HARE V. HALL ET AL.

1. EXECUTION: Venditioni exponas after death of judgment debtor.

An execution levied on land in the life of the judgment debtor may be enforced by venditioni exponas after his death.

2. JUDGMENT: By confession before clerk: Redemption from execution sale.

Since the adoption of the civil code of practice, a judgment by confession before the clerk of the circuit court in vacation is unauthorized and void; but such judgment creditor redeeming land of the judgment debtor from sale under a prior judgment, with the consent of the purchaser, and receiving the sheriff's deed therefor, will obtain good title to it.

3. EXECUTION SALE: Redemption: Priority of subsequent creditors.

A third judgment creditor may intercept a second in redeeming land from the execution sale of the first, and then the second can redeem only from the third. Age of judgments gives priority in the right of redemption.

APPEAL from Jefferson Circuit Court in Chancery.

HON. X. J. PINDALL, Circuit Judge.

M. L. Bell, for Appellant.

In equity fraud may be presumed from facts and circumstances. Myrick v. Jacks, 33 Ark., 430. It clearly ap-

pears that John M. Hall was merely a trustee for John B. Hall, and the attempt to pass title to Allen & Co. was fraudulent and void.

J. M. Moore, for Thos. H. Allen & Co.

The judgment by confession before the clerk was not void. Ch. 133, Sec. 140, Gould's Digest, was not repealed by Sections ——, —— of the Code. 29 Ark., 110-1; 7 Ark., 397. But if void, Allen & Co. are entitled to be treated as the assignee of Carlton's bid, and entitled to his rights. 31 Ark., 443.

Fraud is never presumed. Circumstances of suspicion, leading to no certain result, are not sufficient.

Swinson did not make his interplea a cross-bill against Allen & Co., nor obtain service upon them. Newman on Pl. and Pr., 454, 19-22, 626; 24 Ark., 371; 31 Id., 204.

The land was sold on an execution issued after the death of Hall, and invalid. No specific lien had been fixed by levy prior to his death, as in Barber v. Peay, 31 Ark., 392.

As to the homestead tract, it was not shown or alleged that Hall filed a schedule or took the necessary steps to secure a homestead. Norris v. Kidd, 28 Ark., 485.

EAKIN, J. This is a bill by a purchaser of a plantation under execution sale, against parties claiming by other purchases under other judgments against the same defendant; in which suit there is also an interplea by one claiming a portion of the lands as a purchaser under an execution and ven. ex. from the federal circuit court—also against the same defendant. Questions arising under the homestead law are also involved. It is impossible to obtain any tolerably clear conception of the equities and legal rights of the parties without a succinct statement of the acts and proceedings in chronological order.

Beginning with the oldest judgment: This was recovered in the Jefferson circuit court on the twenty-sixth of February, 1874, at the suit of William and Mary Madden against John B. Hall and others for a debt of $3,500; damages $981.12, with costs. An execution, issued on the thirtieth day of September, 1874, was levied upon the following lands with others: The west half and the northeast quarter "and part of the southeast quarter" of section 36 in township 5 south, range 8 west. Some of the other lands, about the same in quantity, lay contiguous upon the south in sections 1 and 2 of township 6. All these contiguous lands, so levied upon, were sold under the execution on the fourteenth day of November, 1874, and purchased by C. H. Carlton for $4,500, "except 160 acres claimed by J. B. Hall as his homestead exemption." Carlton gave his own bond, with security, at three months for the purchase money, but bought for the benefit, as is claimed, of John M. Hall, who is a nephew of John B., and who at the end of three months paid Carlton's bond.

On the thirty-first day of October, 1874, Perkins, Swinson & Co. recovered a judgment in the United States Court for the eastern district of Arkansas (in which the lands lie), against John B. Hall for $11,206.67, bearing interest at 8 per cent., on which execution, issued on the sixteenth of November following, was returned unsatisfied, no property having been found. On the eighth of November, 1875, another execution was issued, which was levied by the marshal on a tract of land set forth by metes and bounds, containing by estimate 160 acres. It will be apparent to a surveyor that it includes the southern tier of forty acre tracts in said section 36, and the northern tier of forties in section 1 of the adjacent township on the south, with the exception of a small portion at the east end of both tiers. The township line between 5 and 6 runs through the centre. By direction of plaintiff, the execution was returned with-

out sale, but with the levy preserved. On the twenty-fourth day of October, 1877, this judgment was revived on scire facias in favor of S. Magress Swinson, who was shown to have become the sole owner, and the lien was continued for the term prescribed by law, from the third of August, 1877, the date of the scire facias. Afterwards, on the eighteenth day of February, 1878, John B. Hall died, and by another scire facias the judgment was revived against his administrator, John M. Hall, on the 10th of April, 1878. On the twenty-seventh of the same month, a venditioni exponas was issued to the marshal, reciting the former levy and commanding a sale of the lands. They were sold on the twenty-ninth of May, 1878, and purchased by Swinson, the plaintiff in execution, for $3,000. The marshal's deed was executed on the second day of June, 1879.

On the sixteenth day of November, 1874, John Williams & Son recovered in the Jefferson circuit court a judgment against John B. Hall for $14,319.22, which judgment now belongs to Hare, the complainant in this suit. Execution issued on the thirteenth of November, 1875, and was levied on the same lands in section 36, embraced in the first levy under Madden's judgment, and also the southeast fractional quarter of section 35 in the same township, which does not appear to have been touched by the other levies. The lands were purchased by Hare for $4,100, and a deed was obtained from the sheriff on the twelfth of April, 1877.

On the twenty-first day of April, 1875, in vacation, Thos. H. Allen & Co. appeared before the clerk of the circuit court of Jefferson county and filed under oath a statement of a debt due him from John B. Hall of $4,499.58. Hall appeared and confessed, and the clerk entered judgment for the amount. Execution issued on the fifteenth of July following. Allen & Co. offered to credit this execution with $4,000 for the redemption of the lands which had been purchased under the Madden judgment, which offer was

endorsed by the sheriff and returned. They also redeemed from John M. Hall the certificate of purchase, which had been given to Carlton, and which he had assigned to John M. Upon this the sheriff executed a deed to Allen & Co. of the lands bought by Carlton, again excepting the 160 acres claimed by John B. Hall as his homestead. This deed bears date the twenty-first of January, 1876.

Hare filed the bill in this suit about the eighth of September, 1877, in the life time of John B. Hall, against him, John M. Hall, and the firm of Thos. H. Allen & Co., taking no notice of Swinson's claim under the federal judgment. He relies upon his legal rights under his deed, which, although not in possession, he says he cannot enforce on account of the claims of Allen & Co. as they appear of record. He charges fraudulent combination between them and the Halls and Carlton to defeat his claim, in this especially, that the lands were originally bought under the Madden judgment by John M. Hall through Carlton, with the means of John B. Hall and for his benefit; and that, to prevent a redemption by himself under his judgment, the plan of confessing a judgment in favor of Allen & Co. was concocted; and that by their credit and the redemption from John M. it became impossible for him to redeem without advancing $9,000; that the debt of Allen & Co. was fictitious, and that they acted for the protection of John B. Hall against his other creditors. He says that John M. Hall originally paid nothing on the purchase, and that Allen & Co. paid him nothing in redemption, and he offers to reimburse them with proper interest any amount they may have paid. He says the homestead is worth more than $2,500, and offers to pay to John B. Hall that amount of its value. He prays that all the proceedings under the Madden redemption, with the judgment in favor of Allen & Co., be set aside and annulled as impediments to his legal rights, and for general relief.

The Halls answered, denying all the charges of fraud explicitly and in detail. Allen & Co. adopt their answers, make like denials, and claim that their debt was real, and the judgment taken by them was in good faith to secure its payment.

Pending the suit, Swinson, on the second of March, 1880, after the death of John B. Hall, and after he had obtained the marshal's deed, was allowed to come in as a party and set up his right under that to the homestead, which appears to have been the land marked off by metes and bounds, and which he had purchased. With regard to that it may be said in passing that, although John B. Hall marked it off and seems to have been understood as claiming it for a homestead, and although that seems to be conceded to him in the execution of the Madden judgment, there is no showing that he ever made formal claim of it as exempt in any of the proceedings.

The cause was heard upon the pleadings, exhibits and depositions, the latter of which were mostly upon the point of fraud. Some of the answers assumed the form of cross-bills, but it is not necessary to notice them more particularly. The pleadings were sufficient to authorize the chancellor to take cognizance of and adjust all the equities amongst all the parties before it.

The chancellor held that there was no fraud shown; that the purchase by Carlton at the execution sale under the Madden judgment, and the assignment to John M. Hall, and the judgment of Allen & Co. and their redemption under it, with their deed, were all valid; that the complainant, Hare, had never offered to redeem from any one under his own judgment; that the claim of Swinson to the lands purchased by him at the federal sale was superior to either; and that the complainant was entitled only to the southeast quarter of section 35, not contested. A decree was made, adjusting their rights accordingly and quieting titles

amongst them. The complainant, Hare, and also Allen & Co. appealed.

First as to the appeal of Hare:

It is quite evident that his claim to the homestead is subordinate to that of Swinson, who purchased it under an older judgment, the lien of which had never expired. The levy of the execution under Swinson's judgment had been made in the life time of John B. Hall, and the venditioni exponas after his death was permissible. So directly ruled in the case of Barber v. Peay, Ad'r, 31 Ark., 392.

1. Execution: Venditioni exponas.

The remaining question in his appeal is, did the chancellor err in failing to find such fraud in the conduct of the Halls, and in Allen & Co., their agents, as would authorize the court to allow to complainant the benefit of his own purchase on execution upon repayment to them of whatever sums may have been advanced by John M. Hall, or by Allen & Co., to satisfy the purchase under the Madden judgment.

It is very true that in equity fraud need not be shown by direct and positive proof. Circumstantial facts may be sufficiently strong to raise in the mind of a chancellor a conviction that fraud has been committed, but they must be more than sufficient to excite a suspicion. They should induce belief. Courts of equity more readily act upon circumstantial evidences of fraud than do courts of law, but the line between them is not well defined. In neither courts, says Mr. Justice Story, is it insisted that the proofs of fraud should be positive and express. Each deduces it from circumstances affording strong presumptions; but courts of equity will sometimes grant relief upon the ground of fraud established by presumptive evidence which courts of law would not always deem sufficient proof to justify a verdict at law. In this sense, he says, Lord Hardwick's remark is to be understood, that "fraud may be presumed from the circumstances and conditions of the parties contracting, and this goes further than the rule of law, which is, fraud must be proved, not presumed." Neverthe-

less it must be sufficient to satisfy the mind of the chancellor—"sufficient to overcome the natural presumption of honesty and fair dealing." It is neither desirable nor safe to make the rule any more definite. See Eq. Jurisprudence, Secs. 190, 190a.

There is nothing to countervail the positive testimony that John M. Hall paid the purchase money on the bond of Carlton with his own means, and not with those of John B. Hall. There was only a suspicion that he was too poor, but no positive proof even of that. Besides he seems to have had friends of ability to aid him. The natural presumption of honesty and fair dealing is not overcome by the suspicion of his poverty.

It is positively shown that Allen & Co. acted in good faith in obtaining the judgment in vacation. The debt was an honest one, actually due from John B. Hall, and they were attempting to collect it by due diligence, and by what they may well have believed to be lawful means. They were striving for a preference, as they might honestly do.

It does arouse some suspicion that the draft which Carlton gave John M. Hall upon the redemption was never presented for payment. It would have been paid if presented. The Messrs. Allen & Co. expected it to come in, and stood ready to pay it. There was certainly no collusion on their part to consider it a sham. But it was not the duty of the chancellor, we think, to cast about for plausible or probable reasons for the failure to present it, or to declare the whole transaction fraudulent ab initio, on failure to find any. The draft was John M. Hall's own. No one else was interested in it. We cannot say that because men generally are in haste to receive money due them, the failure to seek it implies dishonesty. There may have been honest reasons arising from past transactions, and existing conditions of business, between John M. and the firm of Allen & Co. which induced him to decline the presentation of the draft.

But that would not deprive Allen & Co. of the benefit of their purchase to as full an extent as if the draft were paid. They had already in legal effect paid $4,000 for the redemption, in the credit of their debt. We approve the finding of the chancellor, to the effect that fraud was not satisfactorily shown.

In this connection, another point, independent of fraud, gives rise to more difficulty. The question presents itself, was the judgment in vacation of any validity to afford the basis of a redemption? And if not, were Allen & Co. entitled to their deed from the sheriff? By the Revised Statutes and down from the earliest periods of our State government, such judgments might have been taken, before the adoption of the code of civil practice. They were sustained by the courts as ministerial acts, and were common in practice. See Gould's Digest, Ch. 133, Sec. 140; Pickett & Gregg v. Thurston et al., 7 Ark., 399. The civil code of 1868, however, in providing for judgments by confession omitted this mode of obtaining or suffering them—providing that the person must appear in a court of competent jurisdiction. There is no express repeal of the former act, yet we are of opinion, from the nature and scope of the code itself and the language of this particular part, that the legislature had it in view to cover all modes of taking judgment by confession, and to drop the former mode of taking them before the clerk in vacation, and that now the practice is not proper. The judgment was void.

2. Judgment by confession before clerk void.

But it does not follow that the deed afterward obtained from the sheriff was also. That was not made by virtue of a levy under the void judgment, but upon the levy made under the Madden judgment. John M. Hall would have been entitled to the deed if there had been no attempt to redeem. He might have resisted an attempt to redeem. Hare might have sued out execution on his own judgment, and redeemed from him, regardless of Allen & Co. Nothing of the kind

was done. The transfer of the certificate of purchase to Allen & Co. seems to have been voluntary. John M. Hall does not question the right to the deed, and Hare cannot.

It is insisted for the latter, however, that the supposed efficacy of the judgment by confession deterred Hare from attempting the single redemption from John M. Hall. If this were so, it would seem to us only the misfortune which followed his misapprehension of the law. But it is not plain that he was thus deterred. He obtained his judgment (in the name of Williams & Sons) on the sixteenth day of November, 1874. Carlton had then bought under the Madden judgment. Hare might have redeemed them without any, even apparent, impediments, and on, afterward, until the fifteenth day of July, 1875, when Allen & Co. took out their execution and made the apparent redemption. He was an older judgment creditor than the Allen firm, and had slept considerably upon his rights. It was laches to some extent, imputable under the statute, for, although he did not absolutely lose his right to redeem, he lost the preference of age. He might, however, as the redemption of Allen & Co. was not valid *as such,* have made the redemption within the year, but took no formal steps to do so by regular application for the purpose and legal tender. He has no equity against Allen & Co. to cancel their deed or redeem from them.

3. Redemption: No priority in right of creditors.

The appeal of Allen & Co. on their part against Swinson presents no merit. They stand upon the Madden judgment and the deed under it. Both the levy and deed under which they claim excepts the homestead tract. That is all which the decree gives Swinson, and he is clearly entitled to it under the marshal's deed. Allen & Co. keep all the rest they claim.

All the plaintiff can claim he might have taken without let or hindrance, the southeast of section thirty-five. The bill would most properly have been entirely dismissed as to him

at his cost. He cannot complain that the chancellor, on his own application, quieted his title to a tract which no one else claimed. We think the chancellor properly adjusted the rights of Swinson and Allen & Co., giving the former the homestead and the latter all the other lands claimed by them under the certificate of purchase to Carlton, and the sheriff's deed under the Madden execution.