or the action in the *ordinaria*, and the execution granted thereon, were prescribed within twenty years. (1 Tex. R. 741.)

The Common Law only raises the presumption of the payment of a judgment, after the lapse of twenty years. (2 Am. L. Ca. p. 548.)

Suppose the plaintiff had sued out his execution from Term to Term, up to the time of the death of Fessenden—the judgment would not have been barred. And by neglecting thus to sue out his execution, he only lost his lien if any was ever acquired.

Hemphill, C. J. A question has been made relative to the sufficiency of the return, this being signed by the Deputy Sheriff alone; but the examination of this, as it is not essential to the decision, will be waived.

It has also been contended, that the regular succession of executions not having been kept up, and that more than eighteen months having elapsed between the issue of the first and the second execution, the latter is void; and this position is, beyond doubt, sustained by the principles decided in the cases of Bennett *et ux.* v. Gamble, (1 Tex. R. 124,) and Scott & Rose v. Allen. (Id. 514.) But, were the execution admitted to be valid; yet, this would not materially affect the question raised in the plea. Ten years elapsed from the date of the second execution, prior to the commencement of this action; and if this be sufficient to operate as a bar, the plea was good and should have been sustained: and the question for consideration is, whether ten years, as pleaded, or twenty years, as insisted upon in the argument, must elapse before satisfaction of the judgment can be presumed.

Unfortunately, there is no provision of the statute of limitations, which is directly applicable to the case. In the second Section of the Act of limitations, (Art. 2378,) it is declared, in substance, that judgments in Courts of record, where execution had not issued within twelve months after rendition, may be revived by *scire facias* or action of debt, within ten years next after the date of such judgment, and not after, &c., &c. But, in this case, execution had issued and was returned; and the sufficiency of that return will not now be questioned; consequently, neither the provision we have above cited, nor does any other in the statute, directly apply to the contingency presented by the facts of this case. The rules, then, by which the period within which this action may be brought, are to be found, not in the statute, but in acknowledged legal principles, in relation to the subject matter: and one of the best established of these rules, is, that where a statute has fixed a bar to one action in a particular case, the remedy in analagous cases, not provided for by statute, should be restricted to the same period. For instance, in England, (and prior to the statute of William IV., which gave the sanction of positive law to the doctrine) a right to an incorporeal hereditament was held to be acquired by an adverse, uninterrupted enjoyment of twenty years, in analogy to the provision of the statute of limitations of the 21st James I., under which, by an adverse possession of twenty years, an action of ejectment was barred, and a possessory right to the land was given; (Angell Lim. 3, note;) and, in the United States, grants of such hereditaments have been freely presumed: "it being the policy (in the lan-"guage of Mr. Greenleaf) of Courts of law, to limit the pre-"sumptions to periods analogous to those of the statutes, in "all cases where they do not apply." (2 Greenl. Sec. 539; 8 Pick. R. 504.)

In States where there is a separate chancery jurisdiction or organization, statutes of limitation are not (at least they were not formerly) addressed to Courts of equity. In terms, they embraced only actions at law. But Courts of equity, (in which,

by their own inherent jurisdiction, effect had always been given to lapse of time, and the laches and negligence of plaintiffs, treated with discountenance,) after the passage of statutes of limitations, although they did not in express terms, come within their operation; yet, in a great variety of cases, acted upon the analogies of the statute, and gave to lapse of time, the effect which it had, by positive provision, on kindred subjects, in Courts of law. All causes of relief upon equitable titles, or claims touching real estate, were held barred by the lapse of twenty years, by analogy to the bar of the right of entry, or action of ejectment. A mortgagee in possession for twenty years, without acknowledgment of the existence of the mortgage, was presumed to hold by an absolute title. And, if a mortgagor be in possession for the same space of time, without acknowledgment of the debt, the debt will be presumed satisfied. And a judgment, not acknowledged by the debtor and without any effort on the part of the plaintiff, for twenty years, to enforce it, will be presumed to be satisfied. (Angell, 24, 25; 2 Story, Eq. Sec. 1520; 3 Phill. Ev. Cowen & Hill's Notes, part I. p. 508; 1 Greenl. Sec. 39.) In Smith v. Clay, (Ambler, 645,) the rule, in relation to analogies, is expressed by Lord Camden as follows: "As often as Parliament had limited the "time of actions and remedies, to a certain period, in legal "proceedings, the Court of Chancery adopted that rule, and "applied it to similar cases in equity. For when the Legisla- "ture had fixed the time, at law, it would have been prepos- "terous for equity (which, by its own proper authority, always "maintained a limitation,) to countenance laches beyond the "period that law had been confined to by Parliament; and "therefore, in all cases where the legal right has been barred "by Parliament, the equitable right to the same thing has "been concluded by the same bar." (DeCordova v. Smith, *Ante*, 129.)

These authorities, from the countless number that might be cited, show the rule pursued by Courts, in applying the bars of Acts of limitations, in cases analogous to those expressly provided for by statute.

The question now presents itself, to what statutes are we to look for analogies, in attempting to apply the rule? Unquestionably to our own, and not to those of foreign countries. The rule is of universal application. It is not limited to the jurisprudence of any particular nation. Its design and policy is to consolidate and harmonize the entire structure of prescription, in the State in which it is applied, and to impress uniformity upon the periods within which rights, in all cases of a like nature, might be acquired, and remedies must be prosecuted.

The beneficence of its operation, when applied with reference to the statutes of other States, has been universally acknowledged. And the reasons which impelled Courts, elsewhere, to respect the analogies of their own laws, and induced them to discuntenance laches, in cases not provided for, beyond the period fixed in similar cases by law, impel us, with the like cogency, to ascertain and be governed by, the analogies of our own, and not those of the statutes of other States; and the result, upon the fabric of our remedial system of procedure, will be alike harmonizing and invigorating.

In examining the Act of limitations, for a subject to which the one under consideration is of a kindred nature, we find a striking analogy between a judgment without execution, or without any diligence at all, and the case before us, in which there was execution or some diligence, but which had long ceased to do any act or make any effort to collect the judgment. In the former case, the failure to take out execution raises such presumption of satisfaction, as to drive the party to his suit; and in the latter case, when diligence ceases and a continuous succession of executions is not kept up, the plaintiff is under the like necessity of resorting to his action. In the former case, the action is, by law, prescribed within ten years from the date of the judgment; and the plaintiff cannot complain, if, in the latter, his action be circumscribed within the ten years subsequent to the date of his last execution, or the last effort of legal diligence, which he has made towards enforcing

his judgment. If the second execution of the plaintiff be allowed any force, (although it is entitled to none under the decisions of this Court,) yet the plaintiff, by his subsequent laches, lost all right to proceed by execution; and more than ten years expired from the date of this execution, before the commencement of this action.

Under this view of the law, there was error in sustaining the exception to the first plea; and for this the judgment must be reversed.

It may, perhaps, be proper to notice that the second plea is that of payment; and under this plea, in the Common Law system of pleading, evidence of the lapse of time is admissible. In fact it is not admissible under any other plea, except in cases where payment may be proved under the general issue.

But, from the course of the argument, it does not appear that the plea of limitation was ruled out on the ground that evidence of the lapse of time was admissible under the plea of payment; and had this been the case, it would have been erroneous. Whatever latitude may be given, in the admission of such evidence, yet there cannot be error in alleging the facts as they exist, and thus apprising the opposite party that they would be relied upon as a defence.

The consideration of the alleged error in overruling the plea of bankruptcy, will be postponed for examination and decision in another cause involving the same question. There being error in the judgment, it is ordered that the same be reversed and the cause remanded.

Reversed and remanded.

## Miller v. Thatcher.

Trusts are not included in our statute of frauds, and may therefore be proved, as at Common Law, by parol.

It seems that the testimony of a single witness, swearing to the admissions of an alleged trustee, is insufficient to establish a trust in lands, although the alleged trustee be living, and his answer, denying the trust, be not under oath.

An administrator is a competent witness, in a suit between third parties, to prove that a conveyance which was made by his intestate, and which purported to be an absolute sale, was a conveyance in trust to reimburse both contending parties, for money paid by them as sureties of the intestate.

It seems that a Deputy Clerk of the County Court is not authorized to take the proof or acknowledgment of instruments, for record.

Where one receives a conveyance of property in trust, to reimburse himself and another for money paid, and a suit is brought to enforce the trust, on the part of the second *cestui que trust*, a decree may be prayed for and made, to the effect that the trustee pay to the plaintiff the amount intended to be secured, by a certain day, and in case of his failure to do so, then that the property be sold, &c.

Appeal from Colorado. In this case the answer was not sworn to, the law not requiring it. The facts are stated in the opinion.

*G. A. Jones*, for appellant.

Lipscomb, J. The plaintiff in the Court below, who is the appellee in this Court, filed his petition to subject certain lands and land certificates, conveyed by one Gardiner to Miller, the appellant, to the satisfaction and reimbursement to him of a certain sum of money, paid as security of Gardiner; and he alleges that the land and certificates, so transferred, were conveyed for the purpose of remunerating the said Miller and himself, for money paid as security for him the said Gardiner; that Miller was a co-security with the petitioner, for Gardiner; that, although the said conveyance is, on its face, absolute and unconditional to Miller, it was intended for

the joint reimbursement of the petitioner and Miller, for all such sums as they had been compelled to pay for Gardiner, as his securities, and was so acknowledged to be by the said Miller. He prays "that Miller may be decreed to deliver over "to petitioner, one half of the property so conveyed by Gardi- "ner, or so much thereof as may be sufficient to secure him "against the amount he has paid for said Gardiner; or, fail- "ing to do so, that he be compelled to pay your petitioner the "amount of the loss which he has sustained by signing the "note aforesaid, to wit: the sum of one hundred and twenty- "five dollars, with interest from the date, and for such other "relief as to equity may appertain."

The answer admits the conveyance, but denies that it was made for the benefit of the plaintiff. It alleges that it was conveyed in consideration of different sums of money, paid by the defendant, specifying the sums, as security for the said Gardiner. The defendant, before answering, demurred to the petition; which was overruled by the Court. There was a decree in favor of the plaintiff, that the defendant should pay to him the amount paid as security for Gardiner, and costs.

The overruling the demurrer, is the first error assigned, and will be the first considered.

The petition is very badly drawn, and is obnoxious to criticism, in many respects; but it alleges facts, that, if proven, would create an express trust that would entitle the petitioner to relief. The demurrer was therefore properly overruled.

The trust being an express trust, we will next inquire whether it was proven. There could be no proof of a declaration of an express trust, by oral testimony, under the statute of frauds of 29 Charles II. Ch. 3, Sec. 7, which required that it should be in writing, signed by the party. In this case there was no such evidence of the express trust, as is required by the statute cited. This case, however, is not to be tried by the English statute, but by the Common Law, if not provided for by our own statute of frauds. And this Court has clearly shown and decided that trusts are not embraced in our

statute, and that a trust may be proven as at Common Law by parol evidence. (See James v. Fulcrod, 5 Tex. R. 512; Mead v. Randolph, 8 Tex. R.) In the two cases cited, the question of the admissibility of parol testimony, was maturely considered; and it was clearly shown to be admissible, because not prohibited by our statute of frauds: and it is no longer an open question in this Court.

We will proceed to inquire if the evidence of the trust, in this case was sufficient to sustain a decree in favor of the plaintiff. It was proven by one witness only, unsupported, as is believed, by any corroborating circumstances. The evidence is short, and we will insert it here: Cherry, a witness for the plaintiff, testified, "That he heard the defendant tell "the plaintiff, in conversation that took place between them "at Columbus, that Gardiner had conveyed the land and pro- "perty in the said deed to him the defendant, to indemnify "him as security on a note of seven hundred dollars to W. G. "Foley, as well as to indemnify him the defendant, and the "plaintiff, as securities on the two hundred dollar note: that "defendant told the plaintiff, on the said occasion, that Gardi- "ner had conveyed to the defendant sufficient property to set- "tle both debts and indemnify him, defendant, and plaintiff." The question of fact, as to the sufficiency of the proof to establish the trust, by the confession of the defendant, when it had been denied by him in his answer, has been a good deal discussed in England and in this country. On this subject, Chancellor Kent in Boyd v. McLane, 1 Johns. Chan. R. 590, uses the following language: "The cases uniformly show that "the Courts have been deeply impressed with the danger of "this kind of proof, as tending to perjury and the insecurity "of paper title; and they have required the payment by the "*cestui que trust* to be clearly proved. In the case of Leach "v. Leach, 10 Ves. R. 517, Sir William Grant did not deem "the unassisted oath of a single witness, to the mere naked "declaration of the trustee, admitting the trust, as sufficient, "and there were no corroborating circumstances in the case.

"He thought the evidence too uncertain and dangerous, to be "depended upon. It would be easy to multiply cases of the "like caution and discretion; and the only inquiry is, whether "here is not convincing and satisfactory proof of the loan to "the plaintiffs, and consequently the payment of the consider- "ation in the deed, with their money."

The Chancellor continues to recapitulate the evidence, and shows that it was proven in the case under his consideration, by several witnesses, and was made fully satisfactory. He, however, clearly shows his approbation of the opinion of Sir William Grant, and, no doubt, would have made the same decision, had the trust been proven by one witness only, unassisted by corroborating circumstances. The case before the Chancellor was an implied trust; but we have seen that with us there is no distinction in the proof of an express and an implied trust, in proving the trust. If it was considered in other countries as too dangerous, and tending to perjury and insecurity of paper title, to admit the sufficiency of such evidence, that danger would be greatly enhanced in this country where property of almost every description is subject to such fluctuation in price. What is to-day sold at a fair price, may, in a year or two, be enhanced four fold. If one witness could establish the fact of the trust, by the naked declaration of the supposed trustee, the inducement would be great, to convert by a perjured witness, the most fair and unobjectionable and absolute sale, into a mere trust for the repayment of the purchase money; and it is doubted wether a single case can be found where such testimony was held sufficient. In the case of Mead v. Randolph, cited, there were several strong corroborating circumstances to support the evidence of Mrs. Madden, to establish the trust. We believe that the same proof, that is to say, as certain and satisfactory, should be required to prove an express trust, as to establish a resulting trust, and that the naked oath of one witness, without other corroborating circumstances proved, ought never to be held as sufficient. This, in effect, was ruled by us in Neill v. Keese. (5 Tex. R. 23.)

It is not believed that the objection to the admissibility of the witness Cherry, on the ground of his being the administrator of Gardiner's estate, is sustainable. He was not a party to the suit; and the creditors of Gardiner, if he had any besides the plaintiff and defendant, had not intervened. We cannot, therefore, perceive any direct interest Cherry could have in the result. If he had any interest, it was remote and contingent.

The objection to the admissibility of the copy of the deed, offered and read in evidence, would have been well taken, if the evidence had been material; because the deed does not appear to have been authenticated by any person known to the law, authorized to make such authentication; it was made by the Deputy Clerk of the Probate Court. It was not, however, necessary to introduce even the original. The deed had been admitted by the answer.

The decree was, however, erroneous, even if the facts upon which it was based had been fully established by proof. It should have directed the sale of the trust property, and an appropriation of the proceeds in satisfaction of the claims of the *cestui que trusts*. The decree, however, might have been modified by the alternative prayed in the petition; because there being no creditors or heirs, or any other persons intervening, and the rights of only the plaintiff and defendant adjusted, and the plaintiff having prayed the alternative of a decree, that he should be paid the amount secured to him, it might well have been decreed that the defendant should make his election to pay the money, if he preferred doing so, to the sale of the trust property. This, it seems, could have been done upon the authority of Chancellor Kent, in Murray v. Ballou, 1 Johns. Chan. R. 581. It does not appear that any other person is claiming an interest in the trust property; and it is not likely, from the evidence, that any other interest will be interposed, as the property would not, in all probability, sell for much, if anything, more than sufficient to satisfy the heirs of Miller and Thatcher. Under such circumstances the property

should be decreed to be sold, giving Miller a reasonable time, if he preferred doing so, to pay off and discharge Thatcher's lien. Should, however, other interests be interposed, when the case goes back to the Court below, the trust property will have to be sold, and the excess, if any, after satisfying the liens upon it, should go to the satisfaction of other creditors, if any, and if not, to the heirs of Gardiner. The judgment is reversed and remanded.

Reversed and remanded.

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## Williams v. Bradbury.

The statute (Hart. Dig. Art. 1599,) prescribing the time within which, after judgment, an injunction may be obtained to stay execution, manifestly has no application to an injunction, sought for causes which have arisen subsequent to the rendition of the judgment.

The statute of limitations is not applicable to payments.

Where an injunction was prayed, on the ground that an execution had been issued "for the amount of the judgment and costs," whereas certain payments, specifying them, had been made, without a direct averment that the payments had not been credited on the execution, it was held that a general demurrer was improperly sustained. But *Quere?* If the objection had been taken by special exception.

An objection to the misjoinder of parties defendant, cannot be taken by general demurrer.

It seems that the neglect and refusal of a co-defendant in a judgment, to join, as a co-plaintiff, for a writ of injunction, is not a good ground for making him a defendant.

That the judgment-debtor placed claims in the hands of the attorneys of the judgment-creditor, for collection, to be applied when collected, to the payment of the judgment, and that a sufficient amount has been collected by them, to pay the judgment, constitute no ground for the issue of an injunction to restrain execution upon the judgment.

Error from Brazoria. The plaintiff, Williams, filed his petition in February, 1852, praying an injunction, to restrain the

execution of a judgment, and for general relief. The judgment, sought to be enjoined, was rendered against the petitioner and McKinney, in March, 1843; and the petition alleged the payment thereon, of two certain sums: one of $642, in April, and one of $500, in March, 1844. It further sought to charge the plaintiff in the judgment, with sums alleged to have been collected by his attorneys, upon claims placed in their hands for that purpose, and to be applied in satisfaction of the judgment. The petition prayed that Bradbury, Reel, the Sheriff, and McKinney be made defendants, alleging that McKinney neglected and refused to join as plaintiff.

The defendant, Bradbury, (plaintiff in the judgment) filed a general demurrer to the petition; which was sustained, and the case dismissed. The judgment upon the demurrer was assigned as error.

*J. B. Jones*, for plaintiff in error.

*Harris & Pease*, for defendants in error.

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

Wheeler, J. It is urged, in support of the demurrer, that the application for an injunction was not in time; and the statute, prescribing the time within which an injunction to stay an execution upon a judgment, may be granted, is relied on. (Hart. Dig. Art. 1599.)

The statute manifestly has no application to an injunction, sought for causes which have arisen subsequent to the rendition of the judgment: as payment and satisfaction, release, &c. Nor is the statute of limitations applicable to payments. It cannot, therefore, be objected that the injunction, in this case, was not applied for in time.

It is further objected to the sufficiency of the petition, that it does not aver that the several payments were not credited

on the execution sought to be enjoined. It is, however, averred that execution has issued "for the amount of said judgment, and a large amount of costs," &c., and that "said execution has been levied upon nine of the slaves, the property "of the petitioner; and the said slaves are about to be sold by "the Sheriff, to satisfy said judgment," &c. The plain meaning of this statement is, that the plaintiff is proceeding to collect the amount of the judgment, notwithstanding the alleged payments: and we think the averment sufficiently specific and certain to that effect, especially on general demurrer. Had the objection now urged, been taken by an exception to the petition, pointing out the supposed defect, there would be better reason for holding that the petition should have negatived, by averment, the fact of any credit upon the execution. This, however, would be requiring very great specialty in pleading —and greater, it is believed, than has heretofore been required, except in dilatory pleas, or pleading either regarded by the law with disfavor, or construed with more than ordinary strictness.

There does not appear to have been any good reason for making McKinney a party defendant, to the suit for an injunction; but this objection was not well taken by a general demurrer; and, if rightly taken, it might have been obviated by amendment; and did not afford a ground for dismissing the case.

To so much of the petition, as sought to charge the plaintiff in the judgment, with the amount of claims alleged to have been placed in the hands of his attorney to be collected and applied in satisfaction of the judgment, the demurrer was rightly sustained. The facts alleged did not show payment. But, in respect to the actual payments alleged to have been made, the averments of the petition were sufficient to entitle the petitioner to relief—and under the prayer for general relief, the appropriate relief, upon proof of the plaintiff's case, might have been afforded him. There was error, therefore, in dismissing the case; for which the judgment must be reversed and the cause remanded for further proceedings.

Reversed and remanded.

## Henderson Ashworth v. The State.

This Court will not reverse a judgment in a criminal case, for alleged error in the refusal of the Court below to give a charge asked, unless there be a statement of facts, or bill of exceptions stating facts sufficient to show the pertinency of the charge.

An indictment which charges that a free negro, of African descent, lived in fornication with a certain woman, spinster, is good, without averment as to the descent of the woman.

Where the jury assess the fine, it is a sufficient entry of final judgment, to order that the defendant stand committed to the common jail of the county, until the fine and costs be paid.

Appeal from Jefferson. The appellant was indicted and convicted upon the following charge: "that Henderson Ash-"worth, being a free person of color, of African descent, la-"borer, and Lititia Stewart, late of said county, *spinstress*, "on the first day of April, and on divers other days and times "thereafter, and before the finding this bill, to wit: in the "county aforesaid, did then and there live together in forni-"cation, contrary to the statute," &c. The record showed that the defendant asked several charges which were predicated upon the admission that some evidence had been introduced to prove that the parties were married, and that no evidence had been introduced to prove the descent of Lititia Stewart. But there was no statemant of facts; nor bill of exceptions. The entry of final judgment merely recited the verdict, and ordered and decreed that the said defendant be committed to jail until the fine and costs were paid.

*J. B. Jones*, for appellant.

*Attorney General*, for appellee.

Lipscomb, J. In this case there was a verdict and judg-

ment against the appellant, on an indictment for an offence known to our laws. There is no error apparent upon the record; and there is no statement of facts.

The record shows that a charge of the Court was asked to be given to the jury, and refused; but, from the want of a statement of the facts, it is impossible for us to say whether the Court erred or not, in such refusal. It may have been wholly irrelevant to the facts in proof, and a mere abstract proposition. The bill of exceptions should have shown the pertinancy of the charge asked, or it should have been shown by the statement of the facts proven. The judgment must therefore be affirmed.

Judgment affirmed.

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ANDREWS AND ANOTHER v. PALMER AND ANOTHER.

Where the Sheriff, selling several tracts of land, by mistake executes deeds to two different purchasers for the same tract, the purchaser to whom the tract was knocked off, may sustain an action against the Sheriff and the other purchaser, to correct the mistake. But it would be error, in such a case, to correct the mistake merely so far as the plaintiff is concerned: the tract which the defendant bid off, should, by the same decree, be adjudged to him.

Where a vendor and his vendee join in a suit to remove a cloud from the title, it is error to make a decree vesting and confirming the title in the vendor, instead of the vendee.

Appeal from Polk. It appeared from the record, in this case, that, at a Sheriff's sale of two hundred acres of land, pointed out by the defendant in execution, the land levied on was divided and offered for sale in four lots of fifty acres each, and marked out and designated upon a map exhibited at the sale, as No. 1, 2, 3, 4; that Andrews took the bid of Phillips, to whom lot No. 1 was knocked off, as the highest bidder at

the sale; and that Palmer was the highest bidder for the lot No. 2, and the land described by that number was knocked down to him, at the sale; that, by a mistake of the Sheriff, in making out the deeds to the purchasers, he conveyed lot No. 2 to both Andrews, who had taken Phillip's bid for lot No. 1, and to Palmer, who was the purchaser at the sale. This suit was brought to vacate and annul the deed to Andrews, and to decree title to be in Palmer for the lot No. 2. It was alleged that the mistake was made by the Sheriff, in the description of the lots; and it was further alleged that Palmer had, before discovering the mistake, conveyed the lot No. 2, so purchased by him, to E. O. Choat. On issues made up under the direction of the Court, the jury found that lot No. (1,) one, was bid off by Phillips, and that lot No. 2 was bid off by Palmer, and that deeds were made by the Sheriff to both Palmer and Andrews, for lot No. (2) two. The decree of the Court confirmed the deed made to Palmer for lot No. (2) two, and vested the fee simple to the land therein conveyed, in the said Palmer, and annulled and set aside the deed made by the Sheriff, for the same lot No. 2, to Andrews, and decreed that Andrews shall pay all costs. Andrews did not pray to have the title to lot No. 1 decreed to him, in case his deed to No. 2 should be annulled.

*W. R. Moore* and *Yoakum & Campbell*, for appellants.

*B. C. Franklin*, for appellees.

Lipscomb, J. The facts proven and found by the jury, fully sustain the decree in confirming the deed made to Palmer, and in annulling the deed for the same land described in lot No. 2, made by the Sheriff to Andrews. But it is a rule of equity jurisprudence, that the final decree should adjust all the rights of the several parties to the bill, as far as it can be done. The decree seems to be wrong in this: it is set out and alleged in the petition, by Palmer, that he had conveyed all his right

to the land in question, to Elizabeth O. Choat, who is a co-complainant with him. The decree should then have decreed that all the title that Palmer had acquired to the land, should be vested in Elizabeth O. Choat. And the proof shows that Andrews, though not entitled to anything under the deed to him, made by mistake, was entitled on the bid of Phillips, taken by him off Phillip's hands, to the land described in the plat No. (1) one. The decree must therefore be reversed, and rendered by this Court as it should have been rendered by the Court below, and the appellee, Palmer, pay the costs of this Court.

Reversed and re-formed.

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LANGHAM, ADM'R, v. GRIGSBY AND ANOTHER.

A *scire facias* to revive a judgment is barred in ten years; not in less.
It is not a valid objection, that a witness, testifying in answer to interrogatories, has annexed to his answer, a memoreandum to which he had referred in order to refresh his memory.

Appeal from Jefferson.

*B. C. Franklin*, for appellee, suggested delay.

LIPSCOMB, J. This was a suit, by a *scire facias*, to revive a judgment of the District Court of Jefferson county, rendered in favor of the appellees, against the appellant's intestate.

The record is so badly transcribed, that it has been with much difficulty, that we have been able to read and understand the points presented, and the rulings of the Court, there-

on made; and it is possible that we may not correctly comprehend some matter, that, correctly understood, might be material to a correct disposition of the case. The parties, who bring such records into this Court, and the Clerk, who transcribed it, justly deserve the most unqualified reprehension.

In the mass of bad pleading, we have discovered but two grounds of objection to the judgment, that we believe entitled to the notice of this Court.

The defendant pleaded to the *scire facias*, the statute of limitations; which was excepted to by the plaintiffs; and the exception was sustained by the Court. Now, as an abstract proposition, it cannot be controverted, that the statute of limitation is a bar to the revival of a judgment as well as to an action on a judgment itself; and, in this respect, the law is the same, whether the suit be by a *scire facias*, or upon the original judgment. But this plea being falsified by the record, there can be no objection to sustaining the exception to its sufficiency. It will be seen by reference to Article 2378, of Hartley's Digest, that the judgment could be revived within ten years from its rendition, by a *scire facias*, or by an action of debt. In this case the record before the Court showed that the ten years had not expired at the commencement of the suit. It shows that the judgment, sought to be revived, was rendered at the September Term, 1845; and this suit was commenced on the 28th of May, 1851. There was, then, no error in ruling out the statute of limitations.

The remaining point relates to the evidence to support the allegation of a presentation of the claim to the administrator. The administrator had refused to allow or reject the claim, when it was presented to him; and the plaintiff not being furnished with the evidence, that the administrator ought to have supplied to him, proved it by a witness whose evidence was taken by interrogatories; and, in answering the interrogatories, he proved it explicitly, and embodied in his answer a memorandum made by him for the purpose of identifying the claim. To this memorandum being embodied by the witness, the de-

fendant objected; and the Court overruled the objection. We believe the Court was right in so ruling. The failure of the administrator, to endorse the rejection of the claim, made it necessary to be proven *aliunde;* and for the purpose of identifying the claim presented, it was not an unnecessary precaution on the part of the witness, to have made such memorandum.

All the other objections are considered to be frivolous and groundless.

Judgment affirmed.

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## Dunman and Wife v. M. W. & T. R. Hartwell.

Where the record, in a case in which process has been served, recites that the parties appeared by their attorneys and agreed to the following decree, &c., the authority of the attorneys cannot be questioned on appeal or writ of error.

Consent takes away error; and a judgment by agreement or compromise, cannot be impeached, unless for fraud, collusion, or like causes.

Where there had been two partitions, and, on final judgment, the former was re-established, it was but just and proper to require the distributees under the second partition, to give an equivalent to the distributees under the first partition, for any of the property which the distributees under the second and rejected partition had alienated or consumed in the interval.

Error from Liberty. This case was before the Supreme Court once before, and is reported in 7th Texas Reports, 576. On the receipt of the mandate, a decree in accordance with it, was made by consent of the parties, appearing by their attorneys. Dunman and wife alone, prosecuted this writ of error.

*H. N. & M. M. Potter* and *Allen & Hale*, for appellees.

Hemphill, Ch. J. The record, in this case, is very defec-

tive. The proceedings and judgment were based on a mandate of the Supreme Court; but the mandate is not transcribed. It should have been the first entry; and a copy should have been transmitted with the transcript. The judgment which we are invoked to revise and reverse, was entered by consent. It commences with the recital, that, the "case coming on to be heard upon the mandate from the Supreme Court, "the parties appeared by their attorneys and agreed to the following decree, to be entered as the judgment of this Court," &c., &c. This agreement was made by the attorneys of the parties; but no objection is taken to the judgment, on that ground. It is not assigned or contended that their authority should have appeared of record. No question is raised as to their power. That they had competent authority must be presumed, until it is impugned and the contrary shown; and the judgment must be taken as having been agreed to by the parties themselves: under this aspect, the appellants are at once confronted with the general principle, that consent takes away error, and that a judgment by agreement or compromise, cannot be impeached, unless for fraud, collusion, or like causes, none of which appear in this record or are alleged or assigned. (Story v. Hawkins, *et al.*, 8 Da. R. 12; French v. Hotwell, 5 Johns. Chan. R. 555; 14 Ves. R. 31.)

The appellants are concluded by their own consent; and their appeal cannot be sustained.

But, if the decree had not been entered by consent, there does not appear any such substantial error, prejudicial to the appellants, as would have authorized a reversal.

The mandate of the Supreme Court required the rights of Mrs. Hartwell, under the deed of gift, and of her minor children, to a portion of the estate under the law, to be respected; and this, appears, in substance, to have been done, in accordance with the spirit and intent of the mandate, and without injustice to the other distributees of the estate.

After deducting the property or its value, embraced in the deed of gift, the surplus was directed to be equally divided

between the heirs of the deceased. This has been effected, as to the real estate, by establishing the partition formerly made and of record in the County Court; and, if execution has been given the widow for the value of her property under the deed of gift, and the minor heirs for the value of their shares respectively of the personal property, it arose, doubtless, from the fact that this property had been converted, by the other parties, to their own use.

The errors assigned are—

1st. In rendering judgment against the heirs, and ordering execution to issue against the same.

This has been already considered and its futility shown.

2nd. In authorizing the auditors to set aside to Francis M. & Hansel R. Hartwell, out of any of the lands set apart to Rachel Dunman, one of the heirs of E. H. R. Wallis, dec'd, an equal amount in lands in value to that of any amount that the said Rachel and James F. Dunman may have sold, &c.

The mandate, under which the District Court was acting, directed the minors, Francis & Hansel, to have shares of the estate, equal to those of the other distributees. To effect this, the former partition in which their shares were set apart, was recognized or confirmed; and if the Dunmans had, in the mean time, sold any portion of the land, formerly assigned to these minors, it was but equitable that the deficiency should be made up out of the lands set apart as the distributive share of Rachel. Such a disposition was in conformity with the spirit of the mandate; was but just to the minors; and could not operate to the injury of the appellants.

3rd. That Francis M. & Hansel R. Hartwell are given, by said decree, more than their share. There is no evidence of this, in the record. No statement of facts or bills of exceptions are sent up with the transcript.

4th. In ordering execution to issue against the estate of Elisha W. Wallis, dec'd, one of the heirs.

The record furnishes no evidence that any such execution was issued.

The appellants have not appeared to prosecute their appeal; and it was evidently taken for delay. It is ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with ten per cent. damages, on the *pro rata* amount of the judgment for money, which is due from the appellants.

Affirmed with damages.

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## Bullock v. Ballew.

Where execution has not issued on a judgment within the year, a *scire facias* or action of debt may be brought to revive the judgment. In the action of debt, the judgment for the plaintiff is that he recover his debt, &c.; whereas, in a *scire facias*, it is, simply, that he have execution.

It is a maxim in the law, that there can be no averment, in pleading, against the validity of a record; though there may be, against its operation: therefore, no matter of defence can be pleaded, which existed anterior to the recovery of the judgment.

In an action on a judgment of a Court of this State, whether by *scire facias* or debt, to revive it, it is not necessary for the plaintiff to bring before the Court the proceedings in the suit, anterior to the entry of final judgment.

But if a judgment be void, the defendant may plead the matters which show its nullity; and, for that purpose, he may bring before the Court the proceedings anterior to its rendition.

There was judgment for the plaintiff, and a motion for a new trial, which was continued from Term to Term, and a motion was made by the plaintiff's attorney to substitute papers for others which had been destroyed by fire; in the mean time, the plaintiff brought a separate action of debt, to revive the former judgment; and the case being submitted to the Court, upon the entry of judgment, motion for new trial and subsequent orders for continuances, judgment was rendered for the defendant; *Held*, That the judgment should have been in favor of the plaintiff, because the motion for a new trial became void, upon the adjournment of the Court.

Appeal from Grimes. This was an action, brought in September, 1851, upon a judgment, recovered by the plaintiff against the defendant in the District Court of Grimes county,

at the Fall Term, 1848. The plaintiff set out the judgment, and averred that it was in force, not reversed, satisfied, or otherwise vacated; and that he had not obtained execution thereupon.

The defendant excepted to the petition; and answered, denying that there was any sufficient and legal record of the proceedings had against him, or of any legal judgment; and that the pretended judgment was irregular and defective, &c.

The plaintiff thereupon amended, alleging that all the papers and proceedings in the cause, antecedent to the judgment, had been destroyed by fire.

The plaintiff gave in evidence the record of the judgment, entered in the minutes of the Court; which recited that the cause came on to be heard, and that the defendant having filed his answer, thereupon came a jury, &c., and concluded with the verdict and judgment thereon for the plaintiff, regularly entered, in proper form. The plaintiff further gave in evidence, from the minutes of the Court, the entry of a motion for a new trial, which was continued until the next Term; and also an entry, at a subsequent Term of the Court, of a motion to substitute papers for those destroyed, which was refused. The entries, in evidence, showed a continuance of the motion for a new trial from Term to Term. Upon this evidence the Court gave judgment for the defendant, a jury being waived. The plaintiff appealed.

*W. H. Neblett* and *G. A. Jones*, for appellant.

Wheeler, J. The 2nd Section of the Act of Limitations, (Hart. Dig. Art. 2378,) expressly recognizes the right to revive a judgment by *scire facias*, or an action of debt, where execution has not issued within twelve months from the rendition of judgment. The present is substantially an action of debt, brought on the judgment, in the language of the statute "to revive" it. In effect, it is not materially different from a *scire facias*, brought to revive a judgment. In an action of

debt, the judgment for the plaintiff is that he recover his debt, &c. In a *scire facias*, it is simply that he have execution.

In an action on a judgment, no defence can be admitted, which existed prior to the judgment. It is a maxim in the law, that there can be no averment, in pleading, against the validity of a record; though there may be, against its operation; therefore, no matter of defence can be pleaded, which existed anterior to the recovery of the judgment. (1 Chit. Pl. 521; 5 Serg. & R. 65; 8 Johns. R. 77; 12 Mass. R. 268; 13 Id. 443.) In an action on a judgment, therefore, whether by *scire facias* or debt, to revive it, it is not necessary for the plaintiff to bring before the Court the proceedings in the suit. (2 Bibb, R. 331; McFadden v. Lockhart, 7 Tex. R. 573.) Although the judgment be erroneous, debt lies, until it has been reversed. (1 Chitt. Pl. 126.) But if the judgment be void, the defendant may plead the matters which show its nullity; and, for that purpose, he may bring before the Court the proceedings anterior to its rendition. (Griswold v. Stewart, 4 Cow. 457; McFadden v. Lockhart, 7 Tex. R. 573.)

The judgment, given in evidence, appears to have been regular and legal. The defendant having answered, the parties were at issue, and had submitted the matters in controversy, for adjudication. The subject matter appears to have been within the jurisdiction of the Court, and judgment final to have been rendered upon the merits. The judgment was not suspended by the continuance of the motion for a new trial; for the reason that the Court had no authority to continue the motion. (Hart. Dig. Art. 766.) The order for that purpose was against law and void. The motion was, by operation of law, discharged, upon the adjournment of the Court. (McKeen v. Ziller, *Ante*, 58.)

We are of opinion, that, upon the evidence, the plaintiff was entitled to judgment; and, consequently, that the judgment for the defendant is erroneous, and must be reversed, and such judgment be here rendered as the Court below ought to have rendered.

Reversed and re-formed.

## Gay, Adm'r v. McGuffin.

Where there was some circumstantial evidence of payment, and the Court told the jury that there was no evidence of payment; whereupon the Court was requested to charge the jury, that the Court could not undertake to say whether there was proof of payment, but that that was entirely within the province of the jury; which charge the Court refused to give, but charged, in lieu thereof, that if there was any evidence of payment, they must find accordingly; *Held*, That the question of fact was not left to the decision of the jury, uninfluenced by an opinion from the Judge, as it ought to have been.

More indulgence is extended to the representatives of deceased persons, in making proof of facts which rest in parol, than would be allowed to the persons, themselves, if living.

See this case for a motion for a new trial, on the ground of newly discovered testimony, which ought to have been sustained.

Appeal from Montgomery. Suit by the appellee against the appellant on a note. Pleas of *non est factum*, and payment.

*Yoakum & Campbell*, for appellant.

Lipscomb, J. This was a suit brought against an administrator, on a note, in substance, as follows,

"Montgomery, December 12th, 1848.

"I promise to pay John F. McGuffin, or order, two hun-
"dred and seventy-five dollars. Value received.

("Signed,) J. C. BALLEW."

Plea *non est factum*, and payment. The evidence in support of these defences, was circumstantial and tended, some of it, to sustain the plea of *non est factum*, and some of it, to prove, that, if the note was a genuine one, it had been paid. Of the latter, was the testimony of one witness, whose credibility was not impeached, that, some three months before Ballew's death, he heard Ballew say to McGuffin, if he did not pay him, he would sue him. McGuffin made no reply.

Witness said he had known Ballew to win money from McGuffin, and McGuffin to win money from Ballew; and he did not know what debt Ballew referred to. This was certainly circumstantial evidence, that the note had been paid; and it acquires additional weight, perhaps, when coupled with the fact, that the note sued was dated so long before this conversation took place. The petition alleges that Ballew died on the 21st day of October, 1851. This indirect admission that he was indebted to the intestate, considerably more than two years from the time the note purports to be due, is certainly strong circumstantial evidence, that it had been paid. It will be seen, by a bill of exceptions, "That the Court told the jury that "there had been no evidence introduced to prove payment, "under the plea of payment; when, the defendants counsel "requested the Court to charge the jury as follows: the Court "cannot undertake to say whether there was proof of payment; "that is entirely within the province of the jury; which was "refused; but, in lieu thereof, the Court charged the jury, "that, if there was any evidence of payment introduced to "to them, they must find accordingly."

The charge, in the abstract, may be right; but taken in connection with the expression of the opinion that there was no evidence of payment, and in reference to the circumstantial evidence before commented on, it was not leaving the jury to determine upon the facts, without being influenced by the opinion of the Judge, upon those facts. It is not likely, after such an opinion from the Judge that there was no evidence of payment, that they would feel themselves authorized to give any consideration to the circumstantial evidence offered in the case. After such evidence had gone to the jury, they should have been informed, that it was only a circumstance to prove that the note had been paid, and they must determine how far it established, in their minds, the fact of payment. And, in cases of the like character to this, from necessity, more indulgence is extended to the representative of a deceased person, in making proof, than would be allowed to the person, himself,

if he were living. This necessity, and exception, were acknowledged by us in the case of Frosh *et al.*, v. Swett, Adm'r of Conroy. (2 Tex. R. 485.)

The defendant in the Court below, moved for a new trial, upon the ground, among others, of newly discovered evidence, since the trial; and supported his motion, by his own affidavit and the affidavits of the two persons, by whom he could prove the additional facts. The motion was overruled; which overruling is assigned for error. On a reference to the facts sworn to by those persons, it would seem to prove enough to have fully warranted a verdict for the defendant, if such evidence was not impeached or counteracted by other testimony. Michael Baker swears that a day or two after the death of Ballew, this affiant was in conversation with McGuffin, in relation to the condition of the estate of the said Ballew. Affiant inquired of McGuffin, what he thought Ballew owed. He replied that he did not think he, Ballew, owed one hundred dollars in the world. T. W. Smith swore, that, some two weeks before the death of Ballew, he heard a conversation between Ballew and McGuffin, in which Ballew told him, McGuffin, if he, McGuffin, did not pay him some money, he, Ballew, would sue him. McGuffin replied he would pay him as soon as he could get it, &c., and spoke of some one from whom he expected to get it. Ballew then left, and affiant or some other person asked McGuffin how much he owed Ballew, or words to that effect. McGuffin replied as well as affiant can remember, that it was about forty dollars. Comment is not necessary to show the importance of this newly discovered evidence; and it is difficult to conceive of a motion for a new trial being supported on as strong and satisfactory grounds.

We believe the Court erred in the charge as given to the jury; and also erred in refusing to grant a new trial. The judgment is therefore reversed and the cause remanded.

Reversed and remanded.

## FINCH'S HEIRS v. EDMONSON AND OTHERS.

The object of the statute, (Hart. Dig. Art. 667,) which prescribes the places at which suits shall be instituted, was to provide for the protection and convenience of resident citizens, by preventing them from being drawn from home to distant counties to defend suits which might be instituted against them; and, to carry out that object, a liberal construction will be given; but where the statute is invoked for any other purpose, it is not entitled to any other than its plain literal meaning.

Where a suit is brought to annul a pretended probate sale and to remove the cloud, &c., it is not necessary that it should be instituted in the county where the land lies; but it may be instituted in the county where the defendant resides.

See this case respecting the proper place for the institution of suit, where fraud is alleged, or an administrator is a defendant, although the suit be to "recover land or damages thereto."

See this case for allegations of fraud, which were held to constitute good ground for setting aside a probate sale.

In order that a probate sale under the Act of 1846, should be valid, it was necessary that a petition for an order of sale should be filed, as required by the 17th Section of that Act. (Hart. Dig. Art. 1099.) This was necessary, in order to give the Court jurisdiction. The authority to order a sale, was special and limited.

By the Act of 1846, the jurisdiction of the Probate Court could not attach on the question of a sale of the land, until after petition filed for that purpose and a return of citation; and an order of sale and sale, made without these pre-requisites, were void, and may be impeached in a collateral proceeding.

Error from Walker. The plaintiffs in error sued the defendants in error, for the cancellation of certain deeds, and to quiet their title to one third of a league of land, the headright of Matt Finch, who died intestate in 1841, leaving the plaintiffs in error his heirs at law. It was alleged that one Joseph Bennett was appointed administrator of his estate, on 30th of November, 1846, by the Probate Court of Walker county, and on 29th March, 1847, returned an inventory of the property into Court, and, among other property, returned an undivided half of said third of a league, and at the same time obtained an order of sale to sell the same, in pursuance of which the

same was sold on 4th of May, 1847, for $87 90-100, to Alexander McDonald, and the sale confirmed at the May Term of the Court, thereafter; that Bennett collusively required of the purchaser only his note for the purchase money, without mortgage; that the note was yet unpaid; that the proceedings in the Probate Court, ordering and confirming said sale, were null and void, because there was no petition filed by the administrator, showing any necessity for a sale or giving that Court any jurisdiction to order the same; that the estate owed no debts at the time said sale was ordered; that the purchaser McDonald, died intestate in January, 1851; that Margaret McDonald, his widow, one of the defendants, was appointed his administratrix, and that on 7th October, 1851, she sold the interest of her intestate's estate in said land, under an order of the County Court of Walker county, on a credit of twelve months, at which sale the defendant Edmonson became the purchaser, for $10 50-100, with full notice of all the facts charged in the petition, and gave his note and mortgage for the purchase money. The land was stated to be in Polk county and worth four dollars per acre, at the time of the said sales respectively; that Bennett the administrator died in 1848, and that the estate was without a legal representative; that there were no debts or claims against the same; and that petitioners were the only persons interested in said estate. It was alleged that Edmonson resided in the county of Walker.

To this petition none of the defendants answered, except Edmonson, who filed, among other pleas, a special demurrer, alleging that the judgment of the Probate Court, ordering and confirming the sale by the administrator Bennett, was final and conclusive, and could not be impeached collaterally and declared void in this suit. 2nd. That, if plaintiffs were aggrieved, their remedy was against Bennett, the administrator, and not against the purchaser at the sale made by him. The Court sustained the demurrer and dismissed the suit, for want of jurisdiction to take cognizance of the same, from which judgment the plaintiffs prosecuted this writ of error, and assigned for

error, that the Court erred, 1st. In dismissing the suit for the want of jurisdiction. 2nd. In sustaining the demurrer.

*A. P. Wiley*, for plaintiffs in error. I. The first error assigned presents the question, Had the District Court of Walker county jurisdiction to take cognizance of the matters and things charged in the petition? There was no plea to the jurisdiction filed; but the Court, "*ex mero motu*," dismissed the suit, under the 11th exception to the Act regulating proceedings in the District Court, which declares "that in cases where the "recovery of land, or damages thereto, is the object of a suit, "suit must be instituted where the land or a part thereof is "situated." The Court seemed to regard the suit in no other light than as an action of trespass to try titles, and therefore that suit should have been instituted in Polk county, where the land was situated. (Hart. Dig. p. 241.) In this it is respectfully submitted, that the Court erred; for the petition is, in form and substance, an application to a Court of Equity, for the cancellation or delivery up, of certain deeds, and to set aside certain proceedings, on certain alleged grounds, which, it is alleged, constitute a cloud upon complainant's title; and, if the facts charged in the petition are true, then it is submitted that Margaret McDonald, administratrix of A. McDonald, was a necessary party to the suit, as she held a lien or mortgage upon the land, to secure the purchase money from Edmonson, and as such interested in defending the validity of the proceedings in the Probate Court. If then, the administratrix of A. McDonald, under the circumstances, was a proper party, suit was properly brought in the county of Walker, where she obtained her letters of administration. (See, Neill v. Owen, administrator, 3 Tex. R. 145; Richardson & Wife v. Pruitt's administrator, Id. 223; Hart. Dig. p. 241, 5th exception.) The object of this suit is not to "recover possession of the land, or damages thereto," but to remove certain clouds and to quiet the title, and is not a matter of strict and absolute right, as an action of ejectment is, but is a matter for the sound

discretion of the Court, which, in granting relief, may impose upon the complainants such terms as the justice of the case may seem to require. (See Hatch v. Garza, 7 Tex. R.) The fraud and collusion, charged in the sales, is a prolific source of equity jurisdiction, and would, under the 6th exception, give the District Court of Walker county jurisdiction, if it did not possess it from the fact that it was the domicil of the defendant Edmonson. It is also against the spirit and general intent of the Act, to compel a defendant to answer out of the county of his residence, if any reasonable construction of the 11th exception will avoid it. (See, Richardson *et uxor.* v. Pruitt's administrator, 3 Tex. R. 231, before cited.)

II. The next question is, Was the petition obnoxious to the demurrer? What are the facts which it admits? It admits that an undivided half of a third of a league of land, worth four dollars per acre, about three thousand dollars in value, was sold by Bennett, the administrator of Finch, to A McDonald, under an order of the Probate Court, for eighty-seven dollars and ninety cents; and that he collusively took his note, without mortgage, for the purchase money, which is yet unpaid; that said order was obtained without any petition filed, and when there were no debts against the estate to pay; that the defendant Edmonson, with full notice of these facts charged, bought the land at the succession sale of McDonald, on a credit of twelve months, for the sum of ten dollars and a half, and executed his note and mortgage for the purchase money. If, from these facts, the title of Edmonson is held to be good, the heirs of Finch have lost the land worth three thousand dollars, without having received one cent therefor, or the estate deriving any benefit therefrom—a consequence too monstrous to be upheld and sustained by a Court of Justice, unless the clearest principles of law can be invoked in its support.

But, it is believed that the law will give no countenance to the proceedings of the Probate Court, under which Edmonson derives his claim of title. The law of 1846, which was in force at the time the order of the sale was made, provides,

"that, when a sale of land or negroes becomes necessary for "the payment of debts, application shall be made therefor, by "petition in writing, filed with the Clerk;" it further provides what the petition shall contain, and for citation to parties interested, and that an answer may be filed to the petition, showing objections to a sale. In the language of this Court, in the case of Jones v. Taylor, "the authority conferred on the Pro- "bate Court by this Section, is special and limited and must "be strictly pursued; otherwise the acts and proceedings had "thereon, are nugatory and confer no right." (Jones v. Taylor Tex. R.; Hart. Dig. p. 351.) In this case, there was no petition filed, nor any step taken to vest the Probate Court with jurisdiction to order the sale. The whole proceeding from beginning to end, was *coram non judice*. The case of Lynch *et al.* v. Baxter, *et ux.*, administratrix, that went up from Washington county and decided by this Court, which is so much relied on in support of Edmonson's title, is an authority against it, for the counsel of the appellees, in that case, admit that the Probate Court obtains jurisdiction by the petition, and the Court in its judgment in that case, expressly say that the jurisdiction was brought into exercise, directly upon the property, by the petition filed praying the decree for an order of sale. (4 Tex. R. 445.) It is apprehended that the filing of a petition is necessary to confer jurisdiction even upon the District Court, in all cases of proceeding *in rem*. The same doctrine is held in the State of New York, and, it is presumed, in most other States. (See Jackson v. Robinson, 4 Wend. R. 436; Jackson v. Crawford, 12 Id. 536; Ford & Ford v. Walsworth, 15 Id. 449.) In Atkins v. Kinnan, the Supreme Court of New York say that the "difference lies between a want of jurisdiction, and error:" in the former case, the whole is *coram non judice* and void: in the latter, the proceeding cannot be impugned in a collateral action, "even if erroneous on its face." (See 20 Wend. R. 245; also Hare and Wallace, Am. L. Cas. 2 Vol. 564.) From all which it is manifest, that the proceedings of the Probate Court, under

which defendant Edmonson sets up title, were *coram non judice* and void, and could confer no right.

*W. A. Leigh*, for defendants in error. A purchaser at an administrator's sale is not required to look beyond the judgment of the Court ordering the sale. The presumption is, in every case, that the rules of law had been complied with; that the Court had adjudged in strict accordance with those rules. In this particular case, the presumption was that all preliminary proceedings had been taken, prior to the judgment; that a petition, containing the requisite allegations, had been filed, &c. An account of sale had been returned and confirmed by the Court, thereby demonstrating to the purchaser, that not only the Court had acted in accordance with the law, but the administrator also. The purchaser depends upon the judgment and deed. (See 4 Wheat. R. 506; 4 Cr. R. 328.) A judgment of a Court of competent jurisdiction, ordering and confirming the sale, cannot be attacked collaterally. (4 Tex. R. 431; 2 Peters, 168, and other authorities there cited.)

The Probate Court is a Court of competent jurisdiction to order and confirm sales of land belonging to estates of deceased persons. (4 Tex. R. 431.)

Lipscomb, J. In discussing the errors assigned, we propose first to inquire whether the Court had jurisdiction; and secondly, whether the petition shows sufficient equity to sustain the suit.

On the first branch of the proposed investigation, we will inquire if the suit is such as is required to be prosecuted in the county where the land lies, under the last exception in the 1st Section of the Act of 13th May, 1846. (Hart. Dig. Art. 667.) It must be recollected, that the exception refered to, is made to the general proposition embraced by the first Section of the Act, that no person shall be sued out of the county of his residence; and the exception is in the following words, *i. e*:

"In cases where the recovery of land or damages thereto, is "the object of the suit; in which cases, suit must be instituted, "where the land or a part thereof is situated." It is manifest that the object and meaning of the Act was for the protection and convenience of resident citizens of the State, in preventing them from being drawn from their own county, perhaps to a very distant one, and on an increase of expense, to defend suits that might be instituted against them; and, so far as we may, at any time, be called upon to carry that salutary object of the statute, into effect, it would claim a liberal construction; but, when not so called upon, we cannot regard the statute as entitled to any other than its plain literal meaning. In this case, the party claiming the benefit of the exception, presents rather the anamolous case, of claiming it as a right, to be sued out of the county of his residence: as the demurrant is a resident citizen of the county in which suit is instituted. But, it will be borne in mind, that the exceptions in the statute, are all intended for the benefit of the plaintiff; and it is not so clear, that a defendant, when sued in his own individual character in the county of his residence, is entitled to claim the exception. If sued as administrator, executor, &c., he could, under another exception, claim the privilege of being sued in the county where administration had been issued. (Neil v. Owen, administrator, 3 Tex. R. 145; Richardson & Wife v. Wells, administrator, Id. 233.)

It is not, however, necessary to decide whether the exception, in this case, could be claimed, if the suit had been for the "recovery of land or damages thereto:" because the suit is instituted to set aside and vacate a sale made by an administrator; and it is in the county where the administration was granted, and comes within the spirit of the decisions of this Court in the two cases cited from 3 Texas Reports, and under the 5th exception in the statute, "in cases of executors, ad- "ministrators or guardians of an estate, or trustees, who must "be sued, in the county in which the estate is administered." The suit in this case is intended to vacate certain acts of the

administrator; and, although the administrator is not made a party, it is alleged that he died, and that the estate of the intestate, is without an administrator; and it seems, that the reasons of the law, that required an administrator to be sued in the county where the administration was taken out, will apply to this case.

Again, by the sixth exception, "in cases of fraud, the suit "may be instituted in the county where the fraud was com- "mitted." The bill in this case charges a fraud between the administrator and the purchaser; and the transaction was in the county of Walker, where the suit was instituted.

The grounds we have mentioned, authorized the suit to be instituted in the county where it was commenced; but, independently of these grounds, we are of the opinion, that the suit was not brought for land or damages thereto, within the meaning of the statute. We believe, therefore, that so far as it relates to the county in which the suit was instituted, the demurrer is not sustainable, and we must next inquire if the petition, on its face, shows sufficient equity and grounds of relief, to authorize a decree in favor of the plaintiff.

The facts of the case, as made out by the petition, have been recited in the statement of the case, and need not be again particularly recapitulated; that the order of sale and the sale of the land was obtained by fraud, and a fraudulent collusion between the administrator and the purchaser at that sale; and the specifications strongly, if not conclusively, sustain the allegation; that, when no debts were against the estate, the administrator obtained an order to sell the one half of the third of a league of land; and that he did sell the same for eighty-seven dollars and ninety cents; and that the land was worth four dollars per acre, at the time of the sale; that the purchaser gave his note for the purchase money, without the security of a mortgage; and that the purchase money had never been paid; that, at a sale of the estate of the purchaser, by his administratrix, all the right and title to the land, belonging to the estate of McDonald, the purchaser, was sold on

a credit of twelve months, and purchased by the defendant Edmondson for ten dollars and fifty cents, for which he gave his note and a mortgage on the land as security for payment. Of all the facts, the defendant is charged to have had notice. There are some other circumstances, that, if unexplained, would go to confirm the allegation of fraud; but those specified show sufficiently good grounds for bringing the suit; and, if the demurrer can be sustained, it can only be upon the ground that the facts set forth in the petition, could not be set up, according to the principles of law. And the appellee, who was the defendant in the Court below, contends in support of his demurrer, that the plaintiff is precluded from setting up those grounds of equity, because it could not be done without violating the rule of law, that the judgments of a Court of competent jurisdiction cannot be colaterally attacked; that, if erroneous, they can only be avoided by appeal or writ of error; that the judgment of the Probate Court, ordering the sale, was such a judicial act that it cannot be set aside in this Court.

This doctrine is admitted, and is not to be questioned at this day; but it is often a question, and sometimes a very perplexing one, to determine, at what time and by what mode, the jurisdiction is brought to bear upon the subject matter. The appellant insists that the Probate Court had no jurisdiction to make the order operating upon the land, unless its jurisdiction had been called into operation, in the mode prescribed by the statute; that the administrator did not file a petition, as required by law. The 17th Section of the Act to organize the Probate Court, passed May 11th, 1846, (Art. 1099, Hart. Dig,) provides, that, when a sale of land or negroes becomes necessary for the payment of debts, application shall be made therefor, by petition in writing, filed with the Clerk. The petition shall set forth the amount of personal property that has come to the hands of the executor, administrator, or guardian, stating its nature and kind; second, the manner in which any portion of said property has been ap-

plied; third, the debts that have been paid, and those that are still due and unpaid, the amount of each and the names of the parties to whom payable. It proceeds with other things that shall be contained in the petition, requiring a minute description of the land or negroes; and that, on such petition, citation shall issue and be personally served upon the heirs and legatees; and if minors, on their representatives; and makes provision for citation by publication in a newspaper, in cases where the heirs and legatees are not known, at least four weeks; that an answer may be filed by the parties interested, showing their objections. At the return Term of the said notices, the Judge shall determine whether a sale may be necessary, &c., &c. In the petition, it is alleged that no such petition was filed. Was the filing of the petition, a prerequisite to the jurisdiction of the Court attaching? In Lynch *et al.* v. Baxter and wife, administrator, (4 Tex. R. 445,) we hold the following language: "That the Probate Court has jurisdic-" tion of the estates of deceased persons, cannot be doubted; " that the jurisdiction was brought directly into exercise, upon " the property, by the petitioner praying the decree for an or-" der of sale of the land, is equally clear." In that case the order of sale was procured under a different statute, then in force, from the one under which the proceedings in the case before us have been instituted. By the statute then in force, the administrator was required to petition the Court, and obtain an order of sale; and the record showed that the petition had been filed as required by the statute, and the petition is referred to in the opinion of the Court, as we have seen, as giving jurisdiction to the Court, upon the subject matter. Had the record not shown that the order of sale was predicated upon the petition of the administrator, it is beyond doubt that we would have decided that the order was a nullity, because the jurisdiction of the Court to sell had not been called into exercise by presenting something for it to act upon. In the case of Jones v. Taylor, it is said, in reference to another Section of the probate law, i. e. in decreeing title, " that

"the authority conferred upon the Probate Court, by this Sec-"tion, is special and limited and must be strictly pursued, "otherwise the act and proceedings had thereon, are nuga-"tory and confer no right." The authority to order a sale is equally special and limited.

In the State of New York, an administrator cannot sell real estate, for the payment of debts, without first filing a petition with the Surrogate, accompanied with a statement of the indebtedness of the estate, and obtaining the Surrogate's order of sale. In the case of Jackson v. Robinson, (4 Wend. R. 440,) Mr. Justice Marcy, in delivering the opinion of the Court, says: "By an examination of the Act, relative to the "Court of Probate, it will be found that the Surrogate, if he "be the officer for the county in which probate of the will or "letters of administration were granted, is required to act on "the suggestion of an administrator or an executor, of a defi-"ciency of assets, and on receiving an account of the per-"sonal estate, and the debts of the estate. He thus acquires "jurisdiction of the subject matter." And in the case of Jackson v. Crawford, (12 Wend. R. 536,) it was ruled "that the "petition of the administrator, to the Surrogate, for the sale "of the real estate, accompanied by an account of the per-"sonal estate and debts of the intestate, was sufficient to con-"fer jurisdiction upon the Surrogate, over the subject mat-"ter." In the case of Ford v. Walsworth, (15 Wend. R. 450,) it was decided, "that the omission to present to the Surrogate "an account of the personal estate and of the debts of the in-"testate, was a fatal defect in the proceedings; and, as it was "not shown on the trial, that such account was presented to "the Surrogate, when applied to for aid in the premises, it "did not appear that he had jurisdiction in the matter." It will be found that the same doctrine has been held, but more stringently, in Mississippi. (6 How. Miss. R. 106; Id. 230; Id. 269; 1 Sm. & M. R. 351.)

We conclude, then, that according to our own decisions, as well as those of other States, the order to sell the land, as

stated in the petition of the plaintiff, was void for want of jurisdiction; it having been made without the petition required by the statute regulating such orders of sale.

By the Act of 1846, cited above, the jurisdiction of the Probate Court could not attach on the question of the sale of the land, until after the petition filed and a return of the citation—not, until then, was the Probate Judge called upon to act, and decide on the necessity of a sale. We are confident in the correctness of the construction we have given to our statutes, and in the application of legal principles, to this case. But if the facts had shown that innocent purchasers for a valuable consideration would suffer thereby, it would have been to us a source of regret. This case can give rise, however, to no such regret. On the contrary, it affords the most lively satisfaction to know, that the perpetrator of the most flagrant fraud upon the rights of the widow and the orphan, has been arrested. The judgment of the Court below is reversed, and the cause remanded for further proceedings.

Reversed and remanded.

## Baker v. Wofford.

Where, in an action for damages, *ex contractu*, the jury found that both parties were guilty of fraud, and that each party should pay half the costs, upon which verdict the Court rendered judgment in favor of the defendant for all costs, &c. *Held*, There was no error.

Error from Walker. Suit on a contract, for damages. Verdict that both parties were guilty of fraud, and that each party should pay half the costs. Judgment for the defendant for all costs, &c. Errors assigned.

1st. The judgment did not follow the verdict.

2nd. It was not founded on any verdict or issue of law.

*Yoakum & Campbell*, for plaintiff in error.

Wheeler, J. The only judgment which could legally be rendered upon the verdict was a judgment for the defendant: and the legal consequence of such judgment is that he recover his costs against the plaintiff and have execution therefor. (Hart. Dig. Art. 776.)

Judgment affirmed.

## Finley, Adm'r, v. Carothers.

It is settled that a judgment bears interest, although the contract upon which it was recovered, may not have done so.

The approval of a claim against an estate, which has been allowed by the administrator, is a judgment; and the claim, although an open account, bears interest from the date of its approval.

An administrator will be chargeable with interest accruing on claims against the estate, which have been approved, if he have funds and neglect to take proper steps to have the funds applied to the discharge of the claims.

Appeal from Montgomery. The County Court had ordered the administrator, in the payment of claims admitted and approved as due upon open accounts, not to allow interest upon such open accounts. The District Court reversed the judgment, and adjudged that interest should be computed and allowed, upon such accounts, from the date of their approval, until paid; from which judgment, the administrator appealed.

*N. H. Davis*, for appellant.

*Yoakum & Campbell* for appellee.

Lipscomb, J. The appellant contends that the Court erred in its judgment, in allowing any interest at all; and that it is in contravention of the statute of the State, fixing the rate of interest; that the act of the Probate Judge, in approving the claim, did not change its character; that it remained an open account still; and that interest could not be allowed upon it as such. The second Section of the Act of January 18, 1840, to regulate interest (Hart. Dig. Art. 1607) allows interest upon all written contracts ascertaining the sum due. An open account not being such written contract ascertaining the sum due, it has been decided by this Court, that the interest could not be allowed. (1 Tex. R. 105; 2 Tex. R. 238.) It will be

seen, however, that the same Act provides for the allowing of interest on all judgments of the several Courts of the State. (Art. 1610, Hart. Dig.) It was, at one time, made a question whether, under this Section of the Act, the allowance of interest was not restricted to judgments upon contracts on which interest was allowed; but this question is believed to have been settled in the case of Jewett v. Thompson, at Tyler, April Term, 1852: and it is held now, that interest is allowed upon all judgments.

It is insisted by the appellants, that the approval, by the Probate Judge, of the account allowed by the administrator, is not a judgment; that, at most, it is only an account stated, and is not a contract in writing. The analogy between the approval of the account, by the Probate Judge, and an account stated, is not perceived. The former is a judicial act; and it is so far a judgment, that it closes the account and authorizes the order, without any further inquiry into the claim, of a sale of property, for its satisfaction. The account stated carries with it no semblance of a judicial act.

For many purposes, no doubt, the action of the Probate Judge, in approval of the allowance, and ordering it to be paid in due course of administration, must be regarded as a judgment, and was so regarded by this Court in the case of Swenson *et al*, v. Walker's Adm'r, 3 Tex. R. 96, and in Neill v. Hodge, 5 Tex. R. 437. We have said that "the approval of "a creditor's claim, by the Probate Judge, is a judgment upon "that claim; and cannot, so far as the creditor is concerned, "be questioned at a subsequent Term of the Probate Court."

If such approval can be regarded as a judgment for any purpose, it would seem difficult to exclude it from the provisions of the 5th Section of the statute regulating interest, above referred to. And this construction, we belive, would have a most salutary influence, in having prompt payment of the claims, against an estate, and a more speedy closing of the succession. If the claims, after allowance, are to carry interest, an administrator will be bound to stop such interest, by payment, as

soon as he has the means of doing so; and if he permits the interest to run, after he has the means of payment, he will be justly chargeable to the estate, for all such payments. But, if such approvals of accounts are not to bear interest, he will be strongly tempted to put off and postpone, by every possible shift and trick, the payment of the claims, and, in the meantime, use the money with which the claims ought to be paid, for his individual interest. This question is important in its application to the settlement of estates; and it is most likely, that, to have it settled, was the main object in bringing the case into this Court. The judgment is affirmed.

Judgment affirmed.

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BENNETT AND OTHERS v. SPILLARS.

Where one of several defendants, in a suit on a joint promissory note, dies pending the suit, his representatives may be made parties; and, in such a case, the judgment should contain an order for execution against the survivors, and for payment in due course of administration out of the estate of the deceased.

*Quere?* Where one of two defendants, in a suit to enforce a mortgage or other lien, dies pending suit.

Error from Montgomery. This suit was instituted by Spillers, against Bennett and Mixon, on their joint promissory note. After service of process on Bennett, he died; and, on a suggeston of his death, his executors, Davis and S. J. Bennett, were made parties; and the suit proceeded against them as co-defendants with Mixon. Judgment was rendered against the executors and Mixon. Execution was awarded against Mixon; and the judgment, as to the executors, was ordered to be certified to the Probate Court, to be settled in the due course of their administration. The executors brought the case up

for revision, and assigned for error their joinder with Mixon, in the proceedings and judgment of the District Court.

*N. H. Davis*, for plaintiffs in error.

*H. Yoakum*, for defendant in error.

Lipscomb, J. In support of the assignment, we are referred to the decision of this Court, in the case of Martin v. Harrison, (2 Tex. R. 456,) as a case in point. On an examination of that case, it will be found materially different. Harrison had sued Martin & Montgomery for a debt secured to be paid by a joint mortgage; and the plaintiff asked a judgment for his debt, and a sale of the mortgaged premises for satisfaction. Montgomery died before process served; and the plaintiff discontinued as to him. Martin demurred; and there was a judgment against him, and an order for the sale of the whole of the mortgaged premises. Martin appealed and assigned for error, the non-joinder of the legal representative of Montgomery. The Court admits, that, according to the rules of Chancery practice, they ought to have been made parties, before any decree, affecting their rights, could be made, but ruled that the probate law had worked severance as to the mortgaged premises; and that a decree could not be rendered for a sale of their interest in the mortgaged premises; that the plaintiff, as to that security, must enforce it through the Probate Court; and sustained the proceedings against Martin. The mortgage being joint, presented the only difficulty; had that been out of the way, there can be no doubt, from the language of the Court, that the joinder of the representatives of the deceased party, with the living one, in the suit, (would have been required) if the death had occurred after bringing the suit.

In this case there is no mortgage security to be enforced; a judgment for the money is all that is sought, against the executors. No execution is prayed or awarded against the estate

of their testator. This judgment they would have been entitled to, if the claim had been presented and not approved; and this Court decided, in the case of Boon's administrator v. Robinson, (1 Tex. R. 159,) that the provision of the statute, requiring claims to be presented for allowance or rejection, only applied to claims upon which suit had not been commenced; that claims in suit, went on to judgment, and were then to be certified to the Probate Court, for settlement in the due course of administration. In this case, there is but one judgment; though execution cannot be awarded against the representatives, it is only certified, as it would have been if the suit had been brought originally against them on a rejected claim. We believe that there is no error in the judgment, and it is affirmed.

Judgment affirmed.

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## H. Randolph v. The State.

The rule which requires criminal statutes to be construed strictly, applies to those only, of a highly penal character; not to mere misdemeanors.

Statutes should not, in any cases, be so strictly construed as to defeat the obvious intention of the Legislature.

The words of the statute against gaming, "or any other banking game," &c., must have their intended effect; and consequently an indictment will lie for betting at any banking game, naming it, although it be be not enumerated in the statute.

Rondo, as played in this case, was proved to be a banking game.

This case distinguished from Crow v. The State. (6 Tex. R. 334.)

Appeal from Walker. The appellant was convicted of betting "at a certain bank, called Rondo, the same being then and there exhibited for gaming." The proof was that the defendant did bet at a game called Rondo; that one man held

the stake and the bet was against his pile; that it was played with small balls on a billiard table. Thomas Cotton, senior, being sworn, said that he understood this game; that it was called Rondo; he had seen it played in New Orleans; that, when one man held the stakes, and the others bet, it was a banking game; that it might be played so as not to be a banking game. James Moore testified that he did not understand it to be a banking game, as played at Huntsville. There was a motion for a new trial, on the facts; and a motion in arrest of judgment, on the law.

*A. P. Wiley*, for appellant. The bill of indictment is founded on Article 556, (Hart. Dig. p. 213,) which received a construction at the hands of this Court, at Tyler during the Spring Term 1851, in the case of The State v. Crow; in which the doctrine is clearly laid down, that an indictment cannot be sustained for betting at a game upon ten-pin alleys or billiard tables; and, as the proof shows that this game was played with balls on a billiard table, it comes both within the reasoning and the letter of that decision. It would seem to be wholly immaterial, under the ruling in that case, whether the game of Rondo is to be considered a banking game or not; for it is there expressly laid down, that it is not indictable to bet at any banking game, except those mentioned and specifically prohibited by the statute: and, as the game of Rondo, although well known, is not mentioned and specifically prohibited by the statute, it follows that an indictment will not lie for betting on that game.

*Attorney General*, for appellee. The indictment, although assailed on a motion in arrest, is unquestionably good, being in the terms of the stetute. (Hart. Dig. Art. 1476, 1477.) Motion for a new trial on the facts, no question of law being raised. Not only is there some evidence to support the verdict, in the sense of Carter v. Carter, and that class of cases;

but it greatly preponderates, in favor of the verdict. The question turns upon the fact, whether or not Rondo is "a banking game," and that is settled by the learned testimony of Charles Cotton, on the ground that "one man held the stakes and the others bet at his pile."

The defence is mainly based upon the reasoning of the Court in the case of Crow v. The State; (6 Tex. R. 334;) but that case is not in point here, as there is no attempt to show that the game, here played, belongs to a billiard table, and is thereby licensed.

This case is not presented by the State as an instance of "a gaming device," but of "a banking game," "of the like kind," with those mentioned in the statute by name; and therefore the reasoning in Crow v. The State, on this point, does not apply.

WHEELER, J. The appellant was indicted and convicted under Articles 1486 and 1477 of the Digest. The indictment charged that the defendant did bet "at a certain bank, called Rondo, the same being then and there exhibited for gaming."

It is objected to the sufficiency of the indictment, that, as "Rondo" is not named in the enumeration of banking games prohibited by the statute, it cannot be included within the general terms "any other gaming table or bank," or "any other gambling device," as one of the inhibited banks or games.

It is true that penal statutes must be construed strictly, and very great strictness has been observed in the construction of those of the most highly penal character. As in the familiar instance given by Blackstone, of the construction of the statute of 14 Geo. II. c. 6, which made the stealing of sheep or other cattle, felony without the benefit of clergy. These general words "or other cattle" were looked upon as too loose to create a capital offence, and the Act was held to extend to nothing but sheep. This strictness, however, was adopted in favor of life; and it has never been observed in the construc-

tion of statutes enacted for the punishment of mere misdemeanors, or those minor offences which are not punished with great rigor. It has been said by very high authority, and such is the uniform language of the Courts, that, though penal statutes are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the Legislature. The words of a statute are not to be narrowed to the exclusion of cases, which those words, in their ordinary acceptation, or in that sense in which the Legislature had obviously used them, would comprehend. (5 Wheat. R. 76, 94.)

In construing statutes, penal as well as others, an interpretation must never be adopted that will defeat the purpose for which the enactment was obviously intended. (9 Wheat. R. 381.)

That such would be the effect of adopting the construction contended for on behalf of the appellant, cannot be doubted. New names for the games intended to be prohibited by the statute, could be devised and substituted without limit; and thus, not only the present, but any future statute which might be enacted for the prevention of like offences, might readily be evaded. Such a construction would defeat the obvious intention of the Legislature; and is, therefore, inadmissible.

We are referred to our opinion in the case of Crow v. The State. (6 Tex. R. 334.) The decision in that case rested on the conviction, clearly expressed in the opinion, that the supposed offence, charged in the indictment, did not come within either the language or the intention of the Legislature. The offence described in the present indictment, manifestly is that which the Legislature intended to prohibit. The present, therefore, is plainly distinguishable from the case cited. That case sanctions no such principle, as that the table on which the game is played will necessarily give character to the game; or that the having resorted to a billiard table, on which to play a banking game, will render the playing less criminal in the eye of the law; or will afford an immunity to those who resort to this as a device by which to evade the consequences of its violation.

We are of opinion that the indictment describes an offence within the manifest intention and meaning of the statute; and that the verdict was warranted by the exidence. The judgment is, therefore, affirmed.

Judgment affirmed.

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## Tousey v. Butler.

A mistake in stating the names of the members of a partnership, plaintiffs, may be corrected by amendment, after plea in abatement filed.

Error from Walker. The plaintiffs were a mercantile firm, doing business under the name of George Butler & Brother. In setting out the names of the members of the firm, the petition stated them as George Butler and Jonas Butler.

The defendant pleaded, in abatement, that the names of the members of the firm were not George and Jonas, but were George and L. M. H. Butler. The plaintiff thereupon amended his petition, conforming to the plea; to which the defendant excepted. The exception was overruled; there was judgment for the plaintiffs and the defendant appealed.

*A. P. Wiley*, for plaintiff in error. I. The Court erred in permitting the plaintiffs below to amend their petition—thereby adding new parties, whose complaint defendant below was not cited to answer. Neither the non-joinder nor the misjoinder appearing on the face of the pleadings, it was proper matter in abatement. (1 Chitty Pl. m. p. 13, 453.) Besides the plea was a denial of the partnership under the statute.

II. The amendment admitted the truth of the plea and should

not have been allowed. If the objection had been a mere misnomer of the defendant, then the amendment might have been made, according to the case of Cartwright v. Chabert, (3 Tex. R. 261,) which accords with the Common Law mode of pleading in this particular; for by the 3 and 4, W. 4 c. 42, Sec. 11, the plaintiff might, by the plea, amend on payment of costs. (1 Chitty Pl. m. p. 452.) But this has never been held to apply to a non-joinder or misjoinder. The plaintiff, from his knowledge of the persons in whom the legal interest vests, is expected to bring into Court all necessary and proper parties, and hence should not be allowed to come carelessly into Court, wrong, and put himself right at defendant's cost.

*Yoakum & Campbell*, for defendants in error. The error assigned is that plaintiffs below could not amend by correcting the christian name of one of the partners of the firm. The defendants in error rely upon the statute, and the case of Cartwright v. Chabert. (3 Tex. R. 261.)

WHEELER, J. The mistake in stating the christian name of one of the parties plaintiff, is the common case of a misnomer: and it is well settled, that, after misnomer pleaded in abatement, the plaintiff may correct the mistake by amendment. (Cartwright v. Chabert, 3 Tex. R. 261.) It can make no difference whether the misnomer pleaded be the christian or surname: the rule is the same.

Judgment affirmed.

## Cummings and another v. Rice & Nichols.

A party signing by the initials of his christian name, may be sued in the same manner.

Where the petition was against U. S. Cummings, and the citation was issued to and served upon Uriah Cummings, it was held that the variance between the petition and writ was immaterial.

The filing of an amendment by the plaintiff, on the eve of trial, does not entitle the defendant to a continuance on the ground of surprise; but it must be shown by affidavit, that the defendant has a good defence, and that the filing of the amendment makes necessary the attendance of witnesses or the procurement of evidence which was not procured, because not expected to be needed, until after the amendment.

A waiver by the indorser, of suit against the maker, at the first Term of Court, which is accepted by the indorsee, does not prevent the indorsee from suing the maker and indorser at the first Term.

Error from Walker. Suit commenced Fall Term, 1852, by the defendants in error against the plaintiffs in error, on a note dated March 5th, 1852, payable one day after date, signed by Cummings and alleged to have been indorsed same day to the plaintiffs by Tousey, the payee. The petition gave the name of one of the defendants as U. S. Cummings. A citation was issued to Uriah S. Cummings, and was returned executed. Cummings excepted to the citation and service, because it did not correspond to the petition. He also filed a general denial. Tousey demurred generally, and filed a general denial. When the case was called for trial, and after argument of Tousey's demurrer, the plaintiffs amended by filing the following exhibit, and connecting it with the petition by suitable averments:

"I have this day transferred by indorsement to Rice & "Nichols, for the benefit of William Calhoun, successor of "Calhoun & McDurfee, the following notes;" (including note sued on;) "and guarantee the final payment of the same; "and extend the time until the 2nd Term of Court, from date.

"July 12, 1852. Isaac Tousey." Thereupon the defendant Tousey claimed a continuance on the ground of surprise; which was refused by the Court, and Tousey excepted. The exceptions of Cummings and the demurrer of Tousey were then overruled. Judgment for plaintiffs.

The errors assigned were:

1st. Overruling exceptions of defendant Cummings.

2nd. Overruling Tousey's application for a continuance.

3rd. Overruling Tousey's demurrer.

*A. P. Wiley*, for plaintiff in error. In support of the first assignment of error, the Court is referred to Art. 671, 674, 675, Hart. Dig. p. 242. In support of the second assignment, it is submitted that the amendment set up entirely new matter, which, upon its face, presented a new issue, upon which the defendant Tousey was entitled to time to procure proof. (See Tourtelot v. Tourtelot, 4 Mass. R. 506; Homes v. Lansing, 1 Johns. Cas. 248; Watts v. McKenney, 1 Marsh. R. 561; Cabanis v. Lyon, 3 J. J. Marsh. R. 332; 4 Litt. R. 235; Rankin v. Cooper, 1 Browne, R. 253; Nixon v. Brown, 3 Blackf. R. 504; Wright v. Basye, 6 Blackf. 419; 5 Blackf. 84.) In support of the third assignment, the amendment disclosed an agreement to extend the time of sueing, and showed that the present suit was premature; or at all events, it was sufficiently ambiguous to let in parol proof to explain, which the defendant Tousey should have been allowed time to procure.

*Yoakum & Campbell*, for defendants in error. This cause is taken up for delay. The plaintiffs below had the right to amend their petition, by stating that the note was indorsed by Tousey on the 12th July, 1852, instead of on the day the note was made, and also to append to that amendment a memorandum signed by Tousey, showing the actual time of the transfer. This was no ground of surprise to Tousey. The

question of his liability would be determined by the facts. He knew what they were. He set up no other defence. The conclusion is, he had no other. Still less had Cummings any right to be surprised—as he made the note. The other exception, that the "Sheriff's return did not show what Cummings it was," it seems, should have come up in another form; a plea in abatement would have reached it, if he had really been a different Cummings.

Lipscomb, J. In this case, the appellants were sued in the District Court, by the appellees, upon a promissory note given by Cummings to Tousey, and indorsed by the last named. Cummings writes his name to the note U. S. Cummings. The petition names him as U. S. Cummings; but the citation, issued by the Clerk, names him as Uriah S. Cummings. This variance between the petition and the citation, is supposed, by the appellants, to be demurrable; and the overruling of this demurrer is assigned for error.

We have no doubt, that, by the ancient Common Law practice, the petition would have been held bad; because the plaintiffs would have been bound to give the name in full, as initials were not regarded as meaning anything, and were not held to constitute a name: and, on a note so executed, the plaintiffs would have been compelled to have given the full name, and alleged that he had made and executed his note by the style of U. S. Cummings. But it has grown into such universal practice, to sign one's given name by the initials, that it has had the effect to relax the rule; nor is it believed that any injury has resulted from such relaxation. And, in the case before us, if the initials, given in the petition, do not stand for Uriah S., and the defendant intended to be served with process, is not the person really served, it should have been pleaded in abatement of the process. But it would not have abated the action. We believe that the petition giving the name by which the note was executed, the mere fact of the citation

giving the name in full, furnishes no legal exception to the process served.

The other objection to the judgment is that the Court erred in overruling the defendant's motion for a continuance, on the ground of surprise, when the plaintiff was permitted to amend. Now the mere fact that the defendant was surprised by such an amendment, would not, of itself, be a ground of continuance. He should have shown, by his affidavit, that he had a good defence, that he could prove by witnesses whose attendance was not procured, because not expected to be needed, until after the amendment was made. But he showed no grounds for the continuance; and there was no error in overruling the motion of the defendant.

Judgment affirmed.

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## Waller v. Huff, Adm'r.

*Quere?* Whether an action of *scire facias* to revive a judgment of the District Court can be instituted in the county where the judgment remains of record, where the defendant resides in another county.

A judgment on a *scire facias* to revive, that the judgment be revived, and that the plaintiff do recover the amount, for which let execution issue, is substantially correct; or, if erroneous, can be corrected by rendering such judgment as should have been rendered.

Where judgment is rendered with a stay of execution until the happening of a certain event, a *scire facias* to revive and obtain execution cannot be maintained without alleging that the event has happened, or some other fact which avoids the necessity of its happening; and proving the same. And where the judgment went by default, the want of such allegation and proof was held to be fatal, on error.

Error from Brazoria. The petition was filed by George Huff, administrator of Samuel Sawyer, deceased, representing, that

on the 4th day of April, 1838, a judgment was rendered by the District Court of Brazoria county in favor of petitioner, as administrator aforesaid, against Edwin Waller; that no execution had issued on said judgment, and that the same was still in force and unsatisfied; and that "the said Waller resides in the county of Austin."

The petition prayed that a writ of *scire facias* might issue to said county of Austin, requiring Waller to show cause why judgment should not be revived, and execution be issued thereon. A copy of the judgment was annexed to the petition, and was as follows:

"George Huff v. Edwin Waller." "In this case, the parties, by their counsel, "came into Court, waived the right of trial "by jury, submitted the same to the Court, "and the plaintiff having established his demand: It is or- "dered, adjudged, and decreed that the plaintiff recover of "the defendant the sum of thirty-five hundred dollars with "interest at five per cent. per annum from the 11th day of Jan- "uary, 1835, subject to a credit of seventeen hundred and fifty "dollars paid on the 23rd April, 1835; and defendant is al- "lowed interest on that amount at the said rates; and execu- "tion is stayed until the curator, Huff, settle the succession of "S. Sawyer."

The defendant did not appear, and judgment was rendered that the plaintiff recover of the defendant the sum of one thousand seven hundred and ninety 58-100 dollars, with, interest thereon from the 23rd of April, 1835, at the rate of five per cent. per annum, and that execution issue for the same. The defendant sued out a writ of error, and assigned the following as grounds for reversal, viz:

1st. That the defendant was illegally sued in Brazoria county, the petition showing that Waller resided in the county of Austin, and no cause is shown why suit was authorized to be brought out of the county of his residence.

2nd. The judgment is against the law and the evidence.

3rd. The judgment was by default and the damages were incorrectly assessed, as appears by the record.

4th. The judgment does not correspond with, nor does it follow the terms and conditions of, the original judgment upon which the suit was brought.

*E. M. Pease*, for plaintiff in error. I. In relation to the first error assigned: The petition alleges that Waller, the defendant, is a resident of Austin county. The suit was commenced in Brazoria county, on the 24th January, 1846; and it is contended, that, under the law then in force, he could not have been sued in this case, except in the county of his residence. (See Acts of 1st Congress, page 200, Sec. 5.)

II. In relation to the second error assigned: It is contended by the appellant, that the judgment rendered in this case is not such a judgment, as the law authorized. (Hart. Dig. Art. 1623; 2 Tidd. Prac. 1139, 1152, 1153; Appendix Tidd Prac. ch. 42 Sec. 74, ch. 41, Sec. 20; 5 B. Monr. 172; 1 Harringt. R. 94; 7 Cow. R. 540.)

III. It is also contended that this judgment is against the evidence.

The record shows that this judgment was rendered by default, and that there was no evidence before the Court but the original judgment. A copy of this judgment is made a part of the petition for the *scire facias*. It will be seen that it was a part of the judgment, "that execution was stayed until the curator, Huff, settles the succession of S. Sawyer." This part of the judgment was part of the evidence before the Court, and showed that the plaintiff was not entitled to execution, "until the curator, Huff, settled the succession of S. Sawyer." There was no evidence before the Court that the succession of S. Sawyer had been settled by the curator, Huff: indeed, no such evidence could properly have been admitted, for there is no allegation in the petition, that said succession had been settled by said Huff, under which the evidence could have been admitted. The fact that the original judgment contained the above named stay of execution was disclosed by the pleadings of the plaintiff, for the copy of the original judgment, attached

to the petition, must be considered a part of the allegations and pleadings of the plaintiff.

"A judgment taken by default, does not dispense with the "rule which requires that the proof shall conform to the allega- "tions, and that the latter must be sufficient to constitute a "legal basis, on which to predicate the judgment." (3 Tex. R. 305.)

Taking the copy of the judgment as a part of the petition, it is respectfully submitted to the Court, that a general demurrer to the petition would have been sustained, and this is sufficient to reverse the judgment.

The third and fourth errors assigned may be considered as embraced in the second.

*J. B. Jones*, for defendant in error. I. Proceedings to revive a judgment, do not constitute a new suit; but are a continuation of a former suit. (McGill v. Perrigo, *et al.*, 9 Johns. R. 259; Wolf v. Pounsford, Ohio R. Cond. 841.)

The proceedings were therefore properly instituted in Brazoria county where the original judgment was rendered. But even if we should be mistaken on this point; yet, we say the right to be sued in the county of his residence, was a personal privilege of the defendant, which he waived by his default. He should have taken advantage of this defence in the Court below.

II. The judgment, we insist, is substantially correct. It refers to the former judgment, and, in effect, revives it, and orders execution to issue. If all entries, made by the Clerks of our District Courts, were required to be in strict technical form, as required by the Common Law practice, few judgments would be sustained. It is sufficient that the judgment is in substance and effect correct. At most, this Court would but render such judgment as the Court below ought to have rendered.

III. The stay of execution, given by the original judgment, requires an impossibility. It creates two perpetuities. The

condition, being impossible and entirely repugnant to the judgment, is void.

Hemphill, Ch. J. As some difference of opinion might exist, in relation to the first ground, its examination will be waived. The other three grounds of error have been consolidated and considered together, in the argument of the appellant; and we will pursue the same order in their discussion. It is insisted that the judgment is not such as is authorized by law; that the form of a judgment, on a *scire facias* to revive a judgment where execution has not issued, is that the plaintiff have execution for the original judgment; and that this form has not been pursued. It appears from the record, that two attempts were made to enter the judgment in legal and technical form. In the latter it is ordered that the judgment be revived; and the Clerk having assessed the damage, it was ordered that the plaintiff do recover of the defendant a certain sum, with interest from the 23rd April, 1835. This sum, if the interest from January to April be correctly estimated, (and I shall not stay to examine whether it be so or not,) is equivalent to the amount recovered in the original judgment; and it orders execution to issue. Thus far the judgment, though not in due form, is substantially correct; and the error, if any, is one which might be cured by pronouncing such judgment here as should have been rendered below.

But a fatal objection to the judgment and to the action, is, that the original judgment is encumbered with a condition which is not attached to the judgment as revived under this proceeding. By the original judgment, execution is stayed until the curator, Huff, settle with the succession of S. Sawyer. Now, the object of a *scire facias* is to obtain execution where it has not been issued. But how can the plaintiff succeed in having execution in this case, when, by agreement, it is to be delayed until the performance of a precedent condition? He certainly cannot succeed, unless he can show that it has been performed, or that it was fraudulently obtained, or that for

some reason, valid in law, it is no longer binding on the parties. They doubtless understood what was meant and intended by the agreement. That its object was to benefit the defendant, is certain; and of this he cannot be deprived, unless on good cause shown to the contrary. But there is no allegation in the petition, which would let in any proof touching this condition or its performance or want of force and efficacy. There is no evidence but the copy of the judgment itself; and this shows that execution was suspended by consent of the parties. This suspension still continues; for there is no showing, and can be none on the pleadings, to the contrary. The judgment, which the plaintiff produces to show that he is entitled to execution, proves, by its own terms, quite the reverse. If the judgment be revived at all, it must be with all its terms, conditions and contingencies, unless it be alleged and shown to be now disencumbered. As it stands, the original judgment is ordered to be revived and execution issue, without any respect to that portion of the judgment which stayed execution or any showing why it should be disregarded.

The defendant in error contends that the condition is an impossibilty, repugnant to the judgment, and therefore void. The condition may be impossible; but this is not apparent from anything contained in the record. All that can be gleaned from the judgment, is, that execution is not to issue until a curator who is named settles a certain succession. To settle an estate is not, in itself, an impossibility; and there is nothing to show that the suspension of this execution obstructs or prevents such settlement, or in fact that the estate has any or what interest in the judgment.

But the discussion of the points raised in the assignments need not be further prolonged. The judgment is encumbered with a condition. If revived at all, it must be *cum onere;* or it must be alleged and shown that the ground for the suspension of execution no longer continues. Judgment reversed and cause remanded.

Reversed and remanded.

## Thompson, Adm'r, v. Shannon and another.

A charge, either given or refused, must be taken in view of the evidence on the facts alleged. A charge might be perfectly harmless and inoperative in the abstract; but, when referred to a certain set of facts in the proof, might have a most important influence on the jury.

Where an administrator's sale was attacked on the ground of fraud between the administrator and purchaser, and one of the allegations was that no money was paid nor note given, and facts were proved tending to establish the allegations of the petition, it was held that the Court improperly charged the jury that absence of proof of payment of the consideration by the purchaser, did not raise the presumption of fraud.

The failure or refusal of a party to produce testimony, which might reasonably be supposed to be within his power, to explain or rebut circumstances of suspicion, strengthens the presumption arising from those circumstances.

Fraud may be proved by circumstantial evidence.

Appeal from Montgomery. This suit was instituted to set aside a sale of land, made by Cochran, the former administrator, at which sale, Shannon became the purchaser, and received the administrator's title. The ground upon which the sale was sought to be set aside was fraud and collusion, between the administrator and the purchaser. There were other grounds alleged in the petition; but they were not sustained by the record.

The allegations of the petition were tried by a jury; and there was a verdict for the defendant; a motion to set aside the verdict, which was overruled by the Court; and the plaintiff appealed. There was no evidence of any money being paid by the purchaser; nor that he had given a note and mortgage for the same: he received a deed, bearing date the day of the sale; and on the next day conveyed two-thirds of the land, conveyed to him by Cochran, back to Cochran. The same witnesses appeared to both deeds; and those witnesses, before the jury, swore that they distinctly recollected the execution of the deed from Shannon to Cochran; but neither of

them had any recollection of witnessing the deed from Cochran to Shannon—though they both admitted the genuineness of their signatures, as witnesses to that deed. The Court was requested to charge the jury, "that proof of the payment of "the consideration, by the purchaser, would rebut the pre- "sumption of fraud; absence of such proof would raise that "presumption." The Court gave the charge that proof of the payment, of the consideration, by the purchaser, would rebut the presumption of fraud; but refused to give the other part, that absence of such proof raised that presumption; and said that it was not law.

*Yoakum & Campbell*, for appellant. The 4th charge asked—Is it not law? A consideration is the life of all contracts. It there was no consideration between Cochran and Shannon, would it not clearly raise a presumption of fraud?

*A. Hemphill* and *L. L. Bradbury*, for appellees. That the Court below did not err in refusing the portion of the 4th charge, will appear by reference to 1st Greenleaf, Sections 34, 35, and 80; and see Roberts on Frauds, &c., page 520; 3 Tex. R. 36; 8 Pet. R. 244.

Lipscomb, J. If law be a rule of right, and sound reason, it would seem difficult to separate the one part of the charge asked, from the other. If the first part is right in law, the other would seem to be only a logical conclusion, that would follow from the first. But the fair test of the propriety of a charge, cannot be, whether in the abstract, it is right. It must be taken in view of the evidence of the facts charged, on which the jury is required to respond. A charge, in the abstract, as a mere legal proposition, might be perfectly inoperative and harmless; when however, referred to a certain set of facts and circumstances in the proof, it might have a most important, and conclusive influence on the jury, in forming

their verdict. Now, if there had been no evidence of circumstances calculated to impeach the fairness of the transaction, the charge of the Court as given, could not have had any potency in it, and would have been regarded as abstract and irrelevant to the case. But, when taken in view of the facts proven, its influence on the jury is too clear and direct, to be concealed or denied. The charge, made in the petition, was that the sale was a fraudulent and collusive transaction, between the administrator and the pretended purchaser; and it was in evidence, that the deeds, if not passed at the same time, were so nearly one transaction in point of time, as to raise the presumption that Shannon, the purchaser, was only the instrument, and the willing instrument, of completing the fraudulent design; and that the administrator was the real beneficiary in the transaction. The witnesses to the deed, saw no money paid, and no note given. These were but circumstances; they were, however, of a character to create an unfavorable impression, as to the fairness of the transaction. Had the defendants proved payment of the consideration, it would have had an influence, in rebutting the unfavorable presumption, that had been raised. And if that consideration was not grossly inadequate, would have removed the cloud that had been attempted to be thrown upon the fairness of the transaction.

Again, if the party to a transaction refuses or fails to use means, that might reasonably be supposed to be within his power, his failure to produce such evidence, strengthens the unfavorable presumption. It is in general, the only means to to reach fraud and drag it to the light of the day: to prove circumstances, from which the reasonable presumption is inconsistent with the honesty of the transaction. It is not often, that any kind of evidence but circumstantial evidence, can be procured. The most abandoned and profligate man is not willing to acknowledge, in the face of the world, his guilt; and plausible pretences, clothed in the vestments of innocence, are resorted to by those who contemplate the commission of

fraud: and if positive proof can be obtained of the fraud, it is the nearest accident, and only furnishes an exception to the rule, that it can only be reached by circumstantial evidence. The rule of law, that fraud must be proven, and not presumed, does not exclude the proof of facts from which fraud may be inferred. It only means that, in the absence of proof of such circumstances, fraud cannot be presumed.

The charge of the Court, as given, was calculated to make the jury, believe, that in law, no inference unfavorable to the fairness of the transaction, could be drawn legitimately from a failure to prove payment of the consideration. If it had been paid, it is reasonable to suppose that some evidence of such payment could be proven. The deed was not evidence of that fact; because the record shows, that, by the terms of the sale, payment could not have been demanded, until twelve months after it purported to be dated.

Because then, we believe the Court erred in refusing to give the charge, as asked, the judgment must be reversed and the cause remanded for a new trial.

Reversed and remanded.

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## Ayres, Adm'r, v. J. P. Henderson.

The exception, in the statute of limitations, as to debtors absent from the State, is not confined to those who are temporarily absent; but extends to those who remove with an intention not to return.

Where a debtor died while absent from the State, but there was no testimony as to the time of his death, it was held that there was no error in refusing to charge the jury, that the statute ran from the time of his death. But *quere?* If the time of his death had been proved.

Error from Walker. This was an action on a note made by

English, the deceased intestate, on the 5th October, 1844; and it became payable on the 1st of November, 1845. The petition alleged, that, after the execution of the note, the maker went to the State of Louisiana, where he resided until he died. Administration was taken out in September, 1850; and the note being presented, duly authenticated, was disallowed.

The defendant pleaded the limitation of four years, as a bar to the action.

It was proven that English left Texas early in the year 1845, and resided afterwards in Louisiana; and it was reported that he had died in the city of New Orleans.

The Court was asked and refused to charge the jury:

1st. That the exception to the statute does not apply to persons changing their residence from the Republic, but only to citizens who absent themselves without changing their residence.

2nd. That the exception of the statute of limitations does not apply, in a case where a citizen of the Republic absented himself and died in a foreign country, only up to the time of his death, but from his death limitation re-commenced.

Judgment was given for the plaintiff; and the cause was brought up to this Court on a writ of error.

*Yoakum & Campbell*, for plaintiff in error.

*A. P. Wiley*, for defendant in error.

Hemphill, Ch. J. In relation to the refusal of the first charge, we are of opinion that there is no error in the ruling of the Court.

There is some plausibility in the assumption that the 22nd Section of the Act was intended to apply only to persons who left the Republic with the intention of returning, and not to those who removed with no such intention, and who, in fact,

never did return. But the object of the Section was for the protection of domestic creditors. It was to their advantage, that their debtors should remain within the limits of the State. And it was intended to protect them from the inconvenience and loss, to which they would be exposed by the absence of their debtors and consequent immunity of the latter from process and judgment. The permanent removal of the debtor would only aggravate the evil and hazard to the creditor. But whether the removal be permanent or temporary, the return of the debtor was within the range of possibilities—and in the contemplation of the law—and when that event does take place, the creditor can claim the advantage intended by the Section in suspending the operation of the statute. Whether any modification should be made of this provision, under certain circumstances, as, for instance, where the party leaves property subject to attachment, is left to the wisdom of the Legislature. There is no exception in the words of the law, and we are not authorized to admit of any not provided for or intended by the legislative authority; consequently there was no error in refusing the charge as asked by the defendant.

Nor is there any error in refusing the second charge.

The proposition, as presented, has no direct application to the facts of the case. The deceased removed from the State before the note became due, and the statute did not commence to run during his lifetime. There is no proof of any kind, as to the time of his death. If we look to the facts of the case for presumptions as to that period, we may infer that administration was taken out within a reasonable time, a year or two years for instance, after his death; and consequently, if even the statute did then commence to run, yet the bar would not have been completed prior to the commencement of the action. Without considering whether the charge, as a legal proposition, be correct or otherwise, we are of opinion that there was no error in refusing to give it, under the facts of this case.

Judgment affirmed.

## Foster v. McAdams.

One Justice of the Peace cannot, by consent of parties, be substituted for another, in the trial of a case, in a precinct to which the former does not belong.

Where the parties, having a suit pending before Justice Davis in precinct No. 7, agreed that Justice Mason, of precinct No. 3, should sit with Justice Davis at the trial, and that the decision of Justice Mason should be final; and the case was tried in that way, Justice Davis entering up the judgment as the judgment of Justice Mason, and signing his own name thereto; Justice Davis declining to express an opinion, but making no entry to that effect; *Held*, That the judgment was void.

See this case upon the subject of an award in a Justice's Court.

Error from Walker. Injunction against an execution issued by a Justice of the Peace. It appeared that the parties had a suit pending before Davis, in the 7th precinct; that they agreed that Mason, Justice in precinct No. 3, should sit with Davis in the trial of the case, and that the decision of Mason should be final; that the judgment was entered up by Davis, signing his own name thereto, as the judgment of Mason; and declining to give an opinion of his own, but making no entry to that effect. The injunction was dissolved; and the plaintiff obtained a writ of error.

*Wiley & Baker*, for plaintiff in error. I. The Act of 1848, (Hart. Dig. p. 520,) to "organize Justice's Courts and define their jurisdiction," provides for an election "by the qualified "electors of each Justice's precinct, semi-annually, two Jus- "tices," &c. There is no provision in the law for a Justice hearing and determining cases out of his own precinct. Their civil jurisdiction is confined to their precincts, respectively, except in certain cases. (Hart. Dig. p. 527, Art. 1717.) And hence it follows that one Justice has no right to sit upon a case in another's precinct. (2 Root, R. 357; 1 Id. 202.) And for the purpose of remedying this hiatus, the Legislature at

the last session passed an Act which see in Acts of 1852, p. 140, Sec. 2. Their criminal jurisdiction is co-extensive with the county. (Hart. Dig. p. 523, Art. 1703.)

II. The Justice's record, and the Justice, Mason, who rendered the judgment in this case, both show that the judgment was that of Mason and not of Davis; hence it was void. Consent could not give jurisdiction where otherwise there was none. (Wynns & Lawrence v. Underwood, 1 Tex. R. 48.)

III. It was not an arbitration under the statute, for the proceedings show that the parties did not intend to follow the statute for the submitting of matters to arbitrament and award. (Owens v. Withee, 3 Tex. R. 161.) And if it was a submission at Common Law, then the award is only matter for the foundation of an action, and cannot be enforced by execution. (1 Chitty, Pl. m. p. 103; 8 Cow. R. 235; 7 Id. 522; 2 Saund. R. 62.)

*Yoakum & Campbell*, for defendant in error. The judgment entered up by Justice Davis, in this case, is good as his judgment, or as an award.

1st. As his judgment. He was not bound to adopt it, if it did not coincide with his view. But we have reason to believe it did coincide with his opinion, because he stated that the evidence was different from that of the former trial: also, the fact that he was not called on to prove that it was not his judgment, is evidence that it was; and again, as he entered it up on his docket and signed his name to it as a judgment, the presumption is in favor of its being such.

2nd. It was a good Common Law award. The parties had agreed upon the arbitrator. He accepted the position, sat upon it, gave a decision; the parties were there, his award was entered up as the judgment of the Court.

Our arbitration law, does not apply to cases in Court—but only to cases not commenced. Its whole form of proceeding contemplates a new case. Here is a case in Court, a reference is had as at Common Law; no particular form is re-

quired; substantial justice has been done. The claim is small—yet the plaintiff is running up a heavy bill of costs, to avoid the just penalty of a trespass on his neighbor's property.

Lipscomb, J. The question presented in this case, is, Can a Justice of the Peace go out of his own precinct and try and decide a civil suit?

The Justices of the Peace are elected for a particular precinct, by the qualified voters of such precinct; (See Art. 201, 202, 225, Hart. Dig.;) and it would seem to follow, as a matter of course, in the absence of any express authority of law to the contrary, that their jurisdiction is restricted and confined to the particular precinct, for which and in which they had been elected by the qualified voters thereof. They can no more go out of their own precinct and try a civil suit, than they could go out of their county and perform such judicial functions. And the question of jurisdiction is not to be waived, nor can it be given where it does not exist, even by consent of the parties. (Wynns & Lawrence v. Underwood, 1 Tex. R. 48.) In general, a party is protected from a suit only in the precinct of his residence. To this there are some exceptions, such as if there be no Justice of the Peace in the precinct of the defendant's residence; or if it be within an incorporated town or city. In the first exception, he can be sued before the Justice of the next adjoining precinct; and in the latter, he can be sued before any Justice of the Peace within the corporation. In neither these exceptions is it believed that the Justice could go out of his own precinct to hold his Court. He can bring the parties before him; but he cannot go out of his precinct to try the case.

The record shows that the supposed judgment in this case, was rendered and signed by Justice Mason, out of his own precinct, and in the precinct of Justice Davis; and the judgment was entered on the docket of the said Justice Davis, not as his judgment, but the judgment of Mason. There was some evidence that the parties had verbally consented to the substi-

tution of Mason in the place of Davis; but this consent, we have said, could not give jurisdiction to the substituted Justice, no more than if he was not in commission at all. (See the case above cited.)

The appellant filed his petition, and prayed an injunction against an execution issued upon this void judgment. The injunction was granted by the District Judge; but, on a hearing of the case, the Court dissolved the injunction and dismissed the petition. In the petition, the circumstances under which the pretended judgment was obtained, are fully stated; and he alleges that he is threatened with an execution upon this void judgment, against his property. Perhaps this was the only appropriate and ample remedy, that he could have resorted to. We believe that the injunction ought to have been perpetuated, and the appellant relieved from the expense and trouble of further defence against the judgment, on the ground that it was a void judgment, for want of jurisdiction in the the Justice rendering it.

The judgment of the District Court is therefore reversed; and this Court will render such judgment as the District Court ought to have given, perpetuating the injunction.

Reversed and re-formed.

## Hogue, Ex'or, v. Sims and another.

Unless the heirs comply with the conditions imposed by the latter part of the 110th Section of the Probate Law, (Hart. Dig. Art. 1219,) the provision in the will, made in pursuance of the former part of the same Section, taking the estate out of the Probate Court, becomes inoperative; and the estate must be settled, under the direction of the Chief Justice, as in other cases, where the will contains no such direction: that is, if there be any creditors; for if there be no creditors the heirs can adjust their respective rights, without the control of the Chief Justice.

A provision in the will and the assent of the heirs are both necessary to take the administration of the estate, out of the Probate Court; after the heirs have assented by giving bond as provided by the statute, the creditor may sue upon the bond, or he may sue the person in possession of the estate; but not before: and the petition should allege the giving of bond, &c., although the suit be not brought upon the bond.

Appeal from Walker. This suit was brought by the appellees, against appellant, on a note of hand, executed by the testator. The District Court gave a judgment for the plaintiffs.

It is not material to refer to the whole petition. It will be sufficient to notice such parts thereof, as will show the grounds of the demurrer, which was overruled in the District Court. It alleged the death of the testator; the probate of the will, and the qualification of two of the executors named in the will; that the will contained a provision, that the Probate Court should have no other control over the estate of the testator, than to take probate of his will and receive an inventory of his estate, which the petitioner averred had been done; that the claim sued on had been duly authenticated and presented to the executors, and allowed by them, and had been approved by the Chief Justice of the county. It averred refusal and failure to pay, in the testator's lifetime, and that the executors had not paid the same since his death; prayed process and judgment. The defendant filed a demurrer to the plaintiffs' petition, and assigned as special exceptions, that the plaintiffs had failed to set forth, or allege in their petition, that

a complaint in writing had been filed in the County Court of Walker county, by some person having a debt against said estate, and that all the persons entitled to any portion of the estate of A. F. Keeble, deceased, under his will, or as heirs at law, had been cited to appear at some regular Term of said Court, and that they had appeared and executed an obligation, with two or more good and sufficient securities, payable to the Chief Justice of said county, for the amount, and with the condition required by the 110th Section of an Act entitled an Act to regulate proceedings in the County Court, pertaining to estates of deceased persons, passed March 20th, 1848. Secondly, the remedy used in this case, is not the legal remedy.

The demurrer was overruled; and the judgment of the Court below was sought to be reversed, upon the ground that the Court erred in overruling the demurrer.

*W. A. Leigh*, for appellant.

*Yoakum & Campbell*, for appellees.

Lipscomb, J. The statute, referred to in support of the demurrer, is too long to be inserted here; it will be found in Article 1219, of Hartley's Digest. The commencement of the Section authorizes any person, capable of making a will, to so provide by his will, that no other action shall be had in the County Court, in relation to the settlement of his estate, than the probate and registration of his will and the return of an inventory of the estate. A condition and limitation is, however, imposed upon this right, to make such a provision by will.—It provides, pretty much in the language of the special exception, set out in support of the demurrer, so far as the exception goes. It provides, if the bond is not given upon the return of the citation, that the estate shall be administered and settled, under the direction of the Court, as other estates. But, if the obligation shall be executed, it shall be filed and recorded in said Court; and no other action shall be had in said

Court in relation to such estate. It provides that all costs of such proceedings shall be paid by the persons so entitled to such estate, according to their respective interests in it. It provides that every creditor of such estate shall have the right to sue on such obligation, or such creditors may have their actions against those in possession of the estate. The suit seems to have been brought as at Common Law; and it is to be inferred from the structure of the petition, that the pleader believed that the fact of the provision being in the will, taking the estate out of the control of the County Court, had, of itself, the effect to revive the Common Law remedy, in favor of creditors of an estate. And perhaps, such would have been the effect of the authority given, to provide for taking the estate out of the control of the Probate Court, if that provision had not been regulated and controlled by the subsequent regulations imposed in the same Section. This right was given, subject to the consent of the heirs and legatees. They could be called upon to make their election. If they failed to give the bond required, then the provision in the will was inoperative, and the estate was to be settled under the direction of the Chief Justice, as in other cases, where the will contained no such direction.

By the statute, the heirs and legatees could not be called upon to make an election, only on the application of a creditor; if there were no creditors, they could adjust their respective rights, without the control of the Chief Justice. The Chief Justice could take no action in relation to the estates after the probate and registry of the will, and receiving the inventory, until a creditor complained to him; and then he was required to issue citation, and require the heirs or legatees to make their election. This could be done, on the application of one creditor alone; and, if the the bond was given, it would be for the benefit of all; if it was not given, the creditors proceeded as in the case of other estates settled under the control of the Chief Justice; and their claims are to be paid in the due course of administration. The suit was brought

without any regard to the fact that it had not been decided by the election of the heirs and legatees, that they would accept the will with the provision; and the petition was, therefore, fatally bad, and should have been so ruled on the demurrer.

If the bond had been given, there is no doubt two results would be produced by it. It would have removed the estate entirely from the control of the Probate Court; and it would have given a creditor a right to sue on that bond, and his judgment would have been satisfied by execution. Whether he could have been restricted, in his remedy, to a suit on the bond, is not a question free from difficulty. The concluding member of the last sentence in the Section is in the following words: "Or such creditors may have their action against those in possession of the estate." It would not be a fair construction, to say that these words are to be detached from the sentence, and means that the creditor may have his action in any event, whether the heirs have elected to give bond, or not; because the right to make this election, and thereby free themselves from personally being sued, by declining to give the bond, is clearly expressed; and it is equally clear, that, on their so declining to give the obligation, the estate is settled, and debts paid, under the control of the Chief Justice. The more reasonable construction, and the true one, it seems, can be supported without detaching the words from the sentence or paragraph in which they have been placed. It is, that, after a bond has been given, the creditor may have his choice, to sue upon the bond, or to bring his suit against any person who may be in possession of the estate. In either case, on obtaining judgment, he would be entitled to an award of execution for its satisfaction. If the bond had been given, the suit could have been sustained against the executors, if they were in possession of the estate; if the heirs and legatees were in possession, the suit would be against them. When this case goes back, it is possible the plaintiff may be able to amend his petition. If, before this suit had been commenced, the bond had been given, he could sustain his action by alleging that fact in

his amended petition; if this was not the fact, the suit cannot be sustained.

There are two facts alleged, and no doubt they are true, and we are to take them to be so in passing judgment upon the demurrer, that would show that the Probate Court had taken some action in relation to the estate, after the probate of the will and receiving the inventory. These facts are, the presentation of the claim to the executors, and its allowance approved by the Chief Justice; and it might be contended that we are to presume, from these facts, that the heirs and legatees had failed to give the bond after citation, and that the estate was now being settled as in other cases, under the control of the Chief Justice; because the Chief Justice would have nothing to do with the claim, to approve or disapprove, only upon the hypothesis that the heirs and legatees had declined the previlege provided for in the will, and that it had been surrendered to the control of the Chief Justice. If, however, this was a fair presumption, and one that might be legitimately indulged, the plaintiffs' action could derive no advantage from the concession, because they would then show conclusively that they could not support the action; because they aver presentation of the claim to the executor, and his allowance, and the approval of the Chief Justice. The claim, then, could not be sued upon, but it would be ranked among the acknowledged debts, to be paid in the due course of administration.

The judgment of the District Court, on the demurrer in this case, is reversed, and the cause remanded, if the parties desire it. This decision applies to the several suits, number 355, 356, 357, as well as to this case, and the same judgment must be entered in each of them.

Reversed and remanded.

## Leach v. Millard.

Objections to the admissibility of evidence cannot be first taken in the appellate Court.

Irrelevancy is a valid objection to the admissibility of a record, in evidence.

Where the husband is sued for cutting and carrying away timber, the wife has no right to become a party on the ground that she claims the land.

Error from Walker.

*Yoakum & Campbell*, for plaintiff in error.

*A. P. Wiley*, for defendants in error.

Wheeler, J. The defendants in error sued the plaintiff in error, for trespasses committed upon their lands, in cutting and carrying away timber. The plaintiff recovered judgment; to reverse which, the ground mainly relied on in argument, is the ruling of the Court, upon the admissibility in evidence of a deed of conveyance, introduced by the plaintiffs as evidence of title in themselves to the land; and a transcript of the record of certain proceedings in the Probate Court of Nacogdoches county.

It appears by the statement of facts, that the execution of the deed in question was proved to the satisfaction of the Court, and thereupon admitted in evidence. And it is a sufficient answer to the objection, now urged to the sufficiency of the proof of its execution, that it does not appear that the defendant objected to the introduction of the deed in evidence. Objections to the admissibility of evidence cannot be first taken in the appellate Court.

The transcript from the Probate Court of Nacogdoches county, offered in evidence by the defendant, went to prove that the plaintiffs had parted with the title to a part of the

half league of land on which the trespass was committed. The avowed object of its introduction, was to show that the plaintiffs had admitted or recognized a different boundary or divisional line between themselves and the defendant, from that claimed in this suit. It is not perceived, however, that it tended to prove such admission. It seems to us to have been irrelevant and inadmissible for that purpose: and it is not pretended that it was admissible for any other. It was not proposed to prove that the trespasses were committed upon the portion of the tract, to which the plaintiffs had parted with the title.

Other grounds of error are indicated in argument, which, however, scarcely require notice. The wife of the defendant sought to be made a co-defendant with her husband. But, inasmuch as no judgment was sought, or could have been rendered against her, in this action; and as her rights could be in no wise affected by the judgment, the Court rightly ruled that she was not a proper party to the suit, and refused to permit her to contest with the plaintiffs, their right of action against her husband.

A series of propositions was submitted to the Court, and asked as instructions, by counsel for the defendant. But, as they were either irrelevant, or based on assumptions of fact not warranted by the evidence, they were rightly refused; and their propriety, as abstract legal principles, need not be here discussed.

We are of opinion that there is no error in the judgment, and it is affirmed.

Judgment affirmed.

## Tryon and another v. Butler.

Where the defendant was cited to answer the petition of Jonas Butler and George Butler, merchants trading under the name of George Butler & Brother; and the defendant failing to appear, the plaintiffs amended by striking out the name of Jonas Butler and inserting the name of L. M. H. Butler, and then took judgment by default; *Held*, There was no error.

Error from Walker. Facts same as in Tousey v. Butler, *Ante*, 525, together with the fact that Tryon was a co-defendant, who did not appear and against whom judgment went by default.

*Yoakum & Campbell*, for defendant in error.

Wheeler, J. Our opinion in the case of Tousey v. Butler *et al.*, (*Ante*,) meets the objections to the judgment in this case, as to the defendant Tousey. And as a misnomer of parties must always be pleaded in abatement, or the right to the exception is lost, (1 Mass. R. 76; 5 Id. 97; 10 Id. 205; 16 Id. 146; 6 Munf. R. 219; 4 Cow. R. 148; 10 S. & R. 257,) the other defendant, Tryon, can be in no better condition than his co-defendant, in consequence of having suffered judgment to go against him by default. Even if the petition had not been amended, this defendant, not having pleaded the misnomer in abatement, could not take advantage of it on error. The amendment, having been properly allowed, cannot afford a ground for reversing the judgment.

Judgment affirmed.

## Edmondson and others v. Hart, Adm'r.

Probate sale of a tract of land, reserving a parcel contracted to be sold by the intestate, estimated to contain 185 acres; the proof was that the land, sold by the intestate, was sold at one dollar an acre, that the amount sold was 357 instead of 185 acres. that it was worth $2,50 per acre, but that the balance of the land around there was not so valuable; the probate sale brought only 40 cents per acre; *Held*, That the proof was too vague and insufficient to sustain a claim for a greater abatement of the purchase money than 40 cents per acre.

In the absence of fraud or mistake, the rule of *caveat emptor* applies to probate sales.

Appeal from Walker. This was a suit upon a promissory note. The defence was failure of consideration. It appeared in evidence, that the note sued on was given for the purchase money of a tract of land, bought by the defendants, at an administration sale by the plaintiff. A map was exhibited at the sale, on which the land sold was delineated; and it was estimated to contain about 722 acres: but purchasers were apprised that it had not been surveyed, and that the exact quantity was unknown. It was bid off by the defendants, at forty cents per acre. There was excepted out of the tract a smaller tract, embraced in a conflicting survey, sold by the intestate in his lifetime, estimated to contain 185 acres. It appeared, that, by reason of the conflict, which also was delineated on the map, being ascertained to contain 357 acres instead of 185, the tract purchased by the defendants contained less, by about 172 acres, than the estimated quantity. The deed for the land embraced in the conflict, and sold by the intestate, was given in evidence, and recited the consideration of one dollar per acre. A witness testified that the land included in the conflict was worth two dollars and a half per acre: he "was not acquainted with the lands out of the conflict; but "there were other lands about there not so valuable."

The defendants asked the Court to instruct the jury, that,

if there was not 722 acres in the tract sold the defendants, and it was deficient by 172 acres, and that was much more valuable than any other part of the tract, they should allow as a credit upon the note, whatever amount they found the 172 acres to be worth: which instruction the Court refused. The jury returned a verdict for the plaintiff for the amount of the note, after deducting the price of 172 acres at forty cents per acre; on which the Court gave judgment, and the defendants appealed.

*Appellants*, for themselves.

*Yoakum & Campbell*, for appellees.

WHEELER, J. The only error assigned which requires notice, is the refusal of the Court to give the instruction asked by the defendants. And, in this, we are of opinion there was no error. The instruction asked the Court to assume facts not in evidence. There was no certain evidence of the relative value of the land sold by the plaintiff, and that previously sold by the intestate. The fact that the former did not command as high a price at the administrator's sale, as the latter had been sold for by the intestate, or as it was estimated to be worth by a witness, was too uncertain a criterion of the relative value of the lands embraced in the several tracts, to base a verdict upon, of any certain, present relative value. The subject was susceptible of direct and certain proof—the burden of proof was with the defendants. It devolved on them to make out their defence, by evidence so certain as to afford the jury data on which to rest their verdict. This they have not done. There was no evidence of any misrepresentation, or of any mistake as to the quality of the land purchased by the defendants. And if it had been of no value, the plaintiff might well have insisted on the application of the maxim *caveat emptor*. But there was no evidence of the actual present value of the lands embraced in either tract. There was,

in a word, no evidence which would have warranted the jury in finding that there were 172, or any other number of acres in any particular locality supposed to have been embraced, but not, in fact, embraced in the defendants' purchase, which was of greater value than that actually included in it; and the instruction, therefore, which was based upon the assumption that there was such evidence, was rightly refused. The evidence did not authorize a verdict more favorable to the defendants than that found by the jury. They, therefore, have no just cause of complaint. The judgment is affirmed.

Judgment affirmed.

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BISSELL, ADM'R, v. HAYNES AND OTHERS.

The controversy between Power & Hewitson and De Leon, was as to the boundaries of their respective colonies, and as to territory within the ten littoral leagues; the decision of the Federal Executive, in favor of the latter, therefore, carried with it the assent of the Federal Executive to the colonization, by him, of territory within the ten littoral leagues; and the boundaries actually established by the subordinate officers of the government, in carrying the decision into effect, the Coleto and Guadaloupe to the Gulf, and acquiesced in by both Empresarios, must be regarded as the true one.

We have ruled, in several cases, that, to authorize the granting of land, lying within the littoral or border leagues, required the action of both the Federal and State authorities. So far we have thought we could go, in expounding the laws, applicable to those lands. But, where there had been a contest, as to which had the superior claim to the bounty of the government, and it had been decided between the conflicting claimants, we never have claimed the right to revise the correctness of the decision of the former political or judicial authorities of this country, before the Revolution.

See this case as to presumptions in favor of the acts of the authorities of the former government, even if the Courts would revise those acts.

*Quere?* As to the right of an Empresario to assign his contract so as to authorize the assignee to discharge the duties of Empresario; to dispose of it by will, with the same effect; and whether a part of his succession, in the absence of a will, to be administered, &c.

Where the Empresario died, the Commissioner for extending titles, appointed be-

fore the decease of the Empresario, was authorized to continue to issue titles to the colonists, without the customary report as to the qualifications of the applicants and the vacancy of the lands; except where the applicants were foreigners; and the fact that the application was referred to an Empressario *ad interim*, whose authority did not appear, and reported upon by him, did not vitiate the title.

Appeal from Calhoun. This was an action, commenced on the 19th of June, 1849, by Bissell, administrator, to try title to that tract of land embracing the city of Lavaca.

The plaintiff, in his petition, represents, that as administrator of the estate of Silas P. Griswold, deceased, in the fall of the year 1847, he located a certain tract or parcel of land in Calhoun county, on the north-west side of Lavaca bay, beginning at the margin of said bay, at the mouth of Bell creek, (setting forth the locations and certificates.) The petition avers a survey; and that George Haynes, George McConnell and Cock, claim the land adversely to the plaintiff, by mesne conveyances from one Maximo Sanches, who received a pretended title, as a colonist of Martin De Leon, to one league of land from Fernando De Leon, a pretended Commissioner of Martin De Leon's colony. The petition avers that Martin De Leon's colony did not include the land claimed by the plaintiff; but that it was within the ten littoral leagues reserved by the government of Mexico; and that the pretended colony of De Leon abated by his death, long before the title to said Sanches was issued; that Sanches abandoned the country in 1836, and went beyond the Rio Grande with its enemies, where he died. The plaintiff prayed process—that the defendants' title be delivered up to be cancelled—for possession and for costs.

The defendants appeared and pleaded not guilty, statute of limitations, and occupation for a year, and valuable improvements. But everything, respecting the defence of the statute of limitations and valuable improvements, will be omitted in the statement of the case, because no decision was made upon them.

There was a trial; a verdict and judgment for the defendants; motion for new trial overruled—plaintiff appealed.

The proof by the plaintiff was:

His certificate, locations and surveys, and a connecting survey of one Cooper; all of which seem to have been duly proven, and the plaintiff identified the *locus in quo* by practical surveyors.

He proved by Fernando De Leon, that he knew Sanches when he lived in Victoria, from 1828 to 1836; that Sanches left Texas in 1835 or 1836, and went to Matamoras with the Mexican army, when they retreated from Texas; that witness, as Commissioner of Martin De Leon, made Sanches a title to a league of land, but does not know that the land now in controversy is a part of that league; that witness knows the rancho formerly called San Francisco; that it is on the Guadaloupe, below Victoria; that the father of the witness, Martin De Leon, died in August, 1834. With this proof the plaintiff rested his case.

The defendants' evidence:

The Commissioner's grant to M. Sanches.

This is the petition of Sanches to the Commissioner, dated 18th March, 1835; the order not signed, "Pass this, urging "the citizen Placido Venebides, Empresario *ad interim*, that "he inform me if that is so or not, which is set forth in the "petition of the party interested, and return the same;" the report of Venebides, March 19th, 1835, to the effect that Sanches was a colonist introduced by his predecessor; was legally entitled; and that the land was vacant; the order of survey; the survey which shows that the land lies on the west margin of Matagorda bay; the approval and act of possession of Fernando De Leon, subscribed with assisting witnesses, reciting his authority as Commissioner under the first and second contracts of Martin De Leon, and acting under the order of Placido Venebides, Empresario *ad interim;* and the consent of His Excellency, the Vice President of the Republic, communicated by the Secretary of Relations to His Excellency the

Governor of the State, and sent, on the 10th of March, 1832, to the Political Chief of the Department. This title was filed for record, 4th April, 1839, and was recorded 4th April, 1840.

The receipt for the government dues; occupation and cultivation.

The chain of transfers to the defendants, duly recorded.

The testimony as to possession, improvements, &c., is omitted.

Here the defendants closed.

The plaintiffs, then, as rebutting evidence, read in evidence the translation of the original contract and other documents of Martin De Leon.

1. A letter of Juan Jose Hernandez, dated 26th March, 1825, to the acting Governor of Coahuila and Texas, reporting that foreigners were settling about Victoria, and giving his opinion that the Empresario, Martin De Leon, did engage with the most excellent Provisional Delegation, the then government of Texas, to found and build that town with Mexican citizens, &c.

2. The decree of Gonzales, (May 17th, 1825,) ordering the Political Chief of Texas to report the facts in relation to De Leon's contracts, the place at which he was to settle the families introduced by him, &c.

3. The report of Jose Antonio Sancedo, dated Bexar, 10th June, 1825, unaccompanied by any documents, but stating that De Leon had authority from the Provisional Delegation to lay off the town of Victoria, on the opposite side of the Guadaloupe, south of the Atascoato road, at the place called Cypress Grove, (El Sabinal.)

4. The decree of the Governor, referring the whole subject to the Baron Bastrop, member of the Congress from Texas, for a report, dated 14th July, 1825.

5. The report of Bastrop, dated Saltillo, July 30th, 1825. This report refers to the proceedings of the Provisional Delegation of the 13th April, 1824; contains De Leon's petition, dated April 8th, 1824, to be allowed to found a town, with a

public square and streets, on the river Guadaloupe, at a distance of about ten leagues beyond La Bahia Del Espiritu Santo, under the appellation, Nuestra Senora De Guadaloupe De Jesus, and representing that he had forty-one families, giving the names, which desired to settle there, &c., &c.

6. The action of the Provisional Delegation, dated 13th April, 1824, granting the right to lay off the town, with sundry privileges; and declaring, that, in the distribution of lands, there should be observed the strict provisions of the colonization law, and only authorizing a grant to each individual, of land for a house, farm, and field.

7. A letter of M. De Leon, to the Governor of the State of Coahuila and Texas, complaining of the interference of the foreigner, Green De Witt. This petition admits that the boundaries of De Leon's colony had never been defined; but claims that the Alcalde of La Bahia (Goliad) had assigned them; and adds, "It is understood by the families of the settlement, "that its boudaries are from the Anastasia ford, where the road "from La Bahia to Nacogdoches crosses the river Guadaloupe, "on a straight line north to the La Baca creek, and with these "two streams, La Baca and Guadaloupe, eastward to the line "of the ten coast boarder leagues, which district of country "is well known to them, and for the possession of which, I "now claim your favor and protection, by virtue of the ninth "Article of the supreme decree of August 18th, 1824, &c."

He therefore prays for a Commissioner to establish the boundaries, so as to include the land so described. This claim is supported by the same documents referred to by Baron Bastrop, and the recommendation of Sancedo, the Political Chief, that De Leon have preference over De Witt. This is dated 1st of August, 1825.

The Governor decrees that they all be annexed and passed upon.

8. The decree of Governor Gonzales, as to the controversy between De Witt and De Leon, after reciting the substance of, the 2nd Article of De Witt's contract ("in which is included

"the boundaries of the settlement (*amparo*) of the citizen "Martin De Leon") which required him to respect all possessions given to settlers who occupy, &c., to the effect:

1st. That the resolution of the ex-provisional delegation of Texas, of the 13th April, 1824, in relation to De Leon's authority, was sufficient to authorize the settlement; and that lands should be distributed and the town founded in strict conformity with the Colonization Law of the 24th March, and pursuant to instructions, and through the agency of a Commissioner who would be appointed for the purpose.

2nd. * * Privileges only according to the Colonization law.

3rd. Commissioner to be governed in the distribution of land by the instructions already submitted to Congress.

4th. The decree made known to De Witt.

9. The letter of Sancedo, transmitting the petition of De Leon to the Governor, for the appointment of a Commissioner, (27th May, 1827,) referring to the Governor's order of 6th October, 1824, and praying that his, De Leon's, boundaries should be "from the point at which the boundary line of the "ten coast boarder leagues crosses the river La Baca; thence "with its right bank upwards, to the road leading from La "Bahia del Espiritu Santo to Nacogdoches; thence on a "straight line south with said road to the river Guadaloupe, "at the place known as Anastasia ford; thence with the left "bank of said river to the farm (rancho) San Francisco; "(which although, perhaps, within the coast boarder leagues, "your petitioner thinks may be permitted to remain within his "boundaries, as he settled it previous to the publication of the "General Colonization Law, and because he has his stock of "cattle and horses on it, and accustomed to the place,) and "thence on a straight line to the river La Baca, at the place of "beginning, permitting him to designate by land marks the "four points of his boundaries;" and to notify Green De Witt, &c.

10. The direction of Victor Blanco, (in the capacity of Gov-

ernor,) of the 18th May, 1827, to the Political Chief of the Department of Bexar to recommend a suitable person to be appointed Commissioner, to issue titles and found the town.

Sancedo explains that only a Commissioner of boundaries was asked, and recommends himself to that office.

11. The petition of De Leon, by his attorney, Raphael A. Manchola, for an augmentation; and the decree of the Governor, allowing the augmentation, in consideration of his introducing one hundred and fifty families.

The survey, in addition to that already granted, to be as follows:

"Beginning at La Baca creek, near the place where it is "crossed by the middle road leading from La Bahia to Nacog- "doches, and thence run one league with said creek upwards; "thence a line shall be run parallel with said road, to cross "the river Guadaloupe at the Lego ford, until it strikes Cole- "to creek; thence with the creek downwards; the survey "terminating at its junction with the aforesaid Guadaloupe.

"The Empresario, De Leon, receives the lands above de- "scribed as augmentation to his colony, and therefore its ad- "judication is subject to the requirements and provisions of "the Colonization Law of the 24th March, 1825."

This contract bears date the 30th day of April, 1829.

12. An order from the Governor to Navarro, Commissioner of De Witt's colony, of the 2nd May, 1831, in which he says that this augmentation, so far as the grant conflicted with the area granted previously to De Witt, was void; and that, in all cases, the older grant had preference, as only vacant lands could be granted.

13. The report of Aguirre, to the Permanent Committee, dated 23rd July, 1831, upon a memorial, &c., of the Ayuntamiento of Goliad, in which he says:

First. "That, although it appears throughout, that the pro- "visional delegation granted permission to citizen Martin De "Leon to establish a small town on the land situated between "Lavaca creek and the Nueces; it also appears that it was

"not commenced until after the publication of the Coloniza-
"tion Law; it should have been done in strict accordance
"with its provisions; for without it and the necessary and in-
"dispensable approval of the Executive, and this was never
"obtained, that undertaking cannot, nor ought it to be con-
"sidered legal; nor should it in any manner whatsoever af-
"fect the rights of Power and Hewitson, the Empresarios,
"whose contract is replete with every requisite and require-
"ment of the laws.

Secondly. "That the act of the Political Chief, appointing
"Fernando De Leon a Commissioner of boundaries, was a
"gross usurpation and void.

Thirdly. "Finally, the nullity of the undertaking of Mar-
"tin De Leon, is made more apparent in the memorial refer-
"red to, by the Ayuntamiento, claiming that it should be
"located within the limits of the coast border leagues, a sec-
"tion of territory subject to the exclusive control of the Gen-
"eral Government, and which has in fact been ceded by it, in
"favor of the Empresarios, Power and Hewitson, who made
"their contract with the General Government, and not with
"the Government of the State, inasmuch as it had no author-
"ity to that effect.

"The Political Chief of the Department, at the commence-
"ment of his report, requests that no impediments may be
"created to prevent citizen Martin De Leon from legally set-
"tling the families of his contract within the limits of the
"coast border leagues, which are to be settled by Hewitson.
"Hence, it appears, that in his opinion, De Leon's settlement
"is not legally located, nor on land disposable by the State,
"as is the fact with regard to the coast border leagues; and
"in this case, that petition would seem to say or infer,
"that the authorities of the State assume powers expressly
"vested in the General Government."

14. On the 23rd July, 1831, Governor Letona states to the Permanent Committee, that, having received additional documents from the Political Chief of the Department of Bexar,

the resolution of the Executive was suspended until the said "Permanent Committee" give their opinion upon the documents recently received.

15. On the 13th August, 1831, Aguirre reports for this Permanent Committee, and adopts the same views in still stronger language. They say:

"That the pretensions of Martin De Leon, in the judgment "of the undersigned, are destitute of all foundation; and "neither law, reason, nor that decorum which should be ob- "served by the Executive, can justify the annulment of the "contract made with Power and Hewitson.

"The consent of the General Government, which is by law "made indispensably necessary to settle the lands of the coast "border leagues, has been obtained only by Power and Hew- "itson, and by no other person whomsoever; which, as has "already been stated, in the course of this affair, not only "shows that the pretensions of citizen Martin De Leon, and "the inhabitants of Goliad, cannot obstruct the confirmation "of their contract, but that even if they were admitted, the "want of this requisite would render any colonization con- "tract illegal."

The committee affirm what had already been said as to the conflict between the Manchola contract and Green De Witt, for the reasons given in the National Colonization Decrees, as to grants of previously appropriated lands; and also declare this contract null, so far as it conflicts with Power and Hewitson.

The Executive, on the 18th August, 1831, says: "Having "approved the foregoing report of the Honorable Permanent "Committee convened as counsel, it will therefore be only "executed as therein expressed, together with the former re- "port, to which it refers, communicating the same to the par- "ties interested for their own observance.—Letona."

16. On the 22nd October, 1831, Manuel Mier y Teran addresses a letter to the Political Chief of the Department of Bexar, in which he agrees with the reports as to the necessity

of the assent of the President of Mexico to a grant within the coast or border leagues, but insists (as there is a conflict between the two Empresarios, as to the lands "between the mouth of La Baca to Arranzazie creeks,") on a reference of the question to the Federal President; he admits that Power may be maintained in possession of the lands between the Arranzazie and Nueces.

17. On the 1st May, 1832, Ramon Musquis, the Political Chief of the Department of Bexar, notifies Power and Hewitson that, (the Executive of the State, having decided in his supreme order, of the 10th of March last, (this order does not appear) the execution of the resolution of the Supreme General Government, relative to the preference to be given to the colonists of the contract of De Leon, &c., &c.,) they appear before that department, either in person or by attorney, in order to exhibit their documents by which to designate the boundaries of their colony and that of Martin De Leon.

18. (Translated out of its order.) The appointment by Governor Viesca, on the 4th December, 1828, (communicated 8th January, 1829, to the Political Chief of Bexar,) of Juan Antonio Padilla, as Commissioner of De Leon's colony. This was in reply to the official letter of the Political Chief, of the 27th May, 1827. (*Ante* 9.)

19. The appointment of Fernando De Leon, in 1831, as Commissioner of the colony of Martin De Leon, "to distribute the lands yet pending" referring specially to the instructions adopted by the Legislature of the 24th of February, 1827; and referring also to Article 7, of decree 128, adopted 7th of April, 1830.

The plaintiff also, as rebutting evidence, read the translation of the contract of Power and Hewitson to colonize the littoral leagues on the Gulf of Mexico.

1. Hewitson's petition to colonize the coast border leagues "from the mouth of the Nueces river to that of La Baca creek, "and from the Bay of Galveston to the entrance of the Trin- "ity river to the Sabinas."

2. The report of the Governor of Coahuila and Texas, in which is reported what littoral lands are vacant; no mention is made of De Leon's colony; and the supreme authority of the Executive of Mexico over the lands within the littoral leagues, is also recognized. This is dated 2nd October, 1826.

3. The consent in favor of Power and Hewitson, of Canedo, dated 22nd April, 1828, to colonize the littoral lands on the Mexican Gulf, "comprehended within the mouth of the Nueces river, to the mouth of the Lavaca creek;" subject in all respects to the general law of the 18th August, 1824.

4. Power's power of attorney to M. Musquir to proceed to Mexico, and enter into the contract.

5. The contract of Power and Hewitson, of the 11th June, 1828, made with the Governor of Coahuila and Texas, the first Article of which describes the boundaries, until the land shall be shown him within which he is to complete the colonization, as "commencing at the angular point where the Guadaloupe river empties into the sea, on its left margin; thence running the line on the coast of the sea towards the east, to the point where the Lavaca creek empties into the sea; thence running up the right margin of this creek, for the exact distance of ten leagues; thence run a line in the direction of the west, parallel with the coast at the distance of ten leagues, to the Guadaloupe river; thence running down the left margin of this river to the point of beginning." Possessions with corresponding titles to be respected. This embraced the *locus in quo*.

6. Hewitson and Power's petition to the Executive of the State, praying an augmentation extending to the boundary of the State of Tamaulipas; (the Nueces;) and the grant of that augmentation, by the Executive of the State.

7. The decree of the Vice President, Alaman, on the appeal asked by Teran. It ran thus:

"The most excellent Vice President has been impressed with the great delay of the document moved in consequence of the reclamation which has been made by the Mexican

"Empresario, Martin De Leon, to suspend the possession of the "foreigner, Santiago Power, of the littoral land comprehend- "ed between the mouth of Lavaca creek, and that of the "Nueces, and in conformity with the information given on this "subject, by the most excellent General Manuel Mier y Teran, "I have thought proper that the concession of lands made to "Power by the Supreme Executive Government, on the 22nd "April, 1828, cannot be understood in any other light than "in accordance to the 2nd Article of the General Law of Col- "onization of August, 1824, that is by the vacant lands, to "the exclusion of those of particular dominion; that, in con- "sequence, Power must be placed in the possession of the land "that corresponds to him, and the same to Martin De Leon "which he has proved pertains to him."

This is dated 23rd December, 1831, and is directed to the Governor of Coahuila and Texas for his action.

8. The decree in regard to the extinguished Mission of Refugio, in which it is only necessary to notice that the 4th Article provides that the inhabitants of Goliad who had petitioned for "lands in that point" are to be provided for by Power and Hewitson: and that in laying off the town, at the mission of Refugio, the 34th Article of the colonization decree, and 2nd Article decree No. 177 were to be observed.

9. The letter of Letona, Governor of C. and T., dated 10th March, 1832, to the Political Chief of the Department of Bexar, reciting the foregoing decree of the Vice President of Mexico; and the Governor, reciting that "this disposition "being in conformity with the orders that I have communica- "ted to you, on this particular," orders that this decree may be carried into effect, "keeping in view the documents of both "Empresarios, and the ranchos or habitations of particular "individuals that may be found in both colonies, must be re- "spected, as the Empresarios are bound in their respective con- "tracts."

And, "in case that between the Empresarios, to which ref- "erence has been made, there should be any doubt relative to

"the limits of their enterprises, which cannot be decided by "the documents which they may present, you will form one "document of the whole, and forward it to me for its final "decision.

"If the Mexican owners of the indicated establishments "have not titles of property to the lands they possess, you will "order them, in conformity to what is provided by the Colo- "nization Law of 24th March, 1825, to petition this superior "authority, asking for them to dispose of them as may be "convenient in this particular."

The plaintiff also read the translation of the several documents relative to the Special Commissioner, Jesus De Vadauri, as Comissioner for the two enterprises of James Power and James Hewitson.

Plaintiff also proved, by A. S. White, that he was one of the Surveyors of Power and Hewitson's colony; that he ran the line of the colony, under a verbal order of Vadauri, the Commissioner of the colony, some time in the year 1834; that he commenced above the Blanco, on the Nueces, and ran to the upper corner of the town tract of Victoria, on the west side of the Guadaloupe; when he arrived at that point, he was forbidden to cross the river, by Sylvester De Leon, who, at that time, was judge in that town; that Power claimed the right to colonize east of the Guadaloupe river.

Cross examined. Thinks Vadauri issued one title east of the Coleto, and west of the Guadaloupe. De Leon issued all the titles east of the Guadaloupe and west of the Lavaca; and Vadauri, Commissioner of P. &. H., issued all the titles west of the Coleto to the Nueces.

Here the plaintiff closed his rebutting evidence.

The defendants then called Fernando De Leon, who said that the archives of De Leon's colony, up to the war, were kept on loose sheets of paper; were never bound in a book; witness had charge of them, till he was taken prisoner by General Rusk; they were then in possession of Rusk and the army for some time; some papers were lost; amongst the lost

papers was an order in relation to the colony, and one in relation to the Ayuntamiento—witness did not recollect the contents; witness was one of the Commissioners who established the boundary line between De Leon and De Witt's colony; it runs about ten leagues above Victoria; the line between De Leon and Power was not settled until after the order for that purpose came down from the General Government of Mexico, signed by Alaman; a Commissioner to run the line had been appointed previously; but all action was suspended on account of the difficulty between Power and De Leon; that, when the General Government decided the controversy between the parties, the Political Chief of Bexar came down in person and settled the line, giving De Leon the territory between the Lavaca and the Guadaloupe, and in the forks of the Guadaloupe and Coleto; after this settlement of the boundary line, Power gave up his claim to the land east of the Coleto and east of the Guadaloupe; the Political Chief went to see Power, and said he was going to fix his boundaries; from that time the business of the colony went on; witness, as Commissioner of De Leon's colony, as marked out, issued titles to colonists west of the Coleto; between the claim of De Witt and Power, De Leon had no land to settle his families.

Cross examined. De Leon had three contracts; the first for forty-one families; the second to include that number to one hundred; the third for one hundred and fifty families; these contracts were among the archives when he deposited them in the Land Office; the Political Chief came down to settle the boundary line in 1832 or 1833; witness did not issue titles first alone in the upper part of the colony; witness extended titles to the colonists as they called for them, some here, some above, as they selected them.

The Court instructed the jury:

If the jury believe, from the testimony, that Fernando De Leon had the authority and consent of the General Government of Mexico to grant the land in question, the grant would be good, and you should find for the defendant.

And for the plaintiff the Court gave the following instruction:

1. That if the jury believe, from the evidence, that the land embraced within the ten littoral leagues bordering on the Gulf of Mexico, was not embraced within either of De Leon's colony contracts, and that the lands in controversy does lie in that boundary, then the grant to Sanches is without authority, and void.

And the Court refused to give for the plaintiff the following instructions:

2. That, if the jury believe that Martin De Leon had no subsisting contract with the State of Coahuila and Texas, at the date of the grant to Sanches, then that grant is void.

3. That the general government of Mexico had no right to grant lands within the boundary of the State of Coahuila and Texas, without the consent and concurrence of the State.

4. That, if the jury believe, from the evidence, that De Leon never had any contract with the State of Coahuila and Texas, to colonize the land in dispute, the general government could give no authority to colonize it; and a grant made by Fernando De Leon, as Commissioner, is void.

5. That, if the jury believe, from the evidence, that the colonist, Maximo Sanches, was received after the death of Martin De Leon, they will find for the plaintiff.

There were exceptions, on both sides, to nearly all the evidence introduced; but, in the view taken of the case by this Court, they are not important.

Errors assigned:

1st. The Court erred in admitting the grant to Sanches to be read without showing the authority of De Leon, Commissioner, to make the grant.

2nd. The Court erred in the instructions given to the jury.

3rd. The Court erred in refusing to give instructions asked by the plaintiff.

4th. There was error in the verdict of the jury.

5th. The Court erred in overruling a motion for a new trial.

*G. W. Paschal*, for appellant. I propose to consider several of the errors under one head.

Every instruction must be warranted by the evidence and not merely abstract propositions. (Holman v. Britton, 2 Tex. R. 297; Chandler v. The State, Id. 308; Means v. Robertson, 7 Id. 502.) If, therefore, upon the whole evidence of the case, the Court erred in his instructions to the jury, either in giving or refusing instructions, it is such error as will reverse the judgment. (Texas Reports, *passim*; Mimms v. Mitchell, 1 Tex. R. 443; Mercer v. Hall, 2 Id. 284.) It is equally certain, that, if upon the whole evidence, the verdict of the jury was palpably against law and evidence, to refuse the new trial was error. (Briscoe v. Bronough, 1 Tex. R. 326.) Therefore, the first proposition may be thus divided:

Did the plaintiff show such a title as enabled him to recover against the defendant?

Second. Did the defendants show a better legal title than the plaintiff?

Did the plaintiff prove such facts as to authorize a cancellation of the grant to Sanches, as prayed for? And if so, did the defendants prove such facts as to avoid the plaintiff's evidence?

The plaintiff proved a valid location under a recognized warrant. This was sufficient evidence of a legal title to defeat any title not superior to it. This is as well declared by the Act of 5th February, 1841, as the decisions of this Court. (Hart. Dig. Art. 3230; Jones v. Menard, 1 Tex. R. 771.)—The survey, accompanied by the certificate, is sufficient to support the action. (Hart v. Turner, 2 Tex. R. 374.)

It is not enough that the defendants in possession showed title. They must have shown a better title than the plaintiff; and such title as, had the plaintiff been in possession, they could have recovered against his title. (Stewart v. Hicky, 3 Howard, 750, 759, 760; Den v. Dimon, 5 Halstead, 156; Collins v. Torry, 7 Johns. 282; Jackson v. Pratt, 10 Johns. 387; Jackson v. Jackson, 5 Cowen, 174; Jackson v. Mein, 4

Cranch, 419; Proprietors of Township, No. 6, v. McFarland, 12 Mass. R. 425. Adams, on Ejectment, 32, 222, note 6.) Have the defendants shown a valid legal title?

If the title to Sanches was void at its date, it derives no support from our statutes, and is yet void, and cannot serve as a color of title. No colonist's titles were "ratified and confirmed" by the Act of 1837, which were illegal and invalid, *ab initio.* (Hart. Dig. Art. 1860.) If the Act was contrary to law, or prohibited by law, it was void, *ab initio.* (Linn v. Scott, 3 Tex. R. 67; Hunt v. Robertson, and the cases in that opinion cited and approved. (1 Tex. R. 748; League v. De Young, 3 Tex. R. 185: Toby v. Randon, 11 Howard, 493.) If the officer making the grant acted upon lands beyond his jurisdiction, the title was absolutely void. (Linn v. Scott, 3 Tex. R.; Russel v. Mason, 1 Tex. R. 72.) If the lands were reserved from the appropriation, or the grant was not authorized by law, or the officer making the grant had no jurisdiction, it was absolutely void. The State v. Delesdernier decided at Austin, at the late Term, affirms Stoddard v. Chambers, 2 Howard, 318; and Polk v. Wendal, and Wilcox and McConnell.

Judge Wheeler thus states the principle in the late case of Hancock v. McKinney: "Had the sale been made by the officer without the authority of law; or had the law, by express provision, or by necessary intendment, forbade the sale as made, its effect would have been different. 'No title can be held valid which has been acquired against law.' (2 Howard, 318.) A patent 'which has been fraudulently obtained, or issued against law, is void.' (Ib.)

"'There are cases,' said Chief Justice Marshall, in the case of Polk's lessee v. Wendell, *et al.*, (3 U. S. Cond. R. 324,) 'in which a grant is absolutely void; as where the State had no title to the thing granted; or the officer had no authority to issue the grant.' These principles have been fully recognized by the decisions of this Court, and are not to be questioned. (Mason v. Russell's heirs, 1 Tex. R. 721;

"Goode v. McQueen's heirs, 3 Id. 241; Edwards *et al.* v. "Davis *et al.*, Id. 321; The Republic v. Thorn, Id. 499.") These last decisions quoted by Judge Wheeler are particularly applicable to the case under consideration.

The 3rd Article of the National Colonization Decree, of 1824, declares that the Colonization Laws of States "shall "conform themselves, in all things, to the constitutive Act, "general constitution, and the regulations established by law."

And the 4th Article (correctly translated) declares that they (the States) cannot colonize any lands comprehended within twenty leagues of the limits of any foreign nation, nor within ten leagues of the coast. (2 Galban's Decrees, p ; Dallam's Dig. 120.)

The 7th Article of the State Colonization Decree, of 1824, conforms to this inhibition.

"The government shall take care that within twenty leagues "bordering on the limits of the United States of the North, "and ten leagues, in a straight line, from the coast of the Gulf "of Mexico, within the limits of this State, there shall be no "other settlements except such as merit the approbation of the "supreme government of the Union, for which purpose all "petitions on the subject, whether made by Mexicans or for- "eigners, shall be passed to the Supreme Executive, accom- "panied by a corresponding report."

The true construction, given by the highest officers of both governments, manifestly appears in the very contracts of Power and Hewitson, and the effect of the absence of the Federal President's approbation is seen in the decision of the highest authority of Coahuila and Texas, "the Junta," "Executive Council," "Council of State," or "Permanent Committee." De Leon was required in all things to conform to the instructions of Congress to the Commissioners, of the 4th September, 1827. The 5th Article of these instructions declares, that "The Commissioner shall not give possession to any colonist "settled, or intended to settle, within the twenty border leagues "of the United States of the North, and ten littoral leagues of

"the Gulf of Mexico, unless the person interested shall pre-
"sent him a special order from the government, wherein the
"approbation of the national government shall be manifested."
(Decrees C. and T., p. 245.)

Well, then, might AGUIRRE say, that an attempt to make a grant, by the State authorities, within the coast leagues, without the consent of the President of Mexico, was an usurpation of power of which the authorities had never been guilty. These universal constructions, given by the authorities at the time, are the best evidence of the law.

This Court has adopted a well considerd rule upon that subject. In Hancock v. McKinney, it is said, that "The con-
"struction of their powers and of the laws which conferred
"them, adopted and acted upon by the authorities of the for-
"mer government of the country, must be respected until it
"be shown that they have clearly transcended their powers,
"or have acted manifestly in contravention of law." This uniform interpretation by the Mexican authorities might be shown in all the border colonial contracts, and in the practice of all the States. The subject, however, has been settled in a series of decisions by this Court, in which most of the accessible learning is exhausted.

In Goode v. McQueen's heirs, the Chief Justice reviews the whole subject, and arrives at the conclusion, that the assent of the Federal Executive of Mexico, to make grants of land within the limits of what was known as the border and coast leagues, was required; and a grant made by the authorities of Coahuila and Texas, within those limits, is absolutely void, unless it be shown that it was made with the approbation of the supreme government. That the authority to control these lands having been retained by the federal government, no presumption can arise in favor of a grant made by the executive of the State, until it first be shown, by proof, that the power to make the grant had been conferred upon him. (3 Tex. R. 241.)

And in Thorn v. The Republic, (3 Tex. R. 499,) the Chief Justice reviews the whole history of the subject; supports the

same views, and concurs with the Mexican authorities, that, after the passage of the National Colonization Decree, of the 18th August, 1824, the United States of the Mexican confederation possessed the property in the soil, and had alone the power, by direct agency, of appropriating land to individuals. And in that case it was correctly held, that, in suits for the establishment of titles to lands lying within the border leagues, under the Act of the 9th January, 1841, the assent of the Supreme National Executive to the grant or claim, must be specially averred and proved.

In Edwards v. Davis, (3 Tex. R. 321,) Judge Lipscomb reviews the same authorities and arrives at the same conclusions.

If I might venture a reason, in addition to the many cogent ones given by this Court, as to why a party who relies upon a title from Coahuila and Texas to lands within the coast and littoral leagues, should aver and prove the federal President's consent, I should say, that it is to be found in the 10th general provision of the Constitution of the Republic, which, in express terms, declares all titles obtained contrary to the 4th Article of the National Colonization Decree, void, *ab initio*.

The proof clearly shows the land to be on the margin of Matagorda Bay, and all the documents, on both sides, agree that it was therefore regarded by the previous governments as within the littoral leagues.

Let us admit that the grant was made by a Commissioner of De Leon's colony, and still it is void, for two reasons:

1. The land was not within either of the enterprizes of Martin De Leon, and is, therefore, within the principle of Russell and Mason.

2. The consent of the Federal Executive in favor of De Leon was never obtained; therefore, his contract, so for as it extended to the border leagues, was void, unless Sanches produced a special authority from the President of Mexico in his favor, which is not pretended.

It is scarcely necessary to recapitulate the proofs to ascertain that the lands were not within De Leon's enterprize. The

first contract with the Provisional Delegation was only an authority to introduce some forty-one families, and lay off the town of Guadaloupe Victoria. No particular boundaries were assigned. It was certainly within the power of the State government, in affirming the Act of the Provisional Government, which in itself, at that date, could possess no constitutional authority, so as to give a title intrinsically valid, to impose on the party whatever condition it chose. (See Henderson v. Poindexter, 12 Wheaton, 543; 6 Cond. 682; Hancock v. McKinney, 7 Tex. R. 384.)

The terms prescribed were that he should conform in all things to the Colonization Decrees. And when, on the 27th May, 1827, De Leon named his own boundaries, there is no pretence that any portion of the country was within the ten littoral leagues, except "perhaps San Francisco's ranch," which he claims "because it was settled previous to the promulgation of the general Colonization Laws." And this ranch is proved by F. De Leon to be on the Guadaloupe, a little below Victoria, where Egan now lives.

And the augmentation begins at La Baca creek, near the place where it is crossed by the middle road leading from La Bahia to Nacogdoches, and thence runs one league with said coast upwards, &c. The nearest this survey seems to approach the coast is the junction of Coleto with the Guadaloupe river.

It may be as well here to remark, that this contract proves the evidence of Fernando De Leon, as to there being "three contracts" to be positively untrue. De Leon said there were three contracts, the first for forty-one families; the second for one hundred; and the third for one hundred and fifty. But this contract with Monchola, for De Leon not only shows that it was the second, but that there could have been no other except the arrangement with the Provisional Deputation. It is expressly declared to be an augmentation of that arrangement.

The Political Chief, the Governor, the Permanent Committee, Teran, the Vice President, and M. De Leon, himself, all

concur in saying there were but the two contracts. F. De Leon states that he "deposited all three of those documents in the General Land Office." Why was not this second contract produced? Our files were all that appertained to the contracts of De Leon and Power and Hewitson. To the defendants may be credited the ingenious device of producing such detached papers as they supposed favored them, and then calling this witness, who proved too much.

The evidence of F. De Leon is clearly untrue in another statement. He states that the Political Chief came down and settled the boundaries, and that Power renounced the lands between Guadaloupe and Lavaca in favor of De Leon. Who believes that such an act, if true, would not appear among the records?

But suppose it were true, where was the authority for it? The Vice President only decided in favor of De Leon, and the people of the Mission of Refugio, so far as land had been appropriated prior to the Colonization Decree of the 18th August, 1824. The proceedings of the Provisional Department bear date the 13th April, 1824, after the date of the Colonization Decree of the 4th January, 1823.

(See 1, White's Recop., p. 562, *et seq.*)

The arrangement was between the dates of the downfall of Iterbide's Imperial Government, on the 29th May, 1823, and the Instituent Government of the 14th October, 1824. (3 Tex. R. 241.)

This arrangement appropriates no land; but only gives the right to lay off a town and distribute labors among the inhabitants. De Leon himself founds the right to lands on the 9th Article of the Decree of 18th August, 1824, which gives a preference to Mexicans, in the distribution of lands.

The whole proceedings show that De Leon had not taken possession, at the date of the State Colonization Decree, of 1825; and that his own family was introduced after that time. The whole lands were therefore vacant within the purview of the 2nd Article of the National Colonization Decree. Indeed,

he claims nothing as previously occupied, except San Francisco's ranch.

The Governor evidently did not regard the decision of the Vice President as reversing any part of the Decree of the Permanent Committee, as to De Leon's rights. The Governor's direction to the Political Chief was that the Vice President's Decree might be carried into effect, "keeping in view the "documents of both Empresarios, and respecting the ranchos "or habitations of particular individuals." And "in case "that between the Empresarios, to which reference has been "made, there should be any doubt relative to the limits of "their enterprizes, which cannot be decided by the documents "which they may present, you will form one document of the "whole and forward it to ME (the Governor) for final decision."

Now, had the documents shown, which they did not, that any portion of De Leon's original enterprize fell within the coast leagues, within which, De Leon had made individual grants, the most that can be said, is, that *pro tanto* it could not be regarded as vacant land under the 2nd Article of the Colonization Decree, which subjects to colonization purposes "those lands of the nation not the property of individuals, corporations, or towns." But if any of the augmentation had fallen into the coast leagues, the contract being after the date of the Colonization Decree, *pro tanto*, it would have been void. And any renunciation of Power in favor of De Leon, could only have enabled De Leon to solicit the consent of the President of Mexico, through the Governor of Coahuila and Texas, as prescribed in the 7th Article of the State Decree of 1825. Consent of parties can never give jurisdiction.

But where were the documents justifying such a decision as F. De Leon testified to? Not in the contracts, or elsewhere. And had any other proofs than the contracts been offered, then it was not the duty of the Political Chief to decide, "but to "form one document of the whole, and refer it to the Governor "for decision." Neither the Political Chief nor the Governor could make a grant, or confirm an inchoate grant to De Leon

or any one else, of lands within the littoral leagues, without the consent of the Federal President. This principle is fully discussed and decided in Edwards v. Davis, (3 Tex. R. 321,) in an opinion so masterly that it needs no further illustration.

The evidence of F. De Leon, therefore, is not and could not be true; and if true, the act of the Political Chief could confer no power beyond the contracts.

The *locus in quo*, therefore, was not in De Leon's colony; it was in Power's colony; there was no consent of the Federal Executive of Mexico to colonize the coast leagues, and the grant to Sanches, in the language of the Constitution, was, from the beginning, void.

The very fact that the land had been appropriated to Power, was such a designation of it to another purpose, as brings the case within the principle in Delesdernier v. The State, and Perez v. Paul. A grant by De Leon was an invasion of their rights. The settlement of their boundaries could only be made by the appropriate tribunals. This is expressly held in the colonial controversy of Penn v. Lord Baltimore, (1 Vesey, 444,) which was a controversy about the boundaries of Pennsylvania and Maryland.

In England a Court of Chancery took jurisdiction after the Colonial Office had fixed the boundaries, and compelled Baltimore to convey, according to his contract with Penn. (2 Story, Eq. Jur. 743.) In Mexico, as the judicial power was very limited, to the political authorities alone belonged the decision of the question. Their decision was in favor of Power and Hewitson, and against De Leon—a decision which has never been reversed—and is *res adjudicata* as to all rights of the parties—of the Texas government and those deriving rights under it. Such is the spirit of the opinion and the authorities quoted in Hancock v. Kinney. If the defendants sought to prove a reversal of the State decision by the Federal authorities, they should have proven it. Their detached documentary evidence proves the very reverse.

We believe that it might be successfully contended that the

Court should judicially know the boundaries of the colonial contracts—as political divisions of the country—as facts which ought to be generally known. (1 Greenl. Ev. 6.)

If we have established that the grant to Sanches was null and void, as the defendants claim under it, the decree to annul the grant, and thus to remove every cloud from the title of the plaintiff, and every obstacle to his obtaining a patent, would follow.

If the grant was void, the land was entirely vacant, and not covered by a "valid title," and therefore subject to appropriation. (10th General Provision of the Constitution of the Republic; Hart. Dig. p. 38; Id. Art. 1818, 1853.) Indeed, if the land was not held by a perfect and valid title, or was not especially designated for a particular purpose, or reserved from location by some positive law, it was within the class of vacant lands.

Such is the purport of the whole class of decisions of Russell and Mason, Trimble and Smithers, Jones and Menard, 1 Texas; Brown and Horton, 2 Texas; and Paschal and Perez, Hancock and McKinney, and Howard and wife v. Perry, decided at the late Term at Austin. The cases of Paschal v. Perez, and Hancock v. McKinney, are full and conclusive to this point. And the philosophy of the rule is well discussed and maintained in Howard and wife v. Perry.

To avoid, however, the force of these conclusions, the defendants pleaded several acts of prescription, &c.

*A. S. Cunningham*, also, for appellant.

*A. H. Phillips*, for appellees.

Lipscomb, J. This was a suit to recover a certain tract of land. The plaintiff claimed title by virtue of a location and survey of a land certificate. Among other defences, the defendants relied upon title derived from Maximo Sanches, under a grant to him, from the State of Coahuila and Texas. There was a verdict and judgment for the defendants.

The main controversy arises upon the validity of the grant to Sanches; and, if his title is good, the title derived from him by the defendants is not controverted.

The plaintiff alleges that the Court erred:

"In permitting the pretended grant to M. Sanches, to be "read to the jury without showing the authority of the Com- "missioner De Leon, and the admission, as a colonist, of the "grantee, by the Empresario;" and this is his first assignment of error.

The appellant, under the first assgnment, has made two points in his brief. First, that the Commissioner had no authority to extend titles to the land in question, because it was not embraced within the Empressa of Martin De Leon, and that it was within the ten littoral leagues; and secondly, there was no evidence that Maximo Sanches had been received as a colonist by the Empresario.

The first assumes that De Leon, the Empresario, was not authorized by the State government and the Executive of the general government, to colonize the coast leagues, that is the territory lying within ten leagues of the Gulf of Mexico. The documentary evidence is not very clear, as to the time when De Leon acquired a right to colonize the littoral leagues; nor are the precise boundaries of his contract well defined. His claim, however, is founded on his second or extension contract of ———. It is shown, conclusively, that the controversy between De Leon and Power was in relation to the coast leagues; and it could not have arisen upon any other parts or portions of their claims, because Power's contract was for the coast leagues and no others; and, therefore, without De Leon's claim embracing also the coast leagues, there could have been no collision between them. The boundary of Power's claim running upon a line ten leagues from the coast, eastwardly, did not interfere with De Leon, until it crossed Coleto. De Leon claimed the Coleto as his boundary, to the West, and down the same to the Guadaloupe, and all, then, between the Guadaloupe and the Lavaca. It seems pretty clear, that the

coast leagues, as far East as Lavaca, were embraced in the contract with Power. His proposition was to colonize all the coast leagues, from the Nueces to the Sabine. He was confined, East to the Lavaca. But, whether De Leon had an older and better claim, for that portion in dispute, we have not the means, if it was within our province, to decide. His claim received, at different Terms, the construction of both the State and Federal authorities. The State authority, though recognizing the contract of De Leon, gave a preference to Power's as being the better claim; and so, perhaps, it would have rested, but for the representation made by General Teran to the Federal Executive. He seems to have assumed the right of interference, as the highest military officer, because the disputed territory was within the coast leagues; and he gave the preference to De Leon, which received the approbation of the Federal Executive, and was communicated officially to the State Executive. From the time of this preference of the claim of De Leon, by the Federal Executive, being communicated to the State Executive, the latter seems to have taken the adjustment of the controversy into its own hands; and it is shown by documentary and oral evidence, that, under the authority of the State, De Leon was put into the possession of the disputed territory, and Power was excluded from it. It was in evidence, that the boundaries between the two Empresarios were settled by the Political Chief; and that Power and the Commissioner for extending titles acquiesced in this settlement, is to be inferred from the fact that no titles were extended to his colonists, within the bounds prescribed as belonging to De Leon. At any rate, there is nothing before us from which it can be inferred that there was any further controversy; and Power and Hewitson, if not satisfied, submitted to the decision.

After a protracted controversy, we find De Leon in possession, as Empresario, of the debateable ground, by the action of the State government. Is it shown that he is there with the approbation of the Federal Executive? Of that there can

be no doubt. We have it from the archives of the government, officially communicated to the State Executive from the Federal Executive. We have ruled, in several cases, that, to authorize the granting of land lying within the littoral or border leagues, required the action of both the Federal and State authorities, according to the laws of Mexico, and of the State of Coahuila and Texas. So far we have thought we could go in expounding the laws applicable to those lands. But, where there had been a contest as to which had the superior claim to the bounty of the government, and it had been decided between the conflicting claimants, we never have claimed the right to revise the correctness of the decision of the former political or judicial authorities of this country, before the Revolution.

It may have been without any authority of law, that General Teran instituted an inquiry and forwarded to the Federal Executive a memorial in relation to the controversy. He seems to have grounded his right to interfere, upon the fact that it belonged to him, because that the lands were within the littoral leagues, and was therefore at the entire disposal of the federal government. It is clear, however, that the Federal Executive did not, on his representation, undertake to grant the possession to De Leon, but only communicated a preference for him; and, if the proceedings had stopped with the announcement of a preference, we would have been without evidence of the concurrence of the State government, and the issuance of a grant by the latter to Sanches, would have been a nullity, and he would have had no title to convey. We have seen, however, that it did not stop here; but that the State government proceeded to award in favor of De Leon, and caused, by its authority, the titles to be extended to the colonists of De Leon.

If, however, the decision of the conflicting claims between De Leon and Power, was subject to our revision, we would not feel authorized, upon the facts of this case, to annul what had been done under the former sovereignty, in relation to this

matter: because, that one of the contestants having withdrawn from the contest, left it to the other to exercise all the powers claimed by the rightful owner of the disputed territory. And we could not disturb rights that grew up under that adjustment, without destroying the titles of innocent grantees, who had reposed in security upon the right of De Leon, to have titles extended to them. Under such circumstances, we would presume that the decision in De Leon's favor had been sustained by proof that had been lost, and not now accessible to us. In general, we would regard the acts of the former sovereignty not subject to revision; and it would require a clear case of usurpation, without any authority of law, to make the exception. (See Holliman's heirs v. Peebles, 1 Tex. R. 709.) And, here, the very judicious remarks of Judge Arrington, of the 12th Judicial District, seem to be so appropriate as to justify their insertion.

"It is objected, however, that the land, previous to 1826, "was the property of private owners, and that it was taken "for exidos, without compensation, in violation of the Con- "stitution of Tamaulipas. Supposing that to be true in fact, "although it is denied, can it be even imagined that the "Courts of the new sovereign will undertake to revise the "acts of a former government, as being in conflict with its "organic law? Besides, as the Supreme Court of Texas "has said, the interpretation of the Constitution in Mexican "States, is strangely confided to the legislative and not, as "with us, to the judicial power. Our Courts do not occupy "the attitude of tribunals of appeal or error in relation to "irregularities committed by the former authorities of Tamau- "lipas. We cannot afford to resuscitate, and rake from the "tomb of oblivious years, the forgotten controversies so long "gone by." (Exparte District Attorney, Brownsville, November, A. D., 1852.)

The conclusion, to which we have arrived, is, that the contract of Martin De Leon authorized him to colonize the coast leagues between the Lavaca and the Guadaloupe, and in the

fork of the Coleto and the Guadaloupe, and that the Commissioner of that colony was legally authorized to extend titles to the colonists of the said De Leon within those boundaries.

The second objection to the reading the grant to Sanches, as evidence to the jury, is that the authority of Fernando De Leon, as Commissioner, is not shown; nor is it shown that Sanches had been received as a colonist in De Leon's colony. The appointment of Fernando De Leon to the office of Commissioner for the colony, is shown by copies of the archives of the General Land Office, duly authenticated by the Spanish translator, and the General Commissioner of that office, and it was proven by oral evidence that he acted in, and discharged the duties of, that office; the presumption is, therefore, that he was legally appointed. It does not, however, rest upon presumption; because the documentary evidence shows that he had been appointed by the legally constituted authority for making the appointment. The proof is, therefore, plenary, and not merely presumptive, as it would have been if it had not been shown, that, in his appointment, the requirements of the law had been strictly observed.

It is contended that there is no evidence that Maximo Sanches had ever been received as one of De Leon's colonists; that there is no proof that Placido Venebides, who reported in favor of Sanches as possessing the requisite qualifications, was the Empresario *ad interim*, as he styles himself.

The petition to the Commissioner for title, is in the usual form; the grounds upon which petitioner rests his claim, is that he is one of the colonists introduced by the Empresario Martin De Leon; that he is a married man and possesses the requisite qualifications; alleges that he has never received title, and prays for a grant of one sitio, describing its location. This petition is referred to citizen Placido Venebides, Empresario *ad interim*, for his report whether the matters of the petition are true. To which there is a report, signed by Venebides, as Empresario, stating that petitioner had been introduced by his predecessor, Martin De Leon, Empresario. The

Surveyor is ordered by the Commissioner to make the survey prayed for; which is made and returned by the Surveyor to the Commissioner, who then proceeds to extend the title in the usual form. The question arises on the fact that Venebides is called and calls himself the Empresario *ad interim*. Parol evidence shows that Martin De Leon had died before that time, and that Venebides was the acting Empresario to carry out the enterprise. There is, however, no evidence to show when or by what authority, he was constituted Empresario *ad interim*. It may have been by authority derived from his predecessor, or it may have been under some municipal regulation of the colony. From the fact that the Commissioner recognized him as occupying the position, the inference would be, that it was by lawful tenure until the contrary was proven. The Commissioner, under a colonization contract, holds his office independent of the Empresario, directly from the government. And it is not reasonable to suppose that he would have acknowledged Venebides as the Empresario for the time, if it had been self assumed, without any authority for so doing. The presumption that Venebides may have been the legal representative of Martin De Leon, acquires, perhaps, some additional strength from the fact, that these Empresario contracts for colonization were not unfrequently transferred, and the transfer recognized by the government; and it would seem to follow, that, if De Leon could have made an assignment of his contract, he could have disposed of it by testament, or that it was such a right, as could have been and was perhaps administered upon as a portion of the rights pertaining his to succession. If we believed that the reference to, and the report of, the Empresario, was a necessary element constituting a valid title by the Commissioner, we would have had to decide how far such presumption ought to prevail in favor of the action of the Empresario *ad interim*; but we do not believe that the law required such reference; and its being practiced was, at most, only matter of form.

As before said, the Commissioner under the Colonization

Law, held his office independent of the Empresario, from the State Government; and he was clothed with very considerable powers in the extension of titles; and, with one solitary exception, he judged for himself, of the sufficiency of the qualifications of a colonist, to receive title to the land petitioned for. He, besides, had authority vested in him, in the civil organization and municipal government of the colony. See the instructions to the Commissioners, issued from the Executive Department of the State, of September 4th, 1827. (Laws Coahuila and Texas, p. 70, 71, 72 and 73.)

We have said that there is one exception to the authority of the Commissioner, to act independent of the Empresario, in the issuance of titles to the colonists, as to their qualifications; and that is in the case of colonists who are foreigners, and refers to the certificate they are required to produce, from the authorities of the country from which they came, thereby proving themselves to be of the christian religion, and of good moral character; and in 2nd Article of the instructions above referred to, it is enjoined upon him, "In order to guard "against false certificates, the Commissioner shall admit none, "until after the Empresario to whom they shall previously be "transmitted for the purpose, shall give information in writing "relative to the legitimacy of the same." We believe, therefore, that, unless in the case of foreigners, asking to become colonists and to receive title, the Commissioner could have acted upon his own responsibility, and decided without a reference to any one; and, if he should seek information on the subject, he was not required to embody the information acquired, nor the sources from whence obtained, in the titles he extended to colonists. The title would have been valid, without such information being set out in it. We believe, therefore, that the information derived from Venebides, is mere matter of surplusage, and, as such, it cannot vitiate the title extended to Sanches; and that title being a valid and perfect title, there was no error in permitting it to be read in evidence to the jury.

From the views we have expressed, it is not material as to

the result of this suit, to inquire whether the Court erred in the charges given, and in the charges refused to be given, upon the statute of limitations; because the title of the defendant having been shown by documentary evidence to be perfect and valid, the land embraced by it was not a part of the public domain, and was not subject to be located upon by the plaintiff; and, that being the case, he is not prejudiced by the supposed erroneous rulings of the Court, on other matters. The judgment is therefore affirmed.

Judgment affirmed.

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## Teal v. Ayres, Adm'r.

The statute of limitations, although suspended while a debtor is absent from the State, commences again to run, upon the decease of the debtor while so absent.

*Quere?* Where a very small period remains, to complete the bar.

That the mortgage was gone, when the debt was barred, has not been questioned in this case; and the point need not be considered.

Appeal from Walker. This was an action for the recovery of the balance due on a note, and for the foreclosure of a mortgage made to secure its payment. The note became due in December, 1840. The mortgage was executed on the 23rd June, 1841, subject to forfeiture, if the balance then due on the note were not paid on or before the first of January, 1842. The petition was filed on the 8th October, 1851; and it alleged that English was a resident of Texas at the dates, respectively, of the note and mortgage, and that he subsequently, about the last of the year, 1844, abandoned the country, and never resided therein afterwards, but departed this life in Louisiana or Tennessee; that David Ayres, in September, 1850, took out administration, and that the claim, duly authenticated, being presented on the 8th August, 1851, was disallowed.

The defendant pleaded several pleas amounting, in substance to the plea that the action was barred by the statute of limitations. It was admitted that English died in Tennessee on the 15th August, 1846. One witness testified that he had a settlement with English at San Augustine on the 13th December, 1844, and that English was then starting to leave the Republic. Another proved that he left in February, 1844; and his reason for this belief was, that he, the witness, married in April, 1844, and that English had left previous to that event.

A jury was waived; and the cause being submitted to the Court, was dismissed. A motion for a new trial, on the ground that the decision was contrary to the law and evidence, was overruled; and this was assigned for error; and it was also assigned as error, that the Court ruled that the statute of limitations commenced running from the death of English on the 15th August, 1846, without the limits of the State.

*Wiley & Baker*, for appellant. I. Giving the mortgage, was a waiver of the statute of limitations up to that time, and would have been so considered, even if the bar had been complete. (*Vide* Merrills v. Swift, 18 Conn. R. 257; 8 U. S. Dig. p. 265, Sec. 89.) Hence the statute commenced to run on Teal's claim from the law day of the mortgage—1st January, 1842—because the mortgage was an acknowledgment of the debt, expressing a willingness to pay it, on, or before, the 1st of January, 1842—fully within the statute, (Hart. Dig. Art. 2388,) and the rule as laid down by this Court in the case of Coles v. Kelsey, (2 Tex. R. 541,) as to what a promise should be.

II. The statute ceased to run when English left the State. (Hart. Dig. Art. 2395.) To complete the bar, English "must "have been within the State, subject to its process, during the "entire period provided for a bar: but such period of time "need not be continuous, but may be composed of different "periods." (Smith Adm'r, v. Bond, 8 Ala. R. 386.) Then, the main question to be determined in this case, is, whether

the death of English in 1846 revived the running of the statute; for such, in effect, was the decision of the Court below.

III. The case of Tison v. Britton, decided at the last Term of this Court, has no bearing on the principle in this case. In that case, the statute had commenced to run, before the death of the maker of the note sued on, and this Court held, upon principle, "that when the statute of limitations begins to run it shall continue, notwithstanding the death of either party." But the ruling of the Court below, in this case, goes to the extent that the death of a party, when the statute has ceased to run, revives it again; a position that is thought not to be tenable, either upon principle or authority.

It is an established principle, that the statute does not begin to run until there is, in being, a party capable of suing and one capable of being sued. The absence of English from the State operated a discontinuance of the running of the statute; and, before it can be put in motion again, the rights of the parties must be put in *statu quo*. The plaintiff must continue capable of suing either in person or through his personal representative, and the defendant must return within the jurisdiction and thus be capable of being sued. This return can only be in person, or by personal representative, and a return to the State, to put the statute in motion again, must be known to the creditor, and under such circumstances as to enable him, with ordinary diligence, to commence suit against the debtor personally. (Cole v. Jessup, 2 Barb. Sup. Ct. R. 309; 9 U. S. Dig. p. 323, Sec. 89; Hill v. Bellows, 15 Verm. R. 712; 2 Sup. U. S. Dig. p. 363, Sec. 334.) The return of defendant, in law, was when administration was granted on his estate.

IV. That Teal had the right to force an administration on the estate of English, can have no influence in this case; for he was safely lodged within the exception of the statute, and placed there by English himself; and the allegations and proof showing him there, the law will presume him to remain within it, until the contrary is shown. (Davis v. Sullivan, 2 Eng. R. 449; 9 U. S. Dig. p. 322, Sec. 71; State Bank v.

Sewell, 18 Ala. R. 616.) The contrary, in this case, is shown only in the appointment of an administrator.

V. But if it should be insisted that Teal was bound to force an administration on the estate of English after his death, in order to prevent his debt from being barred; yet, there is no proof tending to show that he knew of English's death, until administration granted. By analogy to the character of return to the State, that is necessary to set the statute running again, as cited in the authorities, *supra*, the death of English must have been brought home to the knowledge of Teal, and the proof must show the fact. But, having shown himself within the exception and placed there by English, himself, there was no necessity for any further diligence on his part; he might safely repose within it, until the return of English either in person, or by personal representative.

VI. But lastly, the language of the statute is too plain to admit of doubt. It is, that the action may be maintained "after his or their return to the Republic." These are plain words, used in an ordinary way, and must be understood to impart their ordinary signification, and hence required no judicial construction, or interpretation. Dying out of the State is certainly not equivalent to the expression "after his or their return to the State." The expressions are certainly not identical. These words of the statute claimed the attention of this Court in the case of Snoddy v. Cage, in which the Court aptly remarks, that, "were this question *res integra*, it would "seem very improbable that any interpretation could depart "so widely from the usual signification of the language, as "either to disregard totally, the force and effect of the word "return, or to make returning to a place and coming to it for "the first time, equivalent expressions."

*Yoakum & Campbell*, for appellee. English's death did not stop the statute of limitations. There was, at that time, no such exception. Nearly ten years had elapsed from the

maturity of the mortgage; and nearly eleven from the maturity of the note.

Even if English's change of residence should be construed to come under the exception of Article 2395, (Hart. Dig.) the statute must again have commenced at his death—for his return was rendered impossible.

So, under every aspect of the case, the claim seems to have been barred by the statute of limitations. Three years of the mortgage had run before English had ceased to reside in the State; the note was perhaps already barred. Five full years more had elapsed, from the death of English to the presentation of the claim.

Hemphill, Ch. J. The last assignment presents the most important question raised by the pleadings and facts in the cause. For, if the statute recommenced running after the death of English, the action was beyond question barred. If not, the bar would not be complete, as the acknowledgment, by the mortgage, of the justice of the claim, would save the debt from the operation of the statute prior to January, 1842. Had English remained in the State, and had the bar not been complete before his death, the limitation (as the law then existed) would, notwithstanding his death, have continued to run, on the general principle that where the statute has once commenced running, it will not be stopped by any supervening disability, unless expressly authorized by law. But, in this case, the statute was not running at the death of the debtor. It had been suspended by his absence; and the question is whether, at the death, it was again put in motion, or remained suspended until the grant of administration; or in other words, is it the death of the debtor or the grant of administration, which is equivalent to his return?

In adopting the 22nd Section of the statute of limitations, (Article 2395,) which declares that the time of a person's absence shall not be accounted as a part of the time limited by

the Act, but that suit may be commenced after his return to the Republic, the Legislature intended that the domestic creditor should not be injuriously affected by the absence of his debtor, and consequent exemption from process and judgment, in a suit commenced by personal service or notice.

It is very true, that this provision does not afford the ample protection to the creditor, derived from it in other countries, in which the debtor is liable to arrest and compelled to give bail to secure the payment of the debt. Imprisonment for debt is, under our law, abolished; the arrest of a debtor is unknown. It is also true, that the creditor may sue his absent debtor by publication, and under certain circumstances, may attach his property and have judgment. But, although these remedies may be enforced by the creditor, and the return of the debtor is not important as it would be, were he liable to arrest; yet, the Legislature has deemed his absence of such detriment to the creditor, as to authorize the suspension of the statute, during its continuance. But the injury, caused by the absence of the debtor, be its extent greater or less, ceases on his return. The creditor and the debtor are then restored to the situations, occupied by them antecedent to the absence.—The creditor has his process; and the debtor can invoke the aid of the statute, against antiquated claims. By the default of the debtor, the relative rights of the debtor and creditor had been deranged: by his return they are restored to harmony.

But, in the case before us, the return of the debtor had, by an act of Divine power, become impossible. All capacity for action, on the part of the debtor, had ceased. The creditor was forever precluded from the possibility of personal suit against him, not only here but elsewhere; and this, not by any default of the debtor, but by an act of Divine Providence, to which all must bow with submission. The recourse of the creditor, for his debt, was, by this event, altogether changed, from a suit against the person to one against the property; and it became perfectly immaterial to the creditor, whether

the debtor had died within or without the limits of the State. His estate, in either case, was all that was left of him—all that could be subjected to the discharge of his liabilities; and it was fixed to the spot, in which it was left by the debtor, whether he were present or absent at the time of his death. The fact of his dying abroad did not impede the grant of administration, or the facility of subjecting the property to the payment of claims. His estate stood precisely on the footing that it would have stood, had he died within the limits of the country. The fact of death, let that happen where it may, being ascertained, the grant of administration, when applied for, and the subsequent proceedings necessarily follow.

Is there any reason, then, why the statute should not run in favor of the succession of an absentee, in the same way, and to the same extent, that it does in favor of the estate of a present deceased debtor? The vigilant creditor can, on either and with the like facility, force administration; and if he do not, and his claim as against one be barred, there is no sound reason why it should not be precluded as against the other. The recourse against one, is identical with that against the other; and the creditor should be held to the same degree of vigilance in either case. The death of English, then, placing his estate here upon the footing that it would have occupied, had he died in Texas, the statute, upon his death, recommenced running; and the bar was complete before the institution of this suit.

It was contended that the fact of the death should have been brought home to the knowledge of Teal, before the statute could be again set in motion. This view of the law, we apprehend to be unsound. Four years elapsed from the death, to the grant of administration; and, if any allowance were permitted—and I am of opinion that it might be, in cases where the statute would complete the bar, before the death of a debtor, dying abroad, could be ascertained—it would not be under circumstances like those of the present case. More than one year, according to the testimony of one, and nearly

two according to the testimony of another witness, must have elapsed after the death, before the completion of the bar; and the presumption is, that, before the expiration of even the shortest period, the death must have been known.

That the remedy on the mortgage was gone, when the debt was barred, has not been questioned in this case; and the point need not be considered. If this debt be still in fact unpaid, notwithstanding the great lapse of time, its loss is clearly imputable to the laches of the plaintiff. He might have secured himself, by enforcing administration; and notwithstanding the absence of the debtor, he might have forclosed the mortgage. The law provides remedies for the vigilant—and if the negligent fail to employ them, they cannot complain.

Judgment affirmed.

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TRYON AND ANOTHER v. RANKIN AND OTHERS.

An averment that a note was made payable in the State of New York, and that the legal rate of interest of that State, when the note was made, was seven per cent. per annum, is sufficiently certain, to admit proof, that, according to the laws of New York, the note bore interest at the rate alleged.

The rate of interest of another State cannot be proved by parol, unless it be expressly proved as a usage, having the force of law.

Error from Walker. Suit by the defendants in error against the plaintiffs in error, on the promissory note of the latter.—The note was payable in New York; and the petition averred that the legal rate of interest, at the time the note was made, in the State of New York, was seven per cent. per annum. The Court admitted parol proof of the legal rate of interest in New York; to which the defendant excepted. The only facts proved were, the note, one witness as to the legal rate of in-

terest in the State of New York, and the admission that New York is in the State of New York.

It was assigned for error, that the Court erred,

1st. In admitting any evidence of the rate of interest in the State of New York, on promissory notes, there being no allegation in the petition, that such instruments bear interest, according to the laws of that State, where the note is payable.

2nd. The Court erred, in admitting oral testimony to prove the legal rate of interest in the State of New York, where the note was payable.

3rd. The Court erred in rendering judgment for interest on the note, after maturity, upon the allegations and proof.

*Wiley & Baker*, for plaintiffs in error. I. The petition in this case, as well as the note on which it is founded, shows that payment was to be made in New York—and the proof shows that New York is in the State of New York. To authorize a judgment for interest, the petition should show the debt to be such as by the law of New York, carries interest. (Cook v. McGreal, 3 Tex. R. 487.) The right to interest rests, either upon a contract express or implied to allow it; or upon law giving it as compensation by way of damages for default. (1 Am. Lead. Cas. 345.) The notes containing no agreement to pay interest, the petition should have alleged, that, by the laws of New York, promissory notes bear interest after maturity; and this averment should have been proven as any other fact —by the best evidence.

II. In absence of such averment and proof, it was error to admit any kind of testimony as to the rate of interest in New York. But more particularly was there error in permitting parol testimony to prove it. The rate of interest on promissory notes in New York is fixed either by written law, or by custom and usage. If by the former, it "must be proven like any other fact, by the best evidence which can be produced." (Burton v. Anderson, 1 Tex. R. 93; Cook v. Crawford, 1 Id. 9.) This, in most cases of foreign law, has been held to be,

by an authentic copy under the great seal of the State. But "the peculiar relationship of the several States to each other, "as members of the same confederacy, has produced a relaxa- "tion of this rule of evidence upon this subject," and it is now held that a collection of the acts, printed and published in a book, purporting to be by the authority of the State, after being proven by some person supposed to be well informed on this subject, to be the written law, is sufficient proof of the statutes of other States." (*Vide* Burton v. Anderson, *supra;* Hendricks v. Andrews, 9 Port. R. 10; Thompson v. Muper, 1 Dall. R. 462; Biddis v. James, 6 Binn. R. 321; Young v. The Bank of Alexandria, 4 Cr. R. 388.) And the rule is thought not to have been further relaxed.

III. But if the interest of New York is supposed to be founded on custom and usage—then the testimony of one witness is not enough to prove it. (2 Greenleaf on Ev. p. 241, Sec. 252; Wood v. Hickok, 2 Wend. R. 501; Parrott v. Thracher, 9 Pick. R. 426; Thomas v. Graves, 1 Const. R. 150.)

Hemphill, Ch. J. In relation to the first ground assigned, we are of opinion that there is sufficient certainty in the allegations, as to the rate of interest, and to the fact that the cause of action bore interest, to admit of proof to that effect. The petition shows that the note was payable in New York, and charges that the defendants are indebted in its amount with interest, and by amendment avers that the legal rate of interest in the State of New York, at the time of the making of the note, was seven per cent. The necessary inference from, and plain meaning of these averments is, that seven per cent. was the legal rate of interest on the cause of action, at the time of its accrual.

We are of opinion that the second ground of error was well assigned. The right to recover interest, on claims for money, was not recognized at Common Law; and in countries where that system is the basis of their jurisprudence, interest is generally the creature of the statute. The plaintiff had averred

that there was a legal rate of interest in New York, evidently meaning that the rate was established by law; and if so, parol evidence was inadmissible to establish the fact. If the rate of interest depended upon usage, which had the force of law, it was susceptible of proof by parol; but it should have been proven as a usage. The evidence does not conduce to prove any fact, from which a legal conclusion might be deduced, as to the rate of interest. It does not prove either the existence of a law, or of a usage, by which such rate is established. It is in itself a conclusion of law, and not the proof of a fact; and the objection to its admission should have been sustained.

Reversed and remanded.

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## De Leon v. White.

The colony of Martin De Leon embraced the littoral leagues between the Lavaca and the Guadaloupe and Coleto; and the approbation of the Federal Executive was given to his contract with the State government.

The action of the Empresario not being essential to the validity of the Commissioner's title extended to a native Mexican, it is unnecessary to decide whether Venebides, styling himself Empresario *ad interim*, was legally authorized to act, after the death of Martin De Leon, or not.

Proof of the hand writing of the Commissioner and assisting witnesses to a *testimonio*, is sufficient.

It is the settled doctrine of this Court, that fraud is a question of fact, for the consideration and finding of the jury.

See this case for circumstances, which would warrant a finding by the jury, that the Commissioner had been guilty of fraud in making a grant.

Although the title of an innocent purchaser for a valuable consideration, will not be affected by fraud on the part of the grantor; yet, where the grantor (the Commissioner) acted also as the agent of the grantee, in the transaction, the grant was affected by the fraud, and was void.

Where a grant was void because of fraud, from the beginning, the land was not separated from the public domain, but remained subject to location by any one having a valid certificate.

Fraud is, however, a question of fact, to be found by the jury; and the only con-

trol the Court can exercise, is on a motion for a new trial, on the ground that the evidence of the fraud does not support the verdict of the jury. The question for our decision is, If the jury should find a verdict establishing the fraud, from the facts and circumstances detailed in this case, uninfluenced by any charge, wrong in law, from the Bench, could their finding be set aside, on the ground that their verdict was unsupported by evidence.

A Commissioner for extending titles had no authority to extend a title to his infant son; and a title so extended was held to be void, for the want of power in the Commissioner. It seems the principle would be the same, if the son were of full age.

The ascertainment of any one corner of a survey is sufficient to identify it, where the courses and distances are given; and in order to ascertain a corner, the Surveyor is not confined to the discovery of landmarks called for in the field notes, but may resort to his recollection of objects not mentioned in the field notes.

A defendant who claims to hold by location and limitation, if his certificate be of the first or second class, must prove that it was recommended as genuine.

See this case for testimony which, although irrelevant, had a tendency to bias the jury, and on account of which the judgment should be reversed, although there was legal testimony sufficient to have sustained the verdict.

Appeal from Victoria. The facts will be found in the opinion of the Court. The briefs are omitted because they were confined to the discussion of questions which were decided in Bissell v. Haynes, and to the question of fraud—nothing upon the point of want of power in the Commissioner.

*V. E. Howard*, *A. H. Phillips* and *Allen*, for appellant.

*A. S. Cunningham*, *Robinson* and *I. A. Paschal*, for appellees.

Lipscomb, J. The appellant brought his suit in the Court below, to recover possession of a quarter of a league of land, granted by the authorities of the State of Coahuila and Texas, to Francisco De Leon, as one of the colonists of Martin De Leon's colony. It is alleged that the said Francisco is dead, and that the plaintiff is his father, and only heir. There was a verdict for the defendant; and the plaintiff appealed.

The fact of the death of Francisco De Leon, the grantee, and that the plaintiff is his only heir, is fully established by

the evidence. The deed, upon its face, is in the usual form of grants made by the Commissioner for extending titles to colonists under colonization contracts. Two objections were made to the title going to the jury, that were disposed of by us in the case of Bissel v. Haynes *et al.*, decided a few days ago. It was to the validity of the grant, upon the ground that the land granted was within the littoral leagues, and could only be granted with the approbation of the Federal Executive. Our opinion was, that the Empresario Martin De Leon had the approbation of the Federal Executive, to his contract with the State government; and that it embraced the littoral leagues between the Lavaca and the Guadaloupe and Coleto. The second was, to the action of Placido Venebides, styling himself Empresario *ad interim*, in reporting to the Commissioner that the petitioner, Francisco De Leon, possessed the requisite qualifications, as a colonist. To this we answered, that, as the action of the Empresario was not essential to the validity of the Commissioner's title, it was not material to decide, whether Venebides was legally authorized to act as Empresario, or not.

The title offered, was the *testimonio;* and its execution was, we believe, sufficiently proven by proof of the hand writing of the assisting witnesses and the Commissioner. (See Titus v. Kimbro, Tyler, April Term, 1852, 8 Tex. R.)

The objections, arising from the face of the title, and from its authentication, not being valid, the verdict of the jury, if sustainable, must rest upon the facts given in evidence on the trial. The defence arising from the evidence may be considered under the following distinct heads:

First. That the title was void, for fraud in its issuance.

Second. It was issued contrary to law, in reference to the facts, and therefore void.

Third. That the deed, as to its locality, is too vague and uncertain to admit of identifying the land conveyed; and that it was not identified.

And, lastly, the law of limitation.

Beginning, then, in the order in which the several points have been arranged, we will not stop to notice the various and conflicting decisions on the question of fraud: whether it is to be regarded as one of law, to be decided by the Judge; or of fact, to be found by the jury. Such an examination would be wholly useless, as it is the settled doctrine of this Court, that fraud is a question of fact, for the consideration and finding of the jury. And it is no longer an open question.

The facts appearing from the record, from which it is supposed that fraud, in the Commissioner, in making the concession, must be reasonably inferred, are, that the Commissioner Fernando De Leon, the present plaintiff, is the father of the grantee; that the grantee, at the date of the concession, was a minor, from fourteen to seventeen years of age; that he was absent from the State of Coahuila and Texas, in the State of Louisiana, at school, at the date of the concession, and the petition upon which it was made; that the petition for the concession, as a colonist, purports to have been made at Guadaloupe Victoria; that the grantee was the only child of the Commissioner; and that the mother had died some years before: and there was no evidence that the family of the Commissioner was composed of any other members, than the father and son; and that the father had received a concession of one sitio of land, as the head of a family; that there was no other instance in the colony, of a minor, constituting a part of his father's family, receiving a concession of a quarter of a league of land, as his headright, as a colonist, being the portion allowed by law to unmarried men who were colonists. It appears, further, from the evidence, that, at the time that the Commissioner (the father) came into the colony, as a colonist, his son could not have been exceeding ten years of age. All of these facts must have been known to the Commissioner; at the time he was passing upon the qualifications of his son, necessary to constitute him a colonist, entitled to the portion of land he solicited. Would not all of these facts be sufficient to sustain the conclusion, that the Commissioner had been

guilty of a gross fraud and malfeasance in his office, in making the grant?

It is, however, answered, that the grantor may have acted fraudulently, in making the deed; yet, if the grantee was not privy to the fraud, his right, acquired by the grant, would not be tainted by the fraud. This, as a legal general proposition, may be admitted; and it is certainly true, in the case of an innocent purchaser for a valuable consideration, without notice of the fraudulent intent of his vendor. If, however, the vendor is the agent of the purchaser, it would be impossible for the principal to escape from the taint and the legal consequences of the fraud of his agent. We apprehend, that, in a case like the present, of the father acting for an infant son, in his absence, if he should acquire property for that infant, through fraud, it would affect the title of the infant so acquired by fraud, and render the whole transaction a nullity, notwithstanding it was the fraud of the father only. It would be altogether different from a transfer by the father, of his own property, for a valuable consideration, to an innocent purchaser, without notice. The father, in this transaction, must be regarded as acting for the infant; and, although he could not bind the infant to his contract, yet it seems, that, when the infant seeks to derive any advantage from such assumed agency, he would have to take it affected by all the vices of the contract, known to his father, who had acted as agent or trustee for him. This transaction appears more like a voluntary donation, on the part of the Commissioner, than a sale for a valuable consideration, notwithstanding it was clothed with the formalities of a sale. The Commissioner paid the fees to the Surveyor for making the survey and returning the field notes. And the inference is not unreasonable, that the infant never knew of the transaction.

And it may be doubted, even if the fraud of the Commissioner could not be set up against the infant, whether the Commissioner could at any time claim any title in himself derived from his own fraud. The double capacities he had assumed

were incompatible with each other: as a Commissioner, he was defrauding the government; and as the father and guardian of his infant son, he procured the fraudulent concession, well knowing, both as Commissioner and father, that it was a fraud.

It cannot be true, that the fraud of the Commissioner in this case, cannot vitiate the deed, because he is the agent of the government, and the government must submit to suffer by his delinquency; that, although this same Commissioner, as the father and guardian of his infant son, was not only a participator, but the contriver and executor of the fraud, such fraud cannot invalidate the deed, because the infant was not a participator. Such a conclusion would be as repugnant to common sense, as it is to sound morality. This case would justly form an exception to the rule, if the rule was acknowledged to be that none but the injured party can take the advantage, and show the nullity of the grant, on the ground of fraud. There was no innocent party to the transaction, because the infant represented by his father was no party to the contract. But we believe that if the fraud really existed in this case, it made the contract, or pretended grant, a nullity; and that it never, for a moment, separated the lands embraced in it, from the mass of the public domain; that it was void in its inception, and could confer no right, nor interpose any obstacle to any one claiming adversely to it; that the pretended grant, being a nullity from its inception, the land that it pretends to convey, was subject to location, by any one holding a genuine and valid certificate. Such was the opinion of this Court, expressed in Mason v. Russell's heirs, 1 Tex. R. 730.

Fraud is, however, a question of fact, to be found by the jury; and the only control the Court can exercise, is on a motion for a new trial, on the ground that the evidence of the fraud does not support the verdict of the jury. The question for our decision is, If the jury should find a verdict, establishing the fraud from the facts and circumstances detailed in this case, uninfluenced by any charge, wrong in law, from the

Bench, could their finding be set aside, on the ground that their verdict was unsupported by evidence? It is believed that it could not, without as suming a control over the verdict of a jury, that would be unauthorized by any well established rule of law, on the subject. It is true, that there are only circumstances given in evidence; but they constitute a strong chain, tending to support the conclusion of fraud: and, in Thompson, administrator, v. Shannon and the administrators of Cochran, decided at the present Term, we held that fraud could be legally inferred from proof of facts inconsistent with good faith, and the fairness of the transaction. We will hereafter consider how far the finding of the jury, in this case, may have been influenced by an erroneous charge of the Judge, upon the trial, and will proceed to the second ground proposed for our consideration: that is, the power of the father, acting as a Commissioner, to grant land to his infant son, as a colonist, under the circumstances of this case.

The incompatability of the Commissioner assuming two characters, petitioner for his son, an infant, and grantor, as Commissioner, of the petition, was discussed under another branch of our opinion: that the assuming such double character, was an evidence of fraud. We will now inquire if his powers, as Commissioner, authorized him to, in effect, deal with himself.

Mr. Justice Story, says: "That it may be correctly said, "with reference to christian morality, that no man can faith-"fully serve two masters, whose interests are in conflict. If, "then, the seller were permitted, as the agent of another, to "become the purchaser, his duty to his principal and his own "interest would stand in direct opposition to each other: "and thus a temptation, perhaps in many cases too strong for "resistance, by men of flexible morals, or hackneyed in the "common devices of worldly business, would be held out, "which would betray them into gross misconduct, and even in-"to crime. It is to interpose a preventative check against such "temptations and seductions, that a positive prohibition has

"been found to be the sound policy, encouraged by the purest "precepts of christianity." (Story on Agency, Sec. 210.)— And again, in Section 211: "Hence, it is well settled (to il- "lustrate the general rule) that an agent, employed to sell, "cannot himself, become the puachaser." This principle is believed to prevail in the Civil Law, from whence it was deduced, and engrafted upon our system.

If the Commissioner is to be regarded as a mere ministerial agent of his government, to extend titles to such persons as should be adjudged by him to possess the requisite qualities, as colonists, the above principles would apply, and forbid his acting upon his own claims. And, that he was so dealing with himself, in reality, cannot be doubted, when the infancy and absence of his son, together with the fact that he paid the fees, are considered; and the further consideration, that his son was incapable by reason of his subjection to his father, to act for himself. It will be found, by reference to the Spanish Civil Law, that, in carrying out the same principle, and in guarding against temptation, and the seductive influence of interest, partiality or prejudice, that law is more stringent and embraces more offices, trusts and agencies, and extends the prohibition on account of family relations, further than our own law. In Stroud's case, 16 and 17 of Eliz., Lord Coke thought that an act of Parliament, "giving to any to have cognizance of all manner of pleas, within his manor of D," he shall hold no plea whereunto himself is a party, for *iniquium est aliquem sua rei esse judicem;* and that the exception was implied in the statute. (Lord Campbell, L. Ch. Jus. Vol. 1, p. 245.)— The same doctrine is found in Blackstone. And, we believe that it is a principle of unniversal jurisprudence, that no man can adjudicate his own case, nor the case of one so nearly related by blood, as a son; but, in this case, it is clear that there was but one party to ask for the grant and to concede it; and that this double capacity of Commissioner to extend title, and grantee, is so very incompatible, that to tolerate it, would be alike repugnant to sound policy, and to good morals.

To the question, What would be done, in a case where the son was entitled to land as a colonist, if his father, as Commissioner, was not authorized to extend titles to him? a ready answer may be given: Let him ask of the Political Chief, or other competent authority, the appointment of a Special Commissioner, as it is believed the Commissioner had previously done, in procuring titles to the quantity of land, that he himself was allowed to receive as a colonist. This case is one of such strong and peculiar features, that, if no principle of law could be found against it; yet, it would strike the common sense of every one whose moral sense had not been weakened by interest or some other improper influence, that a deed, made under such circumstances, ought not by any Court to meet with the slightest degree of favor or countenance. We believe, however, that it is repugnant to well established principles of law; and that the Commissioner had no authority to make it.

Thirdly: That the field notes of the survey are vague and uncertain, not admitting of identity as to the land conveyed by the deed, or intended to be conveyed.

The description of the land, given in the field notes of the Surveyor, and recited in the deed of the Commissioner, is as follows, *i. e.*: "Situated on the Western side of the Matagorda "Bay, commencing at a stake which was placed at the edge of "the bay, which serves as the first corner of this survey, a "Well, known as John McHenry's, being to the South, 45° "West, seventy varas." The second corner is described as "a stake planted in the prairie, which is on a line running "from the beginning, South, 45° West, 4687 varas from the "beginning;" to this corner there are no witness, or bearing points, given. "Thence, North 45° West, 2850 varas, where "a stake was driven in the prairie forming the third corner." To this third corner, there were no bearing, or witness points, given. "Thence, North 45° East, 3687 varas, to the edge of "the bay, where another stake was driven for the fourth and "last corner, there being a small mound, to the North 56°

"West, and an island in the bay, to the North 9° 45" East, "thence following meanders of the bay, to the beginning."

The description of the land is very imperfect, from not giving more certain and distinct bearings, to the starting corner, and none to the others except the fourth, and last; and this is defective, in not giving the distance of the small mound, as well as its bearing. The bay shore, with its meanders, is given as the line from the last corner to the first; but it does not appear to have been surveyed, and the courses and distances, according to the meanders given. Had this been done, it would have furnished some data for ascertaining the particular part of the bay, on which the land claimed fronted. If, however, either the first or the last corner could be identified with certainty, it would have been sufficient, as the others could have been fixed by the courses and distances; they having no natural boundary or bearing points. The Surveyor who had first surveyed the land and furnished the field notes set out in the deed, was sworn as a witness to establish the locality of the land. He believed that he had found the corners and boundaries, by ascertaining the fourth and last corner, and reversing his lines. There was, however, some uncertainty left, as to whether he would have been able to find the corners and boundaries from the deed alone. This can not be very material: if from any source he received information as to the place of some known point, described in the survey, from which he could ascertain the precise boundaries, it was sufficient; and there could be no sort of objection to his availing himself of such information.

There is, however, some doubt and uncertainty in the evidence of this witness, in establishing the survey. He is not very confident in the starting point. This uncertainty results from the old well, which he, at first, was confident was McHenry's well, designated in the original survey as the bearing point; but, it proves to be much further from the corner, on a re-survey, than is given as the measured distance in the original; thinks though it may have been a mistake in the chain

carriers, in the first or original survey. His opinion of the correctness, though, of the corner established by him in the second survey, is confirmed by his recollection of a bayou, near the starting corner; but the bayou is not named in the survey; and it is somewhat singular, that it was not, as it is likely, that it would be more notorious and permanent, than the well; there being a great many wells in the immediate vicinity of McHenry's; and they were easily made in the swash, as it is called. A few feet would be sufficient to procure water; and, from this being so shallow, and in a sandy ground, they would be soon filed up, and every vestige of them be lost. The distance having increased, may possibly have been produced by the water of the bay receding from the land. The Surveyor seems to have more confidence in the accuracy of the establishment of the last, or fourth corner of his survey; but, as to this, there is some conflict between him and other witnesses, that may have caused a doubt in the minds of the jury, and may have induced them to believe that the survey was not sufficiently identified. The admission of the defendant, that he believed that he was living on the De Leon survey, was proper evidence, to go to the jury. It was attempted to be proven, that he never had made the admission. It was a question for the jury to decide, after it was permitted by the Court, to go to them: in reviewing the charges of the Court, on the rejection and admissibility of the evidence, we may take occasion to examine this part of the evidence offered by the defendant. Whether the survey originally alleged to have been made, was made out by the testimony, was for the jury to decide; and, had they decided either way in this case, there would hardly have been a sufficient ground for setting aside the verdict.

We will proceed, in the fourth place, to inquire whether the evidence supported the prescription, claimed by the defendant, in favor of his right. The title and possession of the defendant, in support of which he invokes the aid of prescription, is derived from the location and survey of a land certificate

bearing date—There was a great deal of testimony, as to the character in which the defendant settled upon the land, and exceptions taken to the ruling of the Court, as to the admissibility of some of the evidence, that would have required an elaborate investigation; but the view we have taken of the evidence, will render such investigation unnecessary.

The defendant failed to show that the certificate under which he located and claims to have entered, was a genuine and valid certificate. This has uniformly been held by us to be indispensable for headright certificates. Had he sued upon such certificate and location, he would have been required to aver that it was a genuine and valid certificate; and when sued and resting his defence upon such certificate, he must prove its genuineness and validity. Without such proof, he was not in a situation to claim the statute of limitations, as a protection to his possession; and the verdict of the jury, in his favor, can derive no support from the length of time of his possession under his location and survey, no matter how long he had held under such location, resting his defence thereupon.

In discussing the question of fraud, we promised to inquire into the correctness of the Court, in its ruling, to see if there had been any such error, as would probably influence the jury in their finding on the question of fraud. A witness on the part of the defendant, was asked if the plaintiff was not strongly opposed to the Revolution. The question was objected to by the plaintiff; the objection was overruled; and the witness answered that he was opposed to the Independence of Texas; or words to that effect. The same witness was asked, if two men, Americans, had not been killed about that time in Victoria; and if he did not believe the plaintiff could have prevented the killing, if he had tried to do so. This was objected to: the objection was overruled; and the witness said he had heard so, and believed that plaintiff could have prevented it. This testimony was improper, inadmissible and ought not to be have been allowed; not only because it was not relevant to any material and legal defence set up by the

defendant; but was still more decidedly wrong, when considered in relation to the fraud that had been charged against the plaintiff, in the extension of the title under which he claimed to derive his right of action. He may have been culpable in that matter, if the facts alluded to were true, of which, however, there was no evidence, the witness only swearing to what he had heard. But such culpability had nothing to do with the truth of the charge of fraud; and it is very obvious that it was calculated to excite the prejudices of the jury against him, and leave to him but little hope of an impartial trial and verdict.

For this error the judgment would be reversed, because it may have influenced the jury in the finding of their verdict: but, as we have arrived at the conclusion, that the grant was void for want of power in the grantor, no beneficial result could be obtained by sending the case back; and therefore the judgment is affirmed.

Judgment affirmed.

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## Matossy v. Frosh.

There must be a period in the progress of a cause, beyond which it will be within the discretion of the Court to refuse leave to amend the pleadings. But where the Court has permitted an amendment to be filed, which does not appear to have affected injuriously any right of the opposing party, its allowance will not afford a ground for reversing the judgment, although it might, coming in at so late a period, have been rightly refused.

The rule as to the application of payments, recognized.

Where the creditor entered the due bill of his debtor, as an item of account, and credited payments upon account, without particular application; having sued upon the note, the defendant pleaded the payments; to which the plaintiff replied that the defendant was indebted to him upon book-account upon which the payments had been credited; the payments exceeded the book-account proper; *Held*, That the plaintiff was entitled to recover the balance due on the

note, after deducting the excess of the payments, beyond the other items of the account.

The plea of payment, standing alone, admits that a cause of action existed, and imposes upon the defendant the burden of proving the payment; but does not dispense with the production of the cause of action, if a promissory note.

The statute which dispenses with proof of the execution of a note, unless the signature of the maker be denied under oath, does not dispense with its production, under the general denial.

Where the petition contains a copy of the note sued on, and the defendant pleads payment, without a general denial or other plea impeaching its validity, objection cannot be made at the trial, when the note is offered in evidence, that it has been altered since its execution—there being no variance between it and the copy.

Error from Galveston. The appellee brought suit, against the appellant, on a promissory note for $158 15 and interest, and appended to his petition a copy of the note. The defendant pleaded certain payments, and in reconvention.

After the case was called for trial, the plaintiff by leave of the Court, the defendant objecting, amended his petition, alleging, in substance, that the defendant was indebted to him, on an account, besides his indebtedness on the note sued on; that the payments, pleaded, had been credited on the account, and that the note remained unpaid.

The plaintiff gave the note in evidence; and the defendant thereupon introduced the book-keeper of the plaintiff, who testified, that the note was drawn by himself, and was signed and delivered to him by the defendant; and that it had been since altered by interlining, in a different hand writing, the words, "or ord[redacted] the note." Whereupon, the defendant moved the Court to [redacted] the note from the jury, which the Court refused. The plaintiff's account, showing the entries in his books, was produced, from which it appeared that the note constituted an item in the charges. The payments were entered by the book-keeper as credits, and their sum, which exceeded the book account proper, was deducted by him from the sum of the account and note, leaving a balance in favor of the plaintiff of $107 15, not computing interest on the note. For this balance there was a verdict and judgment for the plaintiff.

The defendant asked the Court to instruct the jury. 1st. That if the note had been altered since it was signed and delivered, without the consent of the maker, they must find for the defendant.

2nd. That, if the payments were made when the defendant owed the plaintiff upon both the note and account, and no appropriation of the payments was made by either party at the time, they must apply the payments to the note which drew interest, and not to the account. Which instructions the Court refused.

*W. Alexander*, for plaintiff in error.

*A. P. Thompson*, for defendant in error.

Wheeler, J. The amendment of the petition was admissible, by way of replication to the plea of payment. Amendments should be made in such time as not to operate a surprise to the opposite party, or unreasonably to delay the trial. There must be a limit to the right of amendment—a period in the progress of the cause, beyond which it will be within the discretion of the Court to refuse or allow amendments, as may seem most to accord with the rights of the parties respectively, and the ends of substantial justice. But where, as in this case, the Court has exercised its discretion in permitting an amendment, which does not appear to have affected injuriously any right of the opposite party, [redacted] might, perhaps, coming in at so late a period, have been rightly refused, its allowance will not afford a ground for reversing the judgment.

In respect to the appropriation of payments, it is well settled, as a general rule, that the debtor has a right to appropriate payments; and if he does not, the creditor may. A debtor may control, at will, the application of his payments. Where, therefore, a debtor owing several debts, makes a payment to his creditor, he may apply the payment to whichever debt he pleases. But, if he make no specific designation, the

creditor may apply it as he pleases. And where neither party appropriates it, the law will make the application according to the justice of the case. (1 Mas. C. C. R. 323; 7 Cranch, 572; 4 Id. 317; 1 Pick. R. 332; 1 McCord, 308.) In this case, the debtor neglected to make the application of his payments; and the creditor, by his agent, his book-keeper, applied them, as it was his right to do. Interest was not charged upon the note, when the application of the payments was made, nor was any computed by the jury in their verdict. They held the plaintiff to his application of the payments. They included in their verdict no part of the account; though, as the payments were applied, it was not extinguished; and allowed only the balance due upon the principal of the note. The defendant, therefore, can have no just cause of complaint. The verdict gave him the full benefit of his payments and more.

A copy of the note was annexed to the petition. There was no general denial, or plea putting in issue the existence, or genuineness of the note. By the plea of payment, the defendant took on himself the burden of proof. The effect of the plea, standing alone, was to admit that the cause of action had existed, as alleged, and to impose upon the defendant the necessity of proving that it had been extinguished, by payment. It dispensed with proof by the plaintiff of his cause of action. Had there been a general denial; or had the existence, or genuineness of the note been put in issue, the plaintiff must have produced it as proof of his cause of action. The statute, which dispenses with proof of the execution of the note, unless the signature of the maker be denied under oath, (Hart. Dig. Art. 633, 634,) does not dispense with its production, under the general denial of the cause of action, but only with proof of its execution. This point was determined by the Supreme Court of the United States, in construing a statute of Kentucky, similar in its provisions to our own. The case was tried upon the general issue. There was no denial under oath, as prescribed by the statute of Kentucky, of the execution and assignment of the notes declared on. It was insisted, in ar-

gument, that the statute dispensed with the rules of evidence as to the production of the notes. The Court, Mr. Justice Story delivering the opinion, said: "It would be most dan- "gerous to allow, that, because the proof of the execution of "an instrument was dispensed with, therefore no proof of its "existence, or of the right of the party to hold it by assign- "ment, was to be required. The production of the original "might still be justly required, to ascertain its conformity with "the declaration, to ascertain whether it remained in its gen- "uine state, to verify the title by assignment in the plaintiff, "to trace any payments which might have been made and in- "dorsed, and to secure the party from a recovery by a *bona* "*fide* holder under a subsequent assignment. These are im- "portant objects, and which no wise legislature would lose "sight of; and it is too much to expect any Court of Justice "to infer, upon so slight a foundation, the abolition of those "salutary rules of evidence, which constitute the great secur- "ity of the property and rights of the citizens." (Sebree v. Dorr, 9 Wheat. R. 558, 564.)

To entitle the defendant to contest, at the trial, the plaintiff's cause of action, he should have put it in issue by a general denial, or other plea. Not having done so, but having pleaded payment, with a copy of the note, containing the alleged alteration, before him, he was not in a condition to contest its genuineness, or to question that the alteration had been made with the consent of the maker. If, by his answer, the defendant had given notice of his intention to impeach the legal validity of the note, or to dispute the cause of action set out in the petition, the plaintiff might have come prepared satisfactorily to explain the alteration. Under the issues the instruction was rightly refused; and there is no error in the judgment.

But, although the cause of action was not put in issue, to enable the defendant to contest the existence or genuineness of the note sued on, yet a correct practice required its production upon the rendition of judgment, to preserve regularity in the proceedings, and for the security of the defendant.

Judgment affirmed.

## Cook and another v. Southwick.

Where a person, not the payee, signs his name upon the back of a promissory note, at the time of its inception, without any words to express the nature of his undertaking, he is liable as an original promissor or as surety: but it is competent for the person, so signing, to show by oral or other evidence, the real obligation intended to be assumed at the time of signing.

Although the note, in such a case, be not negotiable, if the consideration passed wholly to the payee, the indorser will be liable as surety, only.

Where the indorsee of a note has complied with the statute, by bringing suit against the principal, at the first Term of the Court, the statute is fulfilled; and the rights and liabilities of the parties are remitted to the Common Law: and at Common Law, delay, without fraud or agreement with the principal, will not discharge the surety.

A plea in abatement of the citation comes too late, after exceptions to the petition.

The absence of witnesses is no ground for a new trial, where their absence was not made the ground of a motion to continue, and excuse is not shown for the failure to make such motion.

Error from Galveston. The defendant in error sued the plaintiffs in error, on a note which read as follows:

"Galveston, Oct. 1st, 1846.

"$300. Five months after date, I promise to pay Robert O. "W. McMannus, three hundred dollars, being in part pay- "ment for the steamboat called the Little Sally.

(Signed) WM. M. COOK."

(Indorsed) "Henry Hubbell."

The petition alleged that the defendant Cook, by his note, which was set out, and the defendant Hubbell, by his indorsement thereof, at the same time became liable and promised to pay the contents thereof to the payee, who assigned the note to the plaintiff. The petition stated that the defendant resided in Galveston. There was service on the defendant Hubbell; and after several ineffectual attempts to obtain service on the defendant Cook, the plaintiff amended his petition, alleging, that, since the commencement of the suit, he had changed his residence to the county of Calhoun. Service was ultimately obtained upon him in that county.

At the first Term after service on the defendant Hubbell, he appeared and moved the Court to dismiss the case, because service had not been made on his co-defendant. He also excepted to the amendment of the petition. His exception and motion to dismiss were overruled. At a subsequent Term he again moved to dismiss, urging various objections to the regularity of the proceedings, and to the legal sufficiency of the petition, and objecting to the want of service on the defendant Cook. The motion was overruled. And at a Term still later, the cause having been continued to perfect service, the defendant Hubbell again moved to dismiss, for the causes assigned in his previous motions, urging that the plaintiff had not used due diligence to obtain service on Cook, who, he averred, was principal, and himself but surety in the note. The motion was overruled, and the cause again continued for service upon Cook. At a subsequent Term, the defendant Hubbell pleaded in abatement of the writ. The defendants answered to the merits, charging fraud, failure of consideration, &c.

Exceptions were sustained to the plea in abatement. There were other exceptions and rulings which do not require notice. The Court instructed the jury, that, by his indorsement upon the note, the defendant Hubbell became a joint and several promissor to the payee, and his liability was the same as if he had signed at the bottom of the note. There was a verdict for the plaintiff. The defendants moved the Court for a new trial; and, in support of their motion, filed an affidavit of the defendant Cook, of the materiality of certain testimony, which he averred he had not had time to obtain since service of process upon him. They also filed the affidavit of a witness explaining his non-attendance at the trial, and stating facts within his knowledge, impeaching the consideration of the note. The Court refused a new trial and gave judgment upon the verdict; and the defendants brought a writ of error.

*Alexander* and *Tucker*, for plaintiffs in error.

*Joseph & Howard*, for defendant in error.

WHEELER, J. It is insisted for the plaintiffs in error, that Hubbell was but a surety upon the note, and that the plaintiff was guilty of such laches in obtaining service on his principal, Cook, as to discharge the surety.

Judge Story, in his Commentaries on the law of promissory notes, &c., says, "In some cases, it is a matter of considera- "ble nicety, to decide in what character a party stands upon "a promissory note, in virtue of his indorsement thereof. It "is plain, that, if he is the payee of the note, whether nego- "tiable or not, he is to be deemed a guarantor of the note, "upon the footing of the original consideration; and, if he in- "dorses it subsequently, not being a regular indorsee from or "under any of the antecedent parties, he will, in like manner, "still be deemed a guarantor, if there be a sufficient consid- "eration for his indorsement: but not otherwise." (Story's Com. on Prom. Notes, Sec. 133.)

Again, after having treated of the cases where there was a written memorandum indorsed upon the note, either at the time when it was made or afterwards; and where, the only question, of course, was, what was the true construction of the written memorandum, as to the parties in interest, the learned commentator adds, "But cases have occurred, of a very dif- "ferent nature, where the party sought to be charged has in- "dorsed his name in blank thereon. These cases have been, "either (1) where the note was not negotiable, or (2) where "it was negotiable. In the former class of cases, it has been "held, that, if the blank indorsement was made at the same "time as the note itself, the indorser ought to be held liable, "as an original promissor, or maker of the note, and that the "payee is at liberty to write over the blank signature, 'for "'value received, I undertake to pay the money within men- "'tioned to B,' the payee." (Id. Sec. 473.)

In Moies v. Bird, (11 Mass. 436, 440,) in treating of the effect of such an indorsement, Chief Justice Parker said: "But this note was not made payable to the defendant, and "therefore was not negotiable by his indorsement. What

"then was the effect of his signature? It was to make him "absolutely liable to pay the contents of the note. If he had "been asked, after the note became due, to guarantee its pay- "ment, and such had been the understanding, when he gave "his name, it might have been necessary to declare against "him as guarantor, instead of charging him as original prom- "isor; but no such agreement is proved. He puts his name "upon a note, payable to another, in consequence of a pur- "chase, made by his brother, in a day or two after the bar- "gain was made, knowing that he could not be considered in "the light of a common indorser, and that he was entitled to "none of the privileges of that character. He leaves it to the "holder of the note, to write anything over his name, which "might be considered not to be inconsistent with the nature "of the transaction. The holder chooses to consider him as "a surety, binding himself originally with the principal; and "we think he has a right so to do. If he was a surety, then "he may be sued as original promissor."

The authorities are numerous to the effect, that, where a person, not the payee of a note, signs his name upon the back, at the time of its inception, without any words to express the nature of his undertaking, he is liable as an original promissor or surety. (8 Pick. R. 122; 4 Id. 311; 24 Id. 64; 9 Mass. R. 314; 5 Washb. 355; 1 La. Ann. R. 274, 248; 16 Ohio R. 1; 1 Hill, R. 256; 5 Sm. & Marsh. 627; 9 Ham. R. 139.) And if the indorsement is without date, it is presumed to have been made at the time of the inception of the note. (17 Shep. 310; 7 Miss. R. 440.) But it is competent for the person, so signing, to show, by oral or other evidence, the real obligation intended to be assumed at the time of signing.

It appears from the face of the note sued on, and from oral evidence at the trial, that the consideration passed to Cook, and, consequently, the obligation of Hubbell was that of guarantor or surety. In Louisiana it is held, that, where one thus puts his name on the back of a note, it will be presumed that he intended to bind himself as a surety for its payment. (1

La. Ann. R. 248, 274.) It seems perfectly clear, that the undertaking of Hubbell was that of guarantor or surety. And it is a general principle of the law, that a person signing a note as guarantor at the time the note is executed by the principal, is liable as an original maker, and may be sued thereon, either alone or jointly with the maker. (16 Ohio R. 1.) "Where the guaranty, or promise, though collateral to the "principal contract, is made at the same time with the prin- "cipal contract, and becomes an essential ground of the credit "given to the principal debtor, the whole is one original and "entire transaction; and the consideration extends to, and "sustains, the promise of the principal debtor, and also of the "guarantor. No other consideration need be shown than that "for the original agreement upon which the whole debt rest- "ed; and that may be shown by parol proof, as not being "within the statute." (Burge on Suretyship, 36.)

As respects the liability of the guarantor, to suit, our statute (Hart. Dig. Art. 670) so far restricts his liability, as to require that the principal shall have been first, or shall be simultaneously sued. A guarantor, or surety, however, may be sued jointly with his principal. Regarding Hubbell, then, in the light of a surety, has the plaintiff been guilty of laches in proceeding against the principal, of a character to discharge the surety? We think not. His principal was joined with him in the suit brought to the first Term of the Court after the maturity of the note. A citation was issued, but the plaintiff failed to obtain service upon Cook. Various unsuccessful attempts were afterwards made by citations issued to the county of Galveston, and afterwards to the county of Calhoun, to obtain service on him. He is alleged to have removed from Galveston after the bringing of the suit. The efforts to obtain service there were ineffectual; and one or more ineffectual attempts were made in Calhoun county, before service was obtained. Under the circumstances, that there may have been periods of from Term to Term, during which no citation issued, can scarcely be imputed to the plaintiff, as laches;

certainly not such as to exonerate the surety from his obligation. The residence of the defendant Cook, or where process would reach him, may not have been known to the plaintiff. If the surety would complain of the negligence of the plaintiff, in proceeding against the principal, he should, at least, have shown that there had been such delay as, under the circumstances, was unreasonable, and to his prejudice. The surety may place himself in a condition to quicken the diligence of the creditor, or to take his remedy against the principal at once. But the mere forbearance of the creditor will not discharge him. Mere delay, without fraud or agreement with the principal, does not discharge the surety. (1 Gallis. R. 32; 2 Pick. R. 581; 4 Shep. R. 72; 4 Yerg. R. 182; Chit. on Con. 531.) A creditor is not bound to active diligence against the principal, in order to preserve the liability of the surety. If he merely remain passive, the liability of the surety is unimpaired. (4 Smedes & Marsh. R. 165.) If the surety, in this case, had urged the creditor to diligence against the principal, and had forwarded his efforts to obtain service and judgment against him, he might, with more reason, be heard now to complain of the want of diligence on the part of the creditor. But, instead of that, as soon as legally apprised of the institution of suit, by the service of process upon him, he sought to dismiss it, as to both himself and the principal; and he appears throughout to have interposed every obstacle in his power, to the enforcing of the demand against the principal. Under the circumstances, it cannot be pretended that there has been laches on the part of the plaintiff, of which the surety can complain, of a character to release him from his liability; and the Court did not err in refusing to dismiss the case on his motion.

The plea in abatement of the writ came too late after exceptions to the petition; and was rightly rejected.

Absence of witnesses merely, there having been no surprise of the party by the evidence adduced against him at the trial, was not a good cause for a new trial. It should have been

made the ground of an application for a continuance. But the defendants did not apply for a continuance, nor have they shown any excuse for not having done so. Their application, therefore, was rightly refused. We are of opinion that there is no error in the judgment, and that it be affirmed.

Judgment affirmed.

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## Wilson v. Sparks.

It is a sufficient answer, to a rule against a Sheriff to show cause why he failed to levy an execution, that the judgment, on which the execution issued, was void, although it was entered, upon the mandate of the Supreme Court.
The entry of "motion overruled" is not sufficient.

Error from Walker. Rule against Sheriff to show cause why he failed to levy, &c. Answer that the judgment, on which the execution issued, was entered on an appeal from a Justice's Court, and was therefore void. It appeared that the case in which the judgment was rendered had gone to the Supreme Court, and that the judgment was entered upon the mandate returned to the Court below. Entry of "motion overruled."

*H. Yoakum*, for plaintiff in error. The plaintiff takes this position, that a proceeding cannot be legally void, when pronounced otherwise by the Supreme Court; that their decree cannot be inquired into by an inferior Court, or an executive officer; that their decision was the law in that case; and, though they might afterwards alter the rule, still it could not apply to *res adjudicata*, except by a review or some proceeding between the original parties.

*B. C. Franklin*, for defendant in error.

LIPSCOMB, J. This was a proceeding in the District Court, against a Sheriff, for failing to make a levy of an execution, in his hands.

The Sheriff, in answer to the rule, showed cause, that the execution had been sued out on a void judgment, it having been rendered by the District Court on an appeal from the judgment of a Justice of the Peace; and because the District Court had no jurisdiction, by appeal from the Justice of the Peace, the judgment was a nullity. The Court sustained the defence; but only entered of record, "motion overruled."—There can be no doubt, that the Court below was right, in sustaining the defence, set up; and if a judgment in favor of the defendant had been entered, it would have been affirmed: but, there being no judgment, the cause is dismissed.

Writ of error dismissed.

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WEATHERED v. SMITH.

Where a note, payable to bearer, past due, is placed in the hands of an agent for a particular purpose, and the agent transfers the note, to a purchaser for value, in violation of his trust, the principal may recover possession of it, in an action against the purchaser.

It seems, that, in such a case, the rules of law applicable to promissory notes, and not those applicable to agency, apply; or, at all events, that the agency is limited by the laws applicable to promissory notes, of which limitation the note itself gives notice.

Although the allowance and approval of a negotiable instrument, as a claim against the estate of the maker, will not destroy its negotiability; yet, it seems, it would subject it when assigned, to defences against it, in the hands of the assignor; and if lost or stolen, or if it has otherwise come unlawfully into the possession of a holder for value, with notice of its allowance and approval, it is subject to recovery from his hands, by the true owner.

Error from Walker. Suit by Weathered against J. C.

Smith and S. R. Smith, to recover possession of a note, of which the following is a copy, together with papers annexed, showing that it had been allowed and approved as a just claim against the estate of the maker:

"$89 67. One day after date, I promise to pay to Francis "M. Weathered, Sen. or bearer, eighty-nine 67-100 dollars, for "value received of him this 23rd day of March, A. D., 1848.

"GEORGE GILLESPIE."

The proof was that Weathered, who resided in San Augustine county, caused the note to be sent to Walker county to one Alexander McDonald, to be presented to the legal representative of Gillespie; that it was presented and allowed and approved by the Chief Justice; that it was without indorsement; that McDonald died; and that a short time afterwards the defendants purchased the note from one S. D. C. Abbott for "a full valuable consideration." There was a judgment for the defendants.

*Yoakum & Campbell*, for plaintiff in error. The defendants aver they paid Abbott for the claim, and that they are innocent holders, &c. The claim is not negotiable. It is not only over due; but is reduced to the form of a judgment—a probate judgment, long before defendants received it. It had ceased to be a chose in action. (Comyn's Dig. Biens: Bonvier's Law Dic. Chose.) As a chose in action, it could be taken only subject to outstanding equities. (6 Johns. Ch. R. 443.)

But the defendants took it with notice. The affidavit of Weathered, showed that he was the owner. He had made no transfer. It is a much stronger case than Hall & Elkins v. Stancell use of Franklin. (3 Tex. R. 400.) There Franklin had no notice that the note had been put in suit. "He who trusts most shall lose most." If defendants had an equity, the plaintiff had more. His title was both legal and equitable. He had parted with nothing—before he sent off the note, he put the affidavit—the stamp of absolute ownership, on it.

*J. C. & S. R. Smith*, for self. The property in a note of the above description, is transferable by delivery; and it matters not how defective the title of the person transfering it may be. (See Story on Sales, p. 154, and Story on Promissory Notes, p. 124.) In order to defeat the holder, he must have had actual or constructive notice of such defect. (*Vide*— Story on Promissory Notes, p. 197.) Such notice must be averred and proved. In this case, there was no evidence upon that point. It can make no difference whether the holder obtained the note before or after maturity; because, it is not a question as to any equity which the maker may have, but a question of title, between the payee and holder. A note payable to A or order is transferable by indorsement as well after maturity as before; but he who takes it, does so, knowing that it is subject to all the equities of the maker. A note payable to A or bearer is transferable by delivery, as well after it is due as before, but subject to the same thing: and if a man makes an agent, who is not trustworthy, he should be the sufferer, and not he who has purchased it in good faith and for a valuable consideration; upon the great principle, that he who trusts most must lose most.

It will be contended upon the part of the plaintiff, that this note became a judgment, upon its approval by the Chief Justice, and consequently could not be transferred by delivery. This view cannot, however, be sustained. It is a mere form of authentication of indebtedness against the estates of deceased persons. The character of the debt is not changed. In this particular case, the allowance of the administrator and the approval by the Chief Justice, only show that the maker had no equity against the note. The note is still payable to Weathered or bearer; without the note, the oath, allowance and approval would have been worthless. The holder of it, in good faith and for a valuable consideration, is entitled to it. It can have no other effect than to revive its negotiability, against the estate of the maker, payable in due course of administration, either to Weathered or bearer. It is not a matter of record. If it be a judgment, the administrator is one of the

judges; and if he be one of the judges he is not liable for any error he may commit in the allowance of claims.

HEMPHILL, CH. J. That the holder of a note, transferable by delivery, or, if payable to order, indorsed in blank, is *prima facie* its owner, and holds it on valuable consideration, is a principle too well established to be questioned; and, although the note may have came into the hands of a former holder, by duress, fraud, theft or finding; yet, that does not defeat the right of a present holder, but only imposes upon him the necessity of proving that he holds *bona fide* and for value. The possession of the instrument, acquired in good faith, in the usual course of trade, gives property, whether the person from whom it was received have title or not. This doctrine, founded on the necessity of securing the benefits accruing from the free circulation of commercial paper, had its origin in the case of Miller v. Race, (1 Burr. R. 452,) in application to Bank notes, and was subsequently extended to all negotiable instruments transferable by delivery. (1 Smith's Leading Cases, p. 250; Story on Promissory Notes, Sections 191-6-7; Greneaux v. Wheeler, 6 Tex. R. 515.)

This rule, in the latitude of its operation in favor of the actual holder, is subject to the important modification, that the instrument must have come into his hands previously to its being due; (Chitty on Bills, 148; Story on Promissory Notes, Sec. 210;) otherwise, it is taken subject to all the equities between antecedent parties. When acquired after over due, it is subject to all the objections, affecting it in the hands of the party who first became wrongfully possessed of it, or by whom it was tortiously transferred. (Chitty on Bills, 157.) And such is the rule in relation to the note which is the subject of this controversy. It was transferred after due. It is affected by objections against it, in the hands of Abbott, or other previous holder; and, if recoverable from them, it is likewise recoverable from the defendants.

But the defendants are, upon another ground also, excluded from the operation of the general rule in favor of the actual holder. The note had, previous to the transfer, been approved by the Chief Justice as a claim against the estate of a deceased person, and was consequently invested with the character of a *quasi* judgment. This would not destroy its negotiability, but would subject it, when assigned, to defences against it in the hands of the assignor; and, if lost or stolen, or if it have otherwise come unlawfully into the possession of a holder, it is subject to recovery from his hands, by the true owner—or from the hands of any person with whom it may be found.

There is no evidence in this case, to prove in what way Abbott became possessed of the note. And if recoverable from him, it was liable to recovery from the defendants. Judgment reversed and cause rendered.

Reversed and remanded.

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TURNER v. SMITH AND ANOTHER.

Where one of several defendants prosecutes a writ of error, and the Supreme Court affirms the judgment, rendering judgment against the principal and sureties in the writ of error bond, which is certified below for observance, the sureties cannot enjoin execution upon the latter judgment, on the ground that the original co-defendants of their principal are not joined in it, nor on the ground that a levy has been made upon their property, notwithstanding their principal and his co-defendants, both, have sufficient property to satisfy the execution.

The pendency of a suit for an injunction against an execution which has been irregularly issued, is no bar to the regular issue of another execution.

Appeal from Walker. The appellees filed their petition, in the Court below, against the appellant and Bailey and the executor of Keenan and the administratrix of Farris, praying an injunction. In their petition they alleged that Turner had ob-

tained a judgment in the District Court of Walker county, against Bailey, Keenan and Farris, on their promissory note; that Bailey sued out a writ of error to the Supreme Court, and gave bond with the petitioners as securities, on the writ of error bond; that the judgment of the District Court was affirmed, and judgment upon the writ of error bond, rendered against Bailey and petitioners, for the amount of the judgment of the Court below, with ten per cent. damages, together with the costs of the Supreme Court; that Turner, on this affirmance of the judgment had sued out execution against the said Bailey, and the estates of Keenan and Farris, who had died, and against the petitioners; that petitioners had obtained an injunction to stay that execution, on the ground that Bailey and the estates of Keenan and Farris had sufficient property to satisfy the execution, and that they should be looked to for satisfaction, before petitions could be resorted to; that the injunction was still pending in the District Court; that Turner had since caused an execution to be sued out against Bailey and petitioner, leaving out the executor of Keenan and the administratrix of Farris; that the execution so last sued out, had been levied on the property of the petitioners; and that it would be sold if the execution was not enjoined; that Bailey had property sufficient to satisfy the execution; and that there was sufficient property of the estates of Keenan and Farris, also, to satisfy the judgment. They prayed that Turner, Bailey and the executor of Keenan and the administratrix of Farris be cited to answer their petition, and alleged that the residence of Bailey was not known. The injunction was granted.

Wiley, executor of Keenan, answered; alleging that his testator was a security on the note sued on by Turner, on which judgment had been rendered; that he was opposed to taking out the writ of error, and wished it to be paid, as there was then property enough of Bailey's, for that purpose; and that the matter so alleged by him, was well known to the petitioners, at the time of their entering into the writ of error bond. Turner demurred to their petition, and answered. The other defendants did not answer. The demurrer was overruled.

There was no evidence, but the records of the proceedings in the original suit; the writ of error bond; and the mandate of the Supreme Court, showing the affirmance of the judgment, and judgment upon the bond against the principal and securities, for the amount recovered below, with ten per cent. damages for delay. A jury being waived, and the cause submitted to the decision of the Judge, the injunction was made perpetual, and judgment for all costs rendered against Turner, from which judgment he appealed to this Court.

*Yoakum & Campbell*, for plaintiff in error.

*Defendants in error*, for themselves.

Lipscomb, J. The grounds upon which the Judge, in the Court below, rested his opinion, are not shown; and, in all probability, it was upon the fact that the former injunction was still pending. Whether there was any equity in the petition, or just ground for the award of the first injunction, is not before us. From the facts shown in this case, there is no doubt, that there was great irregularity in the issuance of the first execution, that was enjoined. It united persons whose liability to execution arose on distinct judgments; and it ran against the estates of Keenan and Farris, when the liability as to them could only be enforced through the Probate Court in the due course of administration. The liability of Smith and Cresap, the securities to the writ of error bond, was not a joint liability, with Keenan and Farris, co-defendants with Bailey in the judgment that Bailey sought to have reversed by the writ of error. They had not complained of the judgment, and refused to join in the bond for the writ of error; and they were not parties to the judgment rendered, upon the bond, by the Supreme Court. That judgment was for a different amount from the judgment originally rendered in the District Court. It was for ten per cent., on account of the writ of error being for delay; and it was for the costs of the Supreme Court, for

which Keenan and Farris could not have been liable to execution. Nor is their property liable in the hands of their representatives. The execution complained of in this case, was sued out upon the judgment of the Supreme Court, and run against the principal in the bond, and his securities in his bond. These are the only persons that it could have legally run against; and we believe, therefore, that it was properly sued out.

It is not perceived, how the fact of another execution, that we have seen was improperly sued out, and proceedings to enjoin that execution being still pending, could interpose a bar to the issuance of the execution in this case: because, it was issued on a different and distinct judgment from the one enjoined. This may not have been the ground on which the injunction was perpetuated. It may have been the opinion of the presiding Judge, that the petitioners showed in their petition, equitable grounds of relief, independent of any legal objection to the issuance of the execution. If so, we have not been able to perceive any such equity, and believe the Judge erred, if he based his decree upon any such supposed equity. There is nothing set forth in the petition, that shows the slightest scintilla of equity in favor of the complainants; not even if they had a right, under any circumstances, to seek an indemnity from the estates of Keenan and Farris: because, with full notice that the writ of error was against the wishes of at least Keenan, they became securities in the bond, and thereby prevented satisfaction of the execution on the original judgment at that time. But whatever the equities may be, between the several defendants, it could not prejudice, delay, or hinder, the plaintiff Turner, in the pursuit of his rights; and he clearly had a right to sue out execution, against the petitioners, on the judgment of the Supreme Court, against them as the securities on the writ of error bond. That judgment was rendered under our statute; (Hart. Dig. 2933;) and it is not supposed that its validity or regularity was drawn into controversy in the case.

The petition, in this case, failed to show any grounds of relief, even if it were admitted, that, by the more expanded principles of equity, the plaintiff was required to first seek satisfaction from the principal, when it was equally sure and convenient, before he would be permitted to levy upon the property of the securities. The petitioner should have shown that property of the principal, sufficient to satisfy the execution, had been shown and not levied on. This is not alleged; but they do allege that the residence of the principal is not known. We see no grounds to support the decree: it is reversed and remanded, with instructions to the Court below to dissolve the injunction and dismiss the petition.

Reversed and remanded.

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## Earle's Ex'ors, v. Earle,

Where the wife, without good cause, voluntarily abandons her husband, for several years (say three or four) immediately previous to his decease, she forfeits her claim to the homestead and widow's allowance.

Appeal from Harris. Proceedings, in this case, commenced before the Probate Court of Harris county. It was by an application of the appellee, as the widow of the appellant's testator, to have the late homestead of her deceased husband stricken from the inventory of his estate, and for the further allowance to her, of one year's support for herself and minor child, and also such other property as is directed by the statute to be exempted from forced sale. To this application the executors of Earle made opposition; and, in their answer, charge, in substance, that the petitioner, Ann Earle, had, in her own wrong and of her own accord, abandoned her deceased husband, his house and bed and board, for several years, say

three or four, before his death, and continued obstinately so to abandon the said deceased, and to live apart from him, until his death, against his wishes and entreaties, failing and refusing, all the while, to perform any of the duties of a wife; that, after the said abandonment of her husband, the petitioner rejected the name of her husband and assumed that of Green, the name of her former husband, and, by that name, instituted and carried on suits in the District Court of Harris county. To this answer, the petitioner demurred; and the demurrer was sustained, and the Probate Court proceeded to decree, that the homestead of the deceased, with two hundred acres of land, should be stricken from the inventory, and set apart for the petitioner and her minor daughter, and making other provisions for her, under Article 1153 and 1154, (Hart. Dig.) The executors appealed to the District Court.

It is not material, to state all the proceedings of the District Court: it is sufficient to say, that a statement of about the same matters, as objections to the granting the prayer of the petitioner was again, on demurrer, overruled, and resulted in a decree similar, in its terms, to the decree of the Probate Judge, and the executors appealed to this Court.

*J. C. Walker*, for appellants. Admitting the answers to be true, they formed a good defence against the petition.

Where the wife has been guilty of such violations of conjugal duty, as would free the husband, at the time of his death, from all obligations to her for a support—such violations of conjugal duty, pleaded by the executors, will be a good defence to the claim of the widow against the estate for an "allowance." That the executor or heir may plead such matter. (6 Bing. 33, Old Ed. 135, Heth v. Graham.) The abandonment of her husband, by the wife, exempts him from the duty of supporting her, and forfeits her privileges and immunities under the Constitution. (2 Bright, H. & W. 14; 2 Kent, Com. 146; Watkins v. Watkins, 2 Atk. R. 97; Head v. Head, 3 Atk. R. 549; Barrett v. Barrett, 4 Des. R. 448; Anonymous, 4 Des.

R. 94; Bedell v. Bedell, 1 Johns. Ch. R. 604; 1 Bright, H. & W. 265; 2 Id. 87; 2 Roper, H. & W. 134; Cooper v. Clason, 3 Johns. Ch. R. 521; Perkins, 9 Law Lib. 104.)

From the above authorities, it would seem that the petitioner would have been barred by the Common Law, of her dower. Admitting the answers to be true, the testator would have been entitled to a divorce, (Hart. Dig. Art. 847, 848,) at the time of his death—therefore, according to the above authorities, he was free from all liability to her, and consequently his estate is free from the charge of her support or "allowance."

By the demurrer she admits that she "of her own wrong" abandoned the testator, and that she did defame him by "charging him with acts calculated to bring him into disre-"pute and disgrace in the community," for which cause even a forced heir might have been disinherited. (Hart. Dig. 3263.) Therefore the claim of the widow (who is not so tenderly regarded in the law as a forced heir) should be disregarded, she having been guilty of the same offence.

*E. A. Palmer*, for appellee. The facts, set up by the executors, in defence against the claim of the widow, in this case, are wholly insufficient in law, to bar the wife's right of dower at Common Law; and I hold and believe that they are insufficient to bar the rights here given her by statute. If so the judgment of the Court upon the demurrers was not erroneous.

According to Common Law the husband could not, by alienation, deprive the wife of dower; nor could it be barred by a divorce *a mensa et thoro*—not even for adultery at Common Law. (2 Black. Com. 130; see also 24 Wend. R. 193; 3 Hill, R. 95.)

Lipscomb, J. The allegations of voluntary abandonment of her husband, against his will, and continuing apart from him, against his wishes and entreaties, are to be taken as admitted; and also the abandonment of his name, and the as-

sumption of another name, by which name, she had brought suits in the District Court of Harris county, is to taken as true, because the demurrer admits the truth of all those allegations.

Can a wife, who has voluntarily adandoned the home of her husband, claim the benefit of the homestead law, after the death of her husband? The principle, involved in this question, was considered and settled at Tyler, the last Term, in the case of Trawick v. Harris.

In that case, the object of the homestead exemption from forced sale, was discussed; and it was believed, that, for the wife to be still entitled to the exemption in her favor, after she had voluntarily abandoned the husband and his homestead, was wholly inconsistent with the spirit and design of that wise and benevolent provision, in our Constitution. If she has been so unmindful of the marital obligations, as to desert her husband and home, voluntarily and without any reasonable excuse for doing so, and so continues separate and apart from her husband, against his consent, and his entreaties, for years, she, whilst so disregarding her duties as a wife, could not interpose an objection to the sale of that homestead, nor can she claim a right to be consulted upon the subject; and the right of the husband to sell, would include in it the right to dispose of the same by testament, should she still be found absent from the place, that both the law and religion had assigned to her.

There are few, if any countries, where the rights of a wife are more carefully guarded by law, than in our own; but they do not go so far as to free her from all the responsibility of her condition, and continue to preserve to her all the protection and immunity, that she would be entitled to, whilst in the discharge of her duties as a wife. The marriage is, by our laws, one of mutual and reciprocal obligation; and the mutuality of those obligations would be entirely disregarded, were she to be allowed, in her own wayward humor, without any just cause, to abandon, for years, the discharge of her duty. To permit her, under such circumstances, after the death of that husband, so abandoned and neglected, to claim from his credi-

tors or his children, the homestead that she had wantonly abandoned, would be an absurdity, to which the law affords no sanction, by any fair construction, that can be given to it: on the contrary it is so far out of the reason of the law, that it would be an implied exception to it. Where the reason of the law is clear and manifest, whatever is not within the reason, is an implied exception.

Had the wife been driven, by the illtreatment of the husband, to abandon the sacred precincts of that home, dedicated by the law, to her use, and to her protection from the misfortunes and adversities of life, she could again have returned to the sanctified asylum, when the storm by which she had been driven out, a houseless wanderer, had passed over. And it is to be hoped, that the demurrer to the facts alleged, was more an experiment upon the law of the case, than an acknowledgment of the truth of the charges, made against the wife, or of her inability to gainsay them.

The same principle, we have discussed and laid down, in relation to the homestead, apply, with equal force, to the other provisions, set apart for the wife, and for the year's supply. Had she not voluntarily abandoned her home, unless the estate was indebted, she could only have had the year's allowance to her, under the statute, and the homestead.

The judgment is reversed, and the cause remanded, with instructions to overrule the demurrer, filed to the answer of the executors, and give leave to the petitioner, to controvert the truth of the matters charged.

Reversed and remanded.

## Ex parte Thornton.

A warrant, issued by the Governor of this State, for the apprehension of a fugitive from justice from another State, should show on its face, by recital at least, that it was issued upon a requisition from such other State, accompanied by an indictment found or affidavit made, charging the alleged fugitive with having committed the crime. *Quere?* Whether the indictment or affidavit should not be fully set forth in the warrant, so as to enable the Court, on *habeas corpus*, to determine whether it is sufficient or not.

Where, on *habeas corpus*, the warrant for the arrest of an alleged fugitive from justice from another State, is found to be defective, this Court has no power to detain the prisoner, in order that another warrant may be obtained.

*Habeas corpus.* This was an application to "one of the "Justices of the Supreme Court, sitting in the city of Gal- "veston," for a *habeas corpus;* the writ was made returnable "before the Judges of our said Supreme Court, now in session, forthwith." The return was, that the relator was detained by virtue of the following writ:

STATE OF TEXAS.

To all and singular, the Sheriffs, Constables, and other civil officers of said State—Greeting: Whereas it has been represented and made known to me by his Excellency, Elias N. Conway, Governor of the State of Arkansas, that Abner E. Thornton, late of the county of Pulaski, in said State of Arkansas, stands charged therein with the crime of forgery, and that the said Abner E. Thornton has fled from justice in said State, and taken refuge in the State of Texas:

And whereas the said Elias N. Conway, Governor of said State of Arkansas, has, in pursuance of the Constitution and laws of the United States, demanded of the Executive of this State, the surrender of said Abner E. Thornton, and that he be delivered to Benjamin F. Danley, who is duly authorized to receive him:

Now, therefore, know ye, That I, P. Hansborough Bell,

Governor of the State of Texas, do, by virtue of the power and authority in me vested by the Constitution and laws of said State, and in obedience to the Constitution and laws of the United States, issue this, my warrant, commanding all Sheriffs, Constables, and other civil officers of said State, to arrest and to aid and assist in arresting the said Abner E. Thornton, and to deliver him, when arrested, to the said Benjamin F. Danley, agent of said State of Arkansas, in order that he may be taken back to said State, to be dealt with according to law. In testimony, &c., (signed, and sealed with the great seal of the State.)

Before the prisoner was discharged, (same day,) a motion was made to detain him for a reasonable time, to be fixed by the Court, in order that the Governor of Texas might issue a regular and legal warrant for his arrest, &c. In support of the motion, the following affidavit was filed:

Benjamin F. Danley, being duly sworn, says that at the time this affiant, as the agent of the State of Arkansas, presented and delivered to P. Hansborough Bell, Governor of the State of Texas, the requisition and demand from the Governor of the State of Arkansas, for Abner E. Thornton, he also presented and delivered to said Governor of the State of Texas, a copy of an indictment found by the Grand Jury of the county of Pulaski, in said State of Arkansas, at the December Term of the Circuit Court of said county, in the year 1849 or 1850; that said copy of said indictment was duly certified by the Governor of the State of Arkansas, as authentic; that said copy, so certified, together with the demand or requisition, was left by affiant, and now remains, as he believes, in the possession of the Governor of Texas, or in the office of the Secretary of State at Austin. Affiant further says that he, affiant, was Sheriff of said county of Pulaski, at the time said indictment was so found by said grand jury, and has seen it since it was so found and returned by said grand jury into said Court. Affiant further says that the person now under arrest, is the same person against whom said indictment was found;

that said indictment is still pending in said Circuit Court of said Pulaski county, in which said county the forgery charged in said indictment was committed.

*R. Hughes*, for relator. I. To give jurisdiction to the Governor, three things are requisite. 1st. A demand by the Executive of the State from where the fugitive has fled. 2nd. A copy of the indictment found, or an affidavit made before a magistrate, charging the fugitive with the crime. 3rd. Such copy of indictment or affidavit, must be certified as authentic, by the Executive. If the pre-requisites are complied with, the warrant is legal; and not otherwise: and to ascertain them, the return to the *habeas corpus* is to be examined.

1. We admit that the return shows that the relator has been demanded by the Executive of Arkansas.

2. But the return does not recite that a copy of the indictment or affidavit, charging the relator, was produced—certified as authentic by the Governor. And consequently the rule, prescribed by the Constitution and Act of Congress, has not been complied with. It is clear that the power of the Governor, to act upon a requisition from another State, is a special authority, and must be strictly pursued. The facts which will give the authority, must not only exist, but the warrant must show them to exist. (Bracy's Case, 1 Salkeld, 348; 1 Ld. Raym. 99; Matter of John L. Clark, 9 Wend. R. 212.)

We have not the demand or the indictment or affidavit—but the warrant being brought before the Court—does it show that the relator is charged? We have the recital of Governor Bell, that it has been represented and made known to him, that the relator stands charged. The Act of Congress requires of the Executive making the demand, to furnish evidence of the charge, not to make the charge: and on that to make the demand. The Executive, here, is not only to see that a charge has been made, as required by the Act of Congress, but he is to show that the evidence has been furnished him—and this evidence is to be of such character, as to satisfy the mind, that

the party has been charged, in the State whence he fled, with the crime for which it is sought to apprehend him. (*Ex parte* Smith, Law Rep. 57.)

Instead of these facts appearing, we have the information of the Executive, here, that it has been made known to him, by Governor Conway, that the relator stands charged—when he should have said, "that, a demand having been made, and "it appearing by the copy of an indictment or affidavit, pro- "perly authenticated by the Governor of Arkansas, that he "there stands charged."

In the Smith case, the warrant of itself, perhaps, might have been good; but it having been accompanied, in the return, by the affidavit, the affidavit was examined, and was said to be insufficient, because it did not show the commission of an offence by Smith, in the State of Missouri. So here: upon the return, which embraces the warrant, there being no evidence as required by the Act of Congress, that the relator had been charged with a crime in the State whence he is said to have fled, the Executive has shown no authority to act in the premises, and the warrant is void, and the relator ought to be discharged. We do not insist that the warrant should state that the party has committed an offence: for with this the authorities here have nothing to do; but it must state that he was charged, and the manner in which the Executive was informed of the charge. (*Exparte* Clark, 9 Wend. R. 222.) The Governor is a ministerial officer, (Western Law Journal, 525,) and he should comply with his authority, by showing a charge expressly made, of some offence. (Law Reporter, 318.)

II. But it may be thought that it is competent for this Court to hold the relator in custody, until it can be ascertained whether the Governor has the proper information. To this we say,

1. It must be presumed that the Governor, who is the highest executive officer in the State, recited all the information he has. He says it "has been represented and made known to him" by Governor Conway. He must have had

the documents before him; and if the requisite fact was otherwise made known, it would have been so stated; and not being so stated, this Court must presume that he had it not. But this is not all.

2. This State, except for the purposes embraced in the Federal Constitution, is as much a State foreign to Arkansas, as is Mexico, or any other foreign State. (Buckner v. Finley *et al.*, 2. Peters, 586.) And as a consequence, but for the article referred to, in the Constitution of the United States, and the Act of Congress of 1793, referred to, it would not only not be the duty of the several States to attempt the surrender of fugitives from justice, but they would have no power. (Holmes *ex parte*, 12 Verm. 631; Case of Jose Ferreira dos Santos, 2 Brock. 493; In matter of Short. 10 S. & R. 125; Holmes v. Jennison, 14 Peters, 540; *contra*, Matter of Washbourn *ex parte*, 4 Johns. Ch. R. 106.)

But the Constitution and Act of Congress having provided for the surrender of fugitives, they are to be surrendered as required. But how is this to be done? By the Executive—to him the power only is given. This Court can have no such power: because, it is only by virtue of the municipal law of the State, that this, or any other of the State Courts, can act; and in that respect the States are foreign to each other. (Warder v. Abell, 2 Wash. Va. R. 359, 380.) And, it being a universal principle, that the Courts in one State or nation have no authority to enforce the criminal laws of another, it must follow that they have not power to arrest for offences committed against the laws of another State. (Case of Jose Ferreira dos Santos, 2 Brock. 574.)

What power, on this subject, is given by law to this Court? As to offences committed against the laws of the State, the Court may examine the evidence, though the warrant is quashed; and if an offence is committed, remand the prisoner. But for the reason given by Mr. Justice Barbour, in such a case as this, the Executive only is authorized to act, and upon a ministerial authority.

But suppose the Court should say they would detain the prisoner in custody, until the Governor is heard from, what will be done with him in the mean time? Have this Court any power to commit? or have they power to bail? We can find no authority to this effect, but we have shown the law to be otherwise. Could the prisoner be arrested, upon an affidavit, without the intervention of the Executive? We think we have shown he could not. And if he could not, where is the power found to detain?

But there is another view. It has been repeatedly decided, that the Courts of the States cannot act upon the criminal law of the United States; and, in order that officers of the States might have power to commit, an Act of Congress was necessary.

The Courts, upon this subject, cannot act. The distinction is to be noted, between cases where the prisoner is brought up on *habeas corpus*, in cases where the Court may act as a committing Court, and where they cannot. (Bracy's Case, 1 Salk. 248; Yoxby's Case, 1 Salk. 351.)

*Jones & Ballinger*, for respondent. I. As the only ground alleged, is, that the warrant is not in compliance with the law, the Court will look into the Constitution and Act of Congress which regulate the proceeding. The language employed is the simplest that can be conceived, to express the mere Executive duty of the Governor. The Constitution says, the fugitive "shall be delivered up." The Act of Congress, that "the Governor shall cause him to be arrested and secured." It does not provide, that the Governor shall issue a warrant. This was a well known Common Law term, but is not employed. It uses no term to signify any form of process known to the law. It does not declare, nor does it fairly imply, that he shall issue any precept setting forth the facts and evidence which have been presented to him; but simply requires the mere executive duty of causing his arrest. From the entire silence of the Constitution and law, as to the mode by which

he shall cause the arrest, it seems evident that the manner of this was left to Executive discretion. He could have caused the arrest by proclamation, and any citizen would have been justified in acting under it. (Eanes v. The State, 6 Humph. R. 53; 1 U. S. An. Dig. Title ARREST, Par. 18, 19.) So any citizen could have made the arrest, at his peril, without special order or warrant; and on showing that there was good cause for arrest, it would have been legal.

It is believed, then, to be the letter and spirit of the law, that any order or process from the Governor, signifying the Executive will, and authenticated as his act, by the great seal of the State, is valid and effectual, for causing the arrest; and that no other form, recitals, or technical requirements of a process are necessary.

It is not contended that the act of the Governor, in causing the arrest, and surrendering an accused person on demand from another State, is not as open to judicial inquiry, as would be the act of any magistrate of the State, in causing an arrest for a supposed offence. The jurisdiction of the Court, to inquire into the legality of the arrest, and of the acts of the Executive in this matter, is fully admitted. It is true, this Court cannot inquire into the question of guilt or innocence of the crime charged. But it can inquire into any and every fact necessary to give jurisdiction or authority to the Governor, to cause the arrest.

Thus, if it had been denied that he was a fugitive from justice, and therefore not within the provision of the Constitution, as in the case of Jo. Smith, the Mormon prophet, in 3 McLean; or if it had been denied that he "stands charged" with crime, in the State of Arkansas; or that the evidence of that fact, required by law, had been produced to the Governor, who had therefore acted without authority—if any of these grounds had been alleged by the prisoner, there can be no doubt they would have been proper facts for judicial inquiry.

But nothing of this sort has been done. The petitioner, himself, shows that he is under arrest, as a fugitive from jus-

tice from the State of Arkansas, and that his arrest has been caused by the Governor of Texas. All that he alleges, is, that the warrant is not in legal form. When he shows, however, that the Governor has caused his arrest, it is all the Governor was required to do; as it has been proved, that no specific or technical form of process is necessary for that purpose. He must attack the authority of the Governor to cause his arrest: that Executive act being all that was required of the Governor; and not, whilst admitting that he is under arrest, raise an issue upon supposed technical requirements of the process.

It was usual to apply for a *certiorari* to cause the proceedings under which a party was committed, to be sent for inspection to the Judge or Court trying the *habeas corpus*. (1 Chitt. Crim. L. 118, 119.) And the party, in this case, if he had sought to deny the authority of the Governor, or that he came within the provisions of the Act of Congress, should, "by affidavit or other evidence," have shown "probable cause" for the belief; and he could have obtained the evidence on which the Governor acted, for the inspection and decision of the Court. On the contrary, without alleging or proving any want of authority in the Governor to cause his arrest, the petitioner, in this case, asks the Court to presume that the Governor has acted without authority. This would be entirely to reverse the rule of presumption, applicable to public officers. No principle can be better established, than that the law presumes the act of its officer to be correct, unless the contrary is shown.

II. But, in the next place, it is contended that the warrant of the Governor is good, as a Common Law warrant.

At Common Law it was not necessary to "set out the charge, or offence, or evidence," in the warrant; and in many cases it was considered imprudent to do so. (1 Chitt. Crim. L. 41.) At most, it was only advisable to state the particular species of crime, without showing the particular facts of the charge, or the evidence on which it was founded. (1 Chitt.

Crim. L. 42.) So of a commitment. It was only "necessary "to set forth the particular species of crime alleged against "the party;" but it was not necessary to state any part of the evidence adduced before the magistrate, or to show the grounds on which he had thought fit to commit the defendant. (1 Chitt. Crim. L. 110, 111.) The warrant, in this case, shows that the Governor of Arkansas has demanded the accused as a fugitive from justice from that State, charged with the crime of forgery, and that the demand was made in accordance with the provisions of the Constitution and laws of the United States. This is as full as any warrant, commitment, or precept for the purpose can be required.

When then the Governor shows, that it has been made known to him, that the party does stand charged with a particular crime, it is as specific and certain as need be, and he is not required to set out the evidence.

III. Even should it be held by the Court, that there was any technical defect, or want of a recital, in the warrant, it is most confidently urged that it will be the duty of the Court to detain the prisoner a reasonable time to enable such defect to be supplied. Such is the jurisdiction of the writ of *habeas corpus*. Such have been the decisions of appellate Courts, as well as of District Judges; and such practice is necessary to sustain and enforce the law. The Court exercises original jurisdiction in this matter. It hears the proceeding, just as each of its Judges would hear it, in vacation, and can make the same order. With no legal exactness or propriety, can its jurisdiction be considered other than original. (See Hart. Dig. Art. 2928.)

The jurisdiction to hear a *habeas corpus*, and to render judgment upon the return, is a jurisdiction either to discharge the prisoner finally, or remand him to custody; or, if there be a defect in the commitment, and yet probable ground appears to the Court, of the commission of the offence, to detain him a reasonable time to enable a formal warrant or commitment to issue. It is as much a part of the jurisdiction over writs

of *habeas corpus* to detain a reasonable time for further proceedings, if in its discretion it seems proper, as it is to discharge, or remand the prisoner. (1 Chitt. Crim. L. 130; *ex parte* Tayloe, 5 Cow. R. 50, and cases cited.) The law, then, which gives this Court jurisdiction to hear the writ of *habeas corpus*, thereby gives it the discretion of detaining the prisoner for a more formal warrant or commitment.

In this case, the recitals in the warrant are certainly sufficient to force upon the minds of the Court, the conviction that Thornton was properly demanded by the Governor of Arkansas, and that the proper evidence was before the Governor of Texas. Even if the requisition were informal, it has been held to be the duty of the Court, to detain the prisoner a reasonable time to enable the Governor of Arkansas to demand him in proper form. (*Ex parte* Smith, 5 Cow. 273; Short v. Deacon, 10 Serg. & Rawle; State v. Buzine, 4 Harring. R. 572; 10 U. S. An. Dig. Title Fugitives from Justice.) Much more, then, where there has been concurrent action by the Executives of both States, for the removal of this fugitive, would it be the duty of the Court, to detain him until a proper warrant might issue.

The Constitution and laws of the United States are no less the laws of this State, and of this Court, than our own statutes. You are sworn to support them. Your duties as conservators "of the peace," apply no less to their enforcement, than to the laws of the State. The duty of enforcing the laws for the delivery of fugitives is especially enjoined by sound national policy, and by the obligations of morality and justice. (3 Story, Com. Const.)

Hemphill, Ch. J. The relator insists on his discharge, on the ground of the insufficiency and illegality of the warrant; in this, that it does not show, by recital, that the representation and demand of the Governor of the State of Arkansas, was accompanied with a copy of an indictment found, or an

affidavit made before some magistrate of the State of Arkansas, certified to by the said Executive, as being duly authenticated, and charging the relator with having committed the crime of forgery within the said State—and we are of opinion, that, on the ground set forth, he is entitled to his discharge. The delivery up, by the Executive of this State, of fugitives from the justice of a sister State, is controlled, not by the principles of international law, or the practices of comity between nations, or the provisions of any statute of this State: for none such has been passed; but exclusively by the provision of the Constitution of the United States, in relation to the subject matter—and the Act of Congress adopted to carry the same into effect.

The portion of the Section of the Constitution, referred to, is in these words: "A person charged in any State with trea- "son, felony, or other crime, who shall flee from justice and "be found in another State, shall, on demand of the Execu- "tive authority of the State from which he fled, be delivered "up to be removed to the State having jurisdiciion of the "crime."

The Act of February, 1793, to carry this provision into effect, providing that, whenever the Executive authority of any State or Territory, shall demand any fugitive from justice, of the Executive authority of any such State or Territory, to which such person shall have fled, and shall, moreover, produce the copy of an indictment found, or an affidavit made before a magistrate of any State or Territory, as aforesaid, charging the person so demanded with having committed treason, felony, or other crime, certified as authentic by the Governor or Chief Magistrate of the State or Territory from whence the person, so charged, fled, it shall be the duty of the Executive of the State or Territory, to which such person shall have fled, to cause him or her to be arrested, &c. From this, it is manifest, that two of the essential elements of the authority of the Executive of this State, to issue the warrant, were,

1st. A copy of the indictment found or affidavit made, charging the alleged fugitive, with having committed the crime.

2nd. The certificate of the Executive of Arkansas, that such copy was authentic. This was the evidence, and the only evidence, on which the warrant was authorized to issue. But so far from it appearing on the face of the warrant, that such copy had been produced to the Executive, and that the warrant had issued in consequence thereof, it appears, on the contrary, that the Executive acted on the representations of the Executive of the State of Arkansas, to the effect that the relator stood charged with the crime of forgery in that State. These were altogether insufficient to give the Governor jurisdiction in the case. The representations of the Executive of the demanding State, are of no effect, unless supported by a duly authenticated copy of the indictment found, or affidavit made. These are pre-requisite to the issue of the warrant; and without these, it is void and gives no authority to arrest or detain the person, alleged to be charged. We are of opinion that the warrant should show, on its face, that such authentic copy of the indictment or affidavit had been produced to the Executive. Such appears to be the usual form in the cases which have been submitted to our examination. (9 Wendell, 212; 3 McLean, 121.)

Whether the indictment or affidavit should be fully set forth in the warrant, is a point on which, as yet, we have not attained a definite conclusion. It might be very important, in many cases, to the liberty of the citizen, that the tribunal before which he sues out his writ for discharge, should have the opportunity of inspecting the indictment or affidavit, as these might be totally insufficient to sustain the charge. In the case cited from 3 McLean, 121, *ex parte* Joseph Smith, the affidavit was adjudged insufficient. This opinion is intended simply to announce our conclusions in the case; and it probably may be written out, more at large, before the close of the Term.

We are of opinion that the prisoner is entitled to his discharge; and it is accordingly so ordered.

Ordered accordingly.

NOTE.—The motion to detain was called to the attention of the Court, after the foregoing opinion was read from the Bench. The Court, without further argument, expressed the opinion that they had no power to detain the prisoner. Justice Wheeler requests the Reporter to note, that upon this point he gave no opinion.—REP.

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## ADMINISTRATOR'S SALE.



## ADVERSE POSSESSION.



## AGENT.



## ALIENAGE.



## AMENDMENT.



## APPEAL.

## CONTINUANCE.



See NEW TRIAL, 8.

## CONTRACT.

## COPY.

1 To render a certified copy of a record or document admissible in evidence, without other authentication, it must be certified by the officer having charge of the original. *York* v. *Gregg*, 85

2 Every document of a public nature, which there would be an inconvenience in removing, and which the party has a right to inspect, may be proved by a duly authenticated copy; and, where proof is by a copy, an examined copy, duly made and sworn to by any competent witness, is always admissible. *ib*

3 The records of the proceedings of the Ayuntamientos respecting the denouncement and condemnation of lands, for failure to perform conditions, &c., properly belong to the archives of the General Land Office; and a certified copy from the same, by the Clerk of the County Court, in whose office they were placed probably from a mistaken interpretation of the thirty-third Section of the Act of 1836, to organize inferior Courts, (Hart. Dig. Art. 260,) is not admissible in evidence without further proof. *ib*

4 Where the translator and recorder of Spanish deeds, in the General Land Office, certified to the correctness of a copy of an original Spanish document on file in that office, and the Commissioner of the General Land Office certified "that E. Sterling C. Robertson, "whose name is signed above, is the "translator and recorder of Spanish "deeds in this office," it was held, that, although the attestation was not in the most approved form, yet, that it was sanctioned by long usage, (of which the Court took notice judicially,) and sufficient. *Hubert* v. *Bartlett*, 97

5 A certified copy of an original Spanish title, properly on file in the General Land Office, is admissible without further proof of the original, and without the filing previous to trial, and notice to the opposite party. *ib*

6 Certified copies of public acts which were filed in the office of any Alcalde or Judge in Texas, previous to the first Monday in February, 1837, are admissible in evidence, without other proof of the originals, and without the necessity of filing three days previous to the commencement of the trial, and of giving notice to the opposite party. (Hart. Dig. Art. 746.) *ib*

7 A certificate by the translator in the General Land Office, under his hand, that a document is a correct translation of the original, on file in that office, accompanied by the certificate of the Commissioner, under his hand and seal of the department, that "E. Ster-"ling C. Robertson, whose name is "signed above, is the translator and "recorder of Spanish deeds in this of-"fice, bonded and sworn," is sufficient. *Swift* v. *Herrera*, 268

8 Where a right is claimed by virtue of a proceeding of the Probate Court, it is not necessary, so far as the admissibility of a transcript of the proceedings of the Probate Court, is concerned, that it should purport to be a transcript of all the proceedings. *Townsend* v. *Munger*, 300

9 It is competent for a party to give in evidence such of the proceedings of the Probate Court, as are material to his case; and it is not incumbent on him to introduce more. *ib*

See EVIDENCE, 4.

## CORPORATIONS.

1 All parol contracts, made by the authorized agents of a corporation within the scope of the legitimate purposes of its institution, are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action will lie. *San Antonio* v. *Lewis*, 69

2 Where work is done for a corporation under a special contract, it is not competent to introduce evidence as to the value of the work, unless for the purpose of showing that the contract was so grossly unequal as to raise the presumption of fraud, or want of authority in the officer to make it. *ib*

## EVIDENCE.

## EXCEPTIONS.

1 As a general rule, all exceptions touching the legal sufficiency, whether of form or of substance, of the pleadings, should be taken before going to trial upon the issues of fact. *Williams* v. *Bailes*, 61

2 Where a party excepts specially to the pleadings of his adversary, the latter has a right to regard all other objections than those indicated, unless to matter of substance, as waived. *Crayton* v. *Munger*, 285

See DEMURRER.
PLEADING, 9.

## EXECUTION.

1 Where judgment was obtained in 1840 and execution issued same year, after which there were several executions issued, one in 1844, upon which there was a levy and appraisement, and a fifth in 1850, against which the defendant obtained an injunction, in this case; the Sheriff who had received the *alias*, testified, without objection, that he was present at a conversation between the debtor, the person who had been Sheriff and received the first execution, and the attorney of the defendant, at most, if not all of which, the attorney of the creditors was present; that he did not recollect the precise conversation; he only recollected that it was understood amongst them that the execution which had been in the hands of the former Sheriff (in 1840) had been satisfied; and that the former Sheriff admitted or stated that the amount had been settled with him while Sheriff; but witness did not recollect that the attorney of the creditors took any part in the conversation; *Held*, That it was competent for the jury to infer the fact of a legal payment and satisfaction of the first execution when in the hands of the Sheriff. *Beardsley* v. *Hall*, 119

2 A sale under execution on a judgment in a case in which the Court had no jurisdiction, whether it be a judgment of the Justice's Court, of the District Court, or of the Supreme Court, confers no right where the judgment creditor is the purchaser; but *Quere?* As to the equities in case a third person should be a purchaser. *Horan* v. *Wahrenberger*, 313

3 Nor are we, by this opinion, precluded from sanctioning such equitable doctrines, consistent with the principles of law, as will protect officers enforcing process under a void judgment, and will meliorate the harshness of the rule as to the effect of jurisdictional mistakes. *ib*

4 The doctrine of Bennett v. Gamble, (1 Tex. R. 124,) referred to, but not insisted on—not being essential to the decision of the case. But *Quere? Fessenden* v. *Barrett*, 475

5 It is a sufficient answer, to a rule against a Sheriff to show cause why he failed to levy an execution, that the judgment on which the execution issued, was void, although it was entered, upon the mandate of the Supreme Court. *Wilson* v. *Sparks*, 621

6 The pendency of a suit for an injunction against an execution which has been irregularly issued, is no bar to the regular issue of another execution. *Turner* v. *Smith*, 626

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## EXECUTORS.

See ADMINISTRATION.
ADMINISTRATORS.

# F

## FAILURE OF CONSIDERATION.

1 The Court will not enforce the payment of a promissory note given in consideration of the sale of land, where the sale has been made by virtue of a power of attorney which had been revoked by the death of the principal. *Stewart* v. *Insall*, 397

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## RECOGNIZANCE.

1 Where the law respecting proceedings in the District Court, requires a recognizance, as on an appeal by defendant in a criminal case, a bond is not sufficient. *Laturner* v. *The State*, 451

## RECONVENTION.

1 Repeated decisions of this Court have settled, that, where the defendant has pleaded in reconvention, the plaintiff cannot deprive him of his right to an adjudication upon the matters embraced in his plea by taking a nonsuit. And this rule applies to a case where the plaintiff sues to rescind a contract for the sale of land, and the defendant admits the contract and prays for its specific performance. *McCoy* v. *Jones*, 868

2 Where land is sold by attorney, and part of the purchase money paid and notes given for the balance payable to the attorney himself, in a suit by the payee of the notes, the vendee may plead fraud and failure of title in reconvention, and recover back the purchase money paid. *Stewart* v. *Insall*, 897

## RECORDS.

See COPY.
EVIDENCE, 20.
JUDGMENT, 8, 11.

## REGISTRY.

1 It seems that a Deputy Clerk of the County Court is not authorized to take the proof or acknowledgment of instruments, for record. *Miller* v. *Thatcher*, 482

## REHEARING.

1 After the adjournment of the Term, a judgment can be set aside or vacated only by an original proceeding, instituted for that purpose, setting forth equitable grounds, sufficient to entitle the party to a rehearing. *McKean* v. *Ziller*, 58

See PRACTICE IN DISTRICT COURTS, 13.

## REJECTED CERTIFICATES.

1 Depositions, or written agreements of the facts, by the parties or their attorneys, are not admissible where the State is a party, and the oral testimony of a given number of witnesses is required by the statute, as in cases of suits to establish headright claims. *The State* v. *Sullivan*, 156

LANDS, 55.

## REVIVAL OF JUDGMENT.

See JUDGMENT. 5, 7, 8, 9, 10, 11, 12, 13.
LIMITATION, 15, 16, 17, 18, 19.
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## REVIVAL OF SUIT.

1 It seems that no formal order is necessary in order to enable an administrator to continue the prosecution of a suit commenced by his intestate; and where, after a motion to dismiss for the want of prosecution, the administrator filed a petition praying for the revival of the suit in his name, and the cause was continued for several Terms, the administrator being all the while recognized as a party, and the motion was then taken up and sustained, the Supreme Court reversed the judgment. *Thompson* v. *McGreal*, 892

See PRACTICE, 5, 6.

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### TAXES.



See TAX-TITLE.

### TAX-TITLE.



### TESTIMONIO.

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### TRESPASS.

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## VENUE.



## VERDICT.

## W

### WAIVER.



### WILL.



### WITNESS.



### WRIT OF ERROR.



### WRITTEN INSTRUMENTS.



END OF VOLUME NINE.

ERROR.

Page 264. After "therein" in 4th line read "the condition aforesaid ; *Held.*"