clerk, was presented to the court, which found from the evidence contained in the depositions that the will was "duly witnessed and regular in all things" and declared it to be the last will of the testator. The court also confirmed the action of the clerk. *Held*: That the probate court having jurisdiction to take the probate of wills in common form without summoning any of the parties in interest, its judgment, which goes beyond the mere confirmation of the clerk's act, and admits the will to record on proofs submitted, is not void, and if there is error in it, the same can be corrected only by appeal. Petty v. Ducker, 281.

WITNESSES.

1. *Impeachment of: Reputation for morality.*

A witness cannot be impeached by showing that his reputation for unchastity or other particular immoral habit, renders him unworthy of belief. The impeaching testimony cannot go beyond his general reputation for morality. Cline v. State, 140.

2. *Same.*

It is not admissible to inquire whether from a witness' "reputation for truth and veracity, morality and chastity," he is worthy of belief, since an opinion is thus called for as to the effect of chastity, or a want of it, upon the credibility of his testimony. Ib.

3. *Same: Evidence sustaining.*

When the only objection to evidence introduced by the State to sustain the reputation of an assailed witness is, that it relates to a period twenty-five or thirty years before the trial, a judgment of conviction will not be reversed because of its admission, unless it appears that the refusal to exclude it was an abuse of the court's discretion. Ib.

no lien arises in favor of the vendor to enforce its performance. Bell v. Pelt, 433.

WAIVER.

See PLEADING AND PRACTICE, 4; EXECUTION, 1.

WILLS.

1. *Attesting witness may subscribe by mark.*

One may become an attesting witness to a will by making his mark, although the person who writes the name of the witness fails to attest that fact by signing his own name in accordance with section 6344, Mansfield's Digest, which defines "signature" to include a "mark when the person cannot write, his name being written near it and witnessed by a person who writes his own name as a witness." Davis v. Semmes, 48.

2. *May include after acquired lands.*

When a will manifestly designs to dispose of the whole estate of the testator, as it exists at the time of his death, it will include after-acquired lands of which he dies seized and possessed. Patty v. Goolsby, 61.

3. *Construction: Estate conveyed: Power of sale.*

By the first item of his will a testator gave "his entire estate," real and personal, to his wife, "during her natural life," or until she might "think proper to marry, with full power to sell and dispose of such property as she might think proper." The second and third items are as follows: 2. "It is my desire that, at the death of my said wife, all my worldly effects be equally divided between my children." 3. "If my wife should marry, it is my will and desire that my estate of all kinds whatsoever be equally divided between my wife and children, thereby each one to share each and each alike." By other provisions the wife was made executrix and charged with the payment of the testator's debts and the education of his children out of the estate. *Held*: (1) That the testator gave to his wife a life estate in the real property with remainder in fee to his children. (2) That while, under the power contained in the will, the wife could dispose absolutely of the personal property of the testator, she could sell only her life interest in his real estate. Ib.

4. *Jurisdiction to take probate of, in common form.*

The clerk of a probate court received the probate of a will and admitted it to record. At the next term of the court the will, together with the depositions of the subscribing witnesses which were taken by the

5. *Receiving interest in advance: Bonus paid to agent of lender.*

Where money is placed with an agent, to be loaned, with the understanding that the owner shall receive the highest lawful rate of interest, and that the agent will look to the borrower for his commission, a loan of the money made by the agent is usurious, if he reserves in advance the highest lawful interest, and, in addition thereto, receives a bonus from the borrower. Thompson v. Ingram, 546.

6. *Reserving interest in advance: Bonus paid agent of borrower.*

Reserving interest in advance at the highest lawful rate on money loaned for three months, does not constitute usury. Nor will such loan be made usurious by the fact that a broker who procures it for the borrower retains for his commissions a sum in addition to the interest reserved by the lender. Baird v. Millwood, 548.

VENDOR AND VENDEE.

1. VENDOR'S EQUITABLE LIEN: *How waived: Accepting note of third party.*

The vendor of land waives his equitable lien for the unpaid purchase money when he accepts therefor the obligation of a third party, intending to rely for payment solely on such obligation, and that his vendee shall take the land unincumbered. Springfield and Memphis Railroad Co. v. Stewart, 285.

2. *Action for purchase money: Failure to make title.*

The plaintiff sold the defendant certain town lots and received from him all the purchase money except $100, the payment of which was by agreement deferred until after the execution of a deed for the lots which the plaintiff undertook to procure from M., who owned the property and had authorized the sale. Before the residue of the purchase money was due the plaintiff obtained a deed executed by M., and delivered it to the defendant who received it without objection, but on examination made sometime after its delivery, discovered that it did not convey any part of either of the lots he had purchased. When payment of the $100 was demanded the defendant refused to make it until he received a conveyance for the lots he had purchased. *Held*: That the plaintiffs were not entitled to recover the $100 until they procured according to their agreement, the conveyance of the lots purchased, which was a condition precedent to its payment. McConnell v. Little, 333.

3. VENDOR'S LIEN: *Where land is sold for cotton.*

Where an obligation to deliver cotton is given in the purchase of land,

force at the date of the sale; and the strict rules that apply to others, apply to persons under disabilities unless the statute in terms makes exceptions in their favor. Thompson v. Sherrill, 453.

2. *Same.*

The overdue tax act, approved March 12, 1881, provided that lands sold under it might be redeemed "within the period fixed by law for the redemption of lands sold for taxes;" and the law then in force fixed the period of redemption at two years from the date of sale, but allowed *femmes covert* to redeem within two years after the removal of their disabilities. The revenue act of March 31, 1883, which took effect from its passage and repealed all conflicting acts, also fixes the period for the redemption of lands from tax sales at two years, but contains no exception in favor of married women. Pursuant to a decree rendered under the overdue tax law, the lands of the plaintiff, a married woman, were sold for taxes on the 16th day of May, 1883, after that law had been repealed. *Held*: That the plaintiff's right of redemption was governed by the act of March 31, 1883, and was therefore limited to the period of two years from the date of the sale. Ib.

TENANT IN COMMON.

Conveyance of interest in separate lots.

Where a single tract of land is held in common by two or more persons, they may by agreement lay it off into town lots, and after thus becoming co-tenants of each lot, each may convey his interest in any of the several lots. Shepherd v. Jernigan, 275.

TRUSTEES.

See ADMINISTRATION, 6; JUDGMENT, 1; TRUSTS.

TRUSTS.

1. CONSTRUCTIVE TRUST: *On land bought with money wrongfully converted.*

Where one person wrongfully collects the money of another and invests it in real estate, taking the title in his own name, equity will create a trust on the property thus acquired, in favor of the person with whose means it was purchased, as against the wrong doer and his vendee having notice of the trust. And it is not necessary to the creation of such trust that a fiduciary relation should have existed between the parties. Humphreys v. Butler, 351.

2. *Same: Same: Equitable lien.*

The defendant in paying the purchase money of a certain lot, conveyed to him in consideration of the sum of $400, wrongfully used the sum of $149.52 belonging to the plaintiff and of which he had obtained possession without her authority, knowledge or consent. *Held:* That the plaintiff's money used by the defendant in the purchase, being only a part of the price paid for the lot, she is entitled to an equitable lien thereon for the amount due her, including interest, and to a decree for the sale of the property in default of payment. Ib.

USURY.

1. *Reserving interest in advance: Act of* 1875.

The provision of the act of Feb. 9, 1875, (Mansf. Dig., sec. 4736), to the effect that it shall be lawful for all persons loaning money in this State, to reserve or discount interest upon any commercial paper, mortgage or other securities, at any rate of interest agreed upon by the parties, not exceeding ten per cent., does not violate section 13, article 19, of the constitution, prohibiting usury, and is valid as far as it relates to transactions of a commercial kind, in short time paper. Vahlberg v. Keaton, 534.

2. *Same.*

Where a note for loaned money is made payable in three months without interest until due, it is not usury to reserve in advance out of the sum for which it is given, interest thereon at the highest legal rate, from the date of the note to its maturity. Ib.

3. *Bonus paid to agent of borrower.*

A sum paid by the borrower of money to his own agent for procuring the loan, is not paid for the loan or forbearance of the money thus obtained, and will not, although in excess of the highest lawful interest, constitute usury. Ib.

4. *Bonus paid to agent of lender.*

A lender cannot lawfully receive for the forbearance of his money more than ten per cent. per annum. And where his agent receives from the borrower a bonus in excess of the highest lawful interest, either with his knowledge or under circumstances from which the law will presume he had knowledge, the transaction is usurious. But if the agent receives such bonus without the lender's knowledge and under circumstances from which his knowledge can not be reasonably presumed, then it will not make the loan usurious. Ib.

and the right of contribution exists, as between the co-sureties. Dugger v. Wright, 232.

2. *Same.*

After property of an estate had been converted by the executor, his sureties at the time of such conversion were released by the probate court from future liability and others were accepted in lieu of them. The executor was subsequently charged with the value of the property, and the probate court ordered him to pay it over to the distributees. He failed to make such payment, and to recover the amount for which he was thus delinquent part of the distributees brought an action against the sureties on the first bond. Three of the plaintiffs were sureties on the second bond. *Held*: (1.) That the defendants are liable for the property converted by the executor; but the breach of his bond, thus occasioned, was a continuing one and the new sureties are also liable for his failure to pay over the value of the property, and they are therefore co-sureties of the defendants. (2.) That the defendants are equitably entitled to contribution against the three plaintiffs who are their co-sureties and the latter can only recover their distributive shares of the fund sued for, less the sums they are severally bound to contribute, in order to equalize the common burden of all the sureties. Ib.

TAXES.

1. *Assessor's return: Injunction.*

The failure of a county assessor to append to his return of real property assessed, an affidavit in the form prescribed by the statute, is no ground for enjoining the clerk of the county court from extending the assessment on the tax books. Equalization Board v. Land Owners, 516.

2. *Equalization of assessments: Notice of raised valuation.*

The jurisdiction of the county board of equalization, to raise the assessor's valuation of property, is not affected by their failure to give the notice required by section 52 of the act of 1887, which provides that when the board shall raise the valuation of any property, they shall give notice thereof to the owner "by postal card or otherwise through the mails:" and it is error to enjoin the clerk because of such failure, from extending the board's valuation on the tax books. Ib.

TAX SALES.

See EJECTMENT.

1. *Statute governing right of redemption: Exceptions.*

The right to redeem lands from a tax sale depends upon the statute in

of the purchase money; and his agreement to make such unauthorized sale, although in writing, will not bind his principal. Ib.

STATUTE OF LIMITATIONS.

See also PRACTICE IN SUPREME COURT, 7; RAILROADS, 6.

1. *When statute runs: Homestead laws.*

Where land, entered under the homestead law, is alienated before the right thereto is perfected, the statute of limitations will not run in favor of the enterer's grantee while the title remains in the government. Nichols v. Council, 27.

[QUERE: Will the statute begin to run on the complete performance of every act necessary to perfect the right to the land, although no patent for it has been issued? See 4 Wall, 44; 22 Ib., 444; 117 U. S., 151.] Ib.

2. *Scire facias to revive judgment not barred by.*

The statute of limitations will not bar a proceeding by *scire facias* to revive a judgment. Crane v. Crane, 287.

3. *Claim against county barred by.*

Where the claim of a county clerk against the county, for expenses incurred in his office in 1881, 1882 and 1883, was not presented to the county court for allowance until July, 1887, it was barred by the statute of limitations. Desha County v. Jones, 524.

STREETS.

Right of way over, see RAILROADS, 20.

Fee in soil of: Right of adjacent owner.

Subject to the easement of the public in a street, to use and enjoy it as a highway, the fee therein belongs to the owners of adjacent lots. And any use of the street not contemplated by its original dedication to the purposes of a highway, is an infringement of the reserved rights of such owners, for which they may invoke the ordinary legal remedies. Reichert v. St. L. & S. Fr. Ry., 491.

SURETIES.

1. *On bond of executor: Contribution.*

Where the sureties on an executor's bond are discharged by the probate court and new sureties taken, the two sets of sureties become jointly liable for a breach of the bond which occurred before the discharge,

oral agreement, entered into before the issue of a patent, to assign an interest therein, in consideration of expenses borne in procuring it. And it is not error to decree a direct divesture of the interest contracted for, instead of compelling the patentee to assign it. Blackmer v. Stone, 489.

STATUTES.

Construction of, see DESCENTS AND DISTRIBUTION, 1; LIQUORS, 1-6, 13, 14; MECHANIC'S LIEN, 1-7; SET-OFF, 2; SPECIAL ADMINISTRATOR, 1.

1. *Presumption as to constitutional enactment.*

Where a legislative journal recites the final passage of a bill in legal form—by a vote taken by yeas and nays—but does not affirmatively show how it was read, this court will presume that the reading was had in conformity to the Constitution, (art. 5, sec. 22), which provides that every bill shall be read at length, but does not require the fact of such reading to be shown by an entry on the journal. Glidewell v. Martin, 559.

2. *Repeal by implication.*

The act of January 23, 1875, section 71, (Mansf. Dig., sec. 2722), conferring on the county court jurisdiction to try contests for county and township offices, is not repealed by implication by the act of February 5, 1875, entitled: "An act fixing the regular terms of the county courts," etc. (Mansf. Dig., sec. 1407). *Babcock v. Helena*, 34 Ark., 499; *Coats v. Hill*, 41 Ark., 149, and *Chamberlain v. State*, 50 Ark., 132, approved and followed as to repeals by implication. Ib.

STATUTE OF FRAUDS.

1. *Agreement to sell land.*

In an action to recover damages for the breach of a contract for the sale of land, an undelivered deed of the defendant to a third person is not sufficient to take the case out of the statute of frauds, where, upon the face of the deed, the plaintiff is a stranger to the contract and there is no memorandum in writing connecting him with it. Nor could the plaintiff rely on such deed, if it could be shown by parol that the title it purports to pass was to be held in trust for him, unless it was also shown that the grantee had, on his part, offered to perform the contract. Henderson v. Beard, 483.

2. *Same: Authority of agent.*

Where an agent is simply authorized to sell land, he has no authority to sell it on credit without retaining a lien by contract for the security

pleaded by the defendant. He must reply thereto without notice. Heer Dry Goods Co. v. Shaffer, 368.

2. *In effect a cross-action.*

A set-off is in effect a cross-action brought by the defendant against the plaintiff, and an account on which it is based if not denied under oath by the plaintiff may be proved by the affidavit of the defendant, filed under sec. 2915 Mansf. Dig., which provides: "In suits upon accounts, the affidavit of the plaintiff, duly taken and certified according to law, that such account is just and correct, shall be sufficient to establish the same, unless the defendant shall, under oath, deny the correctness of the account, either in whole or in part, in which case the plaintiff shall be held to prove such part of his account as is thus denied by other evidence." Ib.

SPECIAL ADMINISTRATOR.

1. *Revival of suit in name of: Construction of statute.*

The only object of sec. 5231, Mansfield's Digest, providing for the revival of suits on the death of either party, in the name of a special administrator to be appointed by the court where the action is pending, was to prevent the dismissal of actions for the want of a party to prosecute or defend. It was not intended to empower the court in every case to set up a special administrator to represent all the parties in interest. Driver v. Hays, 82.

2. *Same: In action to restrain sale for taxes.*

On the death of the plaintiff in an action to restrain the sale of lands for the non-payment of taxes, the suit should be revived in the name of his heir, and not in the name of a special administrator; and the latter cannot maintain it unless he acts as a substitute for a general administrator where the lands would be required as assets for the payment of debts. Ib.

3. *Liability for costs.*

The statute, (Mansfield's Digest, sec. 5233), exempts from liability for costs a special administrator in whose name a suit is revived, and it is error to render against him a judgment for costs. Ib.

SPECIAL JUDGES.

See CIRCUIT COURTS.

SPECIFIC PERFORMANCE.

Of agreement to assign interest in patent.

A court of equity has power to order the specific performance of an

ROADS.

Failure to attend road working: Indictment: Instruction.

The defendant was indicted under the first clause of sec. 5907, Mansfield's Digest, for a failure to attend the working of a public road in obedience to the overseer's warning. On the trial, the court charged the jury that the defendant was entitled to three days' notice of the time and place he was required to attend, but that if he attended in obedience to a shorter notice, this might be taken as a waiver of sufficient notice. *Held*: That the instruction was not applicable to the allegations of the indictment, since, if the notice given the defendant was not sufficient, or if he in fact attended in obedience to it, in either event he was not guilty as charged. Ford v. State, 103.

SALES.

Executory contract to sell liquor, see LIQUORS, 4, 5.

1. *Delivery of goods.*

The delivery of goods to a carrier, when made in pursuance of an order to ship them, is in effect a delivery to the consignee. Herron v. State, 133.

2. *By officer without judicial warrant: Compliance with law: Burden of proof.*

Where an officer sells property under a special statutory authority, without judicial warrant and acting upon a state of facts of the existence of which he judges for himself, a strict compliance with the law is exacted of him, and must be proved affirmatively by all persons who justify under him. Proof of such compliance cannot be supplied by the legal presumption that the officer did his duty. City of Fort Smith v. Dodson, 447.

3. *Same.*

In an action against a city to recover the value of a hog, sold by the marshal under an ordinance prohibiting the running at large of swine, and providing that such stock when found at large in the city limits shall be impounded by the marshal and sold by him at public auction after a prescribed notice, the burden is upon the defendant to prove the fact that the notice required by the ordinance was given. Ib.

SET-OFF.

1. *Plaintiff must reply to without notice.*

It is not necessary to summon or warn a plaintiff to answer a set-off

crop, the defendant's lien on the crop for rent may be made the subject of recoupment in his favor. Jones v. Horn, 19.

REDEMPTION.

See TAX SALES, 1, 2.

REFORMATION OF CONTRACT.

See DEEDS, 1.

REPEAL.

See EXECUTIONS, 3; STATUTES, 2.

REPLEVIN.

Damages recoverable in.

In an action of replevin the plaintiff may recover not only the damages sustained by the detention of the property before the suit is commenced, but also such as accrue thereafter and to the date of the verdict. Lesser v. Norman, 301.

REVIVOR.

See SPECIAL ADMINISTRATOR, 1, 2; PLEADING AND PRACTICE, 6; EXECUTION, 2.

REWARDS.

1. *For performing official duties.*

The policy of the law forbids an officer, or one called to aid him in the performance of an official duty, to receive for his services any reward or compensation not allowed by law. And the promise of such reward is illegal and without consideration. St. L., I. M. & S. Ry. Co. v. Grafton, 504.

2. *Same.*

Where parties while acting as the *posse comitatus* of a sheriff, called out during a railroad strike to aid him in preventing interference with trains, etc., arrest a person accused of interfering with a "switch," they cannot claim to have acted as individuals, independently of the sheriff, and are not entitled to recover a reward offered by the railroad company for the arrest and conviction of persons thus offending. Ib.

is not within the scope of the easement which the public have therein as a highway. A city cannot therefore grant to a railway company the right of way over one of its streets; and no validity can be imparted to an ordinance adopted for that purpose, by an act of the legislature confirming it. Reichert v. S. L. & S. Ft. Ry., 491.

21. *Same: Ejectment for land occupied by: Estoppel.*

Where a railway company enters upon land without compensation to the owner and without his consent, and occupies it for a period of more than three years, during which time the owner of the land, with a knowledge of such occupancy, makes no objection thereto, although he knows that the company is expending large sums in laying its track and in erecting depot buildings which can only be reached by passing over his land, he will be held to have acquiesced in the occupancy of the road and will be estopped to maintain ejectment for the land. Ib.

RAPE.

1. *Charge of, includes assault to commit.*

Under an indictment for rape, the accused may be convicted of an assault with intent to commit rape, the latter offence being included in the charge of the former. Pratt v. State, 167.

2. *Trial for: Conviction of assault.*

Where the jury on a trial for rape find the defendant guilty of assault with intent to rape, the judgment will not be reversed on the ground that the evidence showed that the defendant was guilty of rape or of nothing, since the jury had the power to return a verdict for the assault, although the evidence required a conviction of the higher offence in which it was included. Ib.

3. *Charge made under threats: Instruction.*

On a trial for rape, the defendant requested the court to instruct the jury, that if the woman charged to have been assaulted made the complaint against him under the threats of her husband, they should acquit. *Held*: That it was not error to refuse the instruction, as such threats of the husband could only affect the credibility of his wife and not the question of the defendant's guilt or innocence. Ib.

RECOUPMENT.

In action for conversion of tenant's crop.

In an action by a tenant against his landlord, for the conversion of a

15. *Same: Evidence of negligence.*

The fact that a car leaves the track is *prima facie* evidence of negligence on the part of the company. Ib.

16. *Same: Bound to utmost diligence.*

Passenger carriers by railway are bound to the utmost diligence which human skill and foresight can effect, and if an injury occurs, by means of the slightest omission in regard to the highest perfection of all the appliances of transportation, or the mode of management at the time the injury occurs, the carrier is responsible. Ib.

17. *Master and servant: Duty of railway company to employe: Negligence.*

It is the duty of the railway company to furnish its employes safe appliances for performing the services intrusted to them, and to exercise care in maintaining such appliances in good repair. To this end the company should have its inspectors not only at its termini, but at convenient stations along its line. And where it knowingly employs and retains an incompetent inspector it will be liable for an injury resulting from his incompetency, although the person injured is the fellow-servant of such inspector. But the master is not an insurer of the servant's safety, nor does he guarantee that the tools, machinery and instrumentalities which he furnishes may not prove defective. He only undertakes to use reasonable care to prevent such results. St. L., I. M. & S. Ry. v. Rice, 467.

18. *Same: Same: Burden of proof.*

In an action against a railway company for an injury received by an employe through defective appliances furnished for his work, the plaintiff must show by positive proof that such appliances were defective and that the company had notice of the defect, or was negligently ignorant of it. Ib.

19. *Same: Negligence of fellow-servant.*

Where a yard inspector and yard foreman are not only employed at the same yard by the same railroad company, but their separate services have an immediate and common object—the moving of trains—and neither works under the order of the other, but both are subject to the control of the same yard master, they are fellow-servants and the company is not liable to either for the negligence of the other in the performance of his service. Ib.

20. *Railroads: Right of way over street.*

The use of a street for constructing and operating thereon a railroad,

company was not injured by the refusal, as the charge of the court did not include the supposed damage from the pools in the elements of damage to the land enumerated for the jury's consideration and directed them to consider no element not specified in the charge. Ib.

11. *Same.*

Although a railroad company acquires only an easement in land taken for a right of way, the owner is entitled to the full value of the land actually condemned. Ib.

12. *Same: Opinion of witness.*

The opinion of a witness being admissible to prove the value of a tract of land before and after the construction of a railroad through it, he may also state to what extent in his judgment the land is damaged by the right of way, since the amount of damages recoverable by the land owner is the difference between the two values and this is arrived at by mere computation. Ib.

13. *Condemning right of way: Damage to farm.*

In a proceeding by a railroad company to condemn a right of way, the assessment of damages is not necessarily restricted to the injury done to the legal sub-division of land described in the petition. If the tract described is part of a larger connected body of land, the owner may recover for the injury done to the tract as a whole. And where the tract traversed by the road is part of a farm, its use as such is notice to the company that an injury to it impairs the value of the whole farm, and therefore no answer claiming compensation for damage to the residue of the farm is necessary in order to apprise the company of what it is expected to pay for. Railway v. Hunt, 330.

14. *Railroad companies: Liability as common carriers.*

The defendant is a corporation organized under the laws of this State, and the plaintiff while a passenger on its train was injured by an accident which occurred in the State of Missouri, on a connecting road over which the defendant was then operating its trains and which belonged to another corporation organized and existing there. *Held*: That by the common law— which in the absence of proof to the contrary is presumed to be in force in Missouri—the defendant, as a common carrier, is liable for the injury if sustained through its negligence. Eureka Springs Railway v. Timmons, 459.

mediate or immediate, can hold such land only by paying the value thereof, unless the owner is estopped to assert his claim to compensation by an equity growing out of his conduct. Ib.

6. *Same: Statute of limitations: When action of land owner barred.* Seven years adverse possession of land, wrongfully taken by a railway company in the construction of its road, will bar an action to enforce the claim of the owner against the land, or to enjoin the company from using it until compensation is made. Ib.

7. *Same: Damage to riparian rights.* Where lands bordering upon a navigable stream are partitioned, and by agreement of the owners the riparian rights belonging thereto are not divided, but remain their joint property, they can still maintain a joint action against a railroad company for damages to such rights caused by the company's wrongful construction of tracks and buildings. But no damages can be recovered in such action for the mere tranportation of passengers across the river on a boat kept by the defendant for that purpose, unless it appears that the plaintiffs are licensed ferrymen. Ib.

8. *Same: Personal responsibility of company.* Land bordering on a river and which was wrongfully appropriated by a railroad company, was lost by the caving of the river banks after the owner had commenced an action to recover compensation. *Held*: That, although no action could be maintained after the destruction of such land, to enforce the owner's claim against it or to enjoin its use, the company is personally responsible to him for its appropriation. Ib.

9. *Damages for right of way: Frightening teams.* Where a railroad is located through the lands of a farm, the frightening of teams used on the farm by the running of trains has a tendency to depreciate the value of the lands and is proper to be considered as an element of damages in proceedings to condemn the right of way. Railway v. Combs, 324.

10. *Same: Instruction.* In a proceeding instituted by a railroad company to condemn a right of way, a witness based his estimate of damages to the land in part upon the fact that pools of water had been allowed to accumulate in excavations made in constructing the road-bed. The ditching of the road-bed was not then completed and the court refused to instruct the jury that they should indulge the presumption that the road-bed would be properly drained when completed. *Held*: That the

the Memphis and Little Rock Railroad Company, to appropriate to its use private property without first providing for just compensation to the owner, and that company having failed to secure a right of way over the plaintiff's land, the Memphis and Little Rock Railway Company could only acquire such right in the manner prescribed by the laws under which it was organized. Organ v. Memphis & Little Rock Railroad Co., 235.

2. *Same: Acts* 1855 *and* 1873.

The act of 1855 prescribing the mode of obtaining the right of way for railroad companies, and authorizing the owner of land taken for that purpose, to apply within a limited period for an assessment of damages, was repealed by the act of April 28, 1873, which embraces the whole subject matter of the former act and prohibits the appropriation of land as a right of way, without the owner's consent, until he is fully compensated therefor. Ib.

3. *Same: Injunction to prevent wrongful appropriation.*

Equity will enjoin a railroad company from taking possession of land in the construction of its road until proper compensation is made to the owner; and will, on timely application, also restrain the continuous, unlawful use of land by operating a railway over it without grant from the owner and without having instituted proceedings under the statute to acquire the right of way. But such relief will be denied to a land owner who acquiesces in the use of his property by a railroad company, until it has constructed across his land a track which at that point has become part of a line in which the public have an interest. Ib.

4. *Same: Claim to compensation; Enforcement against land.*

Where a railway company appropriates land to the use of its road without right acquired by purchase and without statutory proceedings for the assessment of damages, the owner may waive such proceedings and electing to regard the act of the company in taking the lands as done under the right of eminent domain, may demand and recover a just compensation. In such case the land owner assumes to the company the relation of a vendor who sells real estate on a credit, and while he holds the title equity will enforce his claim to compensation against the land, as it would a vendor's lien. Ib.

5. *Same: Alienation of land taken without compensation.*

Where a railway company takes land in the construction of its road without grant from the owner and without compensation, its alienee,

company, caused him to be arrested for embezzling the company's funds. It was then agreed between W. and R., the company's manager, that the criminal charge against W. should be dismissed on his giving a note with acceptable sureties for the sum which he admitted to be due to the company. R. informed one of the surties of this agreement—one of the others was informed of it by W., and all of them subsequently signed the note sued on with the understanding that W. would not be further prosecuted. After the note was given the prosecution was dismissed on the order of J., or that of the acting prosecuting attorney—the latter having previously promised that he would consent to its dismissal if the debt was secured. In an action against the sureties, the principal not being sued, *held*: That the evidence was sufficient to sustain the finding of the court that the note was given to procure the dismissal of a pending criminal prosecution. Ib.

PUBLIC LANDS.

When statute of limitations runs as to land entered under homestead laws, see STATUTE OF LIMITATIONS. 1.

Alienation of homestead.

The provision of the original homestead act of congress, which inhibits the sale of lands entered thereunder, before such entry is completed, applies equally to a soldier's additional homestead, entered under the act of June 8, 1872; and under either act, the conveyance of a homestead under a power of attorney executed before the application for the entry was made, is void and constitutes no defence to an action against the grantee to recover the land, although such action is brought by the homesteader. Nichols v. Council, 26.

RAILROADS.

See also CONTRIBUTORY NEGLIGENCE; DAMAGES, 2, 3; PRACTICE IN SUPREME COURT, 6.

1. *Appropriating land for right of way.*

The charter under which the Memphis and Little Rock Railroad Company was organized, granted by the legislature January 11, 1853, gave it the right to enter on lands and appropriate a right of way, and limited the owner of the lands to a period of five years after the road was built on his lands, in which to apply for an assessment of damages. 1873 all the property of the Memphis and Little Rock Railroad Company was sold under a deed of trust and conveyed to persons who in that year organized the Memphis and Little Rock Railway Company. *Held*: That the legislature could not empower

where they have passed upon disputed matters of fact, *provided* the evidence be legally sufficient to support their findings. Of this it is the province of the court to judge. St. L., I. M. & S. Ry. v. Rice, 467.

11. *Admission of incompetent evidence: Reversible error.*

Where it is manifest that the appellant was prejudiced by the admission over his objection, of incompetent testimony, a verdict against him which has only slight support from other proof, will not be sustained by the supreme court. Fordyce v. McCants, 509.

PROBATE COURT.

Presumption as to order for guardian's sale, see GUARDIAN AND WARD, 1.

PROMISSORY NOTES.

1. *Given for insurance: Consideration.*

The plaintiff by its policy agreed to insure the defendant from loss by fire from the first of February, 1885, to the first of February, 1890, in consideration of a certain premium. But the policy provided that it should be void during such portion of said period as any past-due note of the defendant, given for any part of the premium and held by the company, should be unpaid in whole or in part. The defendant paid part of the premium in cash and for the balance executed his note due Dec. 1st, 1885. The note recites that it was given in payment of premium and that if it is not paid at maturity, the policy should then cease and be void until full payment of the note. The plaintiff's action on the note was defended on the ground that it was without consideration after its maturity. *Held*: That the insurance being for one indivisible period, in consideration of one indivisible premium, the note was part of the consideration upon which the defendant was insured up to the time of its maturity; and as the policy was thereafter only suspended by the default of the defendant and could be revived at any time by the proper payment, the note was not without a valuable consideration to support it. Robinson v. Insurance Co., 441.

2. *Made to procure dismissal of criminal prosecution.*

A promissory note made to procure the dismissal of a criminal prosecution, although given for the amount of a debt due to the payee, is contrary to public policy and void. Rogers v. Blythe, 519.

3. *Same: Evidence.*

W. was agent for an insurance company and having failed to pay over money collected as premiums, J., who was his surety on a bond to the

3. *Harmless error.*

Where incompetent evidence is given to the jury without objection and is afterwards withdrawn, its admission cannot be assigned as error. Hanlon v. State, 186.

4. *Objection waived in court below.*

That a judgment is for too large a sum cannot be assigned as error in the supreme court, unless a new trial was asked on that ground in the court below. Wilson v. State, 212.

5. *Misconduct of counsel.*

Where a party makes no effort to prevent opposing counsel from making an improper statement in the hearing of the jury, and asks no ruling of the trial court with reference to such conduct, he is in no attitude to complain of it on appeal. Railway v. Combs, 324.

6. *New trial in proceedings to condemn right of way.*

In statutory proceedings by a railroad company to condemn a right of way, as in suits at common law, a verdict sustained by competent evidence will not be disturbed by the supreme court. Ib.

7. *Failure to make issue below.*

In a chancery cause where the defendant fails to plead the staleness of the plaintiff's demand or that it is barred by the statute of limitations, such defence will not be available on appeal. Humphreys v. Butler, 351.

8. *Motion to advance cause.*

To justify a motion to advance a cause upon the docket on the ground that the appeal is prosecuted for delay merely, the absence of error should be apparent upon a short and cursory examination of the record. Where the court cannot determine whether there is probable ground for the appeal without a minute investigation of the record requiring such time that it would operate to delay other causes having precedence on the docket, the motion will be denied. Vaught v. Green, 378.

9. *Objection not made in trial court.*

An objection to the ability of a plaintiff to prosecute an action, will not be entertained in the supreme court where it is not made in the court below. Robinson v. Insurance Co., 441.

10. *Finding of jury.*

It is the settled policy of this court to uphold the verdicts of juries,

7. *Same: Same: Amendment.*

A judgment recovered before a justice of the peace by B, the administrator of C, for a debt due to the latter, was entered on the justice's docket in favor of "B, adminstrator," instead of "B, as administrator of C, deceased." A transcript of the judgment having been filed with the clerk of the circuit court and entered on the docket of that court for judgments, a *scire facias* was sued out to revive it. *Held*: That it was not error in the proceedings by *scire facias* to cause the judgment to be amended according to the fact. Ib.

8. *Judgment of justice's court: How pleaded.*

The plaintiff brought an action to enforce the lien of a judgment rendered by a justice of the peace and a transcript of which had been filed and docketed in the circuit court. The amount recovered by the judgment was $306.15, a sum above the justice's jurisdiction—and there was no showing that any part of it was for interest. But the complaint alleged that the judgment was obtained before the justice "in due course of procedure," and this allegation was not denied by the defendant's answer. *Held*: That the jurisdiction of the justice was sufficiently shown by the complaint, since it is provided by section 5067 Mansf. Dig., that in pleading the judgment of a court of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but the judgment "may be stated to have been duly given," and if such allegation is not controverted it need not be proved. Lazarus v. Freidheim, 371.

9. *Parties: In suit to reform deed.*

In a suit to reform a conveyance of land, the grantor is a necessary party defendant. Knight v. Glasscock, 390.

PRACTICE IN SUPREME COURT.

See also CRIMINAL PROCEDURE, 2; HABEAS CORPUS, 2; WITNESSES, 3.

1. *Instruction assuming undisputed fact.*

A judgment will not be reversed because an instruction to the jury assumes the existence of an undisputed fact. Cline v. State, 140.

2. *Reading law books to jury: Failure to object.*

It is no ground for the reversal of a conviction that the prosecuting attorney read to the jury, in argument, the report of another case, where it does not appear that the report was used in opposition to the court's charge, and no attempt to prevent its use or request for a ruling of the court in relation to it is disclosed by the record. Ib.

2. *Insane persons: Proceedings against.*

The statute regulating proceedings against insane persons, (Mansf. Dig., secs. 4960, 4964), adopts substantially the former practice in equity and makes it applicable to all civil cases. It is, therefore, the duty of the court in every action to which an insane person is defendant, to see that he is represented on the record by a competent guardian; and until there is such representation it is error to proceed. Cox v. Gress, 224.

3. *Error in adopting proceedings: Transfer to proper docket.*

An error of the plaintiff as to the kind of proceedings he adopts is no ground for dismissing his action, which may be transferred to the proper docket on the motion of either party. If such motion is not made, the error is waived and the cause should be tried according to the principles involved. Organ v. Memphis & Little Rock Railroad Co., 235.

4. *Misjoinder: Waiver.*

A misjoinder of causes of action is waived unless objected to before defence. Ib.

5. *Parties plaintiff: Action for damages to land of decedent.*

W. and O. were joint owners of certain lands. W. died in 1856, and his executor and devisees held possession of the lands jointly with O. until 1873, when partition was made and thereafter the devisees of W. held possession of the portion allotted to them. Part of such portion was wrongfully appropriated by the defendant in 1873 or in 1874, for railroad purposes. *Held*: That in 1880 the devisees could maintain an action to recover compensation or damages for such wrongful appropriation, although the executor had not then been discharged and was still acting. (Following *Mays v. Rogers*, 37 Ark., 155; *Stewart v. Smiley*, 46 Ark., 373; *Graves v. Pinchback*, 47 Ark., 470.) Ib.

6. *Revivor of judgment: By scire facias: Parties.*

An administrator died pending a proceeding by *scire facias* instituted by him to revive a judgment for a debt due the estate of his intestate. At the time of his death the estate had been fully settled and all the debts against it paid. *Held*: That the distributees of the estate being the real parties in interest, the proceeding by *scire facias* was properly revived in their names, and one of them having assigned his interest in the judgment, it was not error in the order of revivor to make his assignee a co-plaintiff, as the defendant was not thereby prejudiced. Crane v. Crane, 287.

PAROL EVIDENCE.

See EVIDENCE, 3; STATUTE OF FRAUDS, 1.

PARTIES.

Plaintiff in action for waste of assets, see ADMINISTRATION, 6. In action to restrain sale for taxes, see SPECIAL ADMINISTRATOR, 2. In suit to reform deed, see PLEADING AND PRACTICE, 9. In proceedings to revive judgment, see PLEADING AND PRACTICE, 6.

PERJURY.

1. *Assignment of in indictment.*

The defendant was indicted for perjury alleged to have been committed in an affidavit appended to an account for the burial expenses of a pauper. The affidavit stated that the articles furnished were reasonably worth the sums charged for them—thirteen dollars for clothing and ten dollars for a coffin—and that they were charged at their cost prices. The assignment of perjury is "that the said R. F. T. did not furnish the said E. J., deceased, a suit of clothes, pants," etc., "of the value of thirteen dollars as charged and sworn to in said account, and one coffin of the value of ten dollars, as sworn to as above stated." *Held*: That the effect of such assignment, if sufficient for any purpose, is to admit the furnishing of the articles and to deny that they were of the value stated in the affidavit. Thomas v. State, 138.

2. *Evidence to sustain charge.*

On a trial for perjury, the oath of the defendant which is charged to have been false, is to be considered equal to that of a credible witness. One witness is sufficient to prove what he swore, but not to establish its falsity; and where there is only one accusing witness, his testimony must be corroborated, not merely as to slight or immaterial circumstances, but as to some particular false statement. Ib.

PLEADING AND PRACTICE.

See also INSTRUCTIONS; SET-OFF; SPECIAL ADMINISTRATOR; REPLEVIN; RECOUPMENT; PRACTICE IN SUPREME COURT.

1. *Practice: Transfer to equity.*

An action at law brought to recover a disputed balance on a complicated mutual account current, extending through a period of thirteen years, was properly transferred to equity. Rogers v. Yarnell, 198.

design and that the verdict convicting them of murder in the first degree is sustained by the evidence. Ib.

4. *Same: Accomplice: Failure to inform against accused through fear.* Where a witness for the State, in a trial for murder, failed to report what he knew for two days through fear and because the accused had threatened to kill him if he did report it, such failure did not make him an accomplice in the crime. Ib.

NEGLIGENCE.

See CONTRIBUTORY NEGLIGENCE, 1, 2; RAILROADS, 17-21.

NEW TRIAL.

See also PRACTICE IN SUPREME COURT, 1-6, 10, 11.

1. *Bill for: When equity will grant.* A bill for a new trial at law is not sufficient which merely shows that an accident has deprived the complainant of the benefit of a motion for a new trial based on technical errors, though they might be sufficient to warrant a reversal on appeal. The merits of the controversy must be disclosed by stating the substance of the evidence, and it must appear therefrom that such injustice has been done that it would be contrary to equity and good conscience to allow the judgment to be enforced. Whitehill v. Butler, 341.

2. *For misconduct of jury.* On a trial for murder, the defendant having testified that the deceased made such an attempt to shoot him with a pistol as would have justified the killing, the jury after retiring obtained the pistol and cartridges used by the deceased and experimented with them, apparently for the purpose of testing the truth of the defendant's instrument. *Held:* That this was taking evidence out of court and in the defendant's absence, and was such misconduct on the part of the jury as entitled him to a new trial. Forehand v. State, 553.

OFFICER.

Sale by without judicial warrant, see SALES, 2, 3.

OFFICIAL DUTIES.

See REWARDS.

OVER-DUE TAX LAW.

Redemption of lands sold under, see TAX SALES, 2.

MUNICIPAL CORPORATIONS.

See SALES, 3.

MURDER.

See also CRIMINAL PROCEDURE, 5.

Cause of death, see CRIMINAL LAW, 3.

1. *Murder in first degree: Intent.*

One who commits a homicide is not guilty of murder in the first degree unless there existed in his mind before the act of killing, a specific intent to take the life of the person slain. But it is not necessary that such intent be formed for any particular length of time before the killing; and where it is the result of deliberation and premeditation and reason is not dethroned, it may be conceived in a moment. Green v. State, 189.

2. *Same: Instructions.*

On a trial for homicide the court gave in charge to the jury the statutory definition of murder in the first degree, (Mansf. Dig., sec. 1521,) and instructed them that if the defendant inflicted the wounds on deceased as charged, "with the intent, formed in the mind at the time of the injuries, to take deceased's life and that such wounds did cause the death of deceased," they might convict of murder in the first degree. The court also charged the jury as follows: "An unlawful act, coupled with malice and resulting in death, will not of itself constitute murder in the first degree, but, in order to constitute murder in the first degree, the killing must have been intentional, after deliberation and premeditation." *Held*: That the jury were correctly charged as to the intent necessary to constitute murder in the first degree, since the effect of the instructions was to tell them that such intent must have preceded the act of killing. Ib.

3. *Same: Evidence.*

On a trial for homicide, the evidence showed that the defendants and others combined to take the deceased from his room for the avowed purpose of whipping him; that during the night they entered the room in which he was sleeping and having forcibly carried him out, cruelly beat him; that on the next day his dead body was found wrapped in a quilt and near it a number of switches with "frazzled ends;" that his skull was fractured, one arm, the collar bone and three ribs were broken and the body lacerated with switches. *Held*: That, although there was no evidence to show who struck the fatal blow, the defendants having combined to commit a crime, are all responsible for the killing committed in the prosecution of the common

as to the precedent of payment. On a sale of the mortgaged property, the proceeds were not sufficient to pay all the notes. *Held*: That in the absence of any special equities arising out of the assignments, the proceeds of the sale should be applied *pro rata* in part payment of the several notes, irrespective of the dates of their maturity or assignment. Penzel v. Brookmire, 105.

3. CHATTEL MORTGAGE: *Description of property.*

A mortgage which describes the property conveyed as "eight bales of cotton weighing 500 pounds each of the crop" which the mortgagor should raise in a designated locality, is not void for uncertainty where the whole crop did not amount to eight bales. Watson v. Pugh, 218.

4. *Same.*

A mortgage of "all my crop of corn, cotton or other produce that I may raise, or in which I may in any manner have an interest, for the year 1884, in Faulkner county, Arkansas," is not void as to third parties for uncertainty. The description could be made certain by extrinsic evidence, and the record of the conveyance was constructive notice of the mortgagee's lien on the crop mentioned. Johnson v. Grissard, 410.

5. EQUITABLE MORTGAGE: *By instrument intended to secure debt.*

Where an instrument is intended to secure a debt by fixing a charge on land which it properly describes, equity will give effect to the intention of the parties, by enforcing the lien, although the writing is not in the form of an ordinary technical mortgage and contains neither words of grant or defeasance. Bell v. Pelt, 433.

6. SAME: *Same.*

The defendant executed and delivered to the plaintiff an instrument in the following words:

"320.64. On or by the 1st day of November, 1883, I promise to pay James D. Pelt, or bearer, the sum of three hundred and twenty dollars and sixty-four cents, for value received, with ten per cent. interest from the 1st day of November, 1882. This note given as aid for that of the purchase money of parcel of land, the W1-2 of NW1-4, sec. 21 and the SE1-4 of SE1-4, sec. 17, and the NE1-4 of sec. 20, all in township 15, range 20 west, and vendor's lien is hereby reserved on said land for the purchase money, all the above land being in the county of Columbia and State of Arkansas. This 10th day of January, 1883.

Witness my hand: his
JOHN M. x BELL.
Witness: J. D. PELT. mark

Held: That such instrument is an equitable mortgage and constitutes a lien on the land it describes. Ib.

by withholding from the contractor one-third of the cost of the improvement, or of the amount agreed to be paid therefor as required by the act, the property improved will be bound to a sub-contractor only for the market value of materials furnished the contractor and not for the price the latter has agreed to pay. Basham v. Toors, 309.

6. *Same: When claim to be presented.*

Under the provision of the Act of 1885, which requires that a sub-contractor in order to assert a mechanic's lien, must present his claim to the landowner within ten days after the "job or contract" let by the owner "shall have been fully completed," the time allowed for presenting such claim must be computed from the completion of the work to be done under the contract of the owner with the principal contractor, although the contemplated improvement may not then be completed. And where the principal contractor abandons his contract after having done work under it, his sub-contractors must present their claims within ten days after such abandonment and cannot postpone the presentation until the work is completed under a new contract with a stranger to the first one, or is completed by the owner himself. Ib.

7. *None for digging well.*

A well is not an improvement within the meaning of the mechanic's lien law, (Mansf. Dig., secs. 4402-4409,) and neither that statute or the act of 1868, (Mansf. Dig., secs. 4425-4440,) providing for laborer's liens, gives a lien on land for labor performed in digging a well, although the work is done under a contract with the owner of the land.| Guise v. Oliver, 356.

MORTGAGES.

See also LIENS.

1. CHATTEL MORTGAGE: *Unrecorded: Lien as against mortgagor's widow.*

The lien of an unrecorded chattel mortgage remains valid after the mortgagor's death, and may be enforced against the mortgage property after the legal title thereto has vested in the widow, under the statute which gives her the right to her deceased husband's estate when it does not exceed the value of $300. Wolf v. Perkins, 43.

2. *To secure several notes: Precedence of payment.*

The maker of several promissory notes executed a mortgage to secure their payment. The notes matured at different times and the mortgage contained no stipulation as to the order in which they should be paid. The mortgagee assigned them to different parties, and at different dates, without any agreement with either of his assignees

MARRIED WOMEN.

Disaffirmance of deed made during infancy, see INFANCY, 1, 2, 4.
Relinquishment of Dower, see DEEDS, 3, 4.
Redemption of lands, see TAX SALES, 1, 2.

MECHANIC'S LIEN.

1. *Right of sub-contractor.*

One who labors for a "contractor," in the erection of a building, is a "sub-contractor" within the meaning of the mechanic's lien act. [Mansf. Dig., secs. 4402-4424]; and where his labor is performed after notice to the owner of the improvement, as provided for in the statute, his lien therefor will not be defeated by the subsequent payment of his wages to the contractor. Buckley v. Taylor, 302.

2. *Proceedings to enforce: Construction of statute.*

Where a claim has been established which comes clearly within the purview of the mechanic's lien act, the provisions of the statute regulating proceedings to preserve the lien, will be liberally construed in order to prevent a failure of the remedy. Ib.

3. *Same: Stating account.*

In a proceeding by a sub-contractor against the owner of a building, to enforce a mechanic's lien for labor, the fact that the plaintiff's account on which the claim is based, is erroneously stated, as if it were for services rendered under a contract with the owner, will not defeat the lien, where there is a substantial compliance with the statute in other respects, and it appears that the error has not misled the defendant to his prejudice. Ib.

4. *Same: Waiver.*

The account of a sub-contractor, presented to the owner of a building with the view of asserting a mechanic's lien for labor, as provided for in sec. 4404, Mansf. Dig., should properly be stated in writing. But where it is presented orally, the owner waives a written statement by placing his rejection of the account solely on the ground that payment for the labor has been made to the contractor. Ib.

5. *Construction of act of* 1885: *Right of sub-contractor.*

Under the Act of 1885, entitled "An act for the better protection of mechanics, artisans, material men and other sub-contractors," where the land-owner fails to reserve a fund for the benefit of sub-contractors,

collection, but that he was instructed by his superior to collect the same amount from each liquor dealer in the city. There was evidence to show that the defendant was in fact engaged in the business and the court instructed the jury that the fact that the city officials may have permitted the defendant to carry it on and collected money from him for the privilege did not justify a violation of the liquor law. *Held*: That the charge was not erroneous and that there was evidence to justify it. Ib.

16. *Evidence of.*

The testimony of railroad and transfer agents, that during the period in which a defendant is charged with carrying on the business of a liquor dealer without a license, they at different times received and delivered to him large quantities of intoxicating liquors, consigned to him, tended to show that he was engaged in the liquor traffic, and was not therefore irrelevant. Hanlon v. State, 186.

17. *Presumption as to ownership of liquors: Burden of proof.*

On the trial of an indictment for selling intoxicating liquors without a license, where the State proves a sale made by the defendant, it will be presumed in the absence of proof to the contrary, that he was the owner of the liquor sold; and if he made such sale as the agent of a licensed dealer, that is a matter of defence and the burden is upon him to establish it. Rana v. State, 481.

18. *Aiding and abetting sale of: Burden of proof.*

On the trial of an indictment for the unlawful sale of intoxicating liquors where the prosecuting attorney, to sustain the charge, relies on evidence that the defendant aided and abetted another person to make the sale, the burden is on the State to prove that it was made by such person without a license. Berning v. State, 550.

19. *Same: Evidence.*

On a trial for selling liquors without a license, the evidence showed that the defendant kept cigars and tobacco for sale in the front room of a house, in the back room of which R. sold intoxicating liquors—each renting his room from the same landlord; that R.'s customers had to and did pass through the defendant's room; that the defendant had purchased liquors of R., and had twice advanced money for the latter when it was demanded of him by the police for the privilege of selling whiskey. *Held*: That this was not sufficient to warrant the defendant's conviction, as it showed nothing beyond the mere acquiescence of the defendant in the sales made by R., and failed to show that the latter had no license. Ib.

9. *Sale of brandy cherries.*

A conviction of selling liquor without a license, is sustained by proof that the defendant sold brandy cherries in pint and quart bottles containing one-half their capacity of intoxicating liquors. Musick v. State, 165.

10. *Same.*

Where intoxicating liquor is sold intentionally, without a license, in bottles partly filled with brandy cherries, the sale cannot be excused by showing that the vendor believed he had the right to sell it as "brandy fruit." Ib.

11. *Sale to minor: Plea of former conviction.*

A sale of liquor without a license and its sale to a minor without the written consent of his parents or guardian, are separate offences and may both be committed by one act of selling. A conviction of the former offence will not, therefore, bar a prosecution for the latter, although both prosecutions are for the same transaction. Ruble v. State, 170.

12. *Sale in prohibition districts: "Drag net proviso."*

Under the act of 1883, amendatory of the license law, and known as the drag-net proviso, (Mansf. Dig., sec. 4522,) a conviction for selling liquor without a license may be sustained in a prohibition district where no license can be legally issued. Mazzia v. State, 177.

13. *Same: Penalty of revenue law.*

The provisions of the revenue act of 1883, creating the offence of carrying on the business of a liquor seller without a license, amended by implication the general license act of which they thus became a part. By such amendment the drag-net proviso of the license law, (Mansf. Dig., sec. 4522,) was made applicable to the penalty of the revenue act, and that penalty may therefore be imposed on one who carries on the business of selling liquors in a prohibition district. Ib.

14. *Dealing in liquors: Penalty in prohibition districts.*

The penalty of the Revenue Act of 1883, for carrying on the business of a liquor seller without a license, is in force in prohibition districts. Hanlon v. State, 186.

15. *Same: Instruction.*

On a trial for carrying on the business of liquor selling without a license, a police officer testified that he collected money from the defendant on several occasions without explanation as to the purpose of the

that act is the only person who can furnish alcoholic stimulants to the sick in a prohibited district; and a sale made therein by a druggist is unlawful, although he sells for medicinal purposes and upon the prescription of such physician. Ib.

4. *Executory contract to sell*: *"Three Mile Law."*

A sale of liquors is not punishable under "the three mile law," unless it is completed within a prohibited district, so that the title to the liquor sold passes there from the vendor to the purchaser. The statute does not apply to a mere executory contract to sell. Herron v. State, 133.

5. *Same*: *Same.*

The defendant being at B., where the sale of liquors was prohibited under the three mile law, received an order for one-half gallon of whiskey, for which he was then paid by the person giving the order. The defendant had no whiskey within the prohibited district, but at N., beyond its limits, he was a licensed dealer and kept whiskey there in barrels. It was agreed at the time the order was received that the defendant should cause the whiskey to be measured out at N. into a jug and deposited in the express office addressed to the purchaser and for transportation to him at B., he to pay the charges—and this was done. *Held*: That the appropriation of the half gallon of whiskey to the contract was necessary to complete the sale; and that having been done at N., the sale was made at that place. Ib.

6. *Proceedings under three mile law*: *Appeal from judgment of county court.*

Petitioners for a prohibitory order under the three mile law, may appeal to the circuit court from a judgment of the county court rejecting their petition. And a liquor dealer admitted as a party to contest such petition, may also prosecute an appeal from a judgment awarding the order. McCullough v. Blackwell, 159.

7. *Same*: *Withdrawal of petitioner on appeal.*

When a petition to put the three mile law in force has been acted upon by the county court, and an appeal from its judgment prosecuted, a petitioner will not be allowed to withdraw his name in the circuit court, except for good cause. Ib.

8. *Same*: *Allegations of remonstrance.*

The allegations of a remonstrance filed against a petition for a prohibitory order under the three mile law, to the effect that certain signatures were unduly obtained, are not evidence and must be sustained by proof. Ib.

tain cotton produced on the land and a few weeks afterwards made his note to the defendant for $400, payable in the fall of the same year and specifying that it was for rent of the land. It was for about twice as much as the land would rent for, and S. testified that it was the understanding between him and the defendant that the amount paid on the note should be credited on his purchase. In an action to recover the value of the cotton which the defendant converted to his own use, *held*: (1.) That the evidence was sufficient to sustain the finding of the court that the contract of purchase had not been rescinded, and that the relation of landlord and tenant did not exist between the defendant and S. (2.) That the recital in the note for $400 that it was given for rent did not preclude the plaintiff from proving that it was not in fact given for that purpose. **Watson v. Pugh, 218.**

LARCENY.

Description of property stolen, see INDICTMENT.

LIENS.

See also EXECUTION, 4;
LABORER'S LIEN; MECHANIC'S LIEN; MORTGAGES; TRUSTS, 2; VENDOR AND VENDEE, 1, 3.

Mortgage and statutory: Priority.

The lien created by statute, (Mansf. Dig., sec. 4468), in favor of the keeper of a jack or stallion, is subordinate to the lien of a prior recorded mortgage executed after the passage of the act. **Easter v. Goyne, 222.**

LIQUORS.

See also SALES, 1.

1. *Construction of license law.*

The construction placed upon the license law in *Chew v. State*, 43 *Ark.*, 361 and cases there cited, that it forbids a sale of liquor for any purpose whatever, by an unlicensed dealer, is approved. **Battle v. State, 97.**

2. *Sale for medicinal purposes: "Three Mile Law."*

The act of 1881, known as the "three mile law," did not change the general license law, so as to permit the sale of liquors for medicinal purposes without a license. Ib.

3. *Who may furnish to the sick.*

Under "the three mile law" a physician who files the oath required by

JUSTICES OF THE PEACE.

Amendment of justice's docket, see AMENDMENT, 1.
Jurisdiction to enforce laborer's lien, see LABORER'S LIEN.
Judgment of, how pleaded, see PLEADING AND PRACTICE, 8.

LABORER'S LIEN.

Statute gives none for digging well, see MECHANIC'S LIEN, 7.

Judgment of justice enforcing: Notice.

The judgment of a justice of the peace in an action to enforce a laborer's lien, under the act of 1868, [Mansf. Dig., secs. 4425-4440] is void, where the proceedings fail to show that notice thereof was given to the defendant or that he waived notice. Levy v. Ferguson Lumber Co., 317.

LANDLORD AND TENANT.

1. *Liability of landlord for improvements.*

It is only by virtue of the agreement of a landlord to pay for improvements that his tenant can recover of him their value. Gocio v. Day, 46.

2. *Same: Counterclaim.*

When a landlord leads his tenant to believe that the value of improvements he may thereafter put upon the demised premises, will be deducted from the rent or paid to him, a special promise to that effect may be implied; and such promise is the subject of a counterclaim in an action for the rent. But the mere fact that a landlord permits permanent improvements to be made without objection, or warning that he will not pay for them, raises no presumption that he intends to do so. Ib.

3. *Relation of: Giving rent note for purchase money.*

B., owning certain land, agreed to sell it to S., who gave his notes for the purchase money and was let into possession under a bond conditioned for the execution of a conveyance on payment of the notes. After the notes matured, B. conveyed his interest in the land to the defendant. On the trial of this action, B. testified, in general terms that at the time of such conveyance there was an understanding between him and S. that their contract was canceled. But there was no written agreement to that effect. The notes were transferred to the defendant, the bond for title was not taken up and S., who testified that the contract to purchase was not canceled, was permitted to remain in possession for several years with no claim upon him to pay rent. He subsequently executed a mortgage to the plaintiff on cer-

assignment by an administrator of a judgment belonging to the estate of his intestate, made privately and without an order of court, is therefore void. Winningham v. Holloway, 385.

3. *Same.*

A judgment recovered by an administrator belongs to the distributees of his intestate, subject to the payment of debts and expenses of administration; and where they assign it during the administration their assignee acquire such interest therein as they will be entitled to when the estate is fully settled and the administrator discharged. Ib.

4. *Same: Probating.*

After the death of H. a judgment which had been obtained against him by the administrator of E., was assigned by the latter's distributees to W. After the estate of E. had been fully settled and his administrator discharged, W. presented the judgment for allowance as a claim in his favor, against the estate of H. It was not authenticated by the oath of the administrator or distributees. Sec. 106, Mansf. Dig., is as follows: "If the debt be assigned, after the debtor's death, affidavit shall be made by the person who held the debt at the death of the debtor, as well as the assignee." *Held*: That W. was entitled to probate the judgment and it was not necessary that it should be authenticated by the affidavit of E.'s distributees who, as they were not authorized to collect the judgment, are not, therefore, such assignors as are referred to by the statute. *Held*, further, that the administrator was not required to make the affidavit because he was not the assignor of the claimant, and that in such case the statute provides for no authentication by an assignor. Ib.

JURISDICTION.

Of county court to try contested elections, see ELECTION CONTESTS.

Of Equity: Over settlement of administrator, see ADMINISTRATION, 1-5. In granting new trials, see NEW TRIAL, 1. In the reformation of contracts, see DEEDS, 1. To compel compliance with oral agreement for assignment of interest in patent, see SPECIFIC PERFORMANCE. To enforce lien of equitable mortgage, see MORTGAGES, 5, 6. As to constructive trusts, see TRUSTS. As to contribution between co-sureties, see SURETIES, 2. To cancel conveyance of infant, see INFANCY, 4. In granting relief by injunction, see ADMINISTRATION, 8; RAILROADS, 3; TAXES, 1, 2.

See also GUARDIAN AND WARD; LABORER'S LIEN; WILLS, 4.

INTEREST.

See also USURY, 1-6.

On mutual account current.

A mutual account current between the plaintiff, who was engaged in farming and money lending, and the defendants, who were merchants, was begun on the books of the latter in 1871. The plaintiff obtained from the defendants merchandise for himself and supplies for his tenants, and sometimes got from them cash advances. They borrowed money from him from time to time, and in 1873 executed to him their note for $1100, loaned money, which bore interest before maturity. The proceeds of crops raised on the plaintiff's lands, or due from his tenants, were turned over to the defendants year after year, to be credited on the account and the items of debit and credit were entered as one continuous account, without rest or balance until 1884, when the dealings between the parties ceased. The manner of keeping the account, in connection with other evidence, shows that it was permitted to run for mutual convenience, the balance to be paid by the party against whom it should exist on a final adjustment. *Held*: That until the dealings between the parties ceased, or one of them was called to account, neither could claim a balance for which the term of credit had expired, and on which interest could be computed either by virtue of an implied agreement or by operation of law. But the note by its terms bore interest and as it entered into the mutual dealings, the items of the account which are demands in favor of the defendants against the plaintiff should be applied to the payment of the interest and principal of the note after first extinguishing the earlier demands of the plaintiff against the defendants, as in ordinary cases of partial payments under the statute. (Mans. Dig., sec. 4758.) Rogers v. Yarnell, 198.

JUDGMENT.

Of justice, how pleaded, see PLEADING AND PRACTICE, 8.

Parties in proceeding to revive, see PLEADING AND PRACTICE, 6.

1. *Assignment by trustee.*

When a plaintiff in a judgment is only a trustee thereof, and, as shown by the record, has no beneficial interest therein, his assignment of it will pass no title. Brice v. Taylor, 75.

2. *Recovered by administrator: Assignment.*

Mansf. Dig., sec. 76, provides that the sale of a decedent's choses in action shall be pursuant to an order of court and at public sale. The

INJUNCTION.

To prevent loss of assets, etc., see ADMINISTRATION, 8.

To prevent wrongful appropriation of right of way, see RAILROADS, 3, 8.

Parties plaintiff in action to obtain, see SPECIAL ADMINISTRATOR, 2.

To prevent extension of assessment on tax books, see TAXES, 1, 2.

INSANE PERSONS.

See DEEDS, 5.

Guardian *ad litem* for, see PLEADING AND PRACTICE, 2.

INSTRUCTIONS.

See also CRIMINAL PROCEDURE, 2; LIQUORS, 15; MURDER, 2; PRACTICE IN SUPREME COURT, 1; RAPE, 3; ROADS.

1. *Excluding points raised by evidence.*

It is not error to refuse a prayer for an instruction which, though correct as far as it goes, is so framed as to exclude from the consideration of the jury points raised by the evidence of the adverse party. Claiborne v. State, 88.

2. *Same.*

A charge that a conviction should be had if the jury find the existence of a given state of facts, which do not legally import guilt without a specific intent, is erroneous, and the error of the specific charge upon the facts singled out by the court to the exclusion of others which the jury had the right to consider, is not cured by a correct general charge in regard to the guilty intent necessary to constitute the offense. Ib.

3. *Oral explanation of written charge.*

Where a party demands that the jury be instructed in writing, it is error to make verbal explanations of the written charge; and unless it affirmatively appears that such error was harmless, it is ground for reversal. Mazzia v. State, 179.

INSURANCE.

Promissory note given for, see PROMISSORY NOTES, 1.

INTENT.

Necessary to constitute murder in first degree, see MURDER, 1, 2.

Criminal, inferred from conversion of money, see EMBEZZLEMENT, 3.

Fraudulent, in signing name, etc., see FORGERY, 3.

INDICTMENT.

For embezzling money, see EMBEZZLEMENT, 2.

See also PERJURY, 1.

For larceny: Description of property.

An indictment for larceny which describes the property charged to have been stolen, as "two ten dollar bills of United States currency," is bad for the vagueness and uncertainty of the description. **State v. Oakley, 112.**

INFANCY.

1. *Conveyance of infant: Disaffirmance: Coverture.*

Where an infant wife joins her husband in the execution of a deed to her lands, she may in the absence of any act on her part sufficient to ratify the conveyance, disaffirm it at any time during coverture. **Stull v. Harris, 294.**

2. *Same.*

The mere passive acquiescence of a married woman in a deed executed by her while she was an infant and covert, will not, though extending through many years, be sufficient during coverture to ratify the contract. **Ib.**

3. *Same: Return of consideration.*

An infant may in general disaffirm his contract without restoring the consideration received by him; but if it remains in his hands in specie at the time of disaffirmance, he must offer to restore it or its value as a condition to disaffirmance. **Ib.**

4. *Same.*

The plaintiff joined her husband in the execution of a deed conveying to the defendant lands which belonged to her, but in which her husband had an interest acquired by his marriage. In part payment of the price of the lands the defendant released $400 of a debt due to him from the plaintiff for necessaries furnished her during her minority and before her marriage. The residue of the purchase money was paid to the husband. On a bill to cancel the plaintiff's conveyance on the ground that it was executed during her infancy, *Held*: That the plaintiff as a condition of obtaining the relief sought, must pay the defendant the $400 released on her debt to him, with legal interest from the date of the deed. But she will not be required to refund any part of the purchase money paid to her husband. **Ib.**

subsequent day, will not enable him to hold it as a homestead exempt from sale under a judgment sustaining the attachment. Reynolds v. Tenant, 84.

2. *Minor's rights to share rents and profits of.*

Where the widow of a decedent holds his homestead to the exclusion of his minor children, who are entitled to share it with her under article 9, sec. 6 of the constitution, she cannot defeat an action brought by them to recover their share of the rents and profits, by showing that no dower has been assigned to her in the lands embraced by the homestead. Sec. 2588 Mansf. Dig., which provides that the widow shall possess the chief dwelling-house of her deceased husband together with the farm thereto attached, free of rent until her dower is assigned, has no application to her use of the homestead and is inoperative as against the homestead right of the minor. Winters v. Davis, 535.

3. *Order vesting in widow: Rights of minor children.*

Since the adoption of the constitution of 1874, which, by art. 9, sec. 6, provides that when the owner of a homestead dies his widow and minor children shall share the same equally, the power of the probate court to make an order under sec. 3, Mansf. Dig., vesting the estate of a deceased person in his widow where it does not exceed in value the sum of three hundred dollars, is confined to cases where the deceased leaves no minor children, or if he leaves such children, no part of his estate constitutes a homestead. Sansom v. Harrell, 429.

4. *On land jutting into village.*

Where a tract of land not within the limits of any incorporated town, is used only for agricultural purposes in connection with a contiguous farm, and has never been surveyed into blocks and lots or dedicated to village uses, it may be claimed as a rural homestead, "outside any city, town or village," within the meaning of the constitution, although the land on which the claimant's residence is situated juts into a village. Orr v. Doughty, 527.

HOMICIDE.

Cause of death, see CRIMINAL LAW, 3.

HUSBAND AND WIFE.

Conveyance between, see FRAUDULENT CONVEYANCES, 1, 2.

GUARDIAN AND WARD.

Guardian's sale: Presumption as to order for.

An order of the probate court for the sale of a minor's lands will be presumed to have been regularly made, where nothing to the contrary appears in the record, and its validity cannot be questioned in a collateral proceeding. Curry v. Franklin, 338.

HABEAS CORPUS.

1. *Erroneous proceedings not corrected by.*

The petitioner entered a plea of guilty to an indictment for criminal abortion and the court assessed his punishment as upon a conviction of a felony. On the next day, having concluded that the indictment charged only a misdemeanor the court, caused the plea to be withdrawn, quashed the indictment and made an order for the submission of the charge to the grand jury and for admitting the prisoner to bail. After the court had adjourned for the term the prisoner, who remained in jail, presented to the judge at chambers his application to be discharged on *habeas corpus*, which was refused. On petition to review such refusal by *certiorari*, *Held*: (1.) That whether the court erred in causing the plea to be withdrawn, could be determined only on appeal or writ of error; (2.) That whether the facts entitle the petitioner to be discharged from further prosecution or not, is a question which might be presented either by a motion for discharge made in the original cause, or by special plea to a new indictment. But such question can not be raised by *habeas corpus*. Barnett, ex parte, 215.

2. *Review of proceedings on: Practice.*

The action of a circuit judge in refusing to discharge a prisoner on *habeas corpus* will be affirmed, where it appears that the petitioner is held to answer a criminal charge, under an order of the circuit court regular on its face, and which that court had power to make. Ib.

HIGHWAYS.

See ROADS.

HOMESTEAD.

1. *Exemption from sale under attachment.*

Where land is not occupied as a residence at the time an order of attachment is levied upon it, the defendant's occupation of it on a

that of a prior unrecorded mortgage, although the mortgage is subsequently filed for record before the sale of the land. Hawkins v. Files, 417.

FORGERY.

1. *Of school warrant.*
It is forgery to make a false school warrant in the name of a majority of the school directors. Claiborne v. State, 88.

2. *By creditor on his debtor.*
It is no defense for a creditor to show that when he executed a forgery on his debtor, he intended to apply the money thus obtained to the payment of his debt. Ib.

3. *Fraudulent intent.*
One who is authorized to sign the name of another to an instrument for the payment of money in a stated amount, or for a legal purpose, will commit forgery if he signs it for a larger amount, or for an illegal purpose, with intent to defraud. Ib.

FRAUD.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 1, 2; FRAUDULENT CONVEYANCES, 1, 2.

FRAUDULENT CONVEYANCES.

See also ASSIGNMENT FOR BENEFIT OF CREDITORS, 1, 2.

1. *Allegations and proof.*
It is not sufficient to charge in general terms that a conveyance of land to a wife, was made to defraud her husband's creditors. The facts constituting the alleged fraud should be stated. And the charge will not be sustained by proof which merely shows that the husband paid for the land and that he owed at the time a small debt, without establishing other indebtedness. Knight v. Glasscock, 390.

2. *Conveyance by husband to wife.*
Although a deed executed by a husband to his wife in fraud of his creditors, may be avoided for their benefit in proper proceedings taken by them for that purpose, it cannot be avoided by the husband; and his subsequent conveyance to the creditors will not divest the wife of her title. Ib.

GUARDIAN AD LITEM.

For insane person, see PLEADING AND PRACTICE, 2.

the deceased had been seriously injured and required the witness's attention. The same witness was also allowed to testify that after driving twelve or thirteen miles, he arrived at the home of the plaintiff to which the deceased had been carried, and that after his arrival the deceased stated to him that he had been thrown heavily across the corner of a seat and had thus received an injury from which the witness found him suffering. *Held*: That the contents of the telegram were hearsay and the statements of the deceased were not part of the *res gestae*. It was therefore error to admit them. Fordyce v. McCants, 509.

EXECUTION.

1. *Sale of land under: Waiver.*

The statutory requirement, (Mansfield's Digest, sec. 3052), that lands shall be sold under execution, in tracts containing not more than forty acres, is directory; and where the owner of the lands is present at the sale, he waives a compliance with the statute by his failure to demand it. Reynolds v. Tenant, 84.

2. *On judgment against administrator.*

After the removal of an administrator, execution on a judgment recovered against him in his fiduciary capacity, and to be levied of the goods and chattels or lands of his intestate, as provided in ch. 60, sec. 8 of the Revised Statutes, could not be legally issued until the judgment had been revived against a new administrator or against the party in interest in the property of the intestate; and where an execution issued without such revivor, a sale under it passed no title. Meredith v. Scallion, 361.

3. *Same: Repeal of statute.*

The statute which recognized the right to issue an execution against an administrator in his fiduciary capacity [Rev. Stat. chap. 60, sec. 8], was repealed by the provisions of the constitution of 1874, conferring exclusive jurisdiction over the assets of deceased persons on the probate courts. Since the adoption of that instrument, although courts of law still have jurisdiction to maintain an action against an administrator, the power to execute a judgment recovered therein belongs alone to the probate court, to be exercised in the course of administration. An execution issued on such judgment is, therefore, without authority of law and a sale made under it is void. Ib.

4. *Superior to prior unrecorded mortgage.*

The lien on land acquired by the levy of an execution, is superior to

husband, without power to sell any greater interest, conveyed them in *fee simple*, and her children, who are the devisees of the remainder, were present and assented to, or acquiesced in the sale, they are not thereby estopped from claiming the lands, as against the purchaser, on the termination of the life estate, where it does not appear that he was misled by their conduct, or was ignorant of their reversionary interest, nor that they were then of age, or knew of their interest. Patty v. Goolsby, 61.

EVIDENCE.

See also ASSIGNMENT, etc., 2; BURDEN OF PROOF; CONTRIBUTORY NEGLIGENCE, 2; COUNTY WARRANTS, 2, 3; EMBEZZLEMENT, 3; LIQUORS, 17, 18; MURDER, 3, 4; PERJURY, 2; PROMISSORY NOTES, 3; SALES, 2, 3; RAILROADS, 12, 15, 18; WITNESSES, 1-3.

1. *Of justice's judgment: Docket entry.*

Where a paper purporting to be the docket entry of a justice of the peace, but not certified as a copy of the docket, nor accompanied by proof that it is genuine, is offered in evidence to prove the imposition of a fine, it is not error to exclude it. Moore v. State, 130.

2. *As to transactions with plaintiff's intestate.*

In an action brought by an administratrix to recover a sum of money which she paid to the defendant before administration in discharge of his claim against the estate of her intestate, he offered to prove by his own testimony that he loaned the deceased the money in controversy to pay upon certain land; that he took no note for the amount, but the deceased at the time of receiving it made an entry in his own private memorandum book; and that no part of the debt had been paid except as paid by the plaintiff. *Held*: That such testimony, relating to transactions between the defendant and the deceased, was properly excluded. (Schedule to Const., sec. 2.) Rainwater v. Harris, 401.

3. *Contradicting policy of insurance.*

Parol evidence is inadmissible to contradict the provisions of a policy of insurance. Robinson v. Insurance Co., 441.

4. *Hearsay: Res gestae.*

In an action against a railway company brought to recover damages for killing the plaintiff's intestate, the court permitted a physician to testify to the contents of a telegram sent him by the plaintiff, stating that there had been an accident on the defendant's road and that

nate a tribunal before which contests for county and township offices should be tried. The act of January 23, 1875, (sec. 71) conferring jurisdiction of such contests on the county court, was passed in obedience to that requirement, and is, therefore, as conclusive against constitutional objection as though written originally in the Constitution itself. Glidewell v. Martin, 559.

EMBEZZLEMENT.

1. *Conversion of money by bailee.*

B. delivered to the defendant a horse to be sold for him. The defendant sold the animal for $125 and received the money, but failed to deliver it to B. *Held*: That if it was expressly or impliedly understood that defendant should deliver to B. the identical money received for the horse, then he was a bailee of it, within the meaning of the statute, (Mansf. Dig., sec. 1640), and liable as such for its unlawful conversion. But he could not be prosecuted for collecting a check received for the price of the horse, since it was in the line of his duty to make the collection. Dotson v. State, 119.

2. *Indictment*: *Description of money.*

A defendant cannot be lawfully convicted of embezzling paper currency on an indictment which describes it as "ten bills of the paper currency of the United States of the denomination and value of ten dollars each," as the description is insufficient because of its uncertainty. Ib.

3. *Criminal intent*: *Instruction.*

On the trial of an indictment for embezzlement the court instructed the jury "that if they found from the evidence that the defendant converted the money alleged * * to have been embezzled, to his own use," they "would be authorized to infer the criminal intent." *Held*: That the instruction was not erroneous as calculated to mislead the jury, since the effect of it was to tell them that the conversion of the money was a circumstance from which a criminal intent might be inferred. Ib.

EQUITY.

See INJUNCTION, JURISDICTION.

ESTOPPEL.

To maintain ejectment for land occupied by railroad, see RAILROADS, 21.

Acquiescence in sale.

Where a widow, having only a life estate in the lands of her deceased

next of kin, equally if equal in degree, and *per stirpes* if in unequal degree—those equal in degree and nearest in degree to the intestate, taking equal shares in their own right, while those of unequal degree and one step further removed from the intestate, take only the shares their ancestors would have taken if alive. Garrett v. Bean, 52.

2. *Same.*

An intestate died without issue and without ancestors, brothers or sisters, surviving him, and leaving thirty-five nephews and nieces—the children of eight deceased brothers and sisters—and four grand-nephews and nieces—the children of his deceased niece—his nearest of kin. At the time of his death he was seized in *fee simple* of certain lands. *Held*: That the nephews and nieces, standing in equal degree and nearest to the intestate, take *per capita* equal shares of his lands, each taking one-thirty-sixth thereof, and the grand-nephews and nieces take *per stirpes*, the share their mother would take if alive—each taking one-fourth of one-thirty-sixth. Ib.

DOWER.

Relinquishment of, see DEEDS, 3, 4.

EJECTMENT.

See also PUBLIC LANDS.

For land occupied by railroad, see RAILROADS, 21.

To recover lands sold for taxes: Tender of taxes, etc.

Sec. 2649, Mans. Dig., which provides that an action to recover lands held by virtue of a tax title, shall not be maintained unless the plaintiff shall, before any writ issues therein, file in the clerk's office an affidavit setting forth that he has tendered to the person so holding such lands, the taxes, costs, etc., applies only to such sales for taxes as are invalid because of irregularities or omissions on the part of the officers conducting them, and has no application where a sale is absolutely void for want of power to make it. The payment of a tax extinguishes the authority to make a sale for its collection, and where land is sold for taxes which have been paid, an action to recover it may be commenced without filing the affidavit of tender provided for by the statute. Kelso v. Robertson, 397.

ELECTION CONTESTS.

Jurisdiction of county court: Act January 23, 1875, constitutional.

The Constitution, by sec. 24, art. 19, required the legislature to desig-

3. *Same*: *Relinquishment of dower.*

Where a married woman joins her husband as grantor in conveying lands in which she has no estate except a contingent right of dower, the deed, although it contains no clause relinquishing dower, will bar her right thereto if she acknowledges it in proper form; and if it does not have that effect merely because the officer's certificate is not in the form prescribed by the statute, then her acknowledgment of such deed is "defective," and "the proof of" its "execution" is "insufficient" within the meaning of the curative acts. Ib.

4. *Same.*

In 1859 the plaintiff joined her husband as grantor in the execution of a deed which contained no clause expressing a purpose to relinquish dower. The officer before whom the deed was acknowledged certifies that the husband acknowledged it "to be his act and deed and that the wife being privily examined separate and apart from her said husband, declared that she did freely and willingly sign and deliver said * * * without any fear or compulsion from her said husband, as her act and deed," but makes no mention of dower. The deed was recorded soon after its execution. After the death of her husband the plaintiff petitioned for dower in the land thus conveyed. *Held*: That the defective acknowledgment of the plaintiff as a relinquishment of dower, was cured by the healing acts of March 8th and March 14th, 1883, and her petition was properly denied. Ib.

5. *Conveyance to imbecile*: *Delivery.*

Where the grantor in a deed conveying land to a person who is *non compos*, delivers it to the latter's father, intending by such delivery to pass the title to her, the father's acceptance of the deed for the daughter is a sufficient delivery to her, and the conveyance being for her benefit, her assent thereto will be presumed. Eastham v. Powell, 530.

DELIVERY.

Of deed to person who is *non compos*, see DEEDS, 5; Of goods to carrier, see SALES, 1.

DESCENTS AND DISTRIBUTION.

1. *Statute of*: *Inheritance per capita and per stirpes.*

When the persons composing the nearest class of kin to an intestate, as fixed by sec. 2522 Mansfield's Digest, die before his death, the next class in order will thus be advanced nearer to him, and the persons composing it will inherit his estate in their own right a:

a father, damages for the killing of his son, where it is shown that the latter's expectancy of life exceeds that of his father, an instruction to the jury that the measure of damages is the probable earnings of the son during his expectancy of life, less his expenses, etc., is erroneous, since it permits the father to recover as a pecuniary loss to himself, accumulations of the son for a period after he (the father) is presumed to have died. Fordyce v. McCants, 509.

3. *Same.*

In an action against a railroad company [under secs. 5223, 5226 Mansf. Dig.,] to recover the damages resulting to a father from the killing of his son, who was of age but unmarried, substantial damages can be recovered only by showing that deceased gave assistance to his father, contributed money to his support, or that the father had reasonable expectation of pecuniary benefit from the continued life of his son—the reasonable character of such expectation to appear from the facts in proof. In the absence of such proof only nominal damages can be recovered. Ib.

DEEDS.

See also FRAUDULENT CONVEYANCES; MORTGAGES; STATUTE OF FRAUDS, 1; VENDOR AND VENDEE. Disaffirmance of infant's deed, see INFANCY, 1-4. Parties in suit to reform, see PLEADING AND PRACTICE, 9.

1. *Uncertain description of land: Reformation of deed.*

Where parties fully execute as they intend and believe, an agreement for the sale of land—on the one part by making and delivering a deed and on the other part, by paying the purchase price, accepting the deed and entering into possession under it, an indefinite and uncertain description of the land, inserted in the deed through a mistake as to the ordinary meaning of the terms used, will not render the contract void. But in such case as against the vendor and subsequent purchasers with notice, an estate in the land intended to be conveyed, will pass to the vendee when the deed is executed, with the right to demand that it be reformed so as to describe the land correctly. Knight v. Glasscock, 390.

2. *Defective acknowledgment: Curative acts.*

The application of the curative acts of 1883 is not limited to the obvious omission of words from certificates of acknowledgment, but extends to every case in which the acknowledgment of a deed is insufficient to give full legal effect to its terms. Johnson v. Parker, 419.

5. *Same.*

On the trial of D. and S., jointly indicted for the murder of M., committed by stabbing him, the testimony showed that the wound was inflicted by D. After witnesses had testified that they saw the defendants with knives in their hands a short time before and after the deceased was wounded, a witness was introduced who stated that he saw a difficulty arise between D. and the deceased, which the latter commenced by striking D.; that D. retreated and asked deceased not to cut him; that S., coming into the room about that time, requested them to stop and on their refusal to do so, grabbed at one or both of them; that the defendant D., then fled, the defendant S. and deceased following him; and that as they went through the door he saw a knife in the hands of deceased, but did not see S. with any. He also stated that he made no effort to prevent the fighting. The presiding judge then asked the witness the folowing question: "Do you mean to say that you remained there and saw these men fighting with knives and did not interfere in any way to prevent it?" Whereupon the attorney for defendants remarked that the witness had not said that he saw them fight with knives; and the judge responded: "The jury will be the judge of that. I am examining the witness and you can object if you don't think it proper." *Held*: That as the guilt of S. depended on his participation in the wounding of the deceased, the question and reply of the judge—which the jury may reasonably have taken to indicate an opinion that he was concerned in the stabbing—tended to deprive him of his constitutional right to have the judgment of the jury in deciding the facts of the case, unaffected by any opinion of the judge. Ib.

DAMAGES.

Recoupment of, in action against landlord for conversion of tenant's crop, see RECOUPMENT, 1; Recoverable on discharge of attachment, see ATTACHMENTS, 1-4. See also RAILROADS, 7, 9-13; REPLEVIN.

1. *Measure of: Conversion of chattel.*

Where a mortgagee of personal property takes and sells it in the exercise of a right existing under the mortgage, and becomes a wrong-doer only by reason of the improper method of exercising his right, he is liable to the mortgagor, in the absence of special damages, only for the value of the property at the time of its conversion, less the amount of the mortgage debt. Jones v. Horn, 19.

2. *To father from death of son: Measure of.*

In an action against a railway company to recover for the benefit of

in its commission, if the facts within her knowledge were such that she could not inform against one without implicating the other. Ib.

3. HOMICIDE: *Cause of death: Maltreatment of wound.*
Where one unlawfully inflicts on another a dangerous wound which proves to be mortal, he is guilty of murder or manslaughter, according to the circumstances of the case, although it may appear that unskillful or improper surgical treatment aggravated the wound and contributed to the fatal result. Sharp v. State, 147.

CRIMINAL PROCEDURE.

See also CRIMINAL LAW, 1; HABEAS CORPUS; INDICTMENT; INSTRUCTIONS; PRACTICE IN SUPREME COURT, 2; WITNESSES, 3.

1. *Swearing the jury: Waiver.*
In a prosecution for a misdemeanor, it is too late after verdict to object for the first time that the jury, composed of the regular panel and sworn generaly for the term, was not also sworn specially as provided in Mansfield's Digest, sec. 2248. The defendant in such case waives his objection to the form of the oath, if he fails to make it before going to trial. Ruble v. State, 126.

2. *Failure to enter plea: Practice on appeal.*
A judgment of conviction for a misdemeanor will not be reversed because the record fails to show that a plea was entered by the defendant, where the court and parties treated the cause as at issue on the plea of not guilty. Moore v. State, 130.

3. *Instructions: Practice on appeal.*
This court will not review the refusal of the trial court to give an instruction asked for by the defendant, where all it contains that could have benefited him was given to the jury in other instructions. Sharp v. State, 147.

4. *Examination of witnesses: Remarks of judge.*
On the trial of a criminal cause the presiding judge may ask a witness any question which either party has failed to propound, and the answer to which may tend to show the guilt or innocence of the accused. But in doing so he should carefully avoid the use of language which may be taken by the jury to intimate an opinion on any fact which it is their duty to decide, Ib.

2. *Same: Proof of publication.*

An affidavit as to the publication of an order calling in county warrants, in which the affiant fails to state he is the editor, proprietor, publisher or principal accountant of the newspaper in which such order was published, or that the paper was a daily or weekly and had a *bona fide* circulation in the county and had been published therein for one month before the first publication of the order, or how long it was published, the number of insertions, or the length of time between the last insertion and the time fixed for the presentation of the warrants, is a nullity and cannot be received as evidence of the publication which the statute requires. [Mansf. Dig., secs. 1148, 4359.] **Ib.**

3. *Same: Posting notice.*

Under the statute (Mansf. Dig., sec. 1148) requiring the sheriff to give notice of an order calling in county warrants, by posting copies of the order at the court-house door and the election precincts, it is the duty of the sheriff to make a written return, setting out the manner in which he has given such notice; and the testimony of a witness that he was the sheriff's deputy when the order was made, and put up copies of the same at some of the places prescribed by law and that the sheriff, who was not then living, had presented to the county court an account charging for his services in giving notice that county warrants had been called in, is not sufficient to show that such notice was posted as the law requires. **Ib.**

CRIMINAL LAW.

See also, CRIMINAL PROCEDURE; EMBEZZLEMENT; FORGERY; HABEAS CORPUS; INDICTMENT; LIQUORS; MURDER; NEW TRIAL, 2; PERJURY; PRACTICE IN SUPREME COURT, 2; RAPE; ROADS.

1. *Finding of jury as to accomplice.*

Whether a witness for the state in a criminal prosecution was an accomplice of the accused or not, is a mixed question of law and fact; and where the jury determine the fact against the prisoner, their verdict is final, unless the testimony shows conclusively that the witness was an accomplice. Edmonson v. State, 115.

2. *Accessory after the fact: Wife of accomplice.*

The statute defining an accessory after the fact, (Mansf. Dig., secs. 1507, 1510), does not compel a wife to become an informer against her husband; and the mere fact that she has concealed a crime does not make her the accomplice of one who participated with her husband

That before the bonds were negotiated they constituted no part of the indebtedness of Hempstead county, and Howard was only liable for its proper proportion of the amount of such bonds as had been negotiated when the act creating it was passed. *Held, further*: That Howard county's proportion of the interest that had accrued on the bonds to the date of judgment, was properly adjudged against it. Hempstead County v. Howard County, 344.

COUNTY TREASURER.

1. *Informality in bond of: Action against.*

The bond of a county treasurer by the terms of which he and his sureties bind themselves that he shall truly account for and pay over all moneys which may come to his hands by virtue of his office is valid, although it names no obligee; and under sec. 1067, Mansfield's Digest, the State may bring an action on such bond for the use of the county to replace money never legally drawn from the treasury and for the amount of which the treasurer is a defaulter. State v. Wood, 205.

2. *Breach of bond.*

The failure of a county treasurer to bring public funds received by him, and not expended, into court to be counted, under an order of the county court made at a regular settlement of his accounts, is a breach of his official bond, and such failure cannot be excused by showing that the money was lost through the insolvency of a bank in which he had deposited it. Ib.

3. *Same: Measure of damages.*

In an action to recover for the breach of a county treasurer's bond, committed by a failure to keep the public funds to be paid to those entitled thereto, the adjustment of his accounts by the county court, at a regular annual settlement, concludes further inquiry as to the state of such accounts, and the amount thus ascertained to be due with legal interest from the date of the settlement is the measure of damages. Ib.

COUNTY WARRANTS.

1. *Order calling in: Notice, etc.*

In proceedings for calling in county warrants, the statutory authority under which the county court acts must be strictly pursued; and unless notice of the order making the call is given and proved in the manner prescribed by the statute, the order is a nullity as to all warrants not presented in obedience to the call. Gibney v. Crawford, 34.

county is itemized obscurely in an abbreviated form, so that it is not sufficiently intelligible to show that the services charged for were of the character for which fees are allowed by law and that the county is liable, the claim should be rejected unless the defect is supplied by evidence. Ib.

COUNTY COLLECTOR.

1. *Rates of commission: Payable "in kind."*

The commission of a collector is limited by the statute, (Mansf. Dig., sec. 5749,) to five per cent. upon the first ten thousand dollars of the whole amount of taxes collected, three per cent. upon the next ten thousand and two per cent. upon the excess over twenty thousand dollars, where the aggregate amount collected exceeds the latter sum. Each fund in which taxes are collected must be made to bear its proportion of the whole expense of collection by paying out of such fund the commission on the amount thereof. Wilson v. State, 212.

2. *Restating account: Penalties.*

When a collector credits himself with commissions in excess of the rate which the law allows, and through inadvertence or mistake, the county court approves his account, the court may at any time within two years from the date of such approval restate the account and correct the error. And if the collector fails to pay the balance against him on the readjusted account within the time in which the law requires other balances to be paid, he incurs the penalties prescribed by the statute and he and his sureties may be proceeded against as provided in sec. 5850, Mansf. Dig. Ib.

COUNTY COURTS.

See ELECTION CONTESTS.

Appeal from judgment of, see APPEAL, 1, 2; LIQUORS, 6.

COUNTY INDEBTEDNESS.

When negotiable bonds become part of.

In 1872 bonds of Hempstead county to the amount of $50,000 were prepared by the proper authorities and placed in the hands of the commissioners to be negotiated by them for the purpose of raising a fund to build a court house and jail. The county of Howard was created by the act of April 17th, 1873, and a part of the territory it embraces was taken from Hempstead. In a proceeding under that act instituted to determine what portion of the indebtedness of Hempstead county at the time Howard was formed, should be paid by the latter, *held*:

for twelve years prior to the date of the injury, and coupling cars was one of his duties. The published rules of the company, of which he had a copy, enjoined the observance of "great care" "in coupling and uncoupling cars," and forbade an attempt to make a coupling unless the draw-bars and other appliances were "known to be in good order." The rules did not require employes to couple cars having uneven draw-heads, with straight links or when the draw-heads were defective. In making couplings it is customary and considered safer to do so with the link in the moving car. The weight of a draw-head is about two hundred pounds. The plaintiff went between a standing and moving car to couple them. He saw that there was a link in the draw-head of each car. He tried to take the link from the standing car, but found it fast. He saw that the draw-head of that car was one and a half or two inches lower than it should have been and was twisted to one side. While the ordinary play of a link is from six to seven inches, the plaintiff saw that the link in the standing car had no play and that he could not couple with it without raising it up by extra force. He then took the link out of the approaching car and seizing the link of the standing car—which was a straight one—tried to raise it up and his hand was caught and injured. *Held*: That the plaintiff was guilty of gross negligence which contributed directly to produce the injury sustained, and he was not, therefore, entitled to recover. Ib.

CONVEYANCES.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; DEEDS; FRAUDULENT CONVEYANCES; INFANCY; MORTGAGES; STATUTE OF FRAUDS.

COSTS.

See SPECIAL ADMINISTRATOR, 3.

COUNTER CLAIM.

For improvements, in action for rent, see LANDLORD AND TENANT, 2.

COUNTIES.

See also COUNTY INDEBTEDNESS; STATUTE OF LIMITATIONS, 3.

1. *Claims against county: Itemizing account.*

On a claim against a county it is error to allow charges which are not itemized and show no liability on the county. (Mansf. Dig., sec. 1413.) Desha County v. Jones, 524.

2. *Same.*

Where an officer's account for fees, presented for allowance against the

CIRCUIT COURTS.

Proceedings before special judge at chambers.

While the regular judge is occupying the bench, a special judge is without judicial power to proceed with the trial of an action at chambers or to appoint a guardian *ad litem* therein. Such proceedings will not be cured by a *nunc pro tunc* order, made afterwards in court by the special judge, entering them of record as of the day on which they were had; nor will the presence of a guardian thus appointed for an insane defendant, estop the latter in a direct proceeding to vacate a judgment entered against him as the result of such trial. Cox v. Gress, 224.

COMMON CARRIERS.

See RAILROADS, 14, 16.

COMMON LAW.

Presumption as to, see RAILROADS, 14.

CONSTRUCTIVE NOTICE.

Of title, see BETTERMENT ACT.

CONTRACTS.

Disaffirmance of, see INFANCY.

Void as against public policy, see PROMISSORY NOTES, 2.

CONTRIBUTION.

As between co-sureties, see SURETIES, 1, 2.

CONTRIBUTORY NEGLIGENCE.

1. *Proximate cause of injury.*

In order to defeat a right of action on the ground of contributory negligence, it must appear that but for the plaintiff's negligence operating as an efficient cause of the injury complained of, in connection with the fault of the defendant, the injury would not have happened. St. L., I. M. & S. Ry. v. Rice, 467.

2. *Same.*

The plaintiff sued the railway company to recover for an injury to his hand, sustained while in the employ of defendant as yard foreman. He had been in the employ of railroads as brakeman and yard foreman

BAILEE.

Conversion of money by, see EMBEZZLEMENT, 1.

BETTERMENT ACT.

Constructive notice of title.

The constructive notice of title which is implied from the registry of a deed, is not in itself sufficient to preclude a defendant who has improved land in good faith, under the belief that he is the owner, from recovering for his improvements under the betterment act. Shepherd v. Jernigan, 275.

BILL OF EXCEPTIONS.

1. *Certificate of judge.*

Pursuant to an order of the court made during the term at which a cause was tried, a bill of exceptions taken therein by the defendant was presented to the court at the next term, and the judge's certificate thereto, after referring to the order proceeds as follows: "No counsel appearing for the plaintiff, I am unable to remember the testimony as given upon the hearing, but I have no reason to doubt it is correctly set forth in the foregoing bill of exceptions. Therefore, the said bill of exceptions is now by me signed and made part of the record in this cause with this explanation." *Held*: That since the judge was unwilling to accept the bill as true and did not sign it for the purpose of evidencing the fact of its correctness, it was not sufficient to bring the defendant's exceptions upon the record. Kansas City, Springfield & Memphis Railroad Co. v. Oyler, 278.

2. *Allowing time to prepare.*

The practice of allowing time in which to prepare a bill of exceptions is provided for by the statute, Mansf. Dig., sec. 5157, to prevent delay or a failure of justice and is intended to apply only to cases of necessity. Ib.

BONDS.

Of county, see COUNTY INDEBTEDNESS.

See also, COUNTY TREASURER, 1-4; SURETIES, 1-2.

BURDEN OF PROOF.

As to aiding and abetting sale of liquors, see LIQUORS, 17, 18.
As to injury received by employe of railway company, see RAILROADS, 18.
As to notice, etc., of sale made under special statutory authority, see SALES, 2, 3.

which recites that they are indebted to the parties who sold the goods to L., giving the amount due to each, and making them, with others, preferred creditors. *Held:* That the preference given to the debts assumed for L., not being for his benefit, will not avoid the assignment on the ground that he was a party to the assignor's fraud; and that until proof of fraud, *prima facie* sufficient to set aside the deed, its recitals are sufficient to show that the assumed debts are genuine, and the assignee is not called upon to produce other evidence of that fact. Ib.

ASSIGNOR.

Authentication of claim by, see JUDGMENT, 4.

ASSESSMENTS.

See TAXES, 1, 2.

ATTACHMENTS.

1. *Damages recoverable on discharge of.*

On the discharge of an attachment only such damages as are strictly compensatory, can be assessed against the plaintiff in that proceeding. The defendant can recover nothing on the ground that the attachment was maliciously sued out. Goodbar v. Lindsley, 380.

2. *Same: Precipitating process of other creditors.*

A plaintiff in attachment is not liable for an injury resulting from the sale of the defendant's property under executions sued out by other creditors and levied upon it simultaneously with the order of attachment, although the issue of the executions may have been precipitated by the example of the plaintiff. Ib.

3. *Same: Levy upon books of account.*

A debtor's credits can only be levied upon by garnishment or judicial proceedings; and the seizure of his books of accounts under an order of attachment—being a levy only upon the materials of which the books are composed—will not render the plaintiff in attachment liable for the loss of debts through a supposed inability to collect them while the books were held by the sheriff. Ib.

4. *Same: Expense of attending trial.*

The personal expenses of a defendant in attachment, incurred, not in resisting the attachment, but in prosecuting his suit for the injury it has caused, cannot be included in the amount of damages to be assessed on the bond of the plaintiff. Ib.

2. *Same: Certifying transcript of record.*
Where an appeal is allowed from the judgment of a county court, the circuit court acquires jurisdiction of the proceedings on the filing there of the original papers, and may cause the clerk of the county court to certify a transcript of that court's record entries. Ib.

APPROPRIATION OF PAYMENTS.

1. *To items of running account.*
The ruling in *Kline v. Ragland*, 47 Ark., 111, that where a debtor fails to appropriate payments made by him and his creditor appropriates them to a running account, the law will apply them to the items of the account in the order of their dates, is approved. Lazarus v. Friedheim, 371.

2. *Right to make.*
After a controversy has arisen between a debtor and his creditor, neither of them has the right to make an appropriation of payments. Ib.

ASSAULT.

With intent to rape, see RAPE, 1, 2.

ASSIGNMENT.

Of judgment, see JUDGMENT, 1, 3.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. *When set aside for fraud of assignor: Act of* 1887.
A deed of assignment for the benefit of creditors, made prior to the act of March 31st, 1887, is not affected by that act and will not be set aside on proof of a fraudulent intent on the part of the grantor alone. To invalidate such deed it must be shown that the assignee or creditors to be benefited, knew of the assignor's fraudulent design, or had knowledge of facts sufficient to lead to its discovery. *Hempstead v. Johnson*, 18 Ark., 123; *Cornish v. Dews*, Ib. 172, and *Mandel v. Peay*, 20 Ark., 325. (The act referred to provides that proof of fraud on the part of the assignor, whether known to the assignee or not, shall be sufficient.—REP.) Hill v. Shrygley, 56.

2. *Preference of assumed debts: Recitals of deed.*
L. sold a stock of merchandise to W. & F., in consideration of which they assumed the payment of his indebtedness for the goods. They afterwards executed a deed of assignment for the benefit of their creditors,

ADMINISTRATOR.

Execution on judgment against, see EXECUTION, 2, 3.
See also ADMINISTRATION; SPECIAL ADMINISTRATOR.

ADVANCEMENT.

Presumption of: Rebutting evidence.

Where a father purchased land and caused it to be conveyed to his imbecile daughter, declaring at the time of directing the conveyance to be made to her, that he did so in order to make provision for her on account of her infirmity, proof that he stated as an additional reason for the conveyance that he wished to exclude his second wife and her children from the benefits of the land, and expressed the opinion that as his daughter's natural guardian he would be able to enjoy the use of the property, is not sufficient to overcome the presumption raised by the law of an advancement to the daughter, but, on the contrary, confirms it—such exclusion of the wife, etc., being consistent with a gift to the daughter. Eastham v. Powell, 530.

AGENTS.

Authority in sale of land, see STATUTE OF FRAUDS, 2.
Bonus paid to in borrowing money, see USURY, 3-6.

AMENDMENT.

Of judgment, see PLEADING AND PRACTICE, 7.

Of justice's docket.

Although a justice of the peace may amend his docket so as to make it speak the truth in a proceeding previously had before him, he must do so on proper application and after notice to the party legally interested. And where it does not affirmatively appear that notice of such application was given the amendment is void. Levy v. Ferguson Lumber Co., 317.

APPEAL.

In proceedings under three-mile law, see LIQUORS, 6.

1. *From judgment of county court: Allowed without formal prayer.*

Under Mansf. Dig., sec. 1436, where the statutory affidavit for an appeal from the judgment of a county court is filed with the circuit clerk, he may act upon it and perfect the appeal without any formal prayer therefor. Hempstead County v. Howard County, 344.

action on his bond, brought under the statute, [Mansfield's Digest, sec. 199,] by a creditor or "other person interested," it should be paid to the administrator *de bonis non* as assets of the estate—although he could not, under the statute, nor at common law, have maintained the action in which it was recovered. Ib.

8. *Same.*

An administrator *de bonis non* may maintain a bill in equity to prevent, by injunction and other appropriate orders, the loss or misapplication of a fund recovered by an insolvent distributee from the administrator in chief, and which is required for the satisfaction of creditors. Ib.

9. *Payment of debt before grant of letters.*

The plaintiff's intestate at the time of his death was justly indebted to the defendant in the sum of $300, on which interest had accrued. His estate consisted of personal property of the value of $900, to one-third of which the plaintiff was entitled as his widow. Before the grant of administration she paid the defendant out of the assets of the estate the sum of $300, which he accepted in full satisfaction of his claim. She subsequently obtained letters of administration on the estate and brought this action as administratrix to recover the money paid to defendant. The deceased owed no other debt—there were no debts due to him and the plaintiff administered on the estate solely for the purpose of recovering in her representative capacity the sum she had paid to the defendant. *Held*: That the plaintiff is not entitled to recover, as the payment she made to the defendant discharged in the interest of the estate, a debt which she would have been bound to pay in the regular course of administration, and the settlement thus made should not be needlessly disturbed. Rainwater v. Harris, 401.

10. *Allowance for expenses of deceased administrator.*

When an administrator expends money in preserving the estate of his intestate and dies without having presented an account thereof to the probate court, leaving his accounts unsettled, the sum thus expended may be allowed as expenses of administration on a final settlement of his accounts which may be had at the instance of his personal representative. But until such settlement and until it is shown thereby that a balance is due the deceased administrator, his administrator can collect nothing from the estate he has administered, on account of such expenditure. Smith v. Davis, 415.

and the consent of the defendant that such charges may be investigated, will give to a court of equity no jurisdiction to grant relief thereon, except upon such proofs as would sustain specific charges amounting to a cause of action. Ib.

4. *Same: Surcharging accounts.*

On a bill to surcharge and falsify an administrator's accounts, he will not be charged with the value of notes and lumber belonging to the estate, alleged to have been unaccounted for, when it is not shown that the notes were collected, or that the lumber was sold and the money appropriated by the administrator to his own use, and where, so far as the proof shows, such notes and lumber still belong to the estate. McLeod v. Griffis, 14.

5. *Same.*

In a proceeding to falsify and surcharge the settlement accounts of an administrator, the chancellor referred the case to a special master to state an account. The defendant excepted to the master's report and his exceptions were sustained to all the paragraphs of the report except the fourth and fifth. A decree based on those paragraphs was reversed, on the defendant's appeal, and the case was referred to a special master appointed by the supreme court. As there was no appeal by the plaintiff, the inquiries of the master were confined, by the order of this court, to the statement contained in the fourth and fifth paragraphs of the report made by the master in the court below. The master appointed here allowed credits amounting to a large sum, which the administrator had neglected to take in his probate settlements, and charged him with a smaller sum, with which his answer admits he was erroneously credited in such settlements. *Held*: That although the item thus charged is not contained in the statement submitted to the master, yet, as the credits he allows the administrator can only stand upon the principle that whoever demands equity must do equity, their allowance should, by the same rule, be upon terms of charging him with the item which he admits to be due from him to the estate. Ib.

6. *Action for waste of assets: Rights of distributees and creditors.*

The distributee of an estate is not entitled to maintain an action against the administrator for waste or conversion of assets, without showing that the claims of creditors have been satisfied; but if such suit is sustained a judgment obtained therein by the plaintiff is not binding on absent parties in interest, and he is only a trustee for the benefit of those entitled to the fund recovered. Brice v. Taylor, 75.

7. *Same: Right of administrator de bonis non.*

When it becomes necessary to remit to the probate court for administration, a balance recovered from the administrator in chief in an

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ACCESSORY.

After the fact, see CRIMINAL LAW, 2.

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ADMINISTRATION.

Assignment of judgment recovered by administrator, see JUDGMENT, 2-4. See also, EXECUTION, 2, 3; SPECIAL ADMINISTRATOR, 1-3.

1. *Jurisdiction of equity over settlement of administrator.*

On a bill to impeach the settlement of an administrator, the inquiry of the chancery court is limited to such items of the account as are affected by charges of fraud, accident or mistake, and all other parts of the account should be left to stand as they are. McLeod v. Griffis, 1.

2. *Same.*

A matter which the probate court has passed upon in the settlement of an administrator's account, cannot, in a chancery proceeding to falsify and surcharge such account, be assigned as fraudulent or as the result of accident or mistake, except upon the statement of some fact or circumstance which the probate court did not consider. Ib.

3. *Same: Allegations and proofs.*

A bill to impeach the settlement of an administrator, which contains only general charges of fraud, accident or mistake, without specifying in what the fraud or mistake consists, states no cause of action;

es of the gentlemen whom the bar have deputed to present them here.

The court then adjourned out of respect to the memory of the deceased.

power of his analysis reduced the voluminous mass of a confused record to the simple statement of a few facts which presented the legal aspect of the cause, and the force and clearness of his intellect resolved the problems which were intricate in their origin into a judgment so lucid that the wonder to others was why doubt or hestitation had ever existed. With a plain bluntness that was indicative of his nature, his simple judicial style gave concise form to abstract principles and made them clear to the common mind. He has not encumbered the reports with superfluous matter. To his opinions in them more than those of any other Judge may we look for models of pithy brevity. Judicial reputation is the growth of time—it is never established in a day, and rarely even in the short period which was allotted to Judge Smith on the bench. His lasting impress is, however, on our jurisprudence for its good. The regret is that a career which gave promise of so much usefulness, should not have had its full development. If the light of after days shall disclose that error has somewhere crept in unawares to mar it. let the magnitude of his labor be remembered and the brief time in which it was dispatched. In rapidity of work our judicial annals furnish no parallel, and it would be more than mortal to find perfection in it.

In his lofty courage, which was never moved by any prejudice, or by public clamor which at times has swayed officials—in his honest, sturdy manhood, he stands out great as a Judge and great as a man needed by the times in which he served.

While we grieve at his loss, we may rejoice that once he lived and presided here, and has left his example to reproduce his virtues. As an aid to that end, the resolutions will be spread on the records of this court and will be published in one of the volumes of our reports, with the address-

common attainment; but they are not for that reason subject to be criticised as exaggerations; and, what is perhaps more more striking, the admiration which we are forced to yield to the memory of his virtues is not shadowed by any fear that the contemplation of the other side of his character may disclose more of man's infirmities than has fallen to the common lot. Candor and justice do not require that we should withhold praise because perfection has not been found, for that is beyond the feeble faculties of man; nor should it be, withheld because the intellectual pitch of the world's first minds has not been reached. When a character is so moulded that each of its attributes lends strength to all the others, and under the strong mastery of a practiced will, constantly impels the man to act the whole of all he knows of the high and true—the admiration, I may almost say the adoration, of his fellows is challenged. Of such rounded completeness was the character of Judge Smith. It may not have attained to perfection at any point, but it was replete with elements of moral and intellectual strength.

His was a bold, just and impartial spirit that spurned dissimulation, evasion and wrong. Reading had made him a full man, and he was ready and exact in making practical application of his knowledge. He combined a clear view of what was theoretically desirable and just with that which was legally practicable. These qualities, joined to an aptitude for intense labor, and directed by a logical mind which was never uncertain in the conclusion it reached, and rarely wavered in reaching it—save in obedience to honest doubt, which has been called the beacon of the wise—fitted him above other men for judicial office.

He possessed the master faculty of the Judge—that of laying aside the non-essentials in a cause and seizing on the point of decision to press it through unwaveringly to the end. The

taking industry allowed investigation to stop at nothing short of iron-handed justice, wrought out and attained by and through the principles expressed in that learning by devotion to which he had engrossed the best years of his life.

"2. That to the family of the deceased we tender assurances of our most sincere sympathy.

"3. That the Secretary be, and he is hereby requested to furnish a copy of these proceedings to W. P. Grace, Esq., M. L. Bell, Esq., and S. M. Taylor, Esq., with the request to act as a committee in presenting the same to the Jefferson Circuit Court for such action as to the court shall seem proper.

"4. That the Secretary be, and he is hereby requested to furnish W. P. Stephens, Esq., with a copy of these proceedings, with a request to present the same to the Supreme Court of Arkansas, for such action as to the court shall seem proper.

"5. That the Secretary be, and he is hereby requested to transmit an engrossed copy of these proceedings to the family of deceased.

"The resolutions were unanimously agreed on, whereupon on motion, the meeting adjourned.

W. M. HARRISON,
Chairman."

C. G. NEWMAN,
Secretary.

And now, with a sad heart, in accord with the gloom that overhangs this court, the bar of this city, and the bereaved family of the honored dead, these resolutions are respectfully presented for such action as to the court shall seem meet.

Chief Justice Cockrill responded as follows:

The resolutions of the bar which have been presented to the court have set the moral and intellectual attributes which adorned the character of Judge Smith beyond the reach of

State, though "contracted in one brow of woe," cannot call him back again, for

"Who can win back the wind,
Beckon lost music from a broken lute,
Restore the redness of a last year's rose,
Or dig the sunken sunset from the deep,
Or call a gifted spirit back again?"

But his desert speaks yet, and we should wrong it

"To lock it up in the wards of covert bosom,
When it deserves, in characters of brass,
A forted residence 'gainst the tooth of time
And razure of oblivion."

By leave of the Court, I will read the resolutions of the Pine Bluff Bar:

"The Hon. Wm. W. Smith, the once able Associate Justice of the Supreme Court of our State, has passed away.

"To him the destroyer came not like a thunderbolt or a thief in the night, but after a long and painful illness, which made him fully aware of his approaching end and enabled the public, as well as his more immediate friends, to await with whatever of resignation comes with a sense of the inevitable, the great loss and sad bereavement which so certainly appeared in store.

"His integrity was never impeached, even in thought. His public course was as spotless as the ermine he wore, and his private life as pure and simple as that of a child.

"It is but proper that the bar of the Jefferson Circuit Court should give an expression of their appreciation of the departed Judge and as well also a sense of the public loss which has fallen on the bar and the whole State in common. Therefore, be it.

"*Resolved,* 1. That in the death of Justice Smith, we have cause to mourn the loss of a truly good man, a citizen devoted to the good of his country, and a Judge upright and fearless, whose unswerving integrity and laborious and pains-

morials of his talent, which the pitiless tread neither of progress nor of time can ever efface.

But in his exalted position here, the most honorable and, therefore, the most coveted that a lawyer of Arkansas can attain unto, his painstaking research, his splendid legal mind and his judicial acumen were more clearly manifest; and here, too, his virtues shone most brightly. If at times he was constrained by a sense of duty to adhere closely to the rigorous rules of the common law, nevertheless he was ever ready to season justice with mercy, and as far as possible to soften down all asperities by an application of the milder and more liberal doctrines of modern equity; and with a mind ever hungering and thirsting after truth, he aimed always at doing justice, and "offence's gilded hand" never dared attempt to shove it by.

His integrity stood without blemish, and his career was such that any eulogium seems superfluous; and the evidence of his industry, zeal and merit conserved in perpetual memory here in these records will be a monument as lasting as the rock-crowned and rock-ribbed hills that encompass this Capital City, and all sufficient to secure his fame to coming times, and in harmony with his deeds, the monument that marks the final place of repose for his body should be of white marble, typical of his purity of life, with inscriptions of something peculiar to Westminster Hall, mingled with reminiscences from our own courts—part English, part American—symbolizing his knowledge of the jurisprudence of both countries, and chiseled in the shaft, a tripartite engraven with a passage from each of the three great fountains of equity law—the code of Justinian, the opinions of Lord Hardwick and the works of our own immortal Story—to indicate to the passer-by the comprehensive views of him whose death we so justly deplore. He is gone, and the

Upon receiving the unwelcome intelligence that the Hon. Wm. W. Smith was no more, speedily the lawers of our city assembled in sadness to bewail the great loss, to do honor to his name and to offer a fitting tribute to his memory, and I am under commission from them to expres to the attorneys throughout the State our most intense fellings of regret, to mingle our sorrow with the general gloom, and moreover, to tender our sympathies to this honorable Court on this sorrowful occasion.

In yielding to the mysterious workings of that *Vis Major* which is beyond human control, our minds involuntarily turn for respite to the life-work of our departed friend, brother, associate and co-worker, and cheer and comfort meet us, for his mind was brim full of pure thoughts, his habits were sinless, as they were uniform, and his daily intercourse with mankind was marked by the broadest charity and the most hearty and manly good will, and within his bosom there never entered an unpleasant motion of an evil design against his fellow-men.

Plainly, he was a good man.

We all do know how energetically he worked and how logically he thought and reasoned as a lawyer. It is my good fortune, when at my office, often to refer to the set of Arkansas Reports used by Judge Smith when engaged in the practice, and I am continually reminded of his labor and the care and accuracy with which he considered every question of law, whenever I read the marginal notes which his handiwork has interspersed here and there throughout these volumes. Work—work—work is the brief, but the truthful history of his life.

The bright and blameless record he made at *nisi prius*, and his briefs in this Court—gemmed and sparkling with the clear principles of truth and justice—remain with us as me-

which do so much to soften and beauty life. No man endeavored more earnestly to fulfill all the duties of society as they came to him, and a truer friend or one more willing to oblige could not be found.

He despised sham, cant and hypocrisy, and was as open as the day, being, indeed, an "Israelite in whom there was no guile."

His life was blameless as became a devoted Christian, for such he was. He believed implicitly in the truth of our holy religion, lived accordingly, and could well say at the end, "I am all right."

We have laid away in his last resting place our distinguished and lamented friend, whither he went in the full faith and belief of a blessed resurrection. A stately and beautiful column of the State has fallen.

This court can no longer profit by his wise and judicious counsel. His family, always so precious to him, is deprived of his protection and affection.

But, if you honors please, we have this consolation: we have left the recollection of a life full of purity, exalted abilities and duty performed.

We have this remembrance. Let us cherish that—

"For memory is the only friend
That grief can call her own."

Pursuant, therefore, to the request of my brethren, I now present these resolutions.

Mr. Caruth then read the resolutions adopted by the bar of the Supreme Court. They appear on a preceding page.

Mr. W. P. Stephens addressed the Court as follows:

MAY IT PLEASE THE COURT: I am deputed by the Pine Bluff bar to make known the deep grief of its members because of the demise of one who but a short time ago worthily occupied one of those seats, and who for many years before had been a ceaseless laborer in our worthy profession.

tion, a simplicity of expression which was always charming.

He wasted no words, but straightway went to the very core of things.

This characteristic directness and simplicity was exemplified in one of his last earthly utterances. But a little while before his dissolution he was asked if he was conscious of his condition. His response came clear-cut and direct, "Yes, the end is near. I am all right." That was all he said, and why should he not be "all right?" If this white-souled Christian gentleman, who had been faithful to every trust, had discharged every duty, could not afford to die, who could?

The Psalmist asks: "Who shall ascend into the hill of the Lord?" and on answering seems almost to have had our dead friend in view: "Even he that hath clean hands and a pure heart; and that hath not lift up his mind unto vanity, nor sworn to deceive his neighbor."

He loved the truth for the truth's sake; even-handed justice was what he sought, and to accomplish that no amount of labor was too great, no extent of research too much. His convictions were always followed, and it never concerned him how his conclusions were received. He neither claimed nor sought applause. His was indeed a striking and unique judical personality. All his ambitions were centered on a faithful discharge of his duties. I have, if your honor please, no hesitation in saying that nearly as any one I ever knew he filled the measure of a perfect Judge. With abilities of a character to have commanded attention at any time or place, he never sought distinction in the political world, nor was he ever induced to seek any of its glittering prizes, because he loved the law.

He was under all circumstances a gentleman. No man more scrupulously observed those courtesies and amenities

the learning of his profession, studious, careful, painstaking and the very soul of honor; but it was as a judge, in the discharge of judicial functions, that his pre-eminence was so marked. It is said of poets they are born and not made. I sometimes think it might with equal truth be said of Judges.

The profession knows that to be a good lawyer is one thing and to be a good judge is another. Something more is needed. It is the judicial mind, and Judge Smith had that to perfection. He had patience without limit, and although himself possessed of a quickness of apprehension which enabled him to grasp the situation in a moment, he was always willing to listen to the humblest and dullest of us with a courtly attention which made it an absolute pleasure to appear before him.

As a Judge in this court, I am sure I do but speak the unanimous sentiment of the bar when I say, no one could be more thoroughly competent to discharge its high, delicate and always responsible duties.

With great learning ever at hand and ready for the occasion, whatever may have been its exigency, he was always most happy and felicitous in its application to the case under consideration.

As for his judicial opinions, from the first to the last they were models.

For purity of style, for clearness of thought, for felicity of illustration and vigor of expression they stand among the finest of judicial deliverances.

His mind was clear, earnest and powerful, and all his faculties severely disciplined.

His analytical and logical powers were remarkable.

There was a delightful directness about all he said.

He called things by their right names, and no man had to read twice to ascertain what he meant. There was, in addi-

The year after his graduation he came to this State and settled in Monroe county. At the commencement of hostilities in the late war he joined the First South Carolina Regiment, commanded by Col. Gregg. He subsequently served as Captain in the Twenty-third Arkansas under Col. Adams.

When the war ended, having shown himself a brave soldier and skillful officer, he returned to Clarendon, and in 1867 formed a partnership with Simon P. Hughes, afterwards Governor, and now a Justice of this Court, in the practice of the law.

Judge Smith continued the practice of his profession at Clarendon until 1877, when he removed to Helena, where he remained until he was elected an Associate Justice of the Supreme Court of Arkansas in 1882. In the spring of 1888 a pulmonary disorder discovered itself, making it necessary for him to seek relief in rest and travel.

He made a resolute and manly struggle with his dread antagonist, undertaking weary journeyings, striving vigorously

"To hold death awhile
At the arm's end."

Gallant as was his struggle, it was fruitless. To him the end was at hand, and finding himself mortally smitten in a distant State, he came back to his home to die.

Surrounded by his family, ministered to by loving hands, without a murmur, in full possession of his faculties, fully realizing that the supreme moment had arrived, he calmly bade the world farewell.

Thus passed away a great jurist, and as clear-souled and clean-handed a man as this age has produced. Great intellectually, he was no less great morally and spiritually. My acquaintance with him began in 1878. To have known him was a privilege, and to have had his friendship I account one of the most fortunate events in my career.

He was an admirable practitioner, splendidly equipped in

ings of this meeting be forwarded by the Secretary thereof to the family of the deceased.

Respectfully submitted,

SOL F. CLARK,
U. M. ROSE,
E. W. KIMBALL,
JOHN FLETCHER,
J. W. BLACKWOOD.

Committee.

The resolutions were adopted, and the chair appointed Judge Rose to present them to the United States Court; Mr. George W. Caruth to present them to the Supreme Court; Mr. W. C. Ratcliffe to present them to the Pulaski Chancery Court, and Mr. E. W. Kimball to present them to the Pulaski Circuit Court.

SUPREME COURT OF ARKANSAS,
SATURDAY, MAY 18, 1889.

Present: Sterling R. Cockrill, Chief Justice; Burrill B. Battle, Monti H. Sandels, Wilson E. Hemingway and Simon P. Hughes, Associate Justices.

Mr. Geo. W. Caruth addressed the court as follows:

MAY IT PLEASE YOUR HONORS: W. W. Smith, the senior Associate Justice of this Court, departed this life, after a long illness, on the eighteenth day of December, 1888.

On that day his professional brethren, keenly alive to the great calamity which had befallen both them and the State, took order touching his death, adopted a series of resolutions feebly expressive of their feeling of admiration, love and respect for their deceased friend, and deputed me to present them in this tribunal, that they may be writ upon your Honors' records, there to remain as long as those records themselves remain, as an earnest, heartfelt, but inadequate tribute to that upright Judge. As I speak these words I am pain-

fully impressed with the frequency with which death has flung its awful shadow over and about this chamber. When I came here but a few years ago to be enrolled at this bar—and oh, how short and swift have been those years—there sat on the bench, English, whose kindly features look down on us from yonder speaking likeness; Walker, whose strong, rugged personality made him so great a figure in our jurisprudence, and Harrison, English and Walker, after serving their country with fidelity and ability, now sleep with their fathers.

Harrison alone is left. Then came the courtly and learned Eakin, who soon wearied of the struggle and went to join the wife of his youth, who had preceded him to the great hereafter. There at the Clerk's desk sat Luke E. Barber, whose presence here was a benediction for so many years, and by his side his deputy, his brother Gwyn; both are gone.

Following fast and quick after these distinguished dead came our lamented friend, and another Judge of this Court ceased from his labors.

In delivering addresses of this character, one is naturally apprehensive, lest, following the admirable maxim, *de mortuis nil nesi bonum,* exaggerated phrases and extravagant eulogiums would find a place. But in this instance it is but the plain truth when I say my apprehension is not that I will say too much, but too little; in a word, that I will not be able to do simple justice to the exalted character, great abilities and lovable qualities of him of whom I now speak. No language I could employ would be too strong in expressing my own estimate of the man and the Judge.

Judge Smith was a native of South Carolina, born near Cokesburg, in the year 1838. He had the benefit of a collegiate education, having graduated from the South Carolina College in 1859.

his matured faculties, enriched by long, laborious and careful study, fitted him in a peculiar manner for the administration of justice, and for the acceptable discharge of all functions of his high office. As he attained not the honors of his position through any devices of personal ambition, but was called to it by the concurring voice of the bar and the people, he disappointed no expectation, and his performance of its important duties was distinguished in an eminent degree by learning, discrimination, judicial ability of a high order, unflagging devotion to labor, a sense of justice that presided over every investigation, pefect uprightness and integrity and that impartiality, moral elevation and stainless purity of character that are the highest attributes and the most shining ornaments of the bench. Conservative in sentiment, he was yet the friend of every rational amelioration of the law; with a steady regard for legal precedents, he never ceased to search the principles which they were intended to illustrate; he neither believed that time could consecrate a wrong, or that innovation and novelty are necessarily meritorious expedients. His opinions, which will have a lasting effect on the development of our jurisprudence, clear without being diffuse, display in a forcible and convincing manner the resources of an active, earnest, able and well-disciplined mind. In private life, Judge Smith was very far above any shadow of reproach. At the foundation of his character was an unfailing sense of rectitude, a conscientious regard for the rights and a tender respect for the feelings of others. Not only in profession, but by long and habitual conduct, extending to every act and relationship, he displayed the graces and exemplified the virtue of a Christain life. Firm in his own beliefs, he was free from any taint of dogmatism; he instilled into his creed the animating principle of an all-pervading charity, which made him tolerant of differing opinions, and excited his sympathy and compassion for conduct having its

origin in human weakness, which he could not approve. The language of censure rarely fell from his lips, and in his intercourse with his fellow men he followed the great exemplar of the law in giving to the accused the benefit of every reasonable doubt.

1. *Be it resolved,* That to the bereaved family of the deceased, the bar tender their heartfelt and respectful condolence in their present deep distress.

2. *Be it further resolved,* That in token of our love and respect for the memory of the deceased, we wear the usual badge of mourning for the period of thirty days.

3. *Be it further resolved,* That we recommend that copies of these resolutions be presented to the Supreme Court, to the United States Court, to the Pulaski Chancery Court and to the Pulaski Circuit Court, by members of the bar to be appointed by the chairman of this meeting, with a request that they may be extended on the records of said courts.

With this imperfect estimate of the character of the deceased keenly alive as we are to the sorrow and pain of the broken ties of family and friends, we consider his death at this time as nothing less than a great public calamity.

We therefore recommend that as a sincere and solemn declaration of the worth of the deceased, the bar here present may, by approving this report, give its public sanction to the sentiments that we have endeavored to express, in words which may be accepted as an inadequate memorial of the qualities and virtues of him whose loss we are called on to deplore.

We also recommend the adoption of the following resolutions:

4. *Be it further resolved.* That the bar attend the funeral of the deceased in a body.

5. *Be it further resolved,* That a copy of the proceed-

off from the controlling points by any wavering desire to follow up useless investigations.

The duties of his office circumscribed the limits of his ambition, and he delighted in their performance—not from any sense of pride of place or power, for he was of a sturdy mould that despised ostentation, and recognized more and more as the swift years went by that office-holding is among the least of the pleasures or personal benefits of life. His ambition was to be useful to his fellow-men by the faithful performance of a sacred trust. No standard of honor was higher or sense of justice more robust than his. He recognized that the importance of an upright and capable judiciary cannot be over estimated in its value to the State. His aim was to lend his aid in perfecting it as far as in him lay. His effort was not with out its fruits; but what he accomplished was not by the exercise of the qualities I have mentioned alone. It avails nothing that a judge is only patient, laborious and able. There is another quality, without which these are useless. It is courage. I do not refer to personal courage, though judge Smith was endued, as I am informed by his war comrades, with as tried a courage as ever marched up to the roaring throats of deep ranged artillery—but I refer to a bravery of a higher and a rarer kind —bravery which could be steadfast under the citicism of friends and against the assaults of enemies. In this, no man, I believe, in modern or in ancient times, excelled him. No popular prejudice or partisan clamor could move him.

He was zealously devoted to duty and became a martyr to his devotion. He has as certainly sacrificed his life upon the altar of public service as did ever soldier who, at his country's bidding, met death upon the field of battle. Weary and worn with the travail of his office, he has dragged out the past year bravely battling to regain the strength he had lost in the service of his people. He is no longer

trammeled. He is delivered out of bondage. Though dead, he speaks. His voice, through his decisions, will still find audience amoung those to come after us. His impress is upon the bar and the judiciary, and through them upon the people. His influence was always for good; with him there was no retrograde movement. He despised hypocrisy and detested wrong.

While the hands of all who knew him are raised to do him reverence, would that mine had the cunning to bring the sweetest rose of all the field to deck his name, for none deserved it more. I trust that better words than I can speak will tell how his loss will be mourned and felt. I do not think it the exaggeration of praise to say that now, when he had just reached the mid-day of his usefulness, the State could have better spared any other of her best and most loyal citizens. In reverent gratitude I do thank God that he has blessed this land with the birth of such a man, and made it my privilege to know him.

Mr. W. S. McCain was appointed Secretary of the meeting.

Upon motion, the chair appointed a Committee on Resolutions, consisting of Messrs. S. F. Clark, U. M. Rose, E. W. Kimball, J. W. Blackwood and John Fletcher, who subsequently submitted the following report:

MR. CHAIRMAN: The committee to whom it has been referred to draft a suitable expression of the sentiments of the bar in regard to the recent death of our beloved brother, W. W. Smith, who was at the time of his demise the senior Associate Justice of the Supreme Court of this State, are profoundly and painfully conscious of the fact that in his death the bar and the State have sustained an irreparable loss; a loss by which they have been deprived of the services of a capable and eminent jurist, who has been cut off in the midst of his usefulness, in the meridian of his life, at a time when

IN MEMORIAM.

WILLIAM W. SMITH,

ASSOCIATE JUSTICE OF THE SUPREME COURT.

Mr. Justice Smith died on the 18th day of December, 1888. The sad intelligence of his death was announced to the people of the State by the following proclamation:

Again the State of Arkansas mourns the loss of one of her best citizens. The Hon. W. W. Smith, Associate Justice of the Supreme Court, departed this life at 11 o'clock p. m., the 18th inst., at his residence in the city of Little Rock. In his death the family has lost a most excellent, kind and affectionate father and husband; society one of its most valued and best beloved members; the bar of the State a modest, earnest, able and upright member; the judiciary a just, conscientious and able judge, and the State a citizen of great worth, faithful, patriotic and true in all the relations of life; and the church a meek, devout and consistent member. In token of respect for his memory, the flag on the State-house will be lowered to half-mast until after his funeral, and the offices of the State government will be closed on Thursday, December 20, after 12 o'clock m., that the State officers and employes may attend the funeral.

SIMON P. HUGHES,
Governor of the State of Arkansas.

Immediately after this annoucement a meeting of the bar of the Supreme Court was held in the Supreme Court-room. The meeting was called to order by Governor Hughes, and upon his motion Chief Justice Cockrill was requested to act as chairman. On taking the chair, and after making other remarks appropriate to the occasion, judge Cockrill spoke of Judge Smith as follows:

He came upon the bench six years ago, admirably equipped and prepared for the discharge of the duties of his office. His previous training had been rigid from close and systematic study. Those who knew him had no apprehension as to his career upon the bench, for they knew that he brought to bear upon its duties an aptitude for labor, and a well-trained mind that was clear and logical and never uncertain in its conclusions. They have not been disappointed in the result. His labor was gigantic. Immediately upon his entry upon the bench it was perceptible that business was dispatched more expeditiously, and even the most critical will be compelled to acknowledge that his work was well done. He may have committed errors. He must have been more than mortal not to have done so. In the discharge of his duties he was industrious, unassuming and far-seeing.

He had the patience and willingness to hear and to learn, which it has been said is, in the assemblage of judicial qualities, perhaps the rarest and most valuable. His lucid and logical manner of statement is apparent to all who have listened to or who have read after him. His judical style is simple and direct. It was never diffuse and rarely ambiguous. It was in these respects but the reflex of his character, for he was ingenuous, frank and direct to a greater degree than any man I have ever known. These qualities, aided by his clear perception and power of mental concentration, enabled him quickly to detect non-essentials in a cause, and penetrate at once into the very heart of a controversy—rarely being led

IN MEMORIAM

RULE 23.

ADOPTED BY THE SUPREME COURT, JUNE 29, 1889.

The abstract of the record required by Rule IX, and all briefs filed for the use of this court, shall be printed in clear type, not smaller than small pica, double leaded, except in cases where counsel shall certify that a litigant is unable to pay for his printing and that the counsel is serving in the cause without fee.

Six copies of the abstracts and of each brief shall be furnished for the use of the court, and one for each of the opposing counsel within the time and in the manner now provided by the rules.

The cost of printing, not to exceed $15 a side, shall be taxed against the losing party as costs of this court.

no lien arises in favor of the vendor to enforce its performance. Bell v. Pelt, 433.

WAIVER.

See PLEADING AND PRACTICE, 4; EXECUTION, 1.

WILLS.

1. *Attesting witness may subscribe by mark.*

One may become an attesting witness to a will by making his mark, although the person who writes the name of the witness fails to attest that fact by signing his own name in accordance with section 6344, Mansfield's Digest, which defines "signature" to include a "mark when the person cannot write, his name being written near it and witnessed by a person who writes his own name as a witness." Davis v. Semmes, 48.

2. *May include after acquired lands.*

When a will manifestly designs to dispose of the whole estate of the testator, as it exists at the time of his death, it will include after-acquired lands of which he dies seized and possessed. Patty v. Goolsby, 61.

3. *Construction: Estate conveyed: Power of sale.*

By the first item of his will a testator gave "his entire estate," real and personal, to his wife, "during her natural life," or until she might "think proper to marry, with full power to sell and dispose of such property as she might think proper." The second and third items are as follows: 2. "It is my desire that, at the death of my said wife, all my worldly effects be equally divided between my children." 3. "If my wife should marry, it is my will and desire that my estate of all kinds whatsoever be equally divided between my wife and children, thereby each one to share each and each alike." By other provisions the wife was made executrix and charged with the payment of the testator's debts and the education of his children out of the estate. *Held*: (1) That the testator gave to his wife a life estate in the real property with remainder in fee to his children. (2) That while, under the power contained in the will, the wife could dispose absolutely of the personal property of the testator, she could sell only her life interest in his real estate. Ib.

4. *Jurisdiction to take probate of, in common form.*

The clerk of a probate court received the probate of a will and admitted it to record. At the next term of the court the will, together with the depositions of the subscribing witnesses which were taken by the

5. *Receiving interest in advance: Bonus paid to agent of lender.*

Where money is placed with an agent, to be loaned, with the understanding that the owner shall receive the highest lawful rate of interest, and that the agent will look to the borrower for his commission, a loan of the money made by the agent is usurious, if he reserves in advance the highest lawful interest, and, in addition thereto, receives a bonus from the borrower. Thompson v. Ingram, 546.

6. *Reserving interest in advance: Bonus paid agent of borrower.*

Reserving interest in advance at the highest lawful rate on money loaned for three months, does not constitute usury. Nor will such loan be made usurious by the fact that a broker who procures it for the borrower retains for his commissions a sum in addition to the interest reserved by the lender. Baird v. Millwood, 548.

VENDOR AND VENDEE.

1. VENDOR'S EQUITABLE LIEN: *How waived: Accepting note of third party.*

The vendor of land waives his equitable lien for the unpaid purchase money when he accepts therefor the obligation of a third party, intending to rely for payment solely on such obligation, and that his vendee shall take the land unincumbered. Springfield and Memphis Railroad Co. v. Stewart, 285.

2. *Action for purchase money: Failure to make title.*

The plaintiff sold the defendant certain town lots and received from him all the purchase money except $100, the payment of which was by agreement deferred until after the execution of a deed for the lots which the plaintiff undertook to procure from M., who owned the property and had authorized the sale. Before the residue of the purchase money was due the plaintiff obtained a deed executed by M., and delivered it to the defendant who received it without objection, but on examination made sometime after its delivery, discovered that it did not convey any part of either of the lots he had purchased. When payment of the $100 was demanded the defendant refused to make it until he received a conveyance for the lots he had purchased. *Held:* That the plaintiffs were not entitled to recover the $100 until they procured according to their agreement, the conveyance of the lots purchased, which was a condition precedent to its payment. McConnell v. Little, 333.

3. VENDOR'S LIEN: *Where land is sold for cotton.*

Where an obligation to deliver cotton is given in the purchase of land,

clerk, was presented to the court, which found from the evidence contained in the depositions that the will was "duly witnessed and regular in all things" and declared it to be the last will of the testator. The court also confirmed the action of the clerk. *Held*: That the probate court having jurisdiction to take the probate of wills in common form without summoning any of the parties in interest, its judgment, which goes beyond the mere confirmation of the clerk's act, and admits the will to record on proofs submitted, is not void, and if there is error in it, the same can be corrected only by appeal. Petty v. Ducker, 281.

WITNESSES.

1. *Impeachment of: Reputation for morality.*

A witness cannot be impeached by showing that his reputation for unchastity or other particular immoral habit, renders him unworthy of belief. The impeaching testimony cannot go beyond his general reputation for morality. Cline v. State, 140.

2. *Same.*

It is not admissible to inquire whether from a witness' "reputation for truth and veracity, morality and chastity," he is worthy of belief, since an opinion is thus called for as to the effect of chastity, or a want of it, upon the credibility of his testimony. Ib.

3. *Same: Evidence sustaining.*

When the only objection to evidence introduced by the State to sustain the reputation of an assailed witness is, that it relates to a period twenty-five or thirty years before the trial, a judgment of conviction will not be reversed because of its admission, unless it appears that the refusal to exclude it was an abuse of the court's discretion. Ib.