THE COMET.

Saturday, February 1, 1879

SUPREME COURT DECISIONS.

MONDAY, *January* 27, 1879.

Reported Weekly by Jenkins & Little, Attorneys at Law.

D. T. PORTER, ET AL.,)
vs. [No. 2618.]
R. H. BRADLEY.)

Appellee, a resident of Franklin, Tennessee, owns a plantation in Tunica county, Mississippi, occupied and controlled by his two sons. In the year 1870, the said sons applied to N. Ford & Co., a mercantile firm in Memphis, Tenn., to furnish supplies for said plantation, that year. Said merchants, knowing that the land belonged to appellee, wrote him for a guaranty for the payment of the advances to be made by them to said sons. He replied that he would bind himself for the payment of the advances so made to his sons, provided they (Ford & Co.) would look alone to the property in Tunica county for the payment of any deficiency that might occur after gathering and shipping the crop of 1870. To this letter, said merchants made no reply, but made said advances during the year to an amount beyond which the crop was sufficient to pay. Ford & Co. brought suit against the sons of Bradley for the unpaid balance, obtained judgment upon which execution issued and was returned *nulla bona*. Appellants, as successors of Ford & Co., then filed their bill to subject the said land of Bradley to the payment of the debt, basing it upon his said letter.

Decree was rendered for appellee; hence this appeal.

CAMPBELL, J.

Held—

1. The generally received American doctrine, to which the Courts of this State seem to be fully committed is, "that the obligation to give notice of the acceptance of the guaranty is imperative, and will defeat the right of action, if not fulfilled, unless it can be shown that the assent of the creditor was known to the guarantor, and did not need to be communicated."

2. The distinction is made between a guaranty, and a proposal to guaranty. Whenever there is any condition in the offer to guaranty, and it is not definite, certain and fixed, so as to be concluded, notice of acceptance is held to be necessary.

3. The fact that the person offering a guaranty may confidently expect it to be accepted and acted on is, not enough to meet the requirements of the authorities. He is entitled to notice of the acceptance of his guaranty, or he will not be bound.

Decree affirmed.

JOHN H. CLOPTON, et ux.)
vs. [No. 2822.]
WM. F. DOWD.)

This is an appeal from an order refusing to set aside a *pro confesso* entered at Rules. Two years elapsed between the service of process and the entry of the *pro confesso*.

Promptly at the next term of Court appellants moved to set aside the *pro confesso*, accompanied by answers disclosing a valid defense, and filed an affidavit alleging that as soon as they were served with process, they employed counsel to file their answers, who repeatedly assured them that he had done so, and that they were not at fault in matter.

The motion was overruled, and decree final rendered; hence this appeal.

CHALMERS, J.

Held—

1. The motion of appellants to set aside the *pro confesso* and to be allowed to file their answers should have been sustained.

2. It is too harsh a rule to deprive them of all opportunity to make defense when their delay in propounding it was superinduced by reliance upon statements of their Attorney, and perhaps to some extent by the great dilatoriousness of complainants in pressing their suit.

Reversed and remanded with instructions to vacate final decree in Court below, set aside the decree *pro confesso* and allow answers to be filed and the cause proceeded with regularly.

W. F. SMYTH,)
vs. [No. 2919.]
MENKEN BROS.)

Opinion of Court by CHALMERS, J.

The plaintiff in error being indebted to defendants in error, went into bankruptcy but afterwards made a conditional but new promise to pay his discharged debt to defendants in error.

On the trial, after the testimony was all heard and the arguments of counsel partially heard, plaintiffs in Court below were permitted to amend their declaration and claim a less sum than that at first demanded. To which defendant objected and his objection being overruled he asked that the cause might be continued on account of surprise, etc., which application the Court declined to grant.

Held—

1. There was no error in excluding the proof offered to be made by Taber. It would only have shown that defendant refused to pay the debt and denied his liability. This he showed by defending this suit and by his own testimony. The fact that he did the same thing before suit in no manner strengthened his defense. The testimony was clearly incompetent.

2. It is impossible that defendant could have been surprised or injured by the filing of the amended declaration. Its only effect was to diminish the sum demanded of him. It in no manner affected the principle involved in the litigation nor affected the facts to be proved on either side.

3. Upon the merits the testimony was conflicting and we cannot reverse the verdict. It is a mistake to say that there was no evidence of an unconditional promise by the defendant.

Affirmed.

A. A. BURLESON, et al.,)
vs. [No. 2931.]
C. F. MILAS.)

Plaintiffs in error sued out an attachment against the estate of J. J. Houston, before a Justice of the Peace, founded on a promissory note for $145 41, and also a writ of garnishment against defendant in error who appeared and answered that he was a Constable of Tallahatchie county, and as such had in his hands $70 14 collected by him under an execution in his hands against one Powers in favor of said Houston, and claimed that it was not liable to be garnished in his hands.

On trial, the Justice so held and discharged said garnishee, and plaintiffs appealed to the Circuit Court which sustained the judgment of the Justice of the Peace, and plaintiffs then sued out a writ of error to this Court.

CAMPBELL, J.

Held—

1. Our statute provides for the garnishment of "any person indebted to or having effects of the defendant," and any officer who shall collect money by virtue of an execution, and shall not "immediately pay the same to the party entitled thereto, or his attorney, on demand made," is liable to summary proceedings for the money, and heavy damages.

2. The language authorizing garnishment is broad enough to embrace Constables, and a Constable who has collected money by virtue of an execution, is indebted to the plaintiff who has a right to demand immediate payment thereof.

3. The cases denying that a Sheriff may be garnished and held liable as such for money collected by him, by virtue of an execution do not rest on sound principles as applied to such officers in this State.

4. A Sheriff and a Constable occupy like positions, and are under similar obligations as to executions in their hands and money collected by virtue of executions, and we hold that a Constable may be garnished for money he has collected by virtue of an execution, and which he is bound to pay over to the plaintiff in execution.

Judgment reversed and cause remanded.

M. W. POLK & CO.)
vs. [No. 2933.]
OLIVER FINNEY & CO.)

Polk and Johnson did business as partners under firm name of M. W. Polk & Co. After the dissolution of the partnership Johnson continued the business and took out license under the old firm name at a different place from where the old firm did business. Polk hearing that Johnson was using his name remonstrated with him on his conduct and forbade the further use of his name, and gave special notice to each of the old dealers with the firm that his connection with it had ceased, but gave no notice to the public generally.

Johnson continued the business as before and under that name bought goods of Finney & Co., who sue for their price. It is not shown that Polk knew that Johnson persisted in using his name after he had forbidden its use, and it is shown that F. & Co. had never been creditors or dealers with the old firm during the proper period of its existence. Is Polk, under these circumstances, bound for the price of the goods.

Opinion of Court by CHALMERS, J.

Held—

1. A retiring partner in order to exonerate himself from future liability, must give actual notice of his withdrawal, or there must be shown knowledge on the part of those who seek to hold him liable, or at least adequate means of knowledge. As to those thereafter dealing with the firm, a retiring partner can exonerate himself from liability by publishing notice of the dissolution or by showing knowledge of the fact.

2. It is not absolutely necessary that notice of the dissolution should appear in a newspaper, but the public must be advised of the change by fair means published as widely as possible. The change must be made public and notorious by notice or advertisement, and the withdrawal of the exterior indications of partnership.

The appellant Polk did not so act as to advise the public, and is therefore liable for the debt due Finney & Co.

Judgment affirmed.

PLEASANT DUNN,)
vs. [No. 2941.]
W. H. PORTER, ET. AL.)

This case involves the construction of a contract of lease as to time.

It specified that it was "for the term of five years beginning 6th December 1873, and ending 1st January 1877." There was a subsequent clause in the contract granting "the use of said premises after the expiration of said lease 1st January 1877, for five years," upon conditions therein mentioned.

CAMPBELL, J.

Held:

1. The doubt as to the interpretation of the instrument of lease should be resolved against the lessor, whose deed it is.

2. It may be justly assumed that the matter to which the attention of the contracting parties was especially directed was the length of time for which the lease was to be made. That was the important matter. The mention of a particular day when the five years should expire was subordinate.

3. The fact that "1st January, 1877," is repeated in the instrument as the time of the expiration of the lease is not sufficient to show that the distinct specification of five years as the duration of the lease was an error.

4. A rule of law which determines the interpretation of the lease against the lessor, is that, of two clauses in a deed so totally repugnant to each other that they cannot stand together, the former shall stand and the latter be rejected.

Judgment reversed and cause remanded.

2484—H. Mitchell vs, Tishomingo Savings Institution. Affirmed.
2882—Clarke, Hood & Co. vs. Dillard & Coffin, et al. Affirmed.
2781—Wm. A. Belew vs. Geo. W. Jones. Reversed and bill dismissed.
2937—J. M. Bass vs. W. F. Tipler, et al. Affirmed.
2889—E. S. Mitchell, adm'r vs. Tishomingo Saving Institution. Affirmed.
2922—James Childers vs. The State. Affirmed.
2926—James P. Boyce, Ex. vs Rosanah Francis, et al. Reversed and remanded.

Dickens, Yates, Wilkie Collins and Fechter.

Dramatic News.

The business of the visit over, Mr. Fechter and his visitors (for there were two from New York) chatted over a glass of claret and a cigar, about the actor's friendships and experiences in England. Of Dickens, of course, he has many anecdotes to tell, for they lived almost as brothers. Fechter gave Dickens the Swiss chalet which is still to be seen outside the house at Gad's Hill, and, when the novelist came to America, lent him his faithful dresser and servant, Scott, who traveled all over America with him. Scott was attached equally to Dickens and Fechter, and when, after having returned to England, and again to America, leaving the novelist there and accompanying the actor here, Scott read the bulletin of Dickens' death outside a newspaper office, the poor fellow's nerves were so suddenly unstrung that, in announcing it to Fechter, he was seized by vapid laughter and his master thought him insane! The blow to the actor was a terrible one, and caused him to relinquish many engagements and return to England.

Of Edmund Yates, Fechter has not a high opinion, but I was delighted to find that he rates that most charming of essayists, George Augustus Sala, at his true worth. Although Sala is the most erratic of men, his genius and industry are indisputable. Fechter also speaks admiringly of Wilkie Collins. During his stay in America, Collins made his home with the actor. He wrote one of his lectures, indeed, in the room at Quakertown in which we were sitting.

THE firemen of Vicksburg, we understand, contemplate the establishment of a mutual life insurance in connection with the fire department.

FORTY-NINERS AT DINNER.

DIGGING FOR GOLD AGAIN, BUT IN COMFORTABLE QUARTERS.

New York Sun.

A crayon drawing of "Sutter's saw Mill," the scene of the discovery of gold in California about thirty years ago, hung near the entrance to the drawing room of the Sturtevant House last evening. It was drawn by Mr. G. H. Johnson, who probably took the first photograph that was ever taken on the Pacific coast. Gen. H. G. Gibson, U. S. A., Gen. George P. Ihrie, Gen. James W. Sweeny, ex-Mayor Vance, Cornelius Lydecker, the Hon. Jeremiah Sherwood, the Hon. Demas Strong, the Hon. James S. Wethered, and many other pioneers of the territorial days of California, as they complacently marched to their fourth annual banquet, and thirty-first celebration of the discovery of gold, looked up at it. The walls of the dining room were hung with shields and scrolls, inscribed with legends that were meaningless to all except the grizzled Forty-niners. But, as they read "Yankee Jims," "Mokelume Hill," "Big Oak Flat," "Red Dog," "You Bet," "Dom Pedro's Bar," "Oro Fino," "Mission de Dolores," "San Rafael," and "Santa Barbara," the floodgates of memory were opened. As they began to enjoy the oysters and sip the Rhine wine, they lived over again in story, with kindling eye and flushing cheek, the life of the canon, the gulch, and the camp. Gen. Gibson presided. A string and reed band played softly the well-remembered airs of the past as the menu, garnished with such culinary inspirations as green turtle a la Sutter and salmon a la San Francisco, was discussed. Mr. George Leland generalled the well-drilled army of waiters in the placing and the removing of the courses, and kept the champagne bottles in a constant state of pop and fizz. When the fruits and heavier wines were put on the board, many lady guests of the hotel were given seats near the door, that they might hear the speeches. Gen. Gibson delivered the opening address. Then letters of regret were read from Gens. Sutter, Sherman, Fremont, and Revere, ex-Secretary Bristow, Gov. Cobinson, Mayor Cooper, Admiral Livingston, and others. James S. Roberts read a poetical tribute to Gen. Sutter.

James J. McClosky, probably the only surviving member of the first theatrical troupe that followed the pioneers, said that every wrinkle, every gray hair that he saw about him, suggested reminiscences, humorous or pathetic, of '49. By his fireside now he recounts the events of the pioneer life. One episode he recalls with particular interest just now. On the way up to Stockton he was one of a band of gallant souls. They cared little for names of antecedents. They re-christened each other. He was known as "Red York," because he hailed from New York and had red hair. A long, thin youth, riding an unkempt and unwilling mule, joined the party. He was called the "Paper Man," because he was a newspaper correspondent.

When they reached Stockton there was not much room for choice in the way of lodgings. The "Paper Man" found an unoccupied bed in a room occupied by Capt. Ulysses S. Grant, afterward a President of the United States. The "Paper Man" was Bayard Taylor.

A KENTUCKY ROMANCE.

Why Phil Hodge Deserted his Bride the Day After the Wedding.

Cincinnati Enquirer.

Ten years ago, into Lewis co., Ky., a young lawyer named Phil Hodge married Miss Addie Sillet, amid flowers, music and the hearty congratulations of friends. At early dawn Hodge left the house, and in passing out he met a servant of his wife's father, to whom he said: "Tell your master I am gone forever." The new-made father-in-law, upon receiving this message, hurried to his daughter's room, where, to his amazement, he found her still in her wedding robes, with hair dishevelled and vail torn off, and in a state of great excitement. A severe spell of fever followed, but never in her wildest delirium, did she betray the cause of her agony, and thus it remained a theme of conjecture ever since. To a friend the other day she, for the first time, told the cause. Here it is:

HER STORY.

"Lon Follet and I have been raised together. I had received most marked attention from him, but I never dreamed of marrying him, for he had a mother and sister depending upon him for a livelihood. Phil. Hodge, whom I had known a few years, courted me. I accepted him, and my admiration for him tempted me to believe I loved him. The night of our wedding, Lon and I were sitting a little apart from the crowd; our conversation was only of ourselves, and I confess I then felt Lon loved me, and he was more of my happiness than I had ever dreamed. Phil. Hodge overheard a few words and saw our earnest manner. When he came to my room he found me dressed still as I was when I left the parlor, and showing his surprise, asked me what was the matter with me, to which I answered, as indifferently as possible: 'Nothing.' We exchanged several commonplace remarks, after which he asked me quite harshly: 'Addie, did Lon Follet ever tell you he loved?' I answered, 'No.' 'What was your conversation tonight?' His eyes were upon me; I dared not tell aught but the truth; they seemed to pierce me through.

I TOLD THE WOULD TRUTH,

And when I had finished he said with coldness, calmness, and stubborn resolution, 'Addie, you love Lon Follet; he shall marry you. We will never meet again.' I begged him on my knees not to leave me, but it was of no avail. When the dawn came he kissed me good-bye, and with a 'God bless you,' passed out from me forever. My feelings were indescribable, the room was horrible in its darkness, my mind lost its reasoning powers, and thus I passed many weeks. Through a mutual friend I heard from him often, of his wanderings, desolate life, and death upon the frontier. Well have our blighted lives paid the penalty of this false step. When Lon heard of his death he came immediately to see me. I refused to see him. Then he wrote a long letter, telling of his love, his never forgetting me an hour these long years, and I have consented to marry him; but we will not meet till our wedding night, January 9, 1879."

THE Seashore Gazette reports two cases of yellow fever at Handsboro last week.

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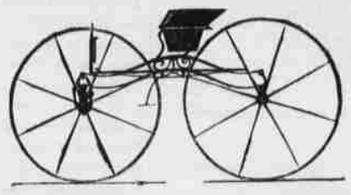

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