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JUDGES

OF THE

SUPREME COURT

DURING THE PERIOD OF THIS VOLUME

EDGAR A. McCULLOCH, - - -	CHIEF JUSTICE.
CARROLL D. WOOD, - - - -	ASSOCIATE JUSTICES
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CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

HOPE SPOKE COMPANY *v.* MARYLAND CASUALTY COMPANY.

Opinion delivered January 8, 1912.

1. INSURANCE—CONSTRUCTION OF POLICY.—Under the maxim, *expressio unius est exclusio alterius*, the fact that a condition is expressed in one of the clauses of a policy of insurance excludes the idea that an unexpressed condition was intended to be declared in another clause. (Page 7.)
2. SAME—CONSTRUCTION OF POLICY.—Where the language of a policy of insurance is doubtful or ambiguous, it should be given the strongest interpretation against the insurer which it will reasonably bear. (Page 8.)
3. SAME—CONSTRUCTION OF POLICIES.—If policies of insurance contain inconsistent provisions, or are so framed as to be fairly open to construction, that view should be adopted, if possible, which will sustain rather than forfeit the contract. (Page 8.)
4. SAME—FAILURE TO GIVE NOTICE—FORFEITURE.—Failure to give notice within a certain time of liability under a policy of liability insurance does not operate as a forfeiture of the right to recover unless the policy in express terms or by necessary implication so provides. (Page 11.)

Appeal from Hempstead Circuit Court; *Jacob M. Carter*, Judge; reversed.

Thos. C. McRae, W. V. Tompkins and *D. L. McRae*, for appellant.

The evidence that there was a custom or usage among insurance companies that where policies were obtained by brokers notices were sent to the broker was sufficient to go to the jury. Upon it the court would have been justified in instructing a verdict for the appellant. 3 Brewst. (Pa.) 452-456; 46 Ark. 210, 215; *Id.* 222, 226; 58 Ark. 565, 574; 85 Ark. 568.

Having without objection permitted notice to be given to Carnes & Son, appellee is now estopped to deny their authority to receive it. 85 Me. 429; 83 Me. 100; 51 N. H. 287; 16 Cyc. 791; 55 Ark. 347; 105 Mo. App. 384, 394; 79 S. W. 1013; 12 Wall. (U. S.) 681; 49 C. C. A. 555.

By its course of dealing appellee had constituted Carnes & Son its agents to receive notice and settle claims. Evidence of its course in permitting them to receive notice and to settle claims was admissible, and the court's directing a verdict for appellee was equivalent to excluding all such evidence. 3 Elliott on Ev. § § 1633-1635; 1 Wigmore, Ev. § 377. See also 52 Ark. 11, 21; 23 L. R. A. 181; 62 Ark. 562; 31 Cyc. 1219, and authorities collated; 96 Pac. 48; 17 L. R. A. (N. S.) 219, and note; 101 S. W. 130; 49 C. C. A. 555, 557; 80 U. S. 222; 36 C. C. A. 615.

Forfeitures are not favored in law, but on the contrary will be enforced only when the strict letter of the contract requires it, and particularly is this true of insurance policies. 53 Ark. 494, 499; 96 U. S. 577; 57 Neb. 622; 28 Neb. 846; 51 L. R. A. 698; 35 Col. 19; 183 U. S. 25-40; 95 U. S. 673; 151 U. S. 462; 55 L. R. A. 291; 15 Cyc. 1037.

The clause in the contract requiring immediate notice will not be literally construed. Such rule is not inflexible, but an honest effort made with due diligence to comply with it will be deemed sufficient, especially where the insurer's rights have not been prejudiced. 55 L. R. A. 290, 291, 292; 62 L. R. A. 485; 29 Pa. St. 198; 126 Pa. St. 870; 93 Am. St. Rep. 514, 518; Niblack, Accident Ins. § 415; 3 Neb. 391; 62 L. R. A. 485.

Where the policy does not provide that the failure to give notice shall cause a forfeiture, no forfeiture results. 35 Cal. 19; 9 Am. & Eng. Ann. Cases, 916; Niblack, Accident Ins. § 415; 26 L. R. A. (N. S.) 747, and note; 102 Pa. St. 281; 59 S. W. (Ky.) 863.

The question whether notice was given in a reasonable time was for the jury. 63 L. R. A. 425, 427; 1 L. R. A. (N. S.) 422; 55 L. R. A. 290; 1 Cyc. 301; 1 Am. & Eng. Enc. of L. 324; 3 May on Ins. 462.

Henry M. Armistead and *Ashley Cockrill,* for appellee.

1. The policy expressly requires immediate notice as a condition precedent to liability. The clause, "Immediate notice of any accident and of any suit resulting therefrom, with every summons or other process, must be forwarded to the home office," etc., is more clearly a condition precedent than the clause in the proof of loss provision in the standard

ERRATUM

On page 313, ninth line from bottom of page, for "13" read 322.
On page 633, fourth line from top of page, for "his" read *the*.

fire insurance policy, which this court has frequently held to be a condition precedent. 72 Ark. 484, and subsequent decisions.

This provision is a condition precedent, even though not expressly made so, and though no forfeiture clause is found in the policy. 4 Cooley's Briefs on Law of Insurance, 3570; 118 N. Y. S. 865; 99 Pac. 537; 82 N. E. 745; 67 N. E. 882; 57 N. E. 458; 63 N. E. 54. Immediate notice being an essential of the contract and a condition precedent to recovery, the question whether appellee was prejudiced by the failure of appellant to give such notice is immaterial.

2. Where the facts are undisputed, the question whether notice was given immediately becomes one of law for the court. 3 May on Ins. § 462; 63 N. E. 54; 21 N. E. 898; 2 N. E. 1041; 57 N. E. 458; 66 N. E. 481. Without regard to whether the reasonableness of the time is a matter for the court or jury, the courts have held "unexcused delays of varying length unreasonable *per se.*" 4 Cooley's Briefs, 3573; 171 Mass. 357; 67 N E. 882; 40 L R. A. 833; 44 Md. 460; 12 Wend. (N. Y.) 452; 7 Jones (N. C.) 435; 29 Pa. St. 198; Cyc. Annotations, 1910, "Liability Insurance," p. 2431; 50 N. E. 516; 36 Wash. 46; 86 Minn. 464.

Notice to Carnes & Son, general agents of the Standard Life & Accident Company, was not notice to appellee. No issue that they were agents for appellee was tendered in the complaint, and appellee objected to the introduction of testimony to show proof of notice sent to Carnes & Son as being notice to appellee.

In any event notice to Carnes, a broker, was not sufficient as notice to appellee. Ostrander on Ins., § 45; 3 Cooley on Ins., 2490; 2 Clement on Ins., 474, 475; May on Ins., § § 122, 123; Mechem on Agency, § 931; 128 N. Y. S. 805; 84 *Id.* 375; 79 Ill. 404; 83 Md. 22; 129 Ill. 599; 611; 64 N. Y. 85; 83 N. Y. 168; 36 Mich. 502; 123 Ind. 177; 36 Fed. 118; 185 S. W. 713; 66 N. Y. 464; 123 N. Y. 6; 74 Mo. 41; 53 Minn. 220; 80 N. Y. 32. Local fire insurance agents and soliciting agents of insurance companies can not waive provisions of policies relating to notice and proof of loss. 60 Ark. 532; 85 Ark. 337, 345; 75 Ark. 25. Carnes & Son, being mere brokers, did not represent appellee for any purpose, and can not be held

to have had as much power to receive notice of the accident as a soliciting agent would have had.

Parol evidence of usage or custom among insurance men for brokers to receive notices of injury is inadmissible to vary the terms of the policy. 109 U. S. 278; 196 U. S. 157. Usage is only resorted to for the purpose of ascertaining with greater certainty the intent of the parties, not to contravene their express stipulations. 44 N. Y. 495; 55 N. Y. 209; 67 Me. 83; 34 N. Y. 417; 20 Wall. 488; 62 Tex. 461; 49 Kan.178; Ostrander on Ins. p. 15; *Id.* § 27; 68 Ark. 259; 54 Ark. 423; 91 Ark. 600.

The testimony offered to establish a usage or custom was insufficient to go to the jury. To be admissible, such proof must be of a general custom, and one in existence a sufficient length of time to become generally known. 91 Ark. 600; 90 Ark. 71, 73; 58 Ark. 125; 17 Ark. 428; 20 Ark. 251; 89 Ark. 591; 81 Ark. 549; 54 Fed. 839. A usage must be uniform and notorious to be binding. Ostrander on Ins. § 27; 65 Fed. 729; 75 N. Y. 65, 77.

3. Appellee did not waive its defense of failure to give notice by investigating the accident. The investigation was made after first obtaining an agreement with appellant that it would be made under reservation of liability. 67 N. E. 882.

MCCULLOCH, C. J. This is an action instituted by appellant, Hope Spoke Company, a concern engaged in operating a manufacturing plant at Hope, Arkansas, against the Maryland Casualty Company, to recover on a policy of employers' liability insurance the amount of a loss sustained by reason of appellant's liability for an injury to Homer E. Presley, one of its employees. Presley sued appellant, and recovered judgment for damages, and on appellee's refusal to pay the judgment appellant paid it and instituted this action. The parties entered into a stipulation in the lower court to the effect that, in the event appellant should be entitled to recover at all, the amount of such recovery should be the sum of $3,812.03, with interest from September 6, 1910, the date of the judgment of the circuit court in Presley's action against appellant. Appellee defended solely on the ground that "immediate notice" of the accident was not given, as provided for in the policy, and

on that ground that the trial court directed the jury to return a verdict in appellee's favor.

So much of the policy as is material to the question now presented reads as follows:

"In consideration of forty-nine and 50-100 dollars ($49.50) initial premium, which is based on the estimated compensation set forth in the schedule below, * * * the Maryland Casualty Company, of Baltimore, herein called the company, hereby agrees to indemnify Hope Spoke Company, of Hope, * * * against loss from the liability imposed by law upon the assured for damages on account of bodily injuries, including death resulting therefrom accidentally suffered by any employee of the assured while upon the premises * * * occupied by the assured in the conduct of the business and at the places mentioned in the schedule below; provided such bodily injuries or death are suffered as a result of accidents occurring within the period of twelve months, beginning on the 1st day of April, 1909, at noon, and ending on the 1st day of April, 1910, at noon. * * * The company's liability for loss from an accident resulting in bodily injuries, including death resulting therefrom, to one person is limited to five thousand and 00-100 dollars ($5,000), and subject to the same limit for each person, the company's total liability for loss from an accident resulting in bodily injuries, including death therefrom, to more than one person is limited to ten thousand and 00-100 dollars ($10,000). In addition to these limits, however, the company will, at its own cost (court costs being considered part thereof), investigate all accidents and defend all suits, even if groundless, of which notices are given to it as hereinafter required, unless the company shall elect to settle the same. * * * Immediate notice of any accident and of any suit resulting therefrom with every summons or other process must be forwarded to the home office of the company, or to its authorized representative."

It appears from the evidence adduced at the trial that appellant had for some years carried this kind of insurance in another company, the Standard Life & Accident Insurance Company, of which W. W. Carnes & Son, of Memphis, Tennessee, were the general agents—the policy being procured by appellant from those agents through the local agent at Hope,

Arkansas. Subsequently the Standard Company decided not to carry the insurance any longer, and Carnes & Son procured a policy for appellant from appellee company through its agent, D. A. Fisher, of Memphis. This was in April, 1908, and the policy was renewed by issuance of the present policy dated April 1, 1909, both of which policies were delivered to Carnes & Son, who forwarded the same to the local agent at Hope for delivery to appellant, the last policy being accompanied by their letter reading as follows:

"We now inclose you herewith the above liability policy renewing last year's contract. We have rewritten this policy on the same basis as last year, and trust that you will find the same in order and be able to deliver. We also inclose you herewith payroll statement which we would thank you to have completed by the spoke company, showing the amount of wages actually expended by them during the last policy year. Your attention to this matter will be appreciated by

"Yours very truly,

"W. W. Carnes & Son."

In procuring the insurance from the Fisher agency, Carnes & Son were acting as brokers. The evidence shows that there is a custom or usage of business in insurance circles that "if, for any reason, an agent is not in a position to take care of a certain policy or class of insurance in the company that he represents, it is customary for him to place that in another company through their agent," and that after a policy has been issued and delivered, "in order to show a proper courtesy to the broker, all transactions of any nature, either claims, or substitutions of policies, or indorsements, should be handled through the broker, and not direct with the assured."

Presley was injured on December 22, 1909, and on the same day the local agent at Hope, upon appellant's request, forwarded notice thereof by mail to Carnes & Son, using for that purpose blanks furnished by appellee. The evidence tends to show that appellant's manager was for some reason laboring under the mistake that the liability insurance was still carried under a policy of the Standard Company. Carnes & Son overlooked the fact that the risk had been changed from the Standard to the appellee company and delivered the notice to the claim agent of the Standard Company for investigation.

The first notice mailed to Carnes & Son was lost in the mail, and appellant, on learning of that fact from subsequent correspondence with Carnes & Son, mailed them another notice on January 3, 1910. The claim agent of the Standard Company was sick when the notice was delivered at his office, and on January 17, 1910, when he returned to work, he proceeded to investigate the circumstances of the injury to Presley under the belief that the risk was carried by his company. He ascertained on January 24, 1910, that his company did not carry the policy, and he called the attention of Carnes & Son to that fact, who realized the mistake they had made, and called up the Fisher agency by telephone and gave verbal notice of Presley's injury. This notice was referred to appellee's claim agent, who went to Hope and made a complete investigation of the circumstances of the accident, but did so under an express agreement that the investigation would not operate as waiver of any of the requirements of the policy. Appellee subsequently denied liability on account of the alleged failure to give immediate notice, and thereafter Presley's action against appellant was instituted, of which appellee was duly notified. There is also testimony to the effect that, a few months prior to Presley's injury, the injury of another employee was reported to Carnes & Son in the same manner that this notice was given, that Carnes & Son gave notice to appellee, and that the claim was investigated by appellee and a check in payment of the claim duly forwarded, all of the correspondence being conducted through Carnes & Son.

It will be seen from the foregoing statement that appellee's agent, D. A. Fisher, who issued the policy, received actual notice of Presley's injury 32 days after it occurred, and that appellant, in giving the notice to Carnes & Son, did so under the honest belief that the latter was agent of appellee with authority to receive notice. It is also apparent from the testimony that appellee sustained no injury by reason of notice not having been given earlier, for it made a full investigation in due time, and it is not claimed that it suffered by the loss of evidence or otherwise on account of the omission to give the notice. The contract of insurance does not in express terms make the provision with reference to giving notice of an accident a condition upon which liability of the insurer depended. The absence of

language indicating an intention to make compliance with that provision a condition of recovery is noticeable. It does not in express terms declare a forfeiture of the insured's right to recover upon failure to give notice; nor can it be fairly implied from the language of the contract that the provision was intended as a condition precedent to the right to recover. On the contrary, the form of the policy and the language employed in it indicate a contrary intention. The first paragraph declares an absolute and unqualified undertaking on the part of the insurer to indemnify the insured against loss from liability for accidental injuries to employees. The next paragraph specifies that the liability shall be limited to the sum of five thousand dollars for injury to one person and ten thousand dollars for all injuries, and then provides that, in addition thereto, the company will, at its own expense, investigate all accidents and defend all suits, even if groundless, "of which notice is given as hereinafter required." This undoubtedly makes the right to recover expense of investigating accidents and the cost of suit depend, as a condition precedent, on a timely giving of notice in accordance with the requirement of the policy. But it is significant that the preceding paragraph, declaring the liability of the insurer for loss from the accident itself, does not refer to a notice, nor use any language indicating that such liability depends on the giving of notice; nor is the paragraph providing for the notice couched in language from which an intention to make it a condition of recovery can be implied. Under the maxim, "*expressio unius est exclusio alterius,*" the fact that a condition is expressed in one of the clauses of a contract excludes the idea that an unexpressed condition was intended to be declared in another clause.

The language of the policy is that of the insurer and, when it is doubtful or ambiguous, must be given the strongest interpretation against the insurer which it will reasonably bear. *American Bonding Co.* v. *Morrow,* 80 Ark. 49, and cases there cited.

Chief Justice Fuller, speaking for the Supreme Court of the United States in *McMaster* v. *New York Life Ins. Co.,* 183 U. S. 25, said that "the rule is that if policies of insurance contain inconsistent provisions or are so framed as to be fairly

open to construction, that view should be adopted, if possible, which will sustain rather than forfeit the contract."

The following authorities fully sustain the view that failure to give notice within a specified time in accordance with the terms of the policy does not operate as a forfeiture of the right to recover, unless the policy in express terms or by necessary implication makes the giving of notice within a time specified a condition precedent to recovery. *Accident Ins. Co.* v. *Fielding*, 35 Col. 19, 9 Am. & Eng. Ann. Cases, 916; *Southern Fire Ins. Co.* v. *Knight*, 111 Ga. 622; *Kenton Ins. Co.* v. *Downs*, 90 Ky. 236; *Tubbs* v. *Dwelling House Ins. Co.*, 84 Mich. 646; *Steele* v. *German Ins. Co.*, 93 Mich. 81; *Mason* v. *St. Paul F. & M. Ins. Co.*, 82 Minn. 336; *Taber* v. *Royal Ins. Co.*, 124 Ala. 681; *Vangindertaelen* v. *Phoenix Ins. Co.*, 82 Wis. 112.

Nothing in the opinion of this court in *Teutonia Ins. Co.* v. *Johnson*, 72 Ark. 484, conflicts with the views we now express, for that decision was based upon the fact that under the terms of the policy the requirement for notice was made a condition precedent to recovery.

It is urged that, in construing a stipulation of that kind in a policy, a distinction should be made between employer's liability insurance and other kinds of insurance. We perceive no reason for such distinction. The purpose of requiring notice is to give the insurer an opportunity to investigate the facts and circumstances affecting the question of its liability and the extent thereof. The reasons for enforcing the requirement, therefore, apply to one class of insurance as well as another. Learned counsel for appellee bring to our attention the following cases as sustaining their contention that such distinction should be made: *Rooney* v. *Maryland Casualty Co.*, 184 Mass. 26; *Deer Trail Consolidated Mining Co.* v. *Maryland Casualty Co.*, 36 Wash. 46; *N. W. Tel. Exchange Co.* v. *Maryland Casualty Co.*, 86 Minn. 467; *Underwood Veneer Co.* v. *London Guarantee & Accident Co.*, 100 Wis. 378; *Columbia Paper Stock Co.* v. *Fidelity & Casualty Co.*, 104 Mo. App. 157; *Travelers' Ins. Co.* v. *Meyers*, 62 Oh. St. 529. Most of those cases deal with a provision similar to the one in the case now before us, and treat it as a condition precedent to a recovery, but they fail to give any reason for the distinction. In most of those cases it appears that there were other clauses

in the contract providing that the stipulation for giving notice should be deemed a condition precedent. For instance, in the case of *Deer Trail Consolidated Mining Co.* v. *Maryland Casualty Co., supra,* which was against the same defendant as in the case now before us, the provisions of the policy were different from the policy in this case. There the stipulation was as follows: "This insurance is subject to the following conditions, which are to be construed as conditions precedent of this contract: 1. The assured, upon the occurrence of an accident, shall give immediate notice thereof in writing with the full particulars to the home office of the company at Baltimore, Md., or to its duly authorized agent." That stipulation, of course, distinguishes the case from the present case.

In *Rooney* v. *Maryland Casualty Co., supra,* and *N. W. Tel. Exchange Co.* v. *Maryland Casualty Co., supra,* the stipulation was as follows: "The assured, upon the occurrence of an accident, shall give immediate notice thereof in writing, with all particulars, to the home office of the company in Baltimore, Md., or to its duly authorized agent. He shall give like notice, with full particulars, of any claim which may be made upon account of such accident."

Without stating whether the contract expressly provides, as in that mentioned in the Washington case, that "this insurance is subject to the following conditions, which are to be construed as conditions precedent of this contract," the court in both those cases held that the stipulation constituted a condition precedent. The Minnesota court seems to lay stress upon the fact that the contract made a distinction between notice of the occurrence of an accident and notice of claim for damages, and this may have had some weight with the court in determining whether the stipulation was intended as a condition precedent. It is certain, however, that, though the cases were against the same defendant as in this case, the language of the policies was somewhat different.

In *Underwood Veneer Co.* v. *London Guaranty & Accident Co., supra,* the policy by its express terms provided that it was issued and accepted "subject to the agreements and conditions indorsed thereon," among which was a stipulation for immediate notice of an accident.

In *Columbia Paper Stock Co.* v. *Fidelity & Casualty Co.,*

supra, the court merely stated the stipulation as to giving notice was a condition, without giving the language of the policy declaring it to be a condition.

The Ohio case cited above is the only one which really sustains appellee's contention, and in that case the court said that "it is obvious that this stipulation is of the essence of the contract in insurance of this kind. It is not merely a stipulation as to the form of bringing to the notice of the insurer the fact of a loss, as in policies of insurance."

Cooley, in his briefs on the law of insurance (vol. 4, p. 570), states the rule to be, citing the above cases relied on by learned counsel for appellee, that the stipulation for notice is of the essence of the contract, being designed, as he says, "to enable the insurer to investigate the circumstances of the accident while the matter is yet fresh in the minds of all, and to make timely defense against any claim filed."

In the absence of an express stipulation declaring this requirement to be of the essence of the contract, and therefore a condition precedent to the right of recovery, we do not think that it is correct to say that such a requirement is of the essence of the contract unless it is shown to materially affect the rights of the parties in the given case. We fail to see why it should be so in an insurance policy, any more than in any other kind of a contract where strict compliance with every specification of the contract is generally held not to be of the essence of the contract unless made so by the terms of the contract or by necessary implication. *Lenon* v. *Mutual Life Ins. Co.,* 80 Ark. 563. The facts of this case illustrate the justness of the conclusion we reach on the question. Appellee received notice of the accident in time to make a full investigation and to investigate to its satisfaction. It is not claimed that it suffered any loss or injury by reason of not having received the notice earlier. The defense is purely technical and without any substantial merit. To hold that the appellee should escape liability on account of the failure to receive notice strictly in accordance with the terms of the contract would be to absolve it from its just obligation on a point which was not in the slightest degree material to its rights. We are, therefore, of the opinion that the trial court erred in giving a peremptory instruction in favor of

appellee. Judgment under the undisputed facts should have been in favor of the appellant. The cause will be remanded, to the circuit court with directions to enter judgment in appellant's favor for the amount of liability mentioned in the stipulation. It is so ordered.

WOOD and HART, JJ., dissent.

ON REHEARING.

Opinion delivered February 12, 1912.

McCULLOCH, C. J. The provision for notice refers to two subjects, notice of the accident and notice of suit. The contract makes the right to recover costs and expenses of defending a suit depend as a condition precedent, on the giving of notice of suit. It is undisputed in this case that notice of suit was promptly given, therefore the right to recover costs and expenses of suit is established. The stipulation of counsel as to the amount which appellant may recover, if entitled to recover at all, precludes all inquiry now as to the amount of the judgment. The case was fully developed in the trial below and a different or additional state of facts could not be established. No useful purpose would be served in ordering a new trial.

Rehearing denied.

McMAHAN v. STATE.

Opinion delivered January 8, 1912.

1. ELECTIONS—TIME FOR HOLDING MUNICIPAL ELECTIONS.—Under Kirby's Digest, section 5589, providing that elections for city officers in cities of the second class shall be held "on the first Tuesday in April, 1888, and on the same day every two years thereafter," a city of the second class which was raised from an incorporated town in June, 1908, was required to hold its next election on the first Tuesday in April, 1910, and persons voted for at a pretended election held in 1911 acquired no right thereby to the offices which they claim to hold thereunder. (Page 13.)
2. SAME—ELECTION HELD AT WRONG TIME—CURATIVE ACT.—The act of April 23, 1909, "curing all defects and irregularities in the creation of cities of the second class," which provides "that all ordinances, resolutions and acts of the council of such cities, based upon their authority as cities of the second class, passed since said action of the

board of municipal corporations, are hereby cured and ratified and declared to be legal, binding and valid," was not intended to cure an ordinance of such council fixing a date for the election of city officers different from the uniform date prescribed by statute for such election. (Page 15.)

Appeal from Union Circuit Court; *George W. Hays*, Judge; affirmed.

STATEMENT BY THE COURT.

This quo warranto proceeding was begun by the State, at the relation of her Attorney General and the prosecuting attorney of the Thirteenth Judicial Circuit in the Union Circuit Court, to oust appellants, the mayor and aldermen of El Dorado, a city of the second class, from office, it being alleged that they had usurped said offices and were holding them without right and legal authority.

The separate answer of the mayor and each of the aldermen denied that they had usurped office or had held the offices without right and authority; admitted that prior to the .....day of June, 1908, said city was an incorporated town, and that it was duly and legally raised to the grade of a city of the second class on said day; that thereafter it passed the necessary ordinances for the conduct and government of a city of the grade to which it was raised, and at the next annual period of election provided by law, the first Tuesday in April, 1909, an election was duly held for mayor, marshal, city treasurer and two aldermen from each ward, and that they were elected to said offices at said election for a term of two years; that they duly qualified and entered upon their respective duties and in due time thereafter, after regular notice, at a general city election held on the first Tuesday in April, 1911, by an order of the city council and after proclamation duly made and published, they were elected to said offices.

A demurrer to the answers was interposed and sustained, and from the judgment of ouster this appeal is brought.

Marsh & Flenniken, Patterson & Green, and *Powell & Taylor,* for appellants.

J. B. Moore, for appellee.

KIRBY, J., (after stating the facts). It is claimed by the State that the election of 1911, at which appellants were elected to the offices held by them, was illegal and void, being

held at a time other than that prescribed by law for the holding of elections in cities of the second class, and conferred no right to the offices to which they were elected.

Section 5589 of Kirby's Digest provides: That the electors of cities of the second class "shall on the first Tuesday in April, 1888, and on the same day every two years thereafter elect one mayor," and the various other city officers, naming them.

El Dorado, an incorporated town, was raised to the grade of a city of the second class in June, 1908, and at the next regular annual period thereafter for the election of municipal officers in incorporated towns, the first Tuesday in April, 1909, it elected all its officers as a city of the second class, to which grade it had been raised, having, after notice of its elevation to such class of cities, duly made provision for its organization into such a city by by-laws and ordinances necessary to perfect such organization, as authorized under section 5428 of Kirby's Digest.

It is contended for appellees that by virtue of said section 5589 of Kirby's Digest, providing for elections in cities of the second class "on the first Tuesday in April, 1888, and on the same day every two years thereafter, the term of office of the officers elected for said city in 1909, at the next regular annual period for election of municipal officers of incorporated towns, was extended to two years, and that the election held in said city at the end of said term, at which appellants were elected to the city offices on the first Tuesday in April, 1911, was therefore a legal and valid election and entitled them to hold said offices. Said election of 1911 certainly was not held on said first Tuesday in April, 1888, nor on the same day any two years thereafter.

The act of 1887, of which said section 5589 is a part, expressly repealed all laws in conflict with it, and, being later than all other acts providing for election of officers of cities of the second class, necessarily repealed all former conflicting laws. If the officers elected at the annual period for election in incorporated towns in 1909 could hold for a term of two years in order that the next election should thereafter occur at the time prescribed by said section 5589, it must be held in 1912, thus, in effect, permitting a tenure of office of three years. While,

if the officers elected at said next annual period for election after the raising of the grade of the city, notwithstanding they were officers of a city of the second class and some other and different from officers of an incorporated town, were only entitled by such election to hold for a term of one year, the length of term for the officers of the town before its change of grade, their successors should have been elected in 1910, in an even year and at the time prescribed in said section 5589.

The evident purpose of said statute was to fix a uniform date for the holding of elections in all cities of the second class, providing that it shall be "on the first Tuesday in April, 1888, and on the same day every two years thereafter," and its meaning is so plain as to admit of no construction.

No violence is done to any provision of either law in thus holding that when an incorporated town is raised to a city of the second class and its next annual period for the election of officers of incorporated towns falls in an odd year, other than at the time fixed by said section 5589, the term of office of the officers elected thereat is but one year, as before the grade of the city was raised that the officers thereafter shall be elected at said uniform date as fixed for the election of officers in all cities of the second class.

The election under which appellants claim the right to hold the offices in question, having occurred in 1911 at a time other than that prescribed by law, was void, and they acquired no right by having been then elected to the officers which they claim to hold thereunder.

It is next contended that the curative act of April 23, 1909, had effect to validate the said election. This contention, however, is not sound, since that act, by its own terms, does not reach to such extent, although it declares: "that all ordinances, resolutions and acts of the council of such cities, *based upon their authority as cities of the second class*, passed since the said action of the board of municipal corporations, are hereby cured and ratified and declared to be legal, binding and valid." It was only intended to cure the informalities, irregularities, defects and errors committed in the organization of the city and to make valid all acts, resolutions and ordinances of the council of such cities as are within the authority of a city of the second class to pass. Certainly, it can not be extended to cover and

cure an ordinance made by such council fixing a date for the election of city officers different from the uniform date prescribed by statute for such election, a thing entirely beyond the power of a city of the second class to do. Such being the case, the judgment of ouster was right, and is affirmed.

VAN VALKINBURGH v. STATE.

Opinion delivered November 6, 1911.

1. LIQUORS—SOLICITING ORDERS IN PROHIBITION TERRITORY.—Under Acts 1907, c. 135, section 2, prohibiting the soliciting or taking orders for liquor in prohibition territory, and providing that any person shall be deemed an agent of the liquor dealer "who receives an order from another for intoxicating liquors in prohibition territory and transmits the same in person, by letter, telegraph or telephone, or in any other manner, to some dealer in intoxicating liquors who accepts and fills the same," it is unlawful for a licensed dealer to accept and fill an order which has been solicited and received by another person in prohibition territory and transmitted to him. (Page 19.)
2. SAME—VALIDITY OF POLICE REGULATION.—Acts 1907, c. 135, prohibiting the soliciting or taking orders for liquor in prohibition territory, is a valid exercise of the State's police power. (Page 20.)

Appeal from Bradley Circuit Court; *Henry W. Wells*, Judge; affirmed.

STATEMENT BY THE COURT.

The grand jury of Bradley County returned against the appellant and his brother, Fay, the following indictment:

"The grand jury of Bradley County, in the name and by the authority of the State of Arkansas, accuse Fay Van Valkinburgh and Henry Van Valkinburgh of the crime of soliciting orders for intoxicating liquors in prohibition territory, committed as follows, towit: The said Fay Van Valkinburgh and Henry Van Valkinburgh in the county and State aforesaid, on or about the 24th day of December, A. D. 1910, being then and there licensed liquor dealers in the State of Arkansas, unlawfully did solicit or receive from one G. W. Givens an order for the sale of intoxicating liquors in Bradley County, Arkansas, wherein it would be unlawful to grant a license to make said sale, contrary to the statutes in such cases made

and provided, and against the peace and dignity of the State of Arkansas."

Dan Givens testified for the State: "I live three miles from Warren, and know both the Van Valkinburgh boys. I understand they are in the whisky business in Dermott, but I haven't been there since they have been in business. I saw Fay in Warren, and asked him if he was going back to Dermott, and he said he was. I asked him if he would send me a half gallon on that train, and he said 'Yes.' I stayed here until the train came and got the whisky. I saw him at Mr. Baker's stable. He was writing something. I do not know whether he was making any note or writing of what I told him or not. I gave him $2. It was all at the same time. The whisky came by express, and I paid the usual charges on it, but I do not remember the exact amount." On cross examination he stated: "Henry Van Valkinburgh was not present at the time, and had nothing to do with the money or the whisky that I know of. I saw Fay Van Valkinburgh, and asked him if he would send me the whisky. I don't know whether he was writing down my order or not. He didn't solicit my order. I went to him. He said he would send me the whisky as an accommodation. He knew my name, and was writing while I talked. I do not know what he was writing."

The court judicially knew the place where the order was given was prohibitive territory, and so declared it to the jury.

Henry Van Valkinburgh testified: "I was engaged in the business of selling liquor in Dermott on December 24, 1910, and have a regular liquor license at that place. I do not know anything about the transaction here. Fay came into the saloon and gave me two dollars and said George Givens wants half a gallon of whisky. Fay had no interest in the business. He was working on a salary. His duties were tending bar at night in the house. I shipped the whisky for the two dollars delivered me there in the house." On cross examination: "I am a licensed liquor dealer. Fay was working for me as bartender, hired by the month. He gave me two dollars, and said George Givens wants half a gallon of whisky. I shipped the whisky by express, charges collect. Fay gets no profits out of the sale of liquor. It all comes to me. He has been off two or three different times, and then

he didn't draw any salary. Whenever he was off, I would take it out of his salary if he was off as much as a week."

The court instructed the jury, and they returned a verdict convicting the appellant, and assessed his punishment at $250, and found his brother Fay not guilty, and from the judgment this appeal is brought.

B. L. Herring, for appellant.

1. The variance between the allegations in the indictment and the proof is fatal. There is no proof in the record that Fay Van Valkinburgh was the agent of Henry, or that he held himself out as such, or that he solicited the order. The offenses of "soliciting or receiving an order for the sale of intoxicating liquor" and of "accepting and filling an order for the sale of intoxicating liquor which has been solicited or received by another," are separate and distinct, and proof of either offense will not support an indictment for the other. 84 Ark. 479, 481; 64 Ark. 188; 66 Ark. 120.

2. The evidence is not sufficient to show that Fay Van Valkinburgh solicited or received an order for the sale of intoxicating liquors from G. W. Givens within the meaning and intention of the act of April 1, 1907. Acts 1907, p. 326; 90 Ark. 582, and cases cited.

Hal L. Norwood, Attorney General, and *William H. Rector,* Assistant, for appellee.

The indictment is drawn under sections 2 and 3 of the act (1907, p. 326), and the proof is conclusive that Fay Van Valkinburgh was in prohibition territory and there received the order. This constitutes a violation by the liquor dealer himself. The act is constitutional, and no errors are found in the record. 84 Ark. 479; 88 Ark. 273; 97 Ark. 38.

KIRBY, J., (after stating the facts). It is contended here that the court erred in refusing to declare unconstitutional the proviso defining the term "agent" in the second section of the acts of 1907.

The proof conclusively shows that appellant was a licensed liquor dealer at Dermott, and that the order for the liquor was given to his brother Fay at Warren, in prohibition territory, with two dollars in money, to pay for the whisky. That Givens gave the order to the said Fay Van Valkinburgh, without

solicitation from him, but understanding at the time that he and his brother were engaged in the sale of liquor at Dermott. The order was by him in person transmitted to appellant at Dermott, and filled and the money received in payment, the whisky being shipped in accordance with the direction of the person ordering it.

Within the definition given in said act, and under its terms, which were all given to the jury as instructions in this case, there can be no doubt but that appellant was guilty of a violation of it. Fay Van Valkinburgh, who was his employee for the sale of whisky, and who was known by the person ordering to be engaged with his brother in the sale of whisky at Dermott, was in prohibition territory, received the order for the whisky, transmitted and in person delivered it to the appellant at the saloon, who accepted and filled it.

It is true that appellant said that Fay had no authority to solicit and receive orders for whisky, and was only employed as a night bartender, for the sale of whisky over the bar in the saloon, but it could have reasonably been inferred that he was acting as agent for appellant in receiving and transmitting the order, as he unquestionably was his agent within the meaning of the term as defined in said act and also guilty of a violation of it. The object of the statute was to prevent the advertisement of liquor for sale and the soliciting and receiving orders from any person therein for the sale thereof, within prohibition territory, and to prevent the presence of liquor dealers, through agent or otherwise, in such territory, soliciting or receiving orders from persons therein, and it broadly defines the term "agent" to "mean any person who receives an order from another for intoxicating liquors in prohibition territory and transmits the same in person, by letter, telegraph or telephone, or in any other manner, to some dealer in intoxicating liquors, who accepts and fills the same." (Acts 1907, c. 135, § 2.)

In *State* v. *Earles*, 84 Ark. 479, this court said:

"The statute in question makes both the liquor dealer and his agent who solicits orders in prohibition territory guilty of an offense, and it defines an "agent" to be one "who receives an order from another for intoxicating liquors in prohibition territory, and transmits the same in person, by letter, tele-

graph or telephone, or in any other manner, to some dealer in intoxicating liquors who accepts and fills the same.

"It is not intended by this statute to punish a licensed dealer for merely selling liquor directly to a person who has solicited orders in prohibition territory; but it is unlawful for a licensed dealer to accept and fill an order which has been solicited and received by another person in prohibition territory and transmitted to him. Such an acceptance of the order is, under the statute, tantamount to soliciting the order in prohibition territory."

No error was committed in giving the instructions in the language of the statute.

If appellant had desired an instruction submitting a different view from that expressed as to the meaning of agency, he should have asked a correct instruction embodying it. Not having done so, he will not be heard to complain of the failure of the court to so instruct the jury. This act is a police regulation, intended to protect the wishes of the citizenship of the prohibition districts of the State and suppress the receiving and solicitation of orders and advertisements for the sale of liquor therein, and was well within the power of the Legislature to enact. *Zinn* v. *State*, 88 Ark. 275.

The judgment is affirmed.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* TONN.

Opinion delivered January 8, 1912.

1. PLEADING—AMENDMENT OF COMPLAINT—NEW CAUSE OF ACTION.—Where plaintiff brought replevin for personal property alleged to be wrongfully withheld by defendant railway company, and subsequently filed an amended complaint in which a recovery was sought, not for possession of the property but for a certain sum which it was alleged the defendant has wrongfully collected from plaintiff for transportation of his property, the amendment states a different cause of action from that set out in the original complaint. (Page 25.)
2. PLEADING—AMENDMENT CHANGING CAUSE OF ACTION—WAIVER OF OBJECTION.—Where defendant filed an answer to an amended complaint which changed the cause of action, without moving to strike out such amended complaint, he will be held to have waived any objection to the amended complaint. (Page 25.)

3. CARRIERS—INTERSTATE COMMERCE—RECOVERY OF EXCESSIVE CHARGES.—Where the amount collected by a carrier for an interstate shipment of freight is in excess of the rate fixed by law, the shipper may recover such excess in any court of the State having jurisdiction of the amount involved, without first making application to the Interstate Commerce Commission to determine whether an excessive charge had been made for transportation. (Page 26.)

4. SAME—WHEN ATTORNEY'S FEE NOT TAXED AS COSTS.—Under Kirby's Digest, section 6621, providing that if the plaintiff shall recover in an action against a railroad company for violating the statute regulating the transportation of freight he shall recover a reasonable attorney's fee, a shipper is not entitled to an attorney's fee where he recovers in an action against a railroad company for making an excessive charge for transportation of freight where the recovery is not based upon the violation of any statutory duty. (Page 29.)

Appeal from Polk Circuit Court; *Jefferson T. Cowling*, Judge; reversed in part.

Read & McDonough, for appellant.

1. Appellee can not recover any damages, because, under his own proof, he was not entitled to possession of the property. The carrier has a lien on the goods transported for all charges due, and the right to possession until all charges are paid. Elliott on Railroads, § 1571; 42 Ark. 313; 67 Ark. 135; 37 Ark. 544; 16 Ark. 90.

2. The court had no jurisdiction of this cause, but the question involved here, construing the schedule of tariffs and thus determining the rates on emigrant movables, is one solely for the Interstate Commerce Commission. 204 U. S. 426; Interstate Commerce Act, § 9; Barnes on Interstate Trans. 1108; *Id.* § 412; *Id.* § 408, p. 601, § 382; *Id.* § 77, and cases cited; *Id.* § § 60, 61. See also 97 Ark. 353; 99 Ark. 105; 219 U. S. 486; *Id.* 467; *Id.* 186; *Id.* 498.

3. It is a well established rule that if any article is to come within the class, that article must be specifically described or named. The schedules which the court construed were the published tariff rates of appellant and its connecting carrier, and therein the definition of emigrant movables and the articles included under those words are expressly set out. Unless potatoes, which are vegetables and not seeds within the meaning of the schedule, are expressly placed within the meaning of emigrant movables, they would necessarily be excluded.

The court therefore, even if it had the right to decide the rate, did it erroneously in holding that potatoes were "seeds for planting purposes" and a part of emigrant movables. Rule 6, Tariff Circular, 17A; 130 U. S. 412; 103 U. S. 597; 101 U. S. 284; 113 U. S. 645; 96 U. S. 108; 116 U. S. 11; 127 U. S. 113.

4. The court erred in allowing against appellant an attorney's fee. 81 Ark. 429; 72 Ark. 357; 94 Ark. 324.

S. A. Downs, for appellee.

1. If the original and amended complaints state separate causes of action, they could properly be joined under the statute. Kirby's Digest, § 6079. But, if improperly joined, appellant should have moved the court before trial to strike out one of the causes of action, and in failing to do so appellant waived the misjoinder. Kirby's Digest, § 6081, foot note (w) and § 6082. Misjoinder of causes of action is properly reached by motion to strike, not by demurrer. 39 Ark. 162; 32 Ark. 495. See also 58 Ark. 139.

2. The court had jurisdiction. This case could be brought in the State court only. 168 Fed. 420; 95 Ark. 412; 99 Ark. 105. The Circuit Court of Appeals holds that the proviso in the act of Congress of June 29, 1906 (U. S. Comp. St. Supp. 1907 p. 909), leaves a shipper free to resort to the laws of his State to right a wrong occurring on an interstate shipment. 97 C. C. A. 198, 172 Fed. 850.

An interstate carrier is not permitted to quote a rate lower than the legal rate in force and on file with the Interstate Commission, and after the shipment has reached its destination charge an additional sum to bring the total up to the regular rate on file with the commission. 105 Am. St. Rep. 111.

It is not a question in this case whether the rates are reasonable or not. It is purely a question of an overcharge according to the rates fixed by the appellant itself. No construction of the Interstate Commerce Act was necessary. As to the potatoes, the evidence shows they were shipped for planting purposes, and the only question for the court or jury was whether that was true or whether they were shipped for commercial or speculative purposes.

3. Appellee was entitled to recover an attorney's fee. Kirby's Digest, § 6621; 66 Ark. 543; 49 Ark. 455; *Id.* 492;

Interstate Com. Act, § 8, 3 Fed. St. Ann. 833. See also 99 Ark. 105.

FRAUENTHAL, J. The appellee, E. A. Tonn, in March, 1909, moved his home from New London, in the State of Wisconsin, to Mena, in the State of Arkansas. He was the owner of certain personal property, consisting of household goods, farming implements, and 250 bushels of potatoes, which he desired to ship from New London to Mena. He intended to use these potatoes for planting purposes in his new home in Arkansas, and applied at New London to the station agent of the Chicago & Northwestern Railroad Company for emigrant rates on his personal effects shipped from that point to Mena. He was informed by said agent that the rate was 45 cents per hundred weight in carload lots of 20,000 pounds. He thereupon tendered his property to the railroad company for such transportation, which was received and accepted by the initial carrier, and a bill of lading was duly issued by it therefor upon that rate. Appellee then paid to the initial carrier the entire freight charges, amounting to $90. Under this bill of lading the property was delivered to appellant as a connecting carrier, who transported same to Mena.

Upon the arrival of the property at Mena, the agent of the appellant at that station refused to deliver the same to appellee, claiming that the freight charges thereon which had been paid by appellee were incorrect, and that he should pay additional freight charges of $200.50. This the appellee refused to pay. Thereupon, he instituted an action in replevin against appellant for the possession of the property, but without giving the bond required to obtain an order of immediate delivery. In a few days after bringing this suit, he paid the additional freight charges demanded by the appellant, towit, $200.50, and obtained possession of the property. Thereafter, he filed an amended complaint in which he alleged all of above facts. He also alleged that said shipment consisted of household goods, implements and potatoes, constituting emigrant movables; that the initial carrier and appellant had fixed the tariff rates thereon from New London to Mena at 46 cents per hundred weight, and that the said tariff had been duly published and filed with the Interstate Commerce Com-

mission in manner prescribed by law, and was the lawful charge for such transportation. He further alleged that since filing the original complaint he had discovered that he was in error as to the amount of the tariff chargeable by law upon said shipment, and that the correct charges thereon were $92 instead of $90, the amount paid by him; and that the amount of the additional charges should only have been $2 instead of $200.50. In this amended complaint he sought a recovery for the sum of $198.50, which he claimed was the excess of charges exacted from him for the carriage of said property. He also asked for the recovery of damages for the detention of the property, and for a reasonable attorney's fee.

Thereupon appellant filed an answer to this amended complaint, in which was also incorporated a demurrer. The demurrer was based upon the ground that the amended complaint did not state facts sufficient to constitute a cause of action; and that the court did not have jurisdiction to hear and determine the cause. In its answer, appellant denied each allegation of the amended complaint. It denied that the the potatoes constituted emigrant movables, and that they were seed potatoes to be used for planting, but alleged that they were shipped for commercial purposes. It alleged that the rate on potatoes shipped for commercial purposes was higher than when shipped as emigrant movables, and that appellee had wrongfully shipped same as emigrant movables in order to avoid paying this higher and proper rate thereon. It also alleged that it had committed error in demanding and receiving from appellee for said shipment the additional freight charge of $200.50; that the erroneous excess amounted to $45.44; and it paid that sum into court for the benefit of appellee. In effect, the appellant alleged that the potatoes were shipped for commercial purposes, and that the the proper and lawful rate chargeable for the transportation thereof, together with the rate chargeable on the other property shipped, was much greater than the sum of $92 as claimed by the appellee.

Upon a trial of the case, the lower court held in effect that appellant had wrongfully exacted from appellee the sum of $198.50 for the transportation of said property, and directed a verdict in favor of appellee for that sum. Appellee

then filed a motion asking for the allowance to him of a reasonable attorney's fee, which the court granted; and fixed the amount of said fee at $50, rendering judgment therefor against appellant.

The original complaint filed in this case sought the recovery of certain personal property, and the cause of action therein set out was one of replevin. Subsequently, an amended complaint was filed in which a recovery was sought, not for the possession of the property, but of a stated sum which it was alleged the appellant had wrongfully collected from appellee for the transportation of his property.

It is urged by counsel for appellant that the cause of action set out in the amended complaint was distinct and different from that set out in the original complaint, and was therefore an entirely new cause of action which substantially changed the claim upon which the suit was originally instituted. The appellant, however, did not ask that the cause of action as set out in the amended complaint should be stricken out, but, instead of this, it joined issue thereon by filing an answer to the amended complaint. By this action, the appellant waived its objection that the amended complaint set out a new cause of action. Kirby's Digest, § § 6081, 6082. The amended complaint set out a distinct cause of action, and was equivalent to bringing a new suit. If a new suit had been brought by the appellee, setting up the cause of action mentioned in the amended complaint, the appellant could have waived the issuance and service upon it of a summons thereon, and could have entered its appearance to that suit. This it could do by filing an answer without question. In like manner it could enter its appearance to the amended complaint, which set up a new cause of action, by failing to move to strike such cause from the complaint and by filing an answer thereto. Appellant did this in this case. By so doing, it entered its appearance to the new cause of action set out in the amended complaint, just as to a new suit. As is said in the case of *Wood* v. *Wood*, 59 Ark. 446: "The same result was reached as would have been accomplished had a new and original complaint been filed. In that case the appellee could have entered his appearance, as he did, and waived summons, and the same end would have been obtained as was reached by the filing of the amendment.

The legal effect of the two proceedings is the same." 1 Enc. Pl. & Pr. 573; *Ferguson* v. *Carr*, 85 Ark. 246; *Greer* v. *Vaughan*, 96 Ark. 524.

By the filing of the amended complaint, appellee in effect abandoned the action of replevin for the recovery of the property, and based his action entirely upon allegations seeking the recovery of money which had been erroneously or wrongfully collected from him, as for money had and received. The appellant entered its appearance to that action by filing its answer and joining issue on the merits of the case set out in said amended complaint, and it thereby waived any objection thereto.

It is urged by appellant that the amended complaint is an action by a shipper to recover from a carrier an overcharge of a freight rate upon a shipment which moved in interstate commerce, and on that account the State court did not have jurisdiction to entertain the suit. This contention is made upon the ground that exclusive jurisdiction has been confided to the Interstate Commerce Commission to fix the amount of the reasonable rates which are charged on property shipped in interstate commerce; that a suit for the recovery of an overcharge of freight is in effect an action based upon a freight rate which it is claimed is unreasonable; that by virtue of the Interstate Commerce Act of February 4, 1887 (U. S. Comp. Stat., 1901, p. 3169), as amended by the act of Congress of June 29, 1906 (U. S. Comp. Stat. Supp. 1907, p. 909), application must be first made to the Interstate Commerce Commission to determine whether or not an unreasonable and excessive charge has been made for the transportation, and the amount thereof, before a suit can be brought for its recovery.

In the case of *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, it was held that, "a shipper can not maintain an action at common law in a State court for excessive and unreasonable freight rates exacted on interstate shipments where the rates charged were those which had been duly fixed by the carrier according to the Interstate Commerce Act, and had not been found to be unreasonable by the Interstate Commerce Commission." But this is not the character of the case which is here presented. Briefly stated, the action

herein brought is founded upon the following undisputed evidence:

The property involved in this shipment made by appellee was delivered to and accepted by the common carrier as emigrant movables. Amongst the property there were 250 bushels of potatoes which were to be used solely for planting and not for sale or commercial purposes. The appellee had purchased land near Mena, Ark., his new home, thirty acres of which were in cultivation, and in this he intended to plant these potatoes. It would require eight bushels of potatoes per acre to plant this tract, and appellee shipped with his household effects these potatoes as seed potatoes. The freight rate fixed by the initial carrier and appellant for the transportation of emigrant movables from New London to Mena was 46 cents per hundred pounds, and this tariff had been duly published and filed with the Interstate Commerce Commission, and had become the rate lawfully chargeable for the carriage of such property, in full compliance with the Interstate Commerce Act. The term, "emigrant movables," according to this tariff, applied to household goods, implements of calling and seeds for planting purposes. General merchandise and articles for sale or commercial purposes were excluded from this tariff. The potatoes included in this shipment made by appellee, being for planting purposes, were therefore seeds for planting within the meaning of this tariff for emigrant movables. The rate named in this tariff for emigrant movables applied to seed potatoes under the undisputed evidence, and this constituted the lawful rate for the transportation.

It is urged by counsel for the appellant that the rate for freight charges on any property is determined by the classification made thereof, and, inasmuch as the Interstate Commerce Commission must first determine the reasonableness of the rate, it must also determine the classification of the property. But we do not think that the question of the reasonableness of the rate upon or classification of this property is involved in this case. The rate for emigrant movables was duly fixed and published by the carrier, as provided by the Interstate Commerce Act, and was therefore found reasonable by the Interstate Commerce Commission. The rate thus named in the tariff became the rate fixed by law. This rate was applicable

to potatoes used for planting purposes, and the potatoes which were shipped by appellee were this character of potatoes. The question involved in this case was not one of classification of property, but simply and solely one of identity thereof. It is not claimed that the rate named in the tariff was not applicable to the household goods and farming implements included in this shipment. It would be necessary to identify such items of property as household goods and implements of calling in like manner as it would be necessary to identify the potatoes as seed potatoes. The determination of the identity of the property as being of a certain kind and character would not constitute a classification thereof, nor would it fix the rate chargeable thereon. The classification in the tariff sheet had been made and published by the carrier and filed with the Interstate Commerce Commission and therein potatoes for planting were classed as emigrant movables. In fact, the rate named in this tariff for emigrant movables is rather a certain rate named upon a certain commodity, and the only question to be determined is whether or not the property shipped constituted that commodity. The rate applicable to the transportation of seed potatoes was therefore fixed in manner prescribed by the Interstate Commerce Act at 46 cents per hundred pounds, and this constituted the lawful and published rate thereon from New London to Mena. In demanding a greater amount the carrier erroneously collected more than it was entitled to receive.

The suit instituted by this amended complaint is one to recover the amount thus erroneously collected from the appellee, and it is not a suit to recover for an unreasonable rate that was fixed or exacted. It was the intention of the agent of appellant to collect from appellee only the amount of the rate actually named in the published tariff for the carriage of this property, and any sum which it actually collected in excess of such rate was erroneous. It has been well settled, we think, that a shipper has a right to have his property transported by a common carrier at the rate fixed by law, and is entitled to recover back all charges collected from him in excess of such rate.

In the case of *Lanning-Harris Coal & Grain Co.* v. *St. L. & S. F. Rd. Co.*, 15 I. C. C. Rep. 37, it was said: "It seems

fairly certain that, in case of the exaction of a rate higher than the published tariff, the shipper may bring his suit in court in the first instance to recover the same." Barnes on Interstate Transportation, § 408-d; *Chapman & Dewey Lbr. Co.* v. *Jonesboro, L. C. & E. Rd. Co.*, 97 Ark. 300; 2 Hutchinson on Carriers, § 805.

Where the amount collected for the transportation of property by a carrier is in excess of the rate fixed by law, the shipper may recover such excess in any court of the State having jurisdiction of the amount involved, to the same extent as in an action for the recovery of money had and received. *Chicago, R. I. & P. Ry. Co.* v. *Lena Lbr. Co.* 99 Ark. 105; *St. Louis S. W. R. Co.* v. *Gramling*, 97 Ark. 353; *Missouri & N. Ark. Rd. Co.* v. *Wood*, 100 Ark. 312. See also *St. Louis & S. F. Rd. Co.* v. *Ostrander*, 66 Ark. 567.

It follows that, under the undisputed evidence adduced upon the trial of this case, appellee was entitled to recover the sum of $198.50 which was paid by him in excess of the lawful published rate applicable for the transportation of this property from New London to Mena.

It is claimed by counsel for appellee that he is entitled to recover a reasonable attorney's fee herein by virtue of sections 6666 and 6621 of Kirby's Digest. But it is conceded by appellee that at the time he demanded this property from the carrier he had only paid the sum of $90 for the transportation charges, and that according to the lawful rate chargeable thereon there was due the sum of $92 for the transportation thereof. Until he paid or tendered the full amount of the freight charges, the appellee was not entitled to the possession of the property, and the appellant was not liable for any penalty prescribed by the above statutes for refusing to deliver the same to him. When this additional sum of $2 was paid by appellee for the carriage of the property, it was immediately turned over to him.

Nor do we think that any provision of the Interstate Commerce Act, granting to a shipper the recovery of an attorney's fee, is applicable to this case, for the reason that the right of recovery herein is not based upon any provision of that act of Congress. As before stated, the suit herein instituted is in the nature of an action for money had and received by the

carrier who, by error, collected a greater amount of charges than it was entitled to receive. It is not founded upon any statute, either State or National, and does not arise from the violation of any statutory duty imposed upon the carrier. It is a right founded upon the common law which gives to the injured party a recovery for money had and received from him without consideration. The appellee could only be entitled to recover an attorney's fee upon the ground that he had a right to recover a penalty from the carrier by reason of its violation of the performance of some statutory duty; and this right we do not think was covered by the cause of action set out in the amended complaint. *Kansas City So. Ry. Co.* v. *Marx*, 72 Ark. 357.

It follows, therefore, that the court erred in adjudging to appellee the recovery of an attorney's fee. So much of the judgment as awarded to appellee the amount of an attorney's fee is reversed and dismissed; in all other respects the judgment of the lower court is affirmed. Any amount deposited in the lower court by defendant should be credited on the judgment when paid to plaintiff.

NAYLOR *v.* SHELTON.

Opinion delivered January 15, 1912.

1. FRAUDS, STATUTE OF—AGREEMENT TO WILL LANDS.—Where a person for a valuable consideration agreed to will a certain tract of land to his daughter, and executed and delivered a will accordingly, the contract is taken without the statute of frauds. (Page 38.)
2. SPECIFIC PERFORMANCE—CONTRACT TO MAKE WILL.—Where a father, for a valuable consideration, agreed to will land to his daughter, and did execute such a will, but afterwards destroyed it, his contract to execute a will, after his death, will be enforced as against his other heirs. (Page 39.)

Appeal from Perry Chancery Court; *Jeremiah G. Wallace*, Chancellor; affirmed.

STATEMENT BY THE COURT.

Appellants brought this suit in the Perry Chancery Court on January 22, 1908, for partition of certain lands, which are described in the complaint, alleging that the parties were the joint owners and entitled to partition.

Appellee answered, denying the joint ownership and joint possession of the lands, and alleging that she was the sole owner. She made her answer a cross complaint, and set up in the cross complaint that she was the owner by reason of a will from her father, H. L. Trundle. She set up that her father, in the year 1897, while he was living with appellee and her husband, came to her and said: "I have been making my home with you and your husband for a number of years, and desire to continue to make your home my home until I die, and in consideration of what you have already done for me, and, in consideration that you and your husband let me live with you and you take care of me during the balance of my life, I will make you a deed to what is known as the Ed. Trundle place that I own." She alleges that she accepted the proposition to take care of him, and that about 1903 he came to her with what he called his will and said it was the same as a deed to what was known as the Ed. Trundle place, and delivered the same to her with other deeds that he said were the title papers to the land. She alleged that he stated that he wanted her to put this will or deed, together with the title papers, in her trunk and to lock them up, and to not let any one —not even himself—have possession of them; that the will or deed and the title papers belonged to her, and that he did not want her to put it on record until after his death; that he wanted the use and rents until his death, but after his death for her to have it put on record; that in accordance with his request she put the will, or deed, as he called it, in her trunk with the title papers and locked them up. She further alleged that some time after her father went to Little Rock in the spring of 1906 she missed the will or deed out of her trunk from the title papers. She didn't know whether she missed the will just before or just after her father died.

She alleged that the lands were not worth exceeding twelve or fifteen hundred dollars; that the board and waiting upon her father were worth $120 per year for at least twelve years of his life, and that she had fully paid for the lands in controversy by caring for her father during the time he lived with them. And she prayed for specific performance.

The appellants replied to the answer and cross complaint, denying the execution of the will set up therein, and alleged

in the alternative that if such a will was ever executed it was revoked and destroyed by appellee's father long prior to his death. Appellants further denied the alleged contract set up by appellee as between herself and her father whereby he was to give her the property in consideration of her taking care of him in his declining years.

There was an agreed statement of facts to the effect that all the parties to the suit are heirs of H. L. Trundle and joint owners of the land in controversy, with interest therein as set out in the complaint unless the said H. L. Trundle made a valid devise of the land to appellee.

The court in its decree, made the following findings of fact: "That H. L. Trundle died July 15, 1906; that prior to his death, about the year 1897, he executed an instrument of writing, attested by W. A. Isgrig and Robt. E. McCarty, who signed their names as attesting witnesses at the request of Trundle, who stated to them at the time that it was his last will, and by which he disposed of the lands involved to his daughter, Ruth L. Shelton; that at the time of the execution of the instrument aforesaid Trundle was of sound mind and disposing memory; that Trundle was then making his home at his said daughter's, and had done so for a long time before the execution of the instrument of writing mentioned, and continued thereafter to make his home with her until his death."

The court further found "that a material consideration inducing Trundle to make said instrument of writing conveying the lands to his daughter was that he lived with her and her family, and that she should take care of him throughout his old age, in the future as in the past, until his death, which she agreed to do and did do, and that in consideration thereof he delivered the instrument of writing to her, together with all title papers to the lands in controversy, and stated to her at the time that the package contained his deed or will to her to the Ed. Trundle place, together with all the title papers to the lands, and requested her to safely keep them until his death; that they were hers, but he wanted the rents of the lands until his death, and after his death for her to have the same put on record."

The court further found "that some time during the

month of March, 1906, prior to Trundle's death (which occurred in July of that year), he, by some means unknown to her and without her knowledge or consent, got possession of the will or deed and destroyed the same by burning it."

The court further found "that at the time Trundle obtained possession of the aforesaid instrument of writing and destroyed it he was in his 89th year, was extremely frail in both body and mind, and was laboring under *senile dementia*; that Ruth Shelton, in good faith, complied with all the terms and conditions upon which the instrument of writing was executed and delivered to her by giving him, the said Trundle, a home at her house with herself and family and by supporting and caring for him until his death; that, by reason of the destruction of the instrument of writing aforesaid in the manner aforesaid, it could not then be definitely determined as to what the character of the writing was."

The court declared that the instrument of writing in any event amounted to a contract upon the part of Trundle, for a valuable consideration, to convey to Ruth L. Shelton the lands involved in this suit, and entered a decree dismissing the suit for want of equity and awarding appellee specific performance by divesting title to the lands in controversy out of the appellants and vesting title to same in the appellee, and awarding her possession, rents since this suit began, etc. The appellants duly prosecute this appeal.

Other facts stated in the opinion.

Sellers & Sellers, for appellants.

1. It is conceded that the evidence is sufficient to establish the fact of the execution of a will—also that it was revoked and destroyed. But proof of the bald fact of the execution of a will is not sufficient to establish its contents. Declarations of the testator are admissible to prove the execution of a will, but are never sufficient in themselves to prove the contents. 73 Ark. 20; 50 Neb. 290; 7 B. Mon. 408; 5 Rawle (Pa.) 235; 14 Bush 434. The proof of the will must be of the whole contents. 8 Met. (Mass.) 487; *Id.* 490; 6 Gill 169; 5 Harr. (Del.) 178; 13 Col. 546; 5 Redf. (N. Y.) 372; 6 Dem. (N. Y.) 31. As to lost wills, the manner of establishing the same in this State is regulated by statute, and this statutory

remedy is exclusive. Kirby's Digest, § 8065; 72 Ark. 381. It places the burden on the party seeking to establish the will to show that it was "in existence at the time of the death of the testator" or was "fraudulently destroyed during his lifetime." No proof to this effect was made or offered. On the other hand, there is affirmative proof that the testator destroyed the will, *animo revocandi,* several months prior to his death, and his statements, oral and written, to that effect were admissible to show its revocation. 76 S. W. (Tex.) 754.

The testimony does not sustain the finding in the decree that the testator was, at the time he destroyed the will, mentally unsound—suffering from *senile dementia.* 66 Ark. 629; 49 Ark. 367; 87 Ark. 279.

2. Under the proof no consideration was paid by Mrs. Shelton, but, on the contrary, the evidence shows that Trundle many times overpaid the Sheltons for all they ever did for him.

3. There is no proof of a valid contract to make a will. Under the statute of frauds, a contract to devise specific lands in consideration of services to be rendered, to be valid, must be in writing. 8 Am. & Eng. Enc. of L. (2 ed.), 1018; 20 Cyc. 235. In this case there was no part performance to take contract out of the statute. Payment of a consideration is not sufficient. 70 Ark. 351.; 4 Pom. Eq. § 1409; 58 Atl. 337; 11 Am. St. Rep. 46; 62 Ala. 579; 81 Ala. 563; 17 Am. St. Rep. 125, 127; 53 Wis. 317; 21 Ark. 537; 44 Ark. 343.

4. The instrument in question can not be treated as a written contract to make a will, because the testimony is undisputed that it was testamentary in character, and therefore revocable, and that it was revoked. 26 Am. & Eng. Enc. of L. (2 ed.), 92; 54 Am. St. Rep. 471.

5. The testimony is not sufficient to establish even a verbal contract to make a will. Contracts of this kind are closely scrutinized, and the evidence to establish them must be of the clearest and strongest. 54 Am. St. Rep. 472. And likewise the courts always subject to the closest scrutiny testimony as to oral statements of persons who are dead. 17 Cyc. 808; 21 How. 493; 16 L. Ed. 207; 45 Am. St. Rep. 94; 53 Mo. 395; 12 La. Ann. 401; 14 La. Ann. 275; 37 La. Ann. 873; 35 La Ann. 1907; 46 Mo. 423; 17 Cyc. 808, cases cited in notes.

P. H. Prince, for appellee.

Trundle had the right to contract with Mrs. Shelton to convey the land to her in consideration of what she had done for him, and that she would take care of him during the remainder of his life. Pursuant to such contract, he delivered into her keeping the will, being a part of the contract, which act, and the performance by her of her part of the contract, took the transaction out of the statute of frauds, and was binding upon him during his lifetime, and thereafter upon his heirs. He then had no moral nor legal right to destroy the will. If he was mentally sound at the time he did so, it was a fraud upon the rights of appellee. But the evidence shows that at the time he destroyed the will he was in a state of *senile dementia,* and the chancellor so found.

Appellee, having fully performed the contract and identified by sufficient evidence the lands contracted and intended to be conveyed, is entitled to have specific performance. 8 Am. & Eng. Enc. of L. (2 ed.) 1017; *Id.* 1018; *Id.* 1020; 12 N. J. Eq. 146; 85 Hun (N. Y.), 263-265, 55 N. Y. 555; 30 Am. & Eng. Enc. of L. (2 ed.) 620; 14 Cur. Law. 2410; 125 N. W. 998; 124 N. W. 52; 91 N. E. 420; 108 Pac. 994; 12 Cur. Law 23, 24; 14 *Id.* 1961; 122 N. W. 852; 64 S. E. 927; 1 Ark. 391; 15 Ark. 315; 19 Ark. 49; 66 Ark. 333; 11 Am. & Eng. Enc. of L. (2 ed.) 180; *Id.* 184.

WOOD, J., (after stating the facts). 1. In 1892 the appellee was married to W. R. Shelton. She was the youngest daughter of H. L. Trundle, and was living with her father on what is known as the old home place, keeping house for him, her mother being dead. She and her husband continued to reside on the old home place with her father for three years. After this she and her husband moved to Houston, Perry County, where they lived nearly three years. After this they moved to Perryville, where they continued to reside for six years. After this they moved to Houston, where appellee's home was at the time her deposition was taken. During all this time, and, in fact, until July 15, 1906, when H. L. Trundle died, he had made his home with appellee. During this time he had visited his other children, staying sometimes for three months with them, but he considered that his home was at appellee's. About six years before his death he had spent the winter

in Little Rock at his daughter's, Mrs. Kirkwood's. During the time that he stayed at Mrs. Kirkwood's he paid her at the rate of $2 a week for his board. Mr. Trundle was a man of pride, and as long as he had any property it seemed to be his desire to reimburse his children for any attention that they were called upon to give him in his old age, and he was anxious to take care of himself as far as possible and not to be a burden on any of his children.

About the year 1897 appellee and her father, according to her testimony, entered into a contract whereby he proposed to deed or will to appellee what is known as the "Ed. Trundle place," in consideration that appellee and her husband should take care of him the balance of his life. She testified her father wanted the benefit of the place during his life, but that after he was gone it was for her; that he had given all the other children all he thought they were entitled to, and that he thought for what she had done for him during his last days she was entitled to it. She said that she considered that it was worth as much as $10 per month to board and take care of her father; that he lived with her and she continued to provide for him and to take care of him in his old age.

After she had the understanding and conversation with her father about taking care of him in his old age, in about the year 1903, he brought her a package of papers containing what he called his will or deed to the Ed. Trundle place. "When he delivered the package," she says, "he told me there was a will or deed to the Ed. Trundle place, and I looked in it, and found that there was contained in the package the will and three deeds." She said: The paper inclosing the will and the three deeds in which the Ed. Trundle place was described contained the following indorsement: "Will and deeds to the Ed. Trundle Place," and on both ends of the package was the indorsement, "Ruth Shelton." The deeds were made exhibits. The deeds were mesne conveyances from various parties to the Ed. Trundle place. The indorsements on the wrapper were in the handwriting of H. L. Trundle.

She says: "My father, at the time he delivered me the package of papers, told me to lock them up and told me to let no one have them; that they were mine."

Other witnesses corroborated the testimony of the appellee.

One witness testified that in 1897 or 1898 he witnessed a will for H. L. Trundle; that Trundle told him at the time he "was conveying all of his property to his daughter Ruthie; he said a number of times that Ruthie would get all he had at his death. H. L. Trundle at the time owned the Ed. Trundle place. He was making his home at that time with Mr. and Mrs. Shelton, and he continued to make his home with them after he made the will until his death."

Another witness testified that he married one of H. L. Trundle's daughters; that he talked frequently with Trundle during the latter part of his life, and knew that he willed the Ed. Trundle place to Ruth Shelton. He saw the will; H. L. Trundle showed it to him, and told him what he had done. H. L. Trundle said: "She should have the place as she was going to take care of him as long as he lived." He called her place his home; had visited around with his other children. He was at witness' house a few times. It was some five years before his death when he showed witness his will, at witness' house. Witness read a part of it, and saw the Ed. Trundle place mentioned in the will, and saw the numbers of the land in the will. He didn't notice that it mentioned anything except the Ed. Trundle place and gave the numbers of the land.

Another witness testified that he was a son-in-law of H. L. Trundle; that he made his home at witness' house part of the time, and Little Rock part of the time, with Mrs. Kirkwood, but most of the time his home was at Ruth L. Shelton's. He always called Ruth Shelton's place his home and kept his things there.

Another witness testified that about the year 1906 he stayed all night at Shelton's house and slept in the same room with H. L. Trundle, and had a conversation with him in which he told witness that he willed the Ed. Trundle place to Ruth L. Shelton; that he had made his home with her since his wife died, and that she had been very good to him. At that time he was very weak and feeble, and had to have fires built for him at night, and he told witness that she built fires for him; that he had to have them; that "Ruthie" built them most of the time, and that her husband, Mr. Shelton, built them some of the time.

Another witness, who had known H. L. Trundle for twenty-

seven or twenty-eight years, said that while Trundle was living with Shelton at Houston he came to witness' store and talked to him a good deal. In these conversations he told witness that "Ruthie was his youngest child, and that he preferred to live with her, and that he would make his home with her the balance of his life; that he had willed Mrs. Shelton the Ed. Trundle place."

Another witness testified that he had known H. L. Trundle for twenty-three years; that Trundle talked to him about deeding the Ed. Trundle place to his daughter, Ruthie, in 1896, when he was speaking about his business generally; said he "was going to make the place known as the Ed. Trundle place over to Ruthie, or that he had done so." The last time witness talked with Trundle was at Perryville in 1905, and there Trundle told witness "that he had deeded the Ed. Trundle place to his daughter, Ruthie."

We are of the opinion, in view of the above testimony, that the finding of the court that there was "a contract upon the part of Trundle, moved by consideration, to convey to Ruth L. Shelton the lands involved in this suit" is in accord with the testimony.

The testimony also warranted the finding of the court that there was "a material consideration inducing Trundle to make said instrument of writing conveying the lands to his daughter, which was that he had been living with her and her family, and that she would take care of him throughout his old age, in the future as in the past, until his death, which she agreed to do and did do;" and also "that, in consideration of the above services, he delivered said instrument of writing to the said Ruth L. Shelton, together with all title papers involved in this case."

The testimony of the appellee shows that there was a contract between her and her father by which she was to render him certain services in the future, and, that in consideration for these services and also the services that she had performed for her father in the past, he was to deed or will to her what is described in the testimony as the "Ed. Trundle place." The testimony shows that she had complied with the contract on her part by rendering the services called for by the contract, and that these services were valuable. The testimony also

shows that her father also executed the contract on his part, afterwards making the will and delivering the same to the appellee. Here the verbal contract to make a future conveyance of land by will or deed was afterwards performed by appellee rendering the services which were the consideration for the conveyance by the father, and her father executed the will and delivered the same to the appellee in accordance with his contract. Therefore, conceding that the contract at first would have been within the statute of frauds requiring agreement for the conveyance of land to be in writing, still this contract was taken out of the statute by the full performance thereof by appellee and by the making of the will or deed on the part of Trundle. Section 14, Current Law, 2410-11, note 89; *Dalby* v. *Maxfield,* 244 Ill. 214.

The testimony of the appellee was definite and certain to the effect that in consideration of her services to him her father was to make her a deed or will to the "Ed. Trundle place;" and her testimony and the testimony of other witnesses shows that the contract was recognized as binding on the part of her father by his making a will and delivering the same to her which described the "Ed. Trundle place." That the will was to be made and was afterwards executed in accordance with the contract is established by clear and convincing testimony.

2. In the spring of 1906, H. L. Trundle wrote to his son-in-law, J. E. Little, as follows:

"I don't want Shelton to have the benefit of another dollar that I can avoid. You know that I have deeded that place to Ruthie and the children. It is more than likely that Ruthie will not live to be very old, but will likely go off young like the balance of her sisters, for she takes very little care of her health. If she were to die off, young Shelton would have the benefit of that land until the children became of age. He is certainly the most obnoxious man, in my judgment, that I ever met with."

A few weeks after this letter he wrote another letter to the same party stating: "I have burned that document which I wrote to you about."

Other witnesses testified that Trundle, a short while before his death, was complaining because Shelton had refused to let him (Trundle) have a buggy and horse to go down on

the farm. In one of his letters to his son-in-law Little he complained that no one seemed to take any interest in him, and said he believed they would be glad if he could drop out. But it appears from the testimony that the reason given for his dislike for Shelton a short time before his death was that he (Shelton) had refused to let him (Trundle) have a horse and buggy to go down on the farm. Trundle told his brother that he had destroyed the will because Shelton had refused to let him have his buggy and horse.

Trundle told another witness: "The way Shelton had treated him, he was not going to let him have it; that he had asked for a horse and buggy, and Shelton had refused him." He further said to this witness: "I think a heap of Ruthie and the children, but I am not going to let them have my property. I burned the will this morning, and after I am dead if you hear them inquiring about the will you will tell them that I burned it."

The appellee explains the reason for her husband's conduct in refusing him the horse and buggy as follows: "During the winter of 1905-6 and the spring of 1906, he was sick, cross and fretful. We objected to his taking trips alone, as it was too hard on him, and one time the last year of his life he took my little boy and went to the Ed. Trundle place on the river, got sick and had to be brought home. After this we didn't want him to have a horse and buggy alone. He asked for a buggy and horse, and I objected and told Mr. Shelton about it, and Mr. Shelton tried to reason with him that he was too weak and feeble to make the trip to his place. My father got very angry with Mr. Shelton because he didn't furnish him the horse and buggy."

The appellee further testified that her father's mind at this time "was bad—was weak, and his body was weak." She says: "He was very fractious; he had never been that way before; we thought from the way he was acting he would not be here long; it was about the middle of February, 1906, when he wanted this buggy and horse; the weather was cold and the roads muddy."

Other witnesses to whom Trundle complained of the conduct of Shelton in not letting him have the horse and buggy say that he "was very weak and feeble." Trundle's

own brother stated: "He (Trundle) made a trip to his farm in the winter or spring of 1906, and it made him sick;" "he took cold and suffered for several weeks from it. This was the trip that Shelton had refused to let him have the buggy and horse." This witness testified also that "he never knew of Shelton or appellee mistreating his brother." The appellee's testimony shows that her husband was very indulgent and kind to her father in his old age; that neither she nor her husband ever at any time mistreated him. On the contrary, they gave him the best treatment they could; they would get up at night and wait on him, and Shelton would bring in wood and make him fires and set up with him at night. At the time he wrote the letter to his son-in-law, Little, stating that he had burned the document, "he was in a very bad, weak and feeble condition," and appellee and her husband "didn't think that he was at himself."

The above testimony shows conclusively that Trundle destroyed the will that he had made to appellee. It also shows the reason why he destroyed it and the condition of his body and mind at the time of its destruction.

The testimony is hardly sufficient to justify the finding of the court that Trundle was laboring under *senile dementia* at the time he destroyed the will. It reveals him as enfeebled by age and disease, weak in mind and body, fractious and easily disconcerted, but it does not go to the extent of showing that he did not possess mental capacity sufficient to enable him to understand the effect of his conduct in the destruction of the will. The only question, therefore, is whether or not H. L. Trundle, after having entered into the contract on his part to make a will, could afterwards by revoking the same deprive appellee of the right to have specific performance of the contract, against the other heirs of Trundle, to convey to her the Ed. Trundle place the same as if the will had not been destroyed.

As we have seen, the contract was taken out of the statute of frauds by the acts of the parties; but, as the will could only take effect after Trundle's death, his revocation by the destruction thereof left appellee to resort to the contract. The will was destroyed, but that did not destroy the contract by

which her father bound himself to make a will of the land to appellee.

In *Maddox* v. *Rowe*, 23 Ga. 431, it was said: "The father made in writing what he thought was his will, and in that writing he said that he gave the two lots of land in controversy to the son. The contract on his side was that he should give these two lots to the son. Here then is a writing that may serve to help to prove the contract. The case is such therefore that it is not left wholly at the mercy of parol evidence. True, this writing was void as a will, but that did not prevent it from being good to help prove the contract."

So here, the making and delivery of the will, taken in connection with the other testimony, was sufficient to show that Trundle had entered into the contract.

The contract being proved, appellee should have specific performance thereof against the other heirs of Trundle by having them convey to her the Ed. Trundle place the same as if the will had not been destroyed.

In the case of *Johnson* v. *Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 773, it is said: "There can be no doubt but that a person may make a valid agreement, binding himself legally to make a particular disposition of his property by last will and testament. The law permits a man to dispose of his own property at his pleasure, and no good reason can be assigned why he can not make a legal agreement to dispose of his property to a particular individual, or for a particular purpose, as well by will as by a conveyance to be made at some specified future period, or upon the happening of some future event. It may be unwise for a man in this way to embarrass himself as to the final disposition of his property, but he is the disposer, by law, of his own fortune, and the sole and best judge as to the time and manner of disposing of it. A court of equity will decree the specific performance of such an agreement upon the recognized principles by which it is governed in the exercise of this branch of its jurisdiction."

In *Bolman* v. *Overall*, 80 Ga. 451, it is held, (quoting syllabus): "A will giving property to one in consideration of personal services rendered and to be rendered to the testator is valid and may be enforced as a contract after the testator's death." *Baker* v. *Syfritt*, 125 N. W. 998, cases cited and head-

note for other cases; *Carmichael* v. *Carmichael,* 72 Mich. 76, 16 Am. St. Rep. 528, and note on p. 536; *Gupton* v. *Gupton,* 47 Mo. 37; *Bird* v. *Pope,* 73 Mich. 483; 8 Am. & Eng. Enc. Law, (2 ed.) 1017, and other cases cited in note 6. See also p. 1020, note 5; *Hespin* v. *Wendeln,* 85 Neb. 172.

We conclude, therefore, that the chancellor was correct in dismissing the complaint of the appellants for want of equity, and in decreeing a specific performance in favor of the appellee according to the prayer of her cross complaint.

The judgment is therefore affirmed.

JORDAN *v.* STATE.

Opinion delivered January 22, 1912.

1. COSTS—RECOVERY AT COMMON LAW.—No costs were recoverable at common law, either in civil or criminal cases. (Page 43.)
2. APPEAL AND ERROR—DUTY OF CLERK TO FURNISH TRANSCRIPT IN FELONY CASES.—In felony cases the clerk of the circuit court must furnish a transcript to the defendant on application therefor, and can not demand payment of his fees in advance; and if he refuses to do so, a rule will be issued from this court requiring him to do so. (Page 44.)

Appeal from Monroe Circuit Court; *Eugene Lankford,* Judge; motion sustained.

H. A. Parker, for appellant.

PER CURIAM: Appellant, Will Jordan, was convicted of a felony, and an appeal was granted by the circuit court.

He moves this court for a rule on the clerk of the circuit court to require the latter to furnish a transcript of the record in the case, which he alleges that the clerk has prepared but refuses to deliver or to send up to this court until the fees for making the same are paid.

This raises the question whether the clerk may rightfully demand payment of his fees in advance for making a transcript in a felony case.

At common law costs were unknown, either in civil or criminal cases, and the question of recovery thereof never arose. A decision of such questions must therefore depend entirely upon a construction of the statutes on the subject.

The statutes of this State concerning payment of costs in criminal cases read as follows:

"Sec. 2469. Fees allowed in criminal cases shall be paid by the defendant; but if sufficient property belonging to the defendant can not be found for that purpose, they shall be paid by the county where the conviction is had, except in such cases of misdemeanor, where the county is not to be liable.

"Sec. 2470. In all criminal or penal cases, pending under indictment in the circuit courts, if the defendant shall be acquitted or *nolle prosequi* entered by the attorney for the State, except in cases where the prosecutor shall be adjudged to pay the costs, or in cases of felony, if the defendant shall be convicted and shall not have the property to pay the costs, the same shall be paid by the county.

"Sec. 2471. The county shall not be liable for costs when the defendant is convicted, until execution shall have been issued against the property of such convict, and returned unsatisfied for the want of property to satisfy the same, unless the court in which the trial was had shall certify that, in the opinion of such court, the costs can not be made out of the property of the defendant." Kirby's Digest.

The statute concerning judgment for costs in felony cases on appeal to this court reads as follows:

"Sec. 2626. On the affirmance of a judgment, where the appeal is taken by the defendant, and on the reversal of the judgment, where the appeal is taken by the State, a judgment for costs shall be rendered against the defendant." Kirby's Digest.

In some jurisdictions it has been held, under statutes making a county liable "for costs of prosecutions," that there is no liability on the part of the county for costs made by the defendant. 11 Cyc. of Law, p. 283, and cases there cited.

Our statute is, however, much broader in its terms, as it makes the county liable for all fees allowed in felony cases where property of the defendant can not be found.

The Constitution of this State and the statutes thereof declare the right of appeal under certain restrictions, but no intention is evinced to impose on a person convicted of felony the payment of fees for transcript as a condition to his right to appeal. The conclusion is, therefore, that the circuit clerk

must furnish a transcript on application therefor and cannot demand payment in advance of his fees. The rule against the clerk, requiring him to furnish transcript, is therefore awarded.

KIRBY, J., dissents.

HALDIMAN v. TAFT.

Opinion delivered January 22, 1912.

1. EXCHANGE OF PROPERTY—WHEN RESCINDED FOR FRAUD.—An exchange of land for corporate stock will be rescinded where the owner of the land fraudulently represented that the corporation owned a stock of goods worth $35,000, and owed about $5,000, and that the capital stock amounted to $16,000, and that the stock was worth par, when he knew or ought to have known that the corporation was insolvent. (Page 47.)
2. CANCELLATION OF INSTRUMENTS—PARTIAL RESCISSION—Where the grantor of land under two different contracts sold undivided parts thereof to two persons, and for convinence made only one deed, and one of the contracts was induced by fraudulent representations of the grantee, the deed may be set aside as to that grantee alone. (Page 48.)
3. MORTGAGES—WHEN MORTGAGEE NOT INNOCENT PURCHASER.—One who accepts a mortgage as security for an antecedent debt will not be deemed an innocent purchaser though the mortgage recites that it was given to secure the payment of a note, if he fails to produce the note or to show that it is a negotiable instrument. (Page 49.)

Appeal from Drew Chancery Court; *Zachariah T. Wood*, Chancellor; affirmed.

Williamson & Williamson, for appellant.

1. The court erred in cancelling the Fred Hert mortgage. He, having taken the mortgage for a preexisting indebtedness and without notice of the alleged equities of the appellee, is in the position of an innocent purchaser for value without notice, and is protected. 96 Ark. 105.

2. The court was without authority to decree a partial cancellation of a deed wherein Haldiman and another were grantees as tenants in common, leaving the deed to stand unaltered as to the other grantee. Under the testimony the contract was entire and indivisible, and could not be rescinded except *in toto*. 6 Cyc. 339, and notes; 1 Green's Digest, Am. St. Rep. 790, cases cited; 129 Mo. 220; 6 Cyc. 322.

3. The evidence to justify a court of equity in cancelling an executed contract on the ground of fraud must be clear and convincing. It will not grant such relief upon a probability, nor even upon a mere preponderance of evidence. 6 Cyc. 336, note 47; 112 Ala. 576; 19 Ark. 522, 528.

R. W. Wilson and *James C. Knox*, for appellee.

1. From the evidence before the chancellor the conclusion is unavoidable that Haldiman was guilty of such fraud as to justify cancellation or rescission. The chancellor so found, and the law sustains his finding. 20 Cyc. 55, 56; *Id.* 58; *Id.* 75; 71 Ark. 305; 138 S. W. 1003; 135 S. W. 458.

2. Hert does not stand in the position of a *bona fide* purchaser for value. His mortgage was given to secure a preexisting debt, and no new consideration is shown. He is not protected against prior equities. 27 Ark. 560; 2 Pom. Eq. (3 ed.) § § 748, 749; 27 Cyc. 1191; 5 Cyc. 719.

The chancellor's finding on this question, as also on the question of Haldiman's fraud, will not be disturbed unless contrary to the clear preponderance of the evidence. 77 Ark. 305; 75 Ark. 52; 72 Ark. 67; 74 Ark. 336; 95 Ark. 523; *Id.* 482.

3. Hert's testimony as to extension of time of payment, the only evidence tending to show a change of his position by a cancellation of the mortgage, was inadmissible because contradictory of the language of the mortgage, and because the note, the best evidence, was not produced, though in his possession at the time the deposition was taken. Parol testimony is never admissible to vary or contradict a written instrument. 94 Ark. 130; 83 Ark. 163, 105, 241, 283; 95 Ark. 131.

McCULLOCH, C. J. The plaintiff, C. T. Taft, owned a tract of land in Drew County, Arkansas, containing 280 acres, and on January 8, 1910, conveyed an undivided fourth thereof to John C. Haldiman, one of the defendants, in exchange for 24 shares, of the face value of $2,400, of the capital stock of the People's Clothing & Shoe Company, a mercantile corporation of California, Missouri. He also paid said defendant the sum of $750 as consideration for said exchange.

On the same date he exchanged the other three-fourths interest in said land with one Reidy for other lands in the State of Missouri, paying Reidy the sum of $750 as a part of

the consideration for the exchange, and for convenience he executed one deed to Haldiman and Reidy conveying said lands to them. At that time plaintiff resided in Drew County, Arkansas, and defendant Haldiman resided at California, Missouri. A short time thereafter Haldiman mortgaged his interest in the land to Fred Hert, to secure the payment of an antecedent indebtedness owing by Haldiman to Hert. Subsequently plaintiff instituted this action in the chancery court of Drew County against Haldiman and Hert to cancel his said conveyance to Haldiman and the mortgage from Haldiman to Hert, on the alleged ground that his deed was procured by fraudulent misrepresentations concerning the value of said capital stock of the Missouri corporation.

The defendants filed separate answers, each denying the allegations of fraud, and also denying that defendant Hert had any knowledge of fraud in the transaction between plaintiff and Haldiman.

The chancellor found in favor of the plaintiff on the allegations of fraud, and also found that the defendant Hert was not an innocent purchaser for value, and rendered a decree in plaintiff's favor cancelling the deed to Haldiman and the mortgage to Hert.

It is earnestly insisted that the testimony is insufficient to sustain the charges of fraudulent misrepresentations concerning the value of the stock. After a careful examination of the testimony, we are of the opinion, however, that the finding of the chancellor was correct, and that it should not be disturbed. The law as to this branch of the case is too well settled for further discussion, and we merely refer to the recent case of *Hunt* v. *Davis,* 98 Ark. 44, for a full discussion of the law applicable to this branch of the case. The Missouri corporation went into bankruptcy about two months after the execution of the conveyance, and the proof was absolutely conclusive that it was insolvent at that time, and must have been grossly insolvent at the time of plaintiff's conveyance to Haldiman. The trade between the parties was made in Drew County, Arkansas, the plaintiff never having been to California, Missouri, and knowing nothing about the value of the stock except what was told him by Haldiman. He testified that Haldiman told him that the corporation owned a stock of merchandise

worth $35,000, and that it owed about $5,000 the capital stock being $16,000. He states that Haldiman told him that the stock was worth $1.06 on the dollar of its face value. Another witness testified that Haldiman said that the stock was worth dollar for dollar *to him.* Haldiman admitted that he made this last statement to plaintiff. Now, if he made the statement to plaintiff, even as qualified by himself and the other witness, he must be taken to have meant that it was worth par value, because, if it was worth that to him, that could only be reasonably understood to mean that that was its true value. If he made that representation, and knew, or ought to have known, that the stock was not worth that much, he was guilty of making a false representation, which, if relied on by the other party, became the inducement for the trade. There is evidence that he was treasurer of the corporation, and had actual knowledge of its financial condition. But, even if he was without actual knowledge on the subject, he occupied a position which was tantamount to holding himself out as having such knowledge, and it is unimportant whether he did possess the knowledge or not Under those circumstances, it was his duty to have informed himself before making any statement to a party with whom he dealt.

A short time before this trade was made, plaintiff's brother moved to California, Missouri, and purchased some of the capital stock of the corporation. It is insisted that plaintiff relied upon his brother's knowledge, and not upon the alleged misrepresentations of Haldiman. We are of the opinion, however, that the plaintiff relied upon Haldiman's statements, and that they were the inducing cause of the bargain.

It is further insisted by learned counsel that, as the deed was made to Haldiman and Reidy conveying all of plaintiff's interest in the property to them, a portion of the conveyance can not be rescinded. They invoke the rule that there can be no rescission of a portion of a contract, and insist that there can not be, in equity, a partial cancellation of a deed for fraud alleged to have been perpetrated upon the grantor by one of the grantees. The evidence shows, however, that, while the deed was made to Haldiman and Reidy jointly, it represented separate bargains for separate and distinct considerations. Under those circumstances, we do not think that the question

of partial rescission arises. The whole transaction, so far as it relates to the conveyance to Haldiman, is involved, and not the transaction with Reidy.

Finally, it is contended that the proof is insufficient to sustain the finding of the chancellor that Hert was not an innocent purchaser for value.

The evidence is undisputed that the mortgage to Hert was executed for the purpose of securing the payment of an antecedent indebtedness. Hert in his answer alleges that Haldiman executed a note for $1,500, the amount of the debt, and also this mortgage for the purpose of securing the same, and delivered them to him in payment of said debt. He also testified that Haldiman executed the note to him, and that he agreed to extend the time of payment in consideration of his giving security. The mortgage is exhibited with the pleadings, and recites the fact that it was given to secure the payment of a note for $1,500. The note is not exhibited, and it does not appear anywhere, either in the pleadings or in the testimony, that the note was in the form of a negotiable instrument. This court held in *Johnson* v. *Graves*, 27 Ark. 560, that where a creditor takes a mortgage merely as security for antecedent indebtedness, without advancing any new consideration, he is not entitled to the protection accorded a *bona fide* purchaser for value as against prior liens or equities. In a long line of cases this court has held that one who takes negotiable paper before maturity, in payment of or as security for an antecedent debt, and without notice of any defect, receives it in due course of business, and is a holder for value and free from any equities of the maker or indorser. *Tabor* v. *Merchants Nat. Bank*, 48 Ark. 458; *Hamiter* v. *Brown*, 88 Ark. 97; *Exchange Nat. Bank* v. *Coe*, 94 Ark. 387; *White-Wilson-Drew Co.* v. *Egelhoff*, 96 Ark. 105. In those cases we recognized the conflict in the authorities on that question, but followed, for the sake of uniformity as much as for any other reason, the decisions of the Supreme Court of the United States on that question, particularly the case of *Railroad Company* v. *National Bank*, 102 U. S. 14, which was cited in several of our cases. It will be observed that the Federal cases base this doctrine entirely upon the fact that negotiable paper is controlled by the law merchant, and that, in order to give it such stability as the

law contemplates, the protection should be extended to a holder who receives the paper either in payment of or as collateral security for an antecedent debt. Mr. Justice Harlan, in his opinion in the case just cited, quoted with approval a statement of Judge Story in the case of *Swift* v. *Tyson,* 16 Peters, 1, which was said to be *obiter* but which was subsequently adhered to as the law on that subject. That learned judge and textwriter said:

"And why, upon principle, should not a preexisting debt be deemed such a valuable consideration? It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass, not only as security for new purchases and advances made upon the transfer thereof, but also in payment of and as security for preexisting debts. The creditor is thereby enabled to realize or to secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor, also, has the advantage of making his negotiable securities of equivalent value to cash. But establish the opposite conclusion, that negotiable paper can not be applied in payment of or as security for preexisting debts, without letting in all the equities between the original and antecedent parties, and the value and circulation of such securities must be essentially diminished, and the debtor driven to the embarrassment of making a sale thereof, often at a ruinous discount, to some third person, and then by circuity to apply the proceeds to the payment of his debts. What, indeed, upon such a doctrine would become of that large class of cases where new notes are given by the same or by other parties, by way of renewal or security to banks, in lieu of old securities discounted by them which have arrived at maturity? Probably more than one-half of all bank transactions in our country, as well as those of other countries, are of this nature. The doctrine would strike a fatal blow at all discounts of negotiable securities for preexisting debts." See also note to *Empire State Trust Co.* v. *Fisher,* 3 Am. & Eng. Ann. Cas. 393, where the authorities are collected which fully sustain us in the conclusion we reach.

The reasoning upon which this rule is based can not be extended to paper not in the form of a negotiable instrument,

for to do so would be to ignore the reasons upon which the rule is based and would put us in conflict with the early announcement by this court on that subject. Neither the evidence nor the pleadings in this case show that a negotiable instrument is involved. It being shown that defendant Hert accepted the mortgage as security for an antecedent debt, it devolved upon him to produce the instrument or to prove in some way that it was a negotiable instrument. Otherwise he has not clothed himself with the protection due an innocent purchaser for value.

Upon the whole case we are of the opinion that the chancellor's decision was correct, and the decree is therefore affirmed.

CAMPBELL v. KENNERLY.

Opinion delivered January 22, 1912.

1. BUILDING CONTRACT—HEATING APPARATUS—GUARANTY.—Where a contractor agrees to put in a heating apparatus which he guarantees to meet certain specified requirements, he can not recover unless he had furnished the material and performed the work substantially as provided in the contract. (Page 53.)
2. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—Where there is an irreconcilable conflict in the testimony in a chancery case, and the state of it is such that the Supreme Court is unable to say that the chancellor's finding is against the preponderance of the evidence, the decree will be affirmed. (Page 53.)
3. CONTRACT—RESCISSION—RESTITUTION.—Where it is adjudged that a heating apparatus installed by plaintiff in defendant's building did not substantially comply with plaintiff's contract, and therefore that plaintiff was not entitled to pay therefor, he will be entitled to remove the machinery from the premises, as far as that can be done without injury to the building. (Page 54.)

Appeal from Independence Chancery Court; *George T. Humphries*, Chancellor; affirmed.

Samuel M. Casey, for appellant.

1. In contracts of the kind involved here, substantial compliance with its requirements is sufficient. 38 Ark. 199; 64 Ark. 34, 40; 79 Ark. 506; 133 S. W. 1032.

2. Evidence introduced by appellees to the effect that, after the contract had been performed or when appellant was trying to adjust the matter with them and get them to pay for

it, and additional work was being done to stop the water out of the furnaces in an effort to satisfy appellees, appellant agreed when they paid the $300.00 that the balance would be payable when they kept the water out, etc., was inadmissible, because it was a patent effort to change a written agreement by parol testimony—an attempt to engraft upon a written contract a parol warranty. 80 Ark. 509; 83 Ark. 105; *Id.* 240; *Id.* 283; 94 Ark. 130.

Even if they could establish such alleged agreement, it was without sufficient consideration to support it and not enforcible. 1 Beach on Cont. 781, 784; 93 Ark. 547; 56 Am. St. Rep. 659-671; 5 Am. St. Rep. 197-201, note.

3. The findings of a chancellor are persuasive only and not conclusive. 83 Ark. 340; 93 Ark. 277.

McCaleb & Reeder, for appellees.

1. The testimony is fully sufficient to sustain the finding of the chancellor. Not only is it supported by a great preponderance of the evidence, but it is fortified by his personal examination and inspection of the plant, and this court on appeal will not set it aside. 68 Ark. 314; 71 Ark. 605; 68 Ark. 134; 72 Ark. 67; 73 Ark. 489; 67 Ark. 200; 75 Ark. 52; 77 Ark. 305; *Id.* 216.

2. The rule as to substantial compliance contemplates that the work done must at least perform the purpose for which it was intended. Deviations from the contract can only be such as result from inadvertence and are unintentional, do not impair the structure as a whole, and may without injury be compensated for by proper deductions from the contract price. 64 Ark. 34; 9 Cyc. 602; 6 Cyc. 57; 30 Am. & Eng. Enc. of L. (2 ed.), 1224.

McCULLOCH, C. J. Appellant instituted this action against appellees in the chancery court of Independence County, to recover the contract price for furnishing and installing a heating plant in a building owned by the latter at Batesville, and to enforce a mechanic's lien. The contract price was $875, of which $350 was paid during the progress of the work, and the action is to recover the balance.

Appellees claim that there was not a substantial compliance with the contract in that the plant was not constructed

and installed in a workmanlike manner and of proper material so as to afford satisfactory heat, and they defended on that ground. They also presented a counterclaim, asking the recovery of the sum of $350 which they had paid on the contract price.

At the hearing of the cause, the chancellor found in favor of appellees, and rendered a decree for the amount prayed for in the counterclaim.

According to the terms of the written contract introduced in evidence, appellant agreed, for the stipulated price, to install the plant, "the said heating apparatus to be placed in said building in such manner and located at such a point as shall be deemed best by said heating company for its most successful operation, it being guaranteed that said heating apparatus shall be constructed thoroughly in all respects of good material, and made smoke and gas tight, and that, subject to the requirements hereinafter specified, such heater shall furnish a pure, moist air and have a capacity to provide a temperature of 70 degrees for the building in the coldest and windiest weather."

The law is settled that a contractor of this sort can not recover unless there has been a substantial compliance on his part with the terms of the contract, or, in other words, unless he has furnished the material and performed the work substantially as provided in the contract. *Ark-Mo Zinc Co.* v. *Patterson*, 79 Ark. 506; *Harris* v. *Graham*, 86 Ark. 570; *Mitchell* v. *Caplinger*, 97 Ark. 278.

The chancellor found that there had not been a substantial compliance with the contract by appellant, and on that ground found in favor of appellees.

The record is very voluminous, and contains the testimony of numerous witnesses. There is a sharp and irreconcilable conflict in the testimony, and the state of it is such that we are unable to say that the chancellor's finding is against the preponderance. Under those circumstances it is our duty to affirm the decree.

It is insisted by learned counsel for appellants that there is a decided preponderance of the testimony of witnesses introduced by appellant who show an accurate knowledge of this kind of work, and that the testimony of many of the witnesses

upon the part of appellees should be disregarded on account of obvious lack of such knowledge. They insist that there should be a considerable degree of expert knowledge on that subject before the testimony of witnesses can be accorded any probative force. We have duly considered these matters, and, upon the whole, we are convinced, as before stated, that the state of the testimony is such that it is impossible for us to say that there is any preponderance in appellant's favor. No useful purpose would be served in setting out the testimony in detail, even if it were practicable to do so, voluminous as it is.

We should add that, inasmuch as appellees rejected the work and refused to pay for same, it is still the property of appellant, and may be removed from the premises, as far as that can be done without injury to the building. *Harris* v. *Graham, supra.* This is doubtless the view that the chancellor took, though he made no mention of that in his decree. The parties have evidently so treated it, as nothing has been said about it in the briefs. We deem it proper to mention that, so that there will be no misunderstanding about the force of the decree which we now affirm.

It is so ordered.

SHELTON v. SHELTON.

Opinion delivered January 22, 1912.

DIVORCE—UNCORROBORATED TESTIMONY OF PARTIES.—A divorce will not be granted upon the uncorroborated testimony of the parties.

Appeal from Chicot Chancery Court; *Zachariah T. Wood,* Chancellor; reversed.

STATEMENT BY THE COURT.

This was a suit for divorce, instituted by the appellant against the appellee, in which the appellant, among other things, alleged in her complaint that defendant "charged her, while they were living together as husband and wife, with having taken provisions and groceries out of the commissary of the defendant and giving them to her married son. That the defendant repeatedly told plaintiff that he wished she would leave his home and never return; that she did not want to leave

the defendant and tried every way possible to stay with him and put up with all the indignities offered her." She further alleged that the defendant "had John Haley, Count Stephenson and Ed. Everett to call to see her and advise her to leave the house of the defendant." "That under this pressure and with many indignities and insults offered to plaintiff that she could not stay with the defendant any longer. That the defendant charged her with stealing provisions out of the commissary, and time and again insisted upon her leaving." She makes, in addition, the general charge "that the defendant offered her such indignities as to make her life intolerable."

Appellee answered, denying the allegations of the appellant's complaint, and alleging that "the plaintiff and himself did not get along at all times in perfect peace and domestic tranquility; that the plaintiff, on two different occasions after their marriage, about two years ago, left the defendant and was gone for two or three days, she being in a tantrum on account of this defendant sending his children to school, but that she repented in a few days and returned. That some two years ago she again became infuriated, and in a fit of passion left defendant and was gone some six weeks. That her children have offered the defendant many indignities, and had at all times treated him badly and insulted him frequently in the presence of their mother, and that she has encouraged the conduct of her children, and offered the defendant such insults and indignities, and has done so continuously, as to make life intolerable for him." These allegations are preceded by the allegation that the appellant at the time of appellee's marriage with her was a widow, having several children, and that he also was a widower, having several children.

There were allegations in the complaint as to the settlement of the property rights between the appellant and the appellee, which, in the view we have taken of the testimony in the case, it is unnecessary to set out. The plaintiff prayed for complete divorce, and for maintenance, alimony, costs and attorney's fees. The appellee made his answer a cross complaint, and asked that he be divorced.

Appellant testified that she and the appellee lived together as husband and wife for five years; that appellee was treating her in such a way that she could not stay with him. She says:

"He was anything but good to me in some ways. He used language to me that was not becoming to any man. I would ask him and beg him, and he knows it, to let us live together, that I would rather live with him than to quit, and he says that when he is done with anybody he is done with them, and he would not listen to me in any way. He went so far as to slap me. He cursed my little boy, who was about four years old. Then I told him that was mighty hard for me to take; I couldn't stand that; and he slapped me on the side of my face, and it was paralyzed for some time before I had any feeling in it. I didn't quit him then. I went ahead, and tried to live through. He said that I would take things from the commissary and give it away when I didn't do it. He just as good as asked me to leave him. He said: 'There is no use for us to try to live together in peace.' I said that it was not my wish to quit. 'I know for my part that we can live together in peace,' but I told him if nothing would do only for me to quit I reckon I will have to quit. Mr. Shelton went on the outside of the road, and talked awhile to Mr. Everett, Mr. Haley and Mr. Stephenson. Then they came to the house, and told me that they had been talking to Mr. Shelton, and it would be best for me to quit Mr. Shelton. They said it would be more credit for me to quit Mr. Shelton than it would be for me to stay there under the circumstances. There was a man living in the house I am living in now, and I didn't think I would leave before evening and would have time to gather up my things, but Mr. Shelton had the family to move out of my house that morning. Then the wagon came right on to move me. Mr. Shelton's son came on, and came in the house, and told me he was ready. I asked him; 'Ready for what?' And he said: 'To move you.' Then I says, 'Well, I thought I would have to go, but I didn't have any idea I would be rushed out before I would have time to pick up my things.' "

John Ellis testified that he was a son of the plaintiff; that he lived about one mile from where his mother and Shelton lived while they were living together. When asked whether or not his mother, the appellant, had given him supplies and provisions out of the commissary, as charged by the appellee, he answered, "She didn't do either," and stated that he didn't

get any provisions or supplies out of Mr. Shelton's commissary through his mother.

The appellee, in his deposition, exhibited two papers which he claimed to have found on his gate post, in which he was warned to leave within forty-eight hours, and that his commissary or store was going to be burned. The appellant testified that she did not know anything about these papers. That if her children had anything to do with it she did not know it; that if they had anything to do with it they never mentioned it to her; that her children never showed any disposition to want to destroy or to burn up appellee's property. Appellee had stated also in his deposition that he was afraid to eat at the table prepared by appellant for fear that something mysterious would happen to him. Appellant stated that she couldn't understand that. In this connection, she says: "I always thought I couldn't do enough for my husbands, and for Mr. Shelton to think that I would put anything in his provisions I never thought of anything. I am told that that was the reason he quit eating at home, that he was afraid I would poison him, and I never thought of such a thing. I and the children and Mr. Shelton all ate together. Everything was cooked together, and I couldn't poison one without poisoning the others."

Three neighbors of the Sheltons were witnesses. They had heard that the Sheltons were not living together peaceably as husband and wife, and they agreed, after talking the matter over, that "if there was not something done something serious would happen, and that some of the neighbors ought to go over there and talk to them, and see if they couldn't get them to do better than they were doing and to bring about a reconciliation or something of the kind." They did go and talk to the Sheltons about the way they were getting along. One witness expressed it as follows:

"They (the Sheltons) didn't talk as though they thought they could live together any longer in peace. I spoke up and told them I had never advised anybody to separate, but it seemed to me like in these circumstances they would be better off separated than the way they were living."

The testimony of the other two witnesses on this point was substantially the same as the above.

The appellee himself testified that he didn't accuse appel-

lant of stealing or anything of the kind. He said: "The things would be missing, and I would merely ask her where they were, and she would say she didn't know anything about them, and I would tell her: 'You ought to know; you are in possession of the key when I am gone.' "

He further testified: "About the 1st of May, 1910, there came a little difference about something—I disremember what it was—being misplaced in the little store, and I asked her about it, and she just said she didn't know anything about it and that she couldn't keep them out of there. She didn't say who; but I said, 'I can keep them out.' I locked the door, and put the key in my pocket."

The court granted to the appellant a divorce, and also rendered judgment in her favor for one-third of the real estate belonging to the appellee, but refused to grant appellant an interest in the personal property of the appellee. The appellant appeals from the judgment of the court refusing to allow her one-third of the personal property of the appellee; and appellee prayed and was granted a cross appeal from the judgment in favor of appellant for divorce, attorney's fees, etc.

J. R. Parker, for appellant.

William Kirten, for appellee.

There is no corroboration whatever of appellee's testimony. The court erred in granting her a divorce. Kirby's Digest, § 2677; 34 Ark. 37; 54 Ark. 20; 83 Ark. 533.

WOOD, J., (after stating the facts). The statute provides that a wife, when granted a divorce against the husband, shall be entitled to one-third of the husband's personal property absolutely. The appellee contends that the appellant should not have been granted a divorce at all, and he is correct about it. There is no testimony except that of appellant herself to sustain the allegation of her complaint that the appellee had offered her such indignities as to render her condition in life intolerable. A divorce can not be granted upon her uncorroborated testimony. True, she says that she was accused by the appellee of taking goods out of his commissary, and that appellee slapped her, and to other things that, if corroborated, would be sufficient to sustain the decree of the chancellor granting her a divorce, but we are of the opinion that the tes-

timony of the other witnesses, which we have set out in the statement, fails to show any corroboration whatever of appellant's testimony.

The testimony of appellant's son to the effect that he had not received from his mother any goods out of the commissary did not tend to corroborate her statement that appellee had accused her of stealing these goods.

The testimony of the witnesses, who are neighbors of the Sheltons, to the effect that they had heard that appellant and appellee were not living peaceably as husband and wife, did not tend to corroborate appellant's testimony to the effect that her husband had mistreated her. The testimony of these witnesses as to what they had heard of the manner in which the Sheltons were living, without any personal knowledge of any disagreement between them or ill-treatment of appellant by the appellee, was hearsay and incompetent.

In *Sisk* v. *Sisk*, 99 Ark. 94, it is said: "Divorces are not granted upon the uncorroborated testimony of the parties and their admissions of the truth of the matters alleged as grounds therefor." To the same effect see, *Chappell* v. *Chappell*, 83 Ark. 533; *Scarborough* v. *Scarborough*, 54 Ark. 20; *Rie* v. *Rie*, 34 Ark. 37; Kirby's Digest, § 2677.

It follows that the court erred in granting the divorce and awarding the appellant one-third of the real estate of appellee, and did not err in refusing to allow plaintiff the personal property prayed for in her complaint; for if appellant is not entitled to a divorce she is not entitled to a division of the property at all.

The judgment is therefore reversed, and the complaint of appellant and the cross complaint of appellee are dismissed for want of equity.

HERGET v. MCLEOD.

Opinion delivered January 22, 1912.

1. QUIETING TITLE—LACHES.—A suit to remove a cloud upon the title to wild and unimproved land will not be barred by laches merely because the plaintiff and those under whom he claims failed to pay the taxes since 1869 and in the meantime the land has greatly enhanced in value. (Page 62.)

2. SAME—LACHES.—In order to bar a suit to remove a cloud upon the title to wild and unimproved land by laches, a purchaser under a void tax title and his privies must have, prior to the commencement of the suit, paid the taxes upon the land under color of title for at least seven years. (Page 63.)

3. SAME—LIEN FOR TAXES.—Where land was forfeited to the State in 1869 for the taxes of the previous year, and no taxes were levied upon the land until 1904 when the State sold the land to defendant's grantors, the forfeiture being void, defendant was entitled to a lien on the land for the taxes for which it was sold and for the taxes paid by defendant and his grantors since the purchase from the State, but not for the taxes which should have been assessed against the land during the intervening years when the land was erroneously marked as State land. (Page 64.)

Appeal from Calhoun Chancery Court; *J. M. Barker*, Chancellor; affirmed.

Block & Kirsch, for appellant.

1. The plaintiff is barred by laches. 138 S. W. 880; 95 Ark. 6; 90 *Id.* 430; 81 *Id.* 352, 432; 93 Ark. 298; 72 *Id.* 101; 94 *Id.* 497; 92 *Id.* 497; 83 *Id.* 154; 81 *Id.* 296; 70 *Id.* 257.

2. It was error to hold that defendant was entitled only to a refund of the taxes paid. 62 Ark. 188; Kirby's Digest, § § 4879-80, 4807.

3. This appellant is, at least, entitled to recover the taxes paid. 94 Ark. 221; 81 *Id.* 258, 84 *Id.* 587; 89 *Id.* 234.

J. R. Wilson, for appellee.

1. Plaintiff is not barred; nor estopped. 24 L. R. A. (N. S.) 1161; 75 Ark. 382; 152 U. S. 416; 45 Ark. 81; 72 *Id.* 101; 90 *Id.* 430; 81 *Id.* 432; 93 *Id.* 298; 95 *Id.* 6; 138 S. W. 380; 83 *Ark.* 160; 92 *Id.* 501; 70 *Id.* 256; 75 *Id.* 195; 81 *Id.* 296-303; 79 *Id.* 382; 82 Ark. 367; 88 *Id.* 395-404; 90 *Id.* 430 *et. seq.*; 92 *Id.* 501; 94 *Id.* 226; 138 S. W. 1010-11.

2. 62 Ark. 195 is not applicable. This is a suit to remove cloud. The State acquired no title by the tax sale. Defendant is entitled to a lien for taxes. 82 Ark. 258; 84 *Id.* 587; 89 *Id.* 234.

FRAUENTHAL, J. This is an action instituted by W. H. McLeod, the plaintiff below, to cancel a tax deed and the title of defendant derived thereunder, and to quiet plaintiff's title to certain lands in Calhoun County. The plaintiff deraigned title to the lands back to an original grantor who in 1857 and

1858 had obtained them from the State, to whom they had been confirmed by the United States Government as swamp and overflowed lands. The lands were forfeited to the State in 1869 for the nonpayment of the taxes of 1868. On August 12, 1904, these lands were sold by the State to T. J. Hays, Henry Ezell and J. R. B. Moore; and a duplicate deed therefor was issued to them by the State on November 17, 1906, it being claimed that the original had been lost. From these parties the defendant obtained title to the lands by mesne conveyances. The chancellor found that said tax sale of the said lands for the year 1868 was void, and that the State and those holding under its conveyance acquired no title thereto. The chancellor thereupon entered a decree setting aside said tax sale and cancelling the deeds held thereunder and removing same as a cloud from plaintiff's title to the lands. He also decreed in favor of defendant a recovery of the taxes on said lands for the year of 1868, and also the taxes paid by defendant and those under whom he claimed for the years since their acquisition of the lands from the State, together with interest thereon.

It is not claimed upon this appeal that the chancellor erred in finding that said tax sale and the title acquired thereunder was illegal and void; and it is conceded that plaintiff and those under whom he claims were the true owners of said lands. The sole defense now urged by counsel for defendant against the recovery sought by plaintiff is that the plaintiff is barred by laches. It is also urged that, in event the plaintiff is entitled to a decree quieting his title and cancelling the tax title under which defendant claims the lands, the chancellor erred in the amount of the taxes awarded to defendant.

It appears that the lands were purchased by defendant's grantors from the State of Arkansas in August, 1904, and that defendant and his grantors paid the taxes thereon for the years from 1905 to 1910; that the taxes thereon were paid by the defendant's grantors, who acquired the lands from the State, for the first time in 1906 for the taxes of 1905, and that they had paid the taxes on the lands for a period of less than five years prior to the commencement of this suit, which was instituted in January, 1911. From the time the lands were certified to the State under said void tax sale made for the nonpayment of the taxes of 1868 up to 1904, when they were pur-

chased from the State by defendant's grantors the lands were never assessed, but they appeared as belonging to the State. During all those years, and up to the institution of this suit neither the plaintiff nor those under whom he claims paid any taxes on the lands.

It is contended that the title and claim of the plaintiff to the lands is barred by laches, because he and those under whom he claims failed to pay the taxes thereon from 1868 to the institution of this suit, and in the meanwhile the lands had greatly enhanced in value. The lands were wild and unimproved, and in the actual possession of no one. They were therefore in the constructive possession of the true owner during all this time. The true owner could be barred of his right to the lands only by limitation or by laches. It is conceded that he was not barred by limitation. The question is, then, whether he has been barred by laches by reason of having failed to pay taxes upon the lands, and in the meanwhile they had greatly enhanced in value.

In the case of *Chandler* v. *Banks*, 92 Ark. 497, it is said: "There are cases in which the owners of land had failed to pay taxes on same for many successive years, exceeding the statutory period of limitation of seven years, and another claiming the land had paid taxes thereon for such time, and in the meanwhile the land had greatly enhanced in value, and in which the court held that a court of equity will not grant the owner relief on account of laches."

In the case of *Earl Improvement Co.* v. *Chatfield*, 81 Ark. 296, it is said: "While it is true that the length of time during which a party may neglect to assert his right and not be guilty of laches varies with the peculiar circumstances of each case, and is subject to no arbitrary rule, like the statute of limitations, yet, in the absence of some supervening equity calling for the application of the doctrine of laches, a court of chancery should and will by analogy follow the law, and not divest the owner of title by lapse of time shorter than the statutory period of limitations." In that case, it was further said that the payment of taxes for only five years, even with a great increase in value of the land, would not justify a court of equity in depriving the true owner of the right to have his title quieted.

In *Fordyce* v. *Vickers*, 99 Ark. 500, it is said: "The

true owner of the land can not be divested of his title thereto by the mere failure to pay taxes and the enhancement of it in value. The doctrine of laches is founded upon the principle, not only that there has been a delay in the payment of taxes by the owner, indicating either that he considers his claim to the land worthless or a total abandonment of his right to the property, and in the meanwhile a great enhancement in the value thereof, but also upon the ground that the party asserting the claim to it has good reason to believe that the alleged rights are worthless or have been abandoned, and, acting upon such belief, has paid taxes upon the land under color of title for at least the period of time named by the statute of limitation."

It will thus appear that, before the plea of laches can be available to deprive the true owner of his land, it must be shown that the party claiming same and his grantors have, prior to the commencement of the suit, paid the taxes upon the land under color of title for at least seven years, the statutory period of limitation. The fact that the true owner has failed to pay taxes on the land for a period longer than seven years will not alone bar him; but it must also appear that during such period the defendant and those under whom he claims have themselves paid taxes thereon for at least seven years prior to the institution of the suit before the true owner can be declared barred by laches. The fact that the land was not assessed or the taxes thereon were paid by strangers to the suit and to the parties will not aid the plea of laches. It is essential to support such plea to show that the taxes were actually paid by the defendant and those under whom he claims for at least the period of seven years prior to the institution of the suit.

In the case at bar, the plaintiff brought his suit to quiet his title within five years after defendant and those under whom he claims began paying taxes on the land under the tax title acquired by them from the State. Plaintiff was not barred by laches.

We think the case of *Chandler* v. *Banks, supra,* is decisive of this question. In that case it was held (quoting the syllabus): "A suit to remove the cloud upon the title of wild and unimproved lands will not be barred by laches where it was brought within four years after defendant's tax title was

acquired from the State, and where plaintiff had done nothing to indicate that he had abandoned the land except that he had failed to pay the taxes during that time."

It is urged by counsel for defendant that the court erred in the amount of the taxes which it adjudged to him. It is contended that, the defendant being subrogated to all rights of the State by virtue of the purchase from it of the lands, the defendant is thereby entitled to all taxes for each of the years from the date of the forfeiture to the sale thereof by the State, as well as to all taxes paid by him and his grantors thereafter. But after the forfeiture of 1868 and the sale thereunder of the lands to the State, these lands were not assessed, and no taxes were levied against them until after they had been sold by the State to defendant's grantors. During those years there were no taxes which were actually charged against and became liens upon the land to which the defendant could be subrogated. The only taxes assessed and charged against these lands were for the year of 1868 and for the years subsequent to the purchase from the State in 1904. For the year of 1868, and for the years subsequent to the acquisition of the lands from the State by the grantors of defendant, a levy of taxes was made and charged upon these lands. These were the only taxes against these lands to which the State asserted any right, and are therefore the only charges thereon to which the defendant could be subrogated. As was said in the case of *Belcher* v. *Harr*, 94 Ark. 221: "The defendant has paid taxes on the lands since he acquired them from the State, and these taxes are a charge upon the lands. The taxes for the year for which each tract was sold to the State are also a charge upon each tract; and by his purchase from the State defendant became subrogated to the lien of the State for the taxes for the year for which the land sold. Defendant is entitled to a decree for these taxes and a lien therefor on the land." *Connerly* v. *Dickinson*, 81 Ark. 258; *Files* v. *Jackson*, 84 Ark. 587; *Seldon* v. *Dudley E. Jones Co.*, 89 Ark. 234.

We find no error in the decree that was rendered by the chancellor in this case, and the same is accordingly affirmed.

WILLIFORD v. WILLIFORD.

Opinion delivered January 22, 1912.

1. LIMITATION OF ACTIONS—NONSUIT—SUBSEQUENT SUIT.—Kirby's Digest, sec. 5083, providing that if an action shall be commenced within the time prescribed and the plaintiff therein suffer a nonsuit he may commence a new action within one year after such nonsuit suffered, does not limit but extends the period applicable under the general statute of limitations. (Page 67.)
2. TRUST—WHEN CONSTRUCTIVE TRUST ARISES.—When an administrator or a trustee, without knowledge of his beneficiary, purchases the property entrusted to his charge, either at a private or public sale, equity will impress a constructive trust upon the property so purchased for the benefit of the beneficiaries. (Page 68.)
3. SAME—ACTIONS TO ENFORCE—BURDEN OF PROOF.—The burden is on one seeking to charge an administrator as constructive trustee of land purchased for himself to show that the land was owned by decedent when purchased by the administrator. (Page 71.)

Appeal from Crittenden Chancery Court; *Edward D. Robertson,* Chancellor; affirmed.

S. S. Cockroft, for appellant.

L. P. Berry, for appellee.

FRAUENTHAL, J. This is an action instituted by J. E. Williford and Sudie Reddit, the plaintiffs below, seeking to impress a trust upon a tract of land in Crittenden County, the legal title to which had been obtained by the defendants, S. P. Williford and his wife, E. E. Williford, and to divest them there of and vest same in plaintiffs. The complaint alleged that the land, which is described as the west half of section 12, township 4 north, range 7 east, was owned by J. M. Williford, who departed this life in 1887, leaving surviving him as his only heirs the plaintiffs, who are his children; that the defendant S. P. Williford was duly appointed administrator of the estate of said J. M. Williford, and in that capacity took charge of said land and attended to paying the taxes thereon. It was also alleged that in 1886 Bettie and Ida Burgett instituted an ejectment suit against said J. M. Williford for the recovery of the above and other lands, which, after the death of J. M. Williford, was revived in the name of his said administrator and heirs. That suit resulted in a judgment in favor of the representatives of said Williford and was appealed to the Supreme Court, where

the judgment was affirmed except as to a tract of land not involved in the present case. It was further alleged that said S. P. Williford as the administrator of said estate, and also representing the plaintiffs, attended to the above suit; that, after the determination of said case by the Supreme Court, the further litigation thereof was compromised, and, in pursuance of such compromise agreement, the said Burgetts conveyed to said J. E. Williford and Sudie Redditt a number of tracts of land, amongst which was the land involved in the present case. It was also alleged that, during the progress of said administration and said above litigation, the said S. P. Williford permitted a portion of said lands to forfeit for the nonpayment of levee taxes, and the remainder to forfeit for the nonpayment of State and county taxes; that through the sales therefor the defendant S. P. Williford obtained the legal title to said land, and subsequently conveyed same to his wife.

The defendants denied that the land involved in the present case was ever owned by J. M. Williford, or that he ever claimed the same, or that he was ever in the possession thereof. They denied that said land was included in the ejectment suit instituted by the said Burgetts against said J. M. Williford, or that the defendant S. P. Williford, as administrator of said estate of J. M. Williford, deceased, had ever taken charge of or paid taxes on said land. They also denied that the land was ever owned by said Bettie and Ida Burgett. They alleged that a portion of the land was sold under decree of the Crittenden Chancery Court in a suit instituted by the St. Francis Levee Board for the nonpayment of levee taxes thereon for the years of 1895, 1896 and 1897, and was purchased by S. P. Williford, who, in January, 1899, obtained the commissioner's deed therefor after due confirmation of such sale; that the remainder of said land was sold to the State for the nonpayment of taxes, and was thereafter acquired by the St. Francis Levee District, which sold and conveyed same to J. F. Hodges on March 21, 1896, and that said Hodges subsequently conveyed same to S. P. Williford. They also alleged that they had held the open and adverse possession of said land for more than seven years prior to the institution of the present suit, and they pleaded in bar of any claim or right that plaintiffs might have in the land the seven years, five years and two years statutes of limitation.

It appears that the present action was instituted on September 2, 1907, in the names of both J. E. Williford and Sudie Redditt as parties plaintiff, and that N. W. Norton, Esq., an attorney of the lower court, prepared and filed the complaint and therein represented the plaintiff J. E. Williford. On February 24, 1908, upon the motion of said N. W. Norton, Esq., the chancery court entered an order dismissing the case as to said J. E. Williford. On September 27, 1910, said J. E. Williford filed a petition in said chancery court asking that he be made or reinstated as a party plaintiff to the suit, upon the ground that same had been dismissed as to him without his knowledge and without authority. The lower court refused this request, and from the judgment denying his prayer to be made a party J. E. Williford has appealed to this court. Thereafter the case proceeded with said Sudie Reddit as sole plaintiff. Upon the final hearing, the court entered a decree dismissing the complaint for want of equity.

Relative to the petition of J. E. Williford to be made or reinstated as a party plaintiff to the suit, the chancery court heard testimony from which it found that said N. W. Norton, Esq., was duly employed by J. E. Williford to institute the action for him and was authorized thereafter to dismiss same as to him. From the testimony of N. W Norton, Esq., and the letters exhibited by him, we think the court was warranted in the finding which it made. After the nonsuit, J. E. Williford had, by virtue of section 5083 of Kirby's Digest, a right to bring a new suit within a year after he had suffered the nonsuit; and it appears that the court denied the petition to make or reinstate him as a party because it was not filed within said year. But we are of the opinion that this statute did not narrow the period of limitation, but extended the period provided by the general statute of limitation applicable to this cause of action, so that, if J. E. Williford was not then barred as to this action by the general statute of limitation, he had still the right to institute a new suit. *Love* v. *Cahn*, 93 Ark. 215. But, according to the view which we have taken of the merits of this case under the evidence which was adduced at the trial thereof, we do not deem it necessary to pass upon the question as to whether or not the court was in error or abused its discretion in refusing said J. E. Williford to be made or reinstated as a

party plaintiff in the action. And for the same reason we do not deem it necessary to note or pass upon the questions raised by the pleas of the statute of limitation.

This was an action instituted for the purpose of impressing upon the land involved herein a constructive trust and to declare the defendants as trustees thereof for the benefit of the plaintiffs. The right of plaintiffs to this relief is predicated upon the allegations that the land was owned originally by their father, from whom they acquired title by descent, and that the defendant S. P. Williford occupied a relation of trust and confidence as to them in regard to this property which he violated by purchasing the land for the nonpayment of taxes and by thus obtaining the legal title thereto. It has been held that no one can be permitted to purchase an interest where he has a duty to perform that is inconsistent with the character of a purchaser. When, therefore, an administrator or a trustee, without knowledge of his beneficiary, purchases the property charged to his care, either at a private or public sale, equity will impress a constructive trust upon the property so purchased for the benefit of those beneficially entitled thereto. 3 Pom. Eq. § 1052; *Wright* v. *Walker*, 30 Ark. 44; *West* v. *Waddell*, 33 Ark. 575; *McGaughey* v. *Brown*, 46 Ark. 25; *Montgomery* v. *Black*, 75 Ark. 184; *Bank of Pine Bluff* v. *Levi*, 90 Ark. 166. The foundation of the right of the plaintiffs to have a trust for their benefit declared upon this land is based upon the allegation and claim that this land was owned and possessed by their father, and that S. P. Williford, as his administrator, was charged with the duty of caring for and protecting it from sale, and thereby was prohibited under the law from purchasing it. The primary fact, then, to determine is whether or not the land was owned by the father of plaintiffs. For, if the land was not owned by him, then S. P. Williford, as his administrator, owed no duty and was not chargeable with any trust relative thereto, If the land was not owned by plaintiffs' father, then it was not litigated in said suit instituted by said Burgetts, and, therefore, S. P. Williford did not as agent or otherwise, during said litigation, occupy any relation of trust or confidence relative thereto for the plaintiffs in the present case.

The testimony on the part of the defendants tended to prove that the land was never owned, possessed or claimed

by J. M. Williford. The defendant S. P. Williford, who was well acquainted with all the lands claimed or owned by his brother, J. M. Williford, testified positively that said J. M. Williford never owned or claimed this land; and there was no witness who testified that he did own it, or that he ever claimed it or paid taxes on it or was ever in possession of it. This testimony tended to prove that the land originally belonged to the State and was acquired by it as Internal Improvement land. In 1874 M. A. Wolf obtained from the State title to the northwest quarter of said section 12 and conveyed it to the Second National Bank of St. Louis in 1878, which, during the same year, executed a deed therefor to Orman Pierson, and he in 1884 conveyed it to Robert Pierson. The tax books show that Orman and Robert Pierson paid the taxes on this land continuously for the years from 1883 to 1893. On February 14, 1898, the Crittenden Chancery Court, in a suit pending in that court instituted by the St. Francis Levee Board, entered a decree subjecting this land to sale for the nonpayment of the levee taxes for the years of 1895, 1896 and 1897. Under that decree this portion of the land was sold to S. P. Williford, and the sale thereof was duly confirmed at the July term, 1898, of said court, and deed therefor was executed by the commissioner of said court to S. P. Williford on January 18, 1899. This testimony tended further to prove that Wm. Chapline acquired from the State the southwest quarter of said section 12, and that thereafter it had forfeited to the State for the nonpayment of the taxes of 1884 and 1885; that by virtue of an act of the Legislature entitled "An act to donate to the St. Francis Levee District all the lands of this State within the limits of said levee district," which became a law March 29, 1893 (Acts 1893, p. 172), the St. Francis Levee District acquired the State's title to the land, and in 1896 conveyed it to J. F. Hodges, who at that time was a partner of said S. P. Williford; thereafter the said Hodges conveyed 120 acres of this land to said S. P. Williford. From this testimony, we think the court was warranted in finding that the land involved in this suit was not owned by J. M. Williford.

The plaintiffs introduced no record evidence to show, nor did they offer any witness who testified, that this land was ever owned by or in the possession of said J. M. Williford.

They urge that this is shown by the proceedings in said suit instituted by Bettie and Ida Burgett against J. M. Williford. That was an ejectment suit instituted on November 16, 1886, in the law court for the recovery of about 3,000 acres of land, and it was appealed to the Supreme Court. The opinion was rendered upon that appeal on May 7, 1892, and will be found in 56 Ark. 187, under the style of *Burgett* v. *Williford.* The original complaint and papers in that case, however, were lost, and the transcript filed in the Supreme Court upon said appeal was also lost, and no testimony as to what these various lost documents contained was introduced upon the trial of this case. The only documents relating to that suit in the lower and appellate courts that were introduced were the abstracts and briefs filed by counsel for appellants and appellee in the Supreme Court. From these we are wholly unable to find or say whether the tract of land involved in the present suit was mentioned in the complaint filed in that case, or whether the defendants in that case claimed any right or ownership in this tract of land. In some parts of the abstract the tract of land is referred to; but that suit involved a great number of tracts of land, and in showing the deraignment of title to these various tracts the description of the tract involved in this suit may have been set out in some of the deeds with the description of the lands which were actually involved in that case. However that may be, in said brief of appellees filed in the Supreme Court, it is stated that J. M. Williford claimed title to the various lands then litigated for under and by virtue of a purchase made by him from and a deed executed to him by Ferguson and Hampson. From this deed and the testimony introduced, it appears that on January 19, 1880, Ferguson and Hampson sold to J. M. Williford 2,878.34 acres of land for $13,625, and on that day executed to him a bond for title therefor, and later, on March 19, 1885, executed to him a deed, which was thereafter duly recorded, and in which the lands are specifically described. Now, the land involved in the present suit is not contained in said deed, and it is not contended by counsel for plaintiffs that J. M. Williford acquired said land from said Ferguson and Hampson. From this statement of the brief of appellees filed in the Supreme Court of what the answer in said case contained, we are led to believe that the only lands involved in

that litigation which J. M. Williford claimed title to were those described in the deed which he obtained from said Ferguson and Hampson. We are also influenced in making this finding by reason of the controlling question discussed in the opinion which was rendered by this court in that case. It was there held that the Burgetts, who were the appellants in that case, were concluded from setting up any title to the lands by reason of a decree rendered against them in a case instituted by said Ferguson and Hampson against them for the purpose of quieting the title thereto. That case was filed on September 29, 1880, and the decree therein was rendered in April, 1881, and the tract of land involved in the present case is not embraced in that decree.

There was no other testimony introduced by the plaintiffs upon the trial of this case showing any title, possession of or claim made by J. M. Williford to the land involved in the present suit. There was no testimony showing or tending to show from what person or source he acquired this land, if he ever owned it or laid claim to it; nor is there any testimony showing that he ever paid taxes thereon. Nor can we say from the meager references in said briefs that there is sufficient evidence showing that this land was involved in the litigation between the Burgetts and J. M. Williford. It appears that in 1900 Bettie and Ida Burgett executed to the plaintiffs a deed for a number of tracts of land, including the land involved in this suit. It is contended that this conveyance was made in compromise of that litigation; but it may be that they simply conveyed to the plaintiffs all lands to which they laid any claim in Crittenden County, and it does not necessarily follow that the land involved in the present suit was also involved in the case brought by said Burgetts. But whether this tract was described in the complaint in that suit or not, it does not appear from any testimony which was adduced upon the trial of the present case that J. M. Williford ever owned or claimed to own any interest in this land. The rights of plaintiffs to have a constructive trust declared upon this land as against the defendants must depend upon the proof of title and ownership of their father, J. M. Williford, to this land, and their right to relief must fail with a failure to make that proof. The burden was upon the plaintiffs to make this showing by a preponderance of the evidence.

It is apparent, we think, that the evidence which was adduced upon the trial of the present case is not sufficient to authorize the court to declare that this land was owned by J. M. Williford, and that S. P. Williford purchased it while acting as his administrator and in a fiduciary relation to the plaintiffs. The chancellor found that this land did not belong to J. M. Williford; that S. P. Williford occupied no trust relation either to his estate or to the plaintiffs when he purchased it; that any other claim to or interest in the land that the plaintiffs may have obtained from the Burgetts, if they owned any right or interest in the land, was barred by the statute of limitation; and upon an examination of the entire record we are of the opinion that these findings are not contrary to the weight of the evidence adduced in this case.

Finding no errors in the decree rendered by the lower court, it is accordingly affirmed.

LONGER v. CARTER.

Opinion delivered January 8, 1912.

1. FRATERNAL INSURANCE—CHANGE OF BENEFICIARY.—Where a member of a fraternal benefit society has the right, under the by-laws of the order, to change the beneficiary, and does make a change in the manner prescribed by the laws of the order, no one but the society can question the eligibility of the person thus designated. (Page 76.)
2. SAME—RIGHT TO BENEFIT—WHO MAY QUESTION.—Where a fraternal benefit society denied any liability under a certificate issued by it, and there was a controversy between appellant and appellees as to who was entitled to the benefit thereof, an agreement between the three parties that the suit should proceed as if appellant was joined as party plaintiff with appellees, and that, if it should be found that the defendant, the society, was liable on the policy, the court should determine whether appellant or appellees were entitled to judgment, did not transfer to appellees the society's privilege of raising the question as to who was entitled to the benefit. (Page 76.)
3. SIGNATURE—AUTHORITY.—Signature by mark is not the only method by which an instrument may be signed by an illiterate, as he may authorize another to sign his name in his presence. (Page 77.)
4. INSURANCE—CHANGE OF BENEFICIARY—IRREGULARITY.—The fact that the name of the local lodge president was signed to an application for change of beneficiaries in a mutual benefit certificate without authority

was an irregularity merely, and could not be taken advantage of by the original beneficiary. (Page 77.)

5. SAME—CHANGE OF BENEFICIARIES—BURDEN OF PROOF.—In an action by the original beneficiary of a mutual benefit certificate against a substituted beneficiary and the benefit society, the burden is on the plaintiff to show that the certificate payable to the substituted beneficiary was obtained without authority from the insured. (Page 78.)

6. APPEAL AND ERROR—REVERSAL—DISPOSITION OF CASE.—It is only in exceptional cases at law that the appellate court renders final judgment on reversal or remands with directions to enter judgment; the general rule being to remand for a new trial. (Page 78.)

Appeal from Lawrence Circuit Court; *R. E. Jeffery*, Judge; reversed.

W. A. Cunningham, for appellant.

In a policy of the kind in question here, the beneficiary takes only an interest in expectancy, liable to be divested at any time at the will of the insured, and, in case of a change of beneficiary, the party originally named as such can not question the right of the beneficiary to whom the policy is changed to take thereunder. This question can only be raised by the supreme lodge or the insurer. 53 Ark. 262; 56 Ark. 62; 9 Am. St. Rep. 629; *Id.* 272.

J. N. Beakley and *McCaleb & Reeder*, for appellee.

1. There was never in fact a substitution of beneficiary in the policy. The insured did not sign the request for change of beneficiary. The signature appearing upon the policy can not legally be construed to be his signature nor a signature authorized by him. Where a party desires to sign or subscribe an instrument, and can not write, it is essential to the validity of the signature that he at least make his mark. Kirby's Digest, section 7799; 51 Ark. 48; 49 Ark. 18; 70 Ark. 449.

2. The rule that only the supreme lodge or the insurer could contest the validity of the change of beneficiary does not apply in this case. Under the agreement entered into by the parties, both sets of claimants were parties to the proceedings, and it was not necessary for the annuity company to raise the objection as to the regularity of the change of beneficiary. When all parties in interest are before the court and no possibility of a second recovery exists, the reason for the rule—the protection of the insurer—ceases to exist.

McCULLOCH, C. J. Antone Frankring became a member of the Loyal Fraternal Home, a fraternal insurance society, and had a benefit certificate or policy therein for the sum of $1,000, payable to his two children, Annie and Bertie Frankring. One of the by-laws of the society contained the following provision:

"Benefits shall be made payable only to families, widows, heirs, blood relatives, affianced husband or affianced wife, to persons dependent upon the member, or to the member for accidental injury, and to such others as may be permitted by the laws of the State of Missouri, and the beneficiary or beneficiaries shall be designated by the applicant in his application. Should a member in good standing desire at any time to change his beneficiary, he shall pay to the secretary a fee of fifty cents, and deliver to him his benefit certificate, with written surrender on the back thereof and directions as to the change desired and name of new beneficiary. The secretary shall then forward said certificate with the fee of fifty cents to the supreme secretary, who shall at once issue a new certificate as requested."

Subsequent to the issuance of said certificate to Frankring, the National Annuity Association, another corporation engaged in the same business, took over and assumed the obligations of the Loyal Fraternal Home. On September 19, 1908, Frankring signed a written application, in accordance with the laws of said association, for a change of beneficiary, offering to surrender the original certificate, and requesting therein the issuance of a certificate payable to appellant, Mary L. Longer, who was designated in said application as a "dependent." This application was forwarded to the national president, together with the surrendered benefit certificate, and that officer erased the names of the two beneficiaries originally designated therein, and inserted in the same place the name of appellant as dependent aforesaid, this change being attested by the signature of said officer and dated September 28, 1908. The certificate as thus changed was returned to the local secretary and delivered to appellant, who still holds it. Frankring died January 7, 1909, while still a member of said fraternity, and while said benefit certificate was outstanding in the hands of appellant, and an action was thereafter instituted against the National Annuity Association by the two children suing by their guardian, F. T. Carter, to recover the amount of said benefit. Appellant

appeared in that action, and asked to be made a party, which was done by consent of all parties. The National Annuity Association denied liability under the policy or benefit certificate on account of alleged misrepresentations of Frankring concerning his habits with reference to the use of intoxicating liquors and also with reference to past illness. While the cause was pending in the circuit court, and before the trial thereof, the three parties to the action entered into the following written agreement:

"It is hereby agreed by all the parties to this suit that the cause may proceed to trial as if Mary Longer was joined as party plaintiff; and if it is found that the defendant, the National Annuity Association, is liable upon the policy of insurance, the court shall determine which of the parties under the law and the evidence is entitled to a judgment; and it is further agreed that, if either party desires to do so, they may submit to the court additional evidence upon the question of the amount recovered."

The cause was tried by a jury, and the trial resulted in a verdict and judgment against the defendant in the action for the full amount named in the benefit certificate, and on appeal to this court the judgment was affirmed. *National Annuity Association* v. *Carter*, 96 Ark. 495. The judgment was rendered in favor of appellant, Mary Longer, and appellees, Annie and Bertie Frankring, and contained an order directing that the sum so recovered "be paid to the clerk of this court, to be held by him until the rights of Mary L. Longer and Francis P. Carter, guardian for Anna and Bertie Frankring, can be determined by this court." After the affirmance by this court, appellees filed an amended complaint, naming appellant and the National Annuity Association as defendants, alleging that they (appellees) were the daughters and sole heirs of Antone Frankring; that the original benefit certificate was payable to them, and that appellant, Mary Longer, is falsely and fraudulently asserting some rights to the benefit. Appellant filed her answer to this amended complaint, setting forth the aforesaid change of benefit certificate in her favor. The National Annuity Association made no further appearance in the suit, and, we assume, paid the amount of the benefit over to the clerk of the court in accordance with the judgment. The cause was tried before the court sitting as a jury, and the court found for ap-

pellees, and rendered judgment in their favor, awarding the amount of the benefit to them.

The benefit was subject to change according to the by-laws of the association, and appellees, as the original beneficiaries, had no vested interest therein. *Carruth* v. *Clausen,* 97 Ark. 50. It seems to be settled by the weight of authority that, where a member of a fraternal benefit society has the right, under the laws of the order, to change the beneficiary, and does make a change in the manner prescribed by the laws of the order, no one but the society itself can question the eligibility of the person thus designated, and the original beneficiary has no right to complain, even though the new beneficiary does not fall within the class specified by the laws of the order. In other words, that the society itself may waive the ineligibility of the designated beneficiary and that the original beneficiary, having no vested interest in the benefit, is not in position to complain. *Alfsen* v. *Crouch,* 115 Tenn. 352; *Coulson* v. *Flynn,* 181 N. Y. 62; *Maguire* v. *Maguire,* 59 N. Y. App. Div. 143; *Tepper* v. *Supreme Council of Royal Arcanum,* 61 N. J. Eq. 638; *Cowin* v, *Hurst,* 124 Mich. 545; *Knights of Honor* v. *Watson,* 64 N. H. 517; *Hoeft* v. *Knights of Honor,* 113 Cal. 91; *Supreme Lodge, etc.,* v. *Terrell,* 99 Fed. 330; *Taylor* v. *Hair,* 112 Fed. 913; *Martin* v. *Stubbings,* 9 Am. St. Rep. 629, 126 Ill. 387. That doctrine has been announced and adhered to by this court, and upon principle we entertain no doubt of its correctness. *Johnson* v. *Knights of Honor,* 53 Ark. 262; *McDonald* v. *Humphries,* 56 Ark. 63. In *Johnson* v. *Knights of Honor, supra,* there was a controversy between the widow and the heirs as to which was entitled to the benefit, there being no designation further than that it should be paid to his heirs, and the widow contended that the heirs in that case were collateral kindred, had no insurable interest, and did not fall within the class of beneficiaries named in the laws of the order, and therefore could not take the benefit. Judge BATTLE, in disposing of the case, said this:

"It is contended that the brother and sister of Johnson are entitled to no part of the $2,000, because the constitution of the supreme lodge of 1884 limits the rights of a member of any lodge of the Knights of Honor to name beneficiaries in a certificate issued to him to the members of his family, or those

dependent on him, and they belonged to neither of these classes. But this question can be raised by no one except the supreme lodge, and it does not. By paying the money into court, it has expressed its willingness to have it paid to Johnson's heirs."

It is insisted that the rule above announced does not apply in this case, for the reason that the effect of the agreement of the parties in the action was to transfer to appellees the society's right or privilege of raising the question as to who was entitled to the benefit. We do not think that such is the effect of the agreement. By entering into this agreement and pleading other defenses, the society, in effect, waived its objection to the alleged ineligibility of appellant as the person named in the benefit certificate, and consented to the payment to her, if its liability under the certificate and the membership of Frankring should be established. Contesting the policy under those circumstances and under that agreement, we think, was the same as if the money had been paid into court for the benefit of the person whom the court should decide was entitled to it. The benefit certificate being payable to appellant, it established her right, *prima facie*, to collect the money, and no one but the society itself can complain. It has not done so, but, on the contrary, has elected to defend solely on other grounds.

It is also insisted that the change of the beneficiary was not valid, because the application was not signed by Frankring himself, the point being made that, as he was an illiterate, he could only sign by mark. Signature of an illiterate by mark is not the exclusive method by which an instrument may be signed by an illiterate. The undisputed testimony in the case establishes the fact that the name of Frankring was signed to the application by the local secretary in his presence. This was sufficient. It appears that the name of the local lodge president was signed to the application without authority. This was, however, only an irregularity, at most, which only the society itself could take advantage of. Moreover, there does not appear to be any requirement that the application for change of beneficiary shall be attested by the president of the local lodge.

It is apparent from the record in this cause that the appellant is entitled to the benefit, and the court erred in not awarding the amount to her. The judgment is therefore reversed, and the cause remanded with directions to enter judgment

in favor of appellant for the fund adjudged to be paid by the National Annuity Association.

WOOD and HART, JJ., dissent.

ON REHEARING.

Opinion delivered February 5, 1912.

MCCULLOCH, C. J. There was an issue raised by the pleadings as to whether Frankring, the assured, ever surrendered his original benefit certificate or authorized the change so as to make it payable to appellant. The only testimony on the subject was the written application for the change and the benefit certificate itself, and the testimony of Pinchback, the secretary of the local lodge, who stated that he signed Frankring's name to the application at the latter's request, and that when the changed certificate was returned to him by the national president, he delivered it to Frankring. The trial court made no special finding, but found generally that appellees were entitled to the fund. It is contended that the court refused to credit Pinchback's testimony and found that the certificate was changed without authority from Frankring, and that we should not disturb the finding. The burden was on appellees to show that the certificate payable to appellant was obtained without authority from Frankring. The testimony of Pinchback was undisputed, and the court could not arbitrarily disregard it. We must assume that the court did not disregard it, but decided against appellant on the ground that she was not within the class of beneficiaries specified in the laws of the order, and for that reason was not entitled to the fund.

Counsel for appellees again insist on the alleged insufficiency of appellant's abstract. That contention was not mentioned in the original opinion, but we considered it and concluded that the abstract was sufficient to comply with the rules of this court.

Appellees ask that the judgment be modified so as to remand the case for a new trial on the issue as to whether Frankring authorized or ratified the change of his benefit certificate. They say that they can bring forward other testimony bearing on that issue sufficient to warrant a finding in their favor. It is only in exceptional cases at law, when the proof is fully devel-

oped and there can be no recovery, that this court renders final judgment here on reversal, or remands with directions to enter judgment. The general rule is to remand for a new trial. The judgment of this court will, therefore, be modified so as to remand the case for a new trial on the issue indicated above.

GRAYSON-MCLEOD LUMBER COMPANY *v.* SLACK.

Opinion delivered January 15, 1912.

1. CONTRACT—CONSTRUCTION.—A contract for cutting timber off the lands of appellant which reserved in the appellant the right to change any part of such contract did not authorize appellant to abrogate the the contract. (Page 81.)
2. SAME—FORFEITURE—WAIVER.—Where one party to a contract, with knowledge of a breach of contract by the other party, suffered the latter to continue in performance of the contract, he will be held to have waived the right to insist upon a forfeiture. (Page 82.)

Appeal from Clark Chancery Court; *James D. Shaver*, Chancellor; affirmed.

John H. Crawford, for appellant.

Thomas C. McRae, W. V. Tompkins and *D. L. McRae*, for appellee.

MCCULLOCH, C. J. Appellant, Grayson-McLeod Lumber Company, owned large bodies of timber land in Clark and Pike counties, in the State of Arkansas, and on November 23, 1909, entered into a written contract with appellees, whereby the latter were to cut the timber and convert same into railroad ties, piling and staves, and deliver same to appellant for certain stipulated prices. The contract (omitting caption) reads as follows:

"That the parties of the second part agree to cut all oak timber from the lands of the first party in Clark and Pike counties, and deliver on the track of the A. V. R. R. [Antoine Valley Railroad] as per instructions and orders given them as follows:

"All oak timber large enough to make 6x8 8 ft. ties, either red or white oak, to be made into standard 6x8 ties and delivered at the track at 26 cents each for white oak, and red oak 23 cents, No. 2's 13 cents each.

"All white oak timber too large for 6x8 ties and not large enough for piling to be made into 7x9 8 ft. ties, and delivered at track for 32 cents each. No. 2, 7x9 ft. ties, 26 cents each.

"All white oak that will make piling up to 40 or 45 feet to be cut into piling, Missouri Pacific specifications, and delivered at track for 4½ cents per lineal foot.

"All oak too large for piling to be made into whisky barrel staves and delivered at track at $16.50 per thousand. Rejects at $7.00 per thousand.

"All white oak timber not large enough for staves and will make bolts to be cut into bolts and delivered at track for $4.00 per cord.

"For piling cut along the A. S. W. or G. & F. S., and delivered at a switch where they can be conveniently loaded 7 cents per lineal foot f.o.b.

"All white oak ties 7x9 8 ft. delivered at switch f.o.b. 46 cents each.

"All white oak ties 6x8 8 ft. delivered on right-of-way of either the A. S. W. R. R., (Arkansas Southwestern Railroad), or the G. & F. S. R. R. (Gurdon & Fort Smith Railroad) 36 cents each.

"The last three items, viz: the 7x9 8 ft. and the 6x8 8 ft. and the piling are not to be cut from lands owned by Grayson-McLeod Lumber Company.

"The Grayson-McLeod Lumber Company reserves the right to change any part of this contract. All above to be paid for net cash after acceptance by the first party."

Appellees proceeded to cut the timber, and continued until July 23, 1910, when appellant served written notice on them to the effect that it claimed the right, under the stipulations of the contract, to terminate it, and had elected to do so. The notice was in the form of a letter addressed to appellees, and reads as follows:

"With reference to the contract placed with you on the 23d day of November last, with reference to getting out staves and piling, the directors of the consolidated concern have decided that we would not make any more ties, staves or piling from the lands in Clark County and Pike County for the time being; and, as our contract provides that we may terminate it any time, we will have to ask you to consider the contract null

and void after August 1, 1910. If at some later date we decide again to work ties, staves and piling, we will be glad to figure with you in the proposition."

Appellees declined to cease work under the contract, and on August 5, 1910, appellant commenced this action to restrain them from cutting timber on the lands in question.

Appellant, in its complaint, sets forth the contract and claims the right to terminate it under the last clause, and, in an amendment to the complaint, it alleges that appellees had violated the contract in manufacturing cross-ties from timber on the land and selling same to other parties.

Appellees, in their answer, denied violating the contract, and also disputed the right of appellant to terminate it under the last clause thereof.

The chancery court, on hearing proof, entered a decree dismissing the complaint for want of equity.

The principal contention of learned counsel for appellant is, that the last clause of the contract gives the right to terminate it. That clause reads as follows:

"The Grayson-McLeod Lumber Company reserves the right to change any part of this contract."

Now, the use of the word "change" does not include the right to abrogate the contract. It means something else, that is, to alter or to make different. But if the effect contended for now was intended by the parties, different language, more appropriate to convey that meaning, would have been employed. It is shown that the contract was not prepared by one learned in the law, but was written by Mr. William Grayson, the president of appellant company, who was a good business man, and is presumed to have understood the ordinary terms applicable to his methods of business. It is inconceivable that, if a man of that kind intended to reserve the right to abrogate the contract, he would have inserted the language which he used in this contract. The only fair construction to be placed on the contract is that it means what it says, that is, that the owner of the timber should have the right to change the contract, but not to abrogate it. It is susceptible of that meaning without destroying the contract, but to adopt the interpretation insisted upon by appellant would be to destroy the contract in its inception, because, if that is what it meant, it had no binding

force upon appellant at all. The interpretation which we place upon the language is consistent with other parts of the contract, which could be changed without abrogating the contract itself. The primary object of the agreement was that appellees should cut all the timber on the lands named for certain stipulated prices. The owner was given the right to direct how the timber should be cut, and the parties in the instrument itself undertook to specify how it should be cut and into what articles it should be manufactured, and the dimensions thereof. It was seen fit to insert the last clause so as to give the right to change the contract in those respects, but we can not agree that it gave the right to terminate the contract altogether.

We think that the chancellor's interpretation of the contract was correct, and his decree should not be disturbed.

It is next contended that appellees violated the contract by cutting two lots of railroad ties and a lot of staves and disposing of them to other parties. One of the lots of ties was cut on the Arkansas Southwestern Railroad. E. T. Slack, one of the parties, explains this transaction by stating that, prior to the date of the contract with appellant, the latter had entered into a contract with one Lintz for the cutting of the timber on some of the land, and that, before the execution of the contract with appellees, Lintz authorized him (witness) to cut the timber, and he did so under the impression that there had been a renewal of the Lintz contract, and he thought he was cutting that particular timber under the Lintz contract, and not under the contract of appellees with appellant. This occurred a considerable length of time before appellant decided to terminate the contract.

The other transaction relates to a lot of ties cut on the Gurdon & Fort Smith and Arkansas Southwestern railroads, and sold by Mr. Slack to one Gerner. This lot of ties is referred to as those cut by the Couches. Slack explains this by stating that he had a conversation with Mr. Grayson before his death in which the latter agreed for him to put the ties out on the Gurdon & Fort Smith Railroad. He calls attention to the fact that under the contract those ties were not to be made from timber cut on appellant's land, and said that he could at that time have bought ties cheaper than appellant was to pay for them; that he notified appellant's manager, Mr. Burns, and,

after ascertaining that appellant couldn't handle ties on the Gurdon & Fort Smith Railroad or the Arkansas Southwestern Railroad, and having an opportunity to sell them to another party, he did so. The evidence does not warrant a finding that appellees, in either of the transactions referred to attempted to perpetrate a fraud upon appellant or to violate the contract in any respect. All that was done in those transactions was done openly and under a claim of right. Appellant, on discovering the mistake, did not claim the right to insist upon a forfeiture, but, on the contrary, suffered appellees to continue in performance of the contract, and later, when appellant saw fit to declare a forfeiture, or, rather, to terminate the contract, it did so under a claim of right to do so under the language of the contract itself, and not on account of any alleged violation thereof. Appellant was paid in full for the ties and lost nothing in the transaction. It was appellant's duty, when it discovered the apparent breach of the contract, if it intended to insist upon a forfeiture, to do so at once. By permitting appellees to proceed with the performance of the contract, it waived the breach. It is very apparent, from the testimony and from the pleadings in the case, that the claim of a breach of the contract on the part of appellee is an afterthought, and was not asserted at the time appellant first claimed the right to terminate the contract.

There is no merit in appellant's contention, and the chancellor was correct in dismissing the complaint.

Decree affirmed.

SODERMAN v. BELL.

Opinion delivered January 15, 1912.

1. REFORMATION OF INSTRUMENTS—JURISDICTION.—The reformation of deeds and other instruments of writing upon allegations of fraud or mistake is a matter for the exclusive exercise of equity jurisdiction. (Page 87.)
2. SAME—RIGHT TO REFORMATION.—Where, in an action for unlawful detainer, it was virtually undisputed that the deed under which the plaintiff claimed did not correctly describe the land which defendant had sold him, and the cause was transferred to equity in order that the deed might be reformed, it was error to refuse to decree its reformation. (Page 87.)

3. SALES OF LAND—REMEDY OF PURCHASER.—Where a vendor of land which was in the possession of third persons under a lease for a year brought suit against the latter and recovered judgment for possession and damages for its detention, and accepted payment thereof and agreed to the further continuance of possession by them during their lease, the relief granted to such vendor inured to the benefit of her vendee, and she is bound to him for the damages and other moneys recovered for rent of the land. (Page 87.)

Appeal from Clark Chancery Court; *James D. Shaver*, Chancellor; reversed.

STATEMENT BY THE COURT.

John Soderman instituted against Alice Bell and others a suit in unlawful detainer for the unlawful detention of the possession of certain lands in Clark County.

It was alleged that on January 19, 1910, he purchased of Alice Bell certain lands, describing them as they were described in his deed, for a consideration of $1,250, and that on that day she executed and delivered to him a warranty deed therefor, under which she was bound to deliver to him possession of the lands and defend the title thereto against all claims. That she failed to deliver possession of the premises, claiming that Stroud and others unlawfully held over as tenants under a former lease, and agreeing to do so immediately upon dispossessing them. That she filed a suit for that purpose and obtained a judgment against them in September, 1910, for the possession and damages for the unlawful detention, and unlawfully and without right and in collusion with the said Strouds accepted payment of said judgment for damages, and a certain further sum of money, agreeing in consideration therefor to allow said Strouds to continue in possession of the lands until the crop was gathered and removed and to not execute the judgment for possession.

A copy of the deed was filed as an exhibit to the complaint. She moved to make the complaint more specific as to the warranty clause, and also by a correct description of the lands that she might know definitely to what lands he claimed the right to possession.

Stroud and others answered, denying any collusion with Alice Bell for unlawfully holding possession, admitted having held possession in 1910, but alleged that it was with the consent

of the said Alice Bell, admitted the recovery of a judgment by her against them on September 7 for possession and damages and a payment to her of said judgment and a further sum of money for the retention of the premises until their crops could be removed. Also made further allegations by way of cross complaint against Alice Bell.

The court granted the motion to make the complaint more specific, and, in compliance with it, an amendment was filed, setting out the warranty in the deed in the language thereof and also a correct description of the land. Alice Bell answered, denying the sale of the land; that she was bound by the deed to deliver immediate possession thereof as alleged; denied withholding possession and collusion with her codefendants, or any of them; alleged that she was seized of an indefeasible estate in fee simple in the lands, and had good title to convey all that were properly described in the deed at the time it was made; that she was without possession of the lands at the time, same being unlawfully held by her former tenants, and that she did all in her power to dispossess them and put the plaintiff in possession; admitted the recovery of judgment for the possession and damages from her codefendants and her refusal to execute the judgment for possession and her agreement to allow her said codefendants to remain in possession of said premises until their crops were gathered and removed, in consideration of the payment of the judgment for damages and the further sum of money as alleged.

Plaintiff then filed a motion to transfer the cause to equity, setting out the terms of the sale and that the deed did not contain a correct description of the land, which should have been described as alleged in the motion and in the amendment to the complaint, that his deed might be reformed and his deed corrected. The cause was transferred over appellee's objections only.

The testimony shows that the plaintiff purchased the lands from Alice Bell, paying therefor the sum of $1,250; that they were incorrectly described in the deed by mistake, the true description being as set out in the amendment to the complaint and the motion to transfer to equity. That she did not put plaintiff into possession of the lands because her codefendants refused to vacate them, claiming a right under a verbal lease

to the possession during 1910; that she assured him she would do all in her power to deliver possession thereof to him and immediately filed a suit in unlawful detainer against her said codefendants. That thereafter she obtained judgment against them for the possession of the lands, in September, 1910, and damages for the detention, and, instead of executing the judgment for possession against Stroud and the other codefendants herein, and delivering possession of the premises to plaintiff, as he expected her to do, she accepted payment of the judgment for damages, and in consideration therefor, and a further sum of money, agreed not to oust them, and that her said codefendants should continue in possession until the crops were gathered, or until January following.

Upon plaintiff's suit being filed, a writ of possession was issued and the premises delivered to him in October, 1910. The chancellor found that possession of the premises had been delivered to plaintiff under his writ, and that the Strouds and Wilson, codefendants of Alice Bell herein, were in possession of the lands sued for, and that the relation of landlord and tenant did not exist between them and the plaintiff. That Alice Bell was not in possession of the land, and that the relation of landlord and tenant did not exist between the plaintiff and her, and dismissed the complaint for want of equity. From this judgment plaintiff appealed.

McMillan & McMillan, for appellant.

Unlawful detainer will lie at the suit of a purchaser of land, which at the time of the purchase was in the possession of a tenant under a lease from the vendor. 41 Ark. 540; 18 Ark. 284; 18 Ark. 304; 27 Ark. 460. A court of equity alone had jurisdiction to reform the deed and correct the misdescription in the land. 33 Ark. 119; 48 Ark. 498; 49 Ark. 397; 51 Ark. 390; 37 Ark. 626. The chancery court, having secured jurisdiction of the controversy, should have settled the whole matter. 77 Ark. 576; 75 Ark. 52; 48; 312; 544; 33 Ark. 328; 37 Ark. 286. The original complaint was good. Kirby's Digest, § 6091; 66 Ark. 145; 53 Ark. 449.

John H. Crawford, for appellee.

Mrs. Bell's covenant did not extend to "quiet enjoyment;" it only warranted and agreed to defend the title. 131 U. S.

75; 7 Sm. & M. 422; 45 Am. Dec. 314; 6 Wash. 247; 7 John. 258. There can be no recovery against her until it is alleged and proved that her title has failed. 65 Ark. 495. Unlawful detainer can be maintained only where the relationship of landlord and tenant exists. 44 Ark. 444; 41 Ark. 535. It can not be converted into an action in ejectment. 84 Ark. 220. An order of court is not enough to create the relationship of landlord and tenant. 93 Ark. 216. The statute must be strictly construed. 93 Ark. 307.

KIRBY, J., (after stating the facts). The reformation of deeds and other instruments of writing upon allegations of fraud or mistake is a matter for the exclusive exercise of equity jurisdiction, and the court committed no error in transferring the cause to equity.

The testimony was virtually undisputed that the land sold to appellant by appellee was, by mistake, not correctly described in the deed to him and also disclosed a correct description of the land intended to be conveyed as set out in the amendment to the complaint, and the motion to transfer the cause and the court erred in not reforming the deed accordingly.

Appellee, Alice Bell, recognized appellant's right to the possession of the lands conveyed to him, and immediately brought suit against her codefendants, the other appellees, who are not affected by this appeal, for such possession, that she might deliver it to him. He relied upon her doing so, and refrained from proceeding until after she recovered judgment for the possession of the lands and damages for the detention and accepted payment thereof and agreed to the further continuance of possession by said codefendants, and refused to execute the judgment for possession for his benefit.

The relief granted to her should have inured to his benefit, and she was bound to him for the payment of the damages recovered and other moneys, for rent of the lands, received from her said codefendants for unlawfully holding over and depriving her grantee of the possession of the premises.

The decree is reversed and the case is remanded with directions to reform the deed in accordance with the opinion and to ascertain, by permitting the introduction of additional testimony if necessary for that purpose, the amount of damages recovered by appellee against said codefendants for the deten-

tion of the possession of these lands, as well as any money paid her by them for a further holding until possession was delivered to appellant under his writ of possession, and render judgment therefor for appellant against appellee, Alice Bell.

It is so ordered.

SUMMIT LUMBER COMPANY v. SHEPPARD.

Opinion delivered January 22, 1912.

1. SALES OF CHATTELS—WHEN BINDING.—A contract of sale is binding and valid, although it does not in terms fix the price, if it furnishes a criterion for determining same, and leaves nothing to be determined by future agreement or negotiation between the parties in relation thereto. (Page 90.)
2. SAME—WHEN BINDING.—Where a contract of sale leaves something to be done as between the vendor and vendee, as to ascertain the amount, quantity or price, before the title shall pass, the sale would not be complete; but if the title actually passed, the sale is binding, though something remains to be done to determine the total quantity of the property sold or the total price thereof. (Page 91.)
3. SAME—WHEN BINDING.—A contract for the sale of growing timber is valid where it provided for the sale thereof for a fixed price per thousand feet, allowed five years to cut same, and stipulated that the vendee should pay to the vendor the balance due for standing timber "as shown by estimate of remaining said timber," as the contract fixed a criterion for making certain the price to be paid for the timber left standing. Page 92.)

Appeal from Union Circuit Court; *George W. Hays*, Judge; affirmed.

Powell & Taylor, for appellant.

The unexecuted portion of the contract is incapable of enforcement for uncertainty, indefiniteness and want of mutuality, in that no method is provided in the contract for ascertaining the price to be paid for the timber left standing on plaintiff's land.

The contract reflects no specific agreement as to the price per thousand feet of the timber uncut at the expiration of the five years, and it also fails to define in what manner the estimate shall be made, and the method of the estimate. 35 So. 919; 1 L. R. A. 380; Fry, Spec. Perf. 163; 34 S. W. 300; 101 N. W. 682; 60 N. W. 784.

J. B. Moore, for appellee.

The contract is sufficiently certain and definite in its terms to show that appellee sold all the merchantable pine timber of twelve inches and over in diameter at the stump growing on the lands described in the contract; the price is fixed at $1.00 per thousand feet, log scale, to be paid, as the timber was cut, on the 10th of each month; the limit for cutting is fixed at five years, and at the expiration of the five years all timber remaining uncut to be paid for at the contract price ($1.00 per thousand feet) on an estimate of the log scale of the number of feet remaining uncut.

On these essentials, the minds of the parties met, and it left nothing undetermined except the quantity of timber, expressed in feet, left uncut, and that could be determined by such measurement as was in accordance with the custom and usage among timber men, by any one experienced in such measurements.

FRAUENTHAL, J. This is an action by J. M. Sheppard, the plaintiff below, to recover a balance which he claims was due him for the purchase money of a body of timber sold by him to defendant. On October 25, 1902, plaintiff executed a timber deed whereby he did "grant, sell, convey and deliver" to defendant all of the merchantable pine timber of specified dimensions standing and growing upon certain described lands in Union County. The written contract of sale or conveyance contained the following provision: "Party of the second part agrees to pay on the 10th of each month one dollar per thousand feet on the timber cut on said lands during the previous month, as shown by the log scale. And further, if at the expiration of five years from this date any of said timber included herein has not been cut from said lands, then the said party of the second part, or their successors and assigns, shall pay to the party of the first part, their heirs, executors, administrators or assigns, the balance due on said timber as shown by estimate of remaining said timber. The said party of the second part to have one year longer to remove said timber under this contract remaining at the end of five years."

By virtue of said contract of purchase, the defendant began to cut and remove the timber from said lands at the date of the execution thereof, and continued until in October, 1907,

when it ceased cutting same. The testimony on the part of the plaintiff tended to prove that when defendant ceased cutting there remained standing on said land a body of timber of the kind and dimensions mentioned in said contract. After October, 1908, plaintiff had said standing timber inspected, measured and estimated, and according to the testimony of the party inspecting same the timber thus left standing on the land amounted to 235,000 feet. It appears that during the time defendant was cutting the timber from the land it made payments for the timber actually cut in compliance with the terms of said contract, but it did not make any further payments to plaintiff therefor nor any payment for the timber left standing on the land. Thereafter, plaintiff demanded from defendant the sum of $235, being the amount of the timber which he claimed was left standing on the land, at one dollar per thousand feet.

The case was tried by the court sitting as a jury, who made finding for the plaintiff for the amount sued for, and rendered judgment in his favor therefor.

There are several assignments of error made by defendant in its motion for a new trial, but only one of these is urged by its counsel upon this appeal as a ground for reversing the judgment. The defense urged is that there is no method provided for in the contract of ascertaining the price to be paid for the timber left standing on said land, and for this reason the provision in the contract relative to said standing timber is not binding and enforecable.

The principles of law that are applicable to ordinary sales of chattels are, we think, applicable to the contract of sale of the timber involved in this case. One of the essential elements of a contract of sale is the price; and, in order to constitute a binding sale, the price must be agreed upon. In Tiedeman on Sales, § 45, it is said: "So important an element in the sale is the price that a failure to stipulate or agree upon the price would always prevent the completion of the sale." 1 Mechem on Sales, § 209; Benjamin on Sales, § 69; *Cage* v. *Black*, 97 Ark. 613.

While there can be no completed contract of sale if the price to be paid is not certain and agreed upon, yet if some guide or method is agreed upon by which such price can be found with

certainty, then this will be sufficient to make a binding contract. A contract of sale is binding and valid, although it does not in terms fix the exact price, if it furnishes a criterion for determining same and leaves nothing to be determined by future agreement or negotiation between the parties in relation thereto. 1 Mechem on Sales, § § 209, 210.

In determining whether or not a binding contract of sale has been made, the primary consideration is the intention of the parties. If it appears from the contract or the plain intention of the parties that there remains something to be done relative to the property as between the vendor and the vendee—as, for example, to ascertain the amount, quantity or price thereof—before the title thereto shall pass, then the sale would not be complete and binding. In such event the title to the property would not pass, and therefore no corresponding obligation to pay therefor would be assumed. On the other hand, if from the contract it clearly appears that it was the intention of the parties that the title to the property was actually passed and the ownership thereof transferred by the seller to the purchaser, then the contract of sale will be mutually binding and effective, although there remains something to be done in order to determine the total quantity of the property sold, or the total price thereof. *Chamblee* v. *McKenzie*, 31 Ark. 155; *Gans* v. *Holland*, 37 Ark. 483; *Shaul* v. *Harrington*, 54 Ark. 305; *Lynch* v. *Daggett*, 62 Ark. 592; *Priest* v. *Hodges*, 90 Ark. 131.

Where the property sold is identified, and a method is agreed upon for determining its price, then the mere fact that the total amount of such price is not definitely fixed in the contract will not render the sale incomplete or ineffective. In the case of *Adams Mining Co.* v. *Senter*, 26 Mich. 73, it was claimed that a contract for the sale of lumber was not binding because the total price thereof was not definitely fixed therein. In that case it was said: "The whole property being identified and sold at a fixed price per foot, the process of ascertaining the amount was not essential to passing title, as it might have been if less than the whole amount delivered was to be sold and separated by measurement. In that case the measurement might be necessary to fix the property sold; but where all is sold no such process is needed to pass title. The ascertainment of

the price was a mere mathematical computation, involving no further action to bring the minds of the parties together." *Ober* v. *Carson,* 62 Mo. 209; *McConnell* v. *Hughes,* 29 Wis. 537.

In the case at bar, the plaintiff sold to defendant all the merchantable pine timber located on specified land, and by the written contract conveyed and delivered same to it. By virtue of this contract, the defendant obtained a title to or an estate in the timber, which it could assert and enforce, including the right to enter on the land for the purpose of removing it. *Liston* v. *Chapman & Dewey Land Co.,* 77 Ark. 117; *Earl* v. *Harris,* 99 Ark. 112.

A definite method was fixed for ascertaining the price to be paid for the timber. The contract price was one dollar per thousand feet on all the timber. The amount of the timber which was actually cut was to be determined by measurement according to log scale. The amount of the timber left standing after five years from the date of the contract was to be determined by estimate—that is, by a measurement made by some one sufficiently experienced to ascertain the number of feet in standing timber. The total price of all the timber became, from such measurement, a mere matter of computation, and could easily be made definite. We think that the plain meaning of this contract is that the defendant was to pay one dollar per thousand feet for all the timber; that the timber cut by it should be measured by the log scale, and that, by the use of the word "estimate" relative to the standing timber, was meant that the amount of such timber should be ascertained by one able to measure standing timber. The contract therefore fixed a criterion for making certain the price which was to be paid for the standing timber, and contained every essential ingredient of a sale to make it binding upon both parties.

Counsel for defendant rely upon the case of *Louis Werner Sawmill Co.* v. *O'Shee,* 35 So. Rep. 919, to sustain its contention that the price was not certain. But we do not think that the terms of the contract involved in that case are similar to the provisions of the contract in the case at bar relative to the price. In that case the contract was in effect only an offer to sell certain land at a price which was to be fixed or agreed upon in the future by estimators or agents of the contracting parties. The contract was by its terms only optional; but, in

addition to that, there was no guide named in the contract by which the price was to be fixed. The amount thereof was to be determined by the quantity of timber upon the land at $1.50 per thousand feet. The amount of the timber was to be arrived at, according to the contract, by two estimators, one to be chosen by each party. That was a contract in which the price in effect was afterwards to be fixed by appraisers or valuers. In such case, if the valuers representing the parties failed to fix the price, the sale would be incomplete; and this is what resulted in the case cited. In that case the price was to be fixed in the future, by the agreement of the parties, represented by these estimators; and they did not agree. In the case at bar, there was to be no agreement or negotiation in the future between the parties as to the price. According to the contract in this case, defendant was to pay one dollar per thousand feet for the timber left standing; and the amount thereof was to be determined by measurement. The amount of the standing timber was not to be determined by any future agreement between the parties, but by an actual measurement made by them. If both made measurements and they differed as to the amount of the timber, then a jury would be required to decide which measurement was correct. The price would thus be made certain without any further negotiation between the parties; and this was the effect of the provision relative to the price contained in the contract involved in this case.

Finding no error in the judgment of the court, it is accordingly affirmed.

CLARK v. WHITE.

Opinion delivered January 29, 1912.

PARENT AND CHILD—RIGHT TO CUSTODY OF CHILD.—Where a mother placed her children in an orphans' home, alleging that she was unable to support and educate them, she will not be permitted to retake them without some showing that her condition has changed so as to enable her to take care of them.

Certiorari to Independence Circuit Court; *R. E. Jeffery*, Judge; judgment quashed.

Samuel M. Casey, for appellant.

The right of a parent to the custody of his child must yield when the welfare of the child demands it. 78 Ark. 193; 37 Ark. 27; 80 Ark. 287; 82 Ark. 461; 89 Ark. 501. The parent is, in this case, estopped by the terms of her agreement to claim the custody of her children. 50 Ark. 354; 37 Ark. 29. Such contracts are enforceable. 29 Cyc. 1591-92. And where not enforceable, it may be considered by the court for the purpose of determining the feelings of the parent towards the child. 6 A. & E. Ann. Cas. note 940; 11 *Id.* 213 and 217.

McCULLOCH, C. J. On March 16, 1911, the petitioner Mrs. Alice White, placed her five children in the Odd Fellows' Orphan Home at Batesville, Arkansas, of which the respondent, S. F. Clark, is superintendent, and on July 17, 1911, she sued out a writ of habeas corpus to recover the custody of the children. On the hearing of the writ, the circuit judge awarded the custody of the children to the petitioner, and that judgment is brought here by certiorari for review.

The Grand Lodge of the Independent Order of Odd Fellows has established and is maintaining at Batesville a home for the orphan children of its deceased members. Certain rules are prescribed which must be complied with in placing children in the home; among other things it being provided that the parent shall agree to leave the children in the home until they arrive at full age of maturity. The home is under the control and management of a board of trustees and a superintendent. Petitioner's husband was a member of said order, and she signed and filled out the customary blank form, stating "that she was unable to provide proper and suitable clothing, sustenance, education and a home for said children," and that the children were accepted and taken into the home at her special request. In the affidavit she answered formal questions to the effect that the father of the children left no means of support, and that they had no near relatives to support them. The petitioner did not allege in her complaint that she was able to support the children, nor did she offer any proof to that effect. Upon that state of the case, it was erroneous to award her custody of the children. In a number of cases this court has decided that "in questions of this kind concerning the custody of infants the main consideration that should influence the court is the

best interest and well-being of the child." *Coulter* v. *Sypert*, 78 Ark. 193; *Lipsey* v. *Battle*, 80 Ark. 287; *Wofford* v. *Clark*, 82 Ark. 461; *Jackson* v. *Clay*, 89 Ark. 501.

The petitioner could not, and did not, by her contract, deprive herself permanently of the custody of her children. *Lipsey* v. *Battle, supra.* But where, on account of her inability to care for the children, she had recently placed them in an orphan's home, where they could be properly cared for and educated, they should not be taken from the home and restored to the custody of the parent without at least some showing that her condition had changed so as to enable her to take care of the children.

The conclusion which we reach in the case, and the decision we now render, does not preclude the petitioner from a renewal of her application to have the custody of her children restored to her; but for the error indicated, in awarding custody without any proof, the order of the circuit judge is quashed, and an order will be entered here directing that the children be delivered to the respondent as superintendent of the orphan's home.

QUEEN OF ARKANSAS INSURANCE COMPANY *v.* ROYAL.

Opinion delivered January 29, 1912.

1. APPEAL AND ERROR—BRINGING UP INSTRUCTIONS.—Instructions given by the trial court must be included in the bill of exceptions, and alleged instructions improperly inserted elsewhere in the transcript will not be considered. (Page 96.)
2. SAME—DUTY OF APPELLANT TO ABSTRACT EVIDENCE.—Where the appellant contends that the evidence was insufficient to sustain the verdict, there must be an abstract of all the evidence, or the presumption will be indulged that the evidence was sufficient. (Page 96.)
3. SAME—HARMLESS ERROR.—Where the jury returned a verdict "for the plaintiff," without specifying which one of the plaintiffs, defendant can not complain. (Page 97.)

Appeal from Chicot Circuit Court; *Henry W. Wells*, Judge; affirmed.

A. W. Files, for appellant.

Fire insurance policies should be interpreted with a view to arriving at the object and intention of the contracting par-

ties. 113 Pac. 259. The insured forfeited his right to recover on the policy. 32 So. 104; 176 Fed. 76; 123 N. Y. S. 877; 114 Ill. 390; 55 N. E. 319; 49 Atl. 767; 46 N. W. 1073; 96 N. Y. S. 183.

McCULLOCH, C. J. This is an action on a fire insurance policy to recover $500, the full amount of the policy. The subject of the insurance was a house in Eudora, Chicot County, Arkansas, which was totally destroyed by fire.

It seems, from the meager abstract of the record which has been furnished, that the defenses tendered by the answer are that proof of loss was not furnished within the stipulated time, that the assured misrepresented the character of the occupancy of the building, thereby securing a lower rate of premium than the company would have taken the risk for, and that there was a change of occupancy after the policy was written which increased the hazard.

The policy contained a clause stipulating that it should be void "if any change, other than by the death of an assured, takes place in the interest, title or possession of the subject of insurance (except change of occupancy without increase of hazard) whether by voluntary act of the assured or otherwise."

It is insisted that the court erred in its instructions; but, as all of the instructions are not abstracted, we can not consider this assignment. An inspection of the record discloses, however, that none of the instructions is contained in the bill of exceptions, nor does the bill of exceptions contain any call for them, though the clerk has included what purports to be a list of instructions in the transcript. This is an additional reason why we can not consider the assignment of alleged errors in giving instructions.

This leaves only the question as to whether the evidence is legally sufficient to sustain the verdict. Enough of the testimony is abstracted to show that there was some evidence to the effect that proof of loss was furnished during the stipulated time. Therefore, that question is eliminated from the case by the verdict of the jury.

The rules of this court require that the appellant shall furnish an abstract or abridgment of the record, so that the court can determine, from a perusal thereof, whether or not prejudicial error has been committed. If such an abstract be not

furnished, an affirmance of the case always follows, as it is not the duty of the judges to explore the record, and we must indulge the presumption that the judgment of the lower court is correct until the contrary is shown. In a case like this, where the only question is whether or not the evidence is legally sufficient to sustain the verdict, there must be an abstract of all the testimony in the case. In this instance counsel have merely given excerpts from the testimony of some of the witnesses, which do not purport to be all of the testimony or the substance thereof. We can not therefore determine whether there was any evidence to sustain the verdict and must indulge the presumption that there was sufficient evidence; otherwise the trial judge would not have submitted the issue to the jury.

The action was originally instituted by the assured, but subsequently C. P. Snell, as mortgagee, to whom the policy was made payable (as his interest might appear), intervened in the cause. The jury returned a verdict "for the plaintiff," stating the amount, and the court rendered a judgment in favor of Snell and the assured. It is insisted that the judgment is erroneous because the verdict did not specify all the plaintiffs or any particular one. This is not, however, a matter of which the defendant has a right to complain, for neither the assured nor the intervener have objected to the form of the judgment, and the defendant is not prejudiced by it, as all the parties in interest are bound by the judgment.

Affirmed.

TAYLOR v. BACON.

Opinion delivered January 15, 1912.

1. HUSBAND AND WIFE—EFFECT OF JUDGMENT AGAINST MARRIED WOMAN.—Under the Married Women's Act of Kentucky of March 15, 1894, a married woman can not resist the enforcement of a judgment against her on the grounds that she was liable only as a surety in the note upon which the judgment was rendered, as that defense could have been made in the original action. (Page 100.)
2. FOREIGN JUDGMENT—CONCLUSIVENESS.—A judgment of the court of another State is conclusive as to the merits of the original cause of action. (Page 102.)

3. ATTACHMENT—ESTATE OF DEVISEE.—The estate of a devisee is subject to attachment against him in the same manner as other beneficial legal estates. (Page 102.)

4. JUDGMENT—EFFECT.—A judgment which, after the usual recitals, adjudges that the plaintiff "do recover herein, under her cause of action stated in her original petition," certain sums of money, etc., is a personal judgment. (Page 102.)

Appeal from Jackson Circuit Court; *Charles Coffin*, Judge; affirmed.

STATEMENT BY THE COURT.

On the 1st day of July, 1910, E. J. Bacon, as executor of the estate of Rebecca S. Turner, deceased, filed a complaint in the Jackson Circuit Court against Anna R. Taylor to recover a balance of $14,530.54 with accrued interest upon a judgment alleged to have been rendered in the chancery court of Jefferson County, Kentucky. The complaint alleges in substance that on the 2d day of March, 1908, Rebecca S. Turner recovered judgment against John D. Rudd, Thomas S. Rudd and Anna R. Taylor, in the chancery court of Jefferson County, Kentucky, in the sum of $7,210 and accrued interest alleged to be due on certain promissory notes executed by the said defendants to said plaintiff in 1904, and the further sum of $41,000, and accrued interest upon promissory notes executed by said defendants to said plaintiff in 1902. That a mortgage was given by said defendants to said plaintiff to secure said indebtedness, and a decree of foreclosure was also entered.

The complaint also alleges that Rebecca S. Turner departed this life on the 28th day of September, 1909, and that the plaintiff E. J. Bacon was duly appointed on the 1st day of October, 1909, as executor of her estate; that on the 21st day of April, 1910, said judgment was revived in the name of E. J. Bacon, as executor of the estate of Rebecca S. Turner, deceased; that on the 9th day of May, 1910, the court made an order approving the sale made by the commissioner under the decree of foreclosure, and finding that there was a balance due plaintiff by said defendants of $14,530.54 with interest from said date until paid at the rate of 6 per cent. per annum. The prayer of the compaint is for judgment for the plaintiff against the defendant for said sum.

On the 2d day of July, 1910, attachments were issued on

the ground that the defendant was a nonresident of the State of Arkansas, and the writs were levied on lands in White and Jackson counties, as lands of the defendant, devised to her by her brother, Thomas S. Rudd.

The defendant answered, denying all of the material allegations in the complaint. She further stated that she is a married woman, having no separate business in her own right, and is without authority under the law of the State of Arkansas to contract personal obligations not in connection with her sole and separate business of her own, and that a personal judgment against her above the security given by her on her obligation in the courts of Kentucky is not obligatory, and is without force and effect under the laws of the State of Arkansas. She further alleges that the said judgment upon which this suit is based is for a balance due under an alleged sale of the securities given by her to secure a loan to the said Thomas S. Rudd during his lifetime; that the property attached in this action is property devised to her by the said Thomas S. Rudd, and is still in the hands of the administrator of his estate for the payment of probated debts against his estate and is not subject to attachment.

The plaintiff introduced in evidence certified copies of the judgments rendered in the chancery court of Jefferson County, Kentucky, and also a certified copy of all of the pleadings and proceedings upon which said judgments are founded.

The court found for the plaintiff, and rendered judgment in his favor for the amount named in the complaint. The defendant has duly prosecuted an appeal to this court

Watkins & Vinson, for appellant.

A married woman failing to plead coverture as a defense to an action in Kentucky is not estopped in another action from contesting the enforcement of the judgment. 10 Ky. Law Rep. 303; 83 Ky. 305.

The law of Arkansas will govern this case, regardless of whether the judgment in Kentucky was valid. 57 L. R. A. 520, note; 124 Mo. 178; 31 R. I. 106; 114 Pa. St. 101; 39 W. Va. 721; 46 Miss. 618; 15 Ark. 465. No personal obligation can be enforced in this State above the securities pledged by her for the payment of the surety debt. 35 Ark. 372; 36 Ark. 476; 43 Ark. 165; 66 Ark. 113; *Id.* 437.

Jones & Campbell and *John W. Newman,* for appellee.

The title to the land is in the devisee to do with as she pleases. 74 Ark. 157. The heirs' interest is such that, even before distribution, it may be seized by attachment or sold under execution. 23 Fla. 437; 17 Vt. 280; 17 Mass. 81; 126 Ia. 447; 102 N. W. 157; 150 Cal. 597; 119 Am. St. R. 254; 89 Pac. 333. The defense of coverture may, in Kentucky, be set up in a collateral action. 89 Ky. 577. But since the passage of the Married Woman's Act she must make her defense in the original action. 109 Ky. 472 59 S. W. 746; 66 S. W. 502; 60 S. W. 491; 105 Ky. 414; 49 S. W. 311; 124 S. W. 360; 116 S. W. 331. The judgment is final, although some order of the court may be necessary to carry it into effect. 13 Pet. 141. Judgment may be given against defendant personally. Ky. Code Civ. Proc. § 376.

The personal judgment is enforceable against appellant's separate real property. Ky. Stat. § 2129; 116 S. W. 331. The judgment, enforceable in Kentucky, must be enforced here. 80 U. S. 497; Kirby's Digest, § 7823; 138 S. W. 308; 160 U. S. 531; 45 N. Y. 542; 22 Ark. 393; 42 Ark. 17; 137 S. W. 568; 35 Ark. 331.

HART, J., (after stating the facts). Counsel for the defendant contend that, under the laws of the State of Kentucky, she is entitled in a collateral action in that State to set up the fact that she was a married woman at the time of the execution of the notes and at the time of the rendition of the judgment in the Jefferson County Chancery Court of Kentucky, and that she became bound merely as a surety. In short, they contend that the personal judgment rendered against her in the chancery court of Jefferson County, Kentucky, was void. They rely upon the cases of *Stevens* v. *Deering,* 10 Ky. Law Reporter, p. 303 and *Parsons* v. *Spencer,* 83 Ky. 305.

It is true that in those cases it was held that a personal judgment against a married woman upon a contract made by her during coverture is void, and that she may resist its enforcement against her general or separate estate. The reason given by the court for its ruling was, that, legally speaking, she had no personal existence. But the law of that State in this regard has been changed by the act of March 15, 1894, being sections 2127-8 *et seq.,* Kentucky Statutes. In the case of *Wren* v.

Ficklin 59 S. W. p. 746, the Court of Appeals of Kentucky held: "Under the Married Women's Act of March 15, 1894, a married woman can not resist the enforcement of a judgment against her on the grounds that she was liable only as surety in the note upon which the judgment was rendered, as that defense could have been made in the original action." The court said.

"The rights of the parties to this litigation must be determined by the act of March 15, 1894, and the general doctrine as to the validity of judgments. Section 2128 of that act provides that a married woman may 'make contracts and sue and be sued, as a single woman, except that she may not make any executory contract to sell or convey or mortgage her real estate, unless her husband joins in such contract.' Section 2127 also provides that 'no part of a married woman's estate shall be subjected to the payment or satisfaction of any liability, upon a contract made after marriage, to answer for the debt, default or misdoing of another, including her husband, unless such estate shall have been set apart for that purpose by deed of mortgage or other conveyance.' Section 2128 certainly confers upon a married woman the right to make contracts and sue and be sued. If she can sue and be sued she has the same right to make the defense to an action as a single woman would have. If she can be sued and she is capable of making a defense to the action, then whatever judgment may be rendered against her is binding. She must be relieved from the effects of that judgment and the consequences of it in the same way that a single woman would get relief."

The court held that the language of the married woman's act does not, nor was it intended to, put it within the power of a married woman, after her liability had been fixed by the judgment, to then plead that it was an obligation for the debt of another. In short, the court held that in all respects, except within the exceptions pointed out in the statute, a married woman, so far as her property rights are concerned, stands in the same position as if she were a single woman. To the same effect, see *Shanklin* v. *Moody*, 66 S. W. 502, 23 Ky. L. Rep. 2063; *Howard* v. *Gibson*, 60 S. W. 491, 22 Ky. L. Rep. 1294.

By section 518 of the Civil Code of Practice of Kentucky the court in which a judgment has been rendered has power, after the expiration of the term, to vacate it for erroneous proceedings against a person under disability, except coverture, if the condition of the defendant does not appear in the record, nor the error in the proceedings. *Eversole* v. *First National Bank of Hazard,* 124 S. W. (Ky.) 360. The proceedings in the chancery court of Jefferson County, Kentucky, showed that defendant in this action was a married woman. She should, therefore, have set up as a defense to that action that she signed the note sued on as surety, and, not having done so, she is precluded by the judgment rendered against her. *Swearingen's Executor* v. *Tyler,* 116 S. W. (Ky.) 331, and authorities cited *supra.*

In the case of *Jordan* v. *Muse,* the court held: "A judgment of the court of another State is conclusive as to the merits of the original cause of action." 88 Ark. 587; *McCarthy* v. *Troll,* 90 Ark. 199.

The court sustained the attachments which were levied on the lands of the defendant devised to her by her brother Thomas S. Rudd. The court did not err in so holding. Since each devisee or legatee has a legal estate which may be alienated or devised by him, such estate is subject to execution or attachment against him in the same manner as other beneficial legal estates. 17 Cyc. 983; 2 Freeman on Executions, (3 ed.), § 183; *McClellan* v. *Soloman,* 23 Fla. 437; *Hyde* v. *Barney,* 17 Vt. 280; *Procter* v. *Newhall,* 17 Mass. 81; *Byerly* v. *Sherman,* 126 Ia. 446, 102 N. W. 157; *Martinovich* v. *Marsicano,* 150 Cal. 597, 119 Am. St. Rep. 254, 89 Pac. 333.

It is next contended by counsel for the defendant that no personal judgment was rendered against Anna R. Taylor in the chancery court of Jefferson County, Kentucky. We can not agree with their contention in this regard. The judgment there, omitting the style of the case, is in part as follows:

"This cause having been heard and submitted in chief upon the pleadings, exhibits and proof and upon the entire record, and the court being fully advised, it is considered and adjudged by the court that the plaintiff, Rebecca S. Turner, do recover herein, under her cause of action stated in her original petition," certain sums of money; "and that the said

plaintiff, Rebecca S. Turner, do further recover herein under her cause of action stated in her amended petition" certain other sums of money, "and that said plaintiff, Rebecca S. Turner, do further recover herein her costs herein expended and incurred, including all costs of sale herein."

It follows that the judgment should be affirmed.

FEE-CRAYTON HARDWOOD LUMBER COMPANY v. HOGAN.

Opinion delivered January 15, 1912.

1. EVIDENCE—PAROL EVIDENCE TO VARY WRITTEN CONTRACT.—It is error to admit testimony of an alleged parol agreement between the parties to a mortgage, made at the time of its execution, that the notes secured by it should be payable in lumber. (Page 105.)
2. APPEAL AND ERROR—HARMLESS ERROR.—The admission of incompetent evidence will not be ground for reversal where it appears that it was not prejudicial. (Page 105.)
3. SAME—NECESSITY OF OBJECTION TO EVIDENCE.—The error of admitting evidence will not be considered on appeal where no objection was taken to its introduction. (Page 105.)
4. ACCOUNT STATED—CONCLUSIVENESS.—Where a party never furnished an itemized account of debts and credits, but merely furnished to the adverse party memoranda of credits from time to time as they were applied, there was no account stated, and the adverse party could claim additional credits. (Page 105.)

Appeal from Jackson Circuit Court; *R.E. Jeffery*, Judge; affirmed.

Jones & Campbell and *John W. Newman*, for appellant.

1. It was error to admit incompetent testimony that the notes were payable in lumber, when they called for dollars. 20 Ark. 293; 1 Gr. Ev. § 275; 13 Ark. 593; 24 *Id.* 210; 67 Ark. 62; 65 *Id.* 333; 66 *Id.* 393; 73 *Id.* 431; 69 *Id.* 406; 71 *Id.* 185; 94 *Id.* 130.

2. It was error to admit testimony as to the value of the lumber when the contract price was fixed and claimed. 52 Ark. 117; 43 S. W. 27.

3. Unliquidated claims can not be considered as payment or set-off. 20 Ark. 293; 19 *Id.* 230; 64 *Id.* 551; 129 S. W. 1081-3; 30 Ark. 50; 54 *Id.* 187; 15 S. W. 463.

4. There was an account stated. 80 Ark. 438; 29 L. R. A. (N. S.) 334; 12 Pet. (U. S.) 300; 13 Ark. 609; 64 *Id.* 39, 52.

Campbell & Suits, for appellee.

1. The testimony complained of did not contradict nor vary the written contract. 75 Ark. 89. But the testimony was immaterial.

2. There is no question as to an account stated involved. 82 Ark. 555; 95 *Id.* 93.

3. No prejudicial error is shown, and the proof fails to sustain the complaint.

McCULLOCH, C. J. The plaintiff, Fee-Crayton Hardwood Lumber Company, instituted this action in the circuit court of Jackson County against the defendant, B. F. Hogan, to recover possession of mortgaged personal property for the purpose of foreclosing the mortgage lien under the power therein contained. The amount of the mortgage debt is set forth in the complaint, and the prayer thereof is for recovery of the property and for judgment for the amount of the debt. The defendant answered, setting forth two defenses, namely, that the debt had been paid, and also that the plaintiff had failed to furnish a verified account of the mortgage debt before attempting to foreclose. The trial before a jury resulted in a verdict in defendant's favor, and the plaintiff appealed.

There was a conflict in the testimony as to the amount of credits wh ch should have been placed on the mortgage debt, but no dispute as to the fact that plaintiff had not furnished defendant an itemized account of the amount claimed. The court instructed the jury to the effect that, if any part of the mortgage debt remained unpaid, the verdict should be for the plaintiff for whatever was found due, even though no statement of account had been furnished, and that if there was a balance due on the mortgage debt and the defendant had attempted to dispose of the mortgaged property, then the verdict should be for the plaintiff for the amount due and also for the possession of the property. The jury having found that nothing was due under the mortgage debt, the question whether an itemized account should have been furnished in accordance

with the terms of the statute is eliminated from the case and need not be further discussed. The plaintiff adduced testimony tending to show that there was a balance of $342.39, exclusive of interest, due on the mortgage debt. On the other hand, the defendant testified that he had delivered to plaintiff lumber and manufactured articles, and also a lot of standing timber which he sold to plaintiff, the price of which aggregated the sum of $592.00, which, if credited on the mortgage debt, was more than sufficient to extinguish it. Among those items was one of $400.00 for the price of the tract of timber land, owned by the defendant, which he stated he sold and delivered to plaintiff, and that the latter accepted it as a payment on the mortgage debt and cut the timber, or at least a considerable portion of it.

It is contended that the court erred in permitting the defendant to testify concerning an alleged oral agreement between the parties, at the time of the execution of the mortgage, that the notes should be payable in lumber. It must be conceded that this testimony was erroneous, but we are of the opinion that the court eliminated the error by instructing the jury that no credit should be allowed for the price of timber or lumber except such as had been accepted by the plaintiff in settlement of the debt. It is apparent from a perusal of the record that the only controversy in the case submitted to the jury was, whether or not the defendant was entitled to certain credits which he claimed. As to the items of credit claimed by defendant, there was a sharp conflict in the testimony, and the jury settled that conflict in defendant's favor. We are, therefore, unable to see that any prejudice resulted to plaintiff from admitting the incompetent evidence above referred to.

It is also argued that the court erred in allowing defendant to state in his testimony that the timber taken by plaintiff from the land was worth six or seven hundred dollars. This testimony was not objected to, and its introduction can not be assigned as error. Moreover, the court, as above stated, charged the jury that they should not allow any credits except for timber that had been accepted under the settlement, which, of course, could only refer to the $400.00 purchase price.

Plaintiff's witnesses testified that from time to time they sent credit memoranda to defendant on the receipt of each

shipment of lumber which was accepted as a credit on the debt, and it is contended that these became an account stated. No instructions were asked or given on the question of an account stated, and we do not think that the undisputed evidence shows that there was an account stated which precluded the defendant from questioning, in this action, the correctness of the credits on the notes. Defendant disputed some of the items which are now claimed to be incorrect; and, even if he was bound by the correctness of the items of credit of which a memorandum was furnished to him, that would not preclude him from claiming a credit for the $400.00, the price of the standing timber. It is not claimed that plaintiff had ever furnished an itemized account showing all the debits and credits which could become an account stated as to the whole indebtedness and credits. It is only claimed that memoranda of the credits were furnished him from time to time as they were applied when lumber was shipped in.

Upon the whole case, it appears to us that the verdict of the jury is against the preponderance of the evidence, but we can not say that the evidence is not legally sufficient to support the verdict, and as there was no prejudicial error committed we are not at liberty to disturb the verdict.

The judgment is therefore affirmed.

HONEY v. GREENE COUNTY.

Opinion delivered January 29, 1912.

1. COUNTIES—CLAIMS—COMPENSATION OF OFFICER.—A county court may not allow a claim of fees for services rendered by an officer, in the absence of specific statutory authority to the officer to make charge therefor. (Page 107.)
2. COUNTY TREASURER—FEES.—Kirby's Digest, section 3508, providing that "the county treasurer shall be allowed fees as follows: in all cases where the amount does not exceed $1,000 in any one year four per centum; on all sums over $1,000 not exceeding two per centum, to be paid out of the respective funds," contemplates the allowance of fees on all county revenue, but not upon funds belonging to a drainage district. (Page 107.)

Appeal from Greene Circuit Court; *Frank Smith*, Judge; affirmed.

Appellant, pro se.

Ditch organizations perform only governmental functions. 135 Ill. 269; 123 S. W. 892. Section 3508 of Kirby's Digest fixes the county treasurer's compensation. 80 Ark. 62. The county treasurer can not make a charge for services rendered unless authorized to do so by statute. 57 Ark. 487. But the statute authorizes a charge for handling the road fund. (80 Ark. 62), and it as clearly authorizes the payment of commissions on the funds of a drainage district.

M. P. Huddleston and *Johnson & Burr,* for appellee.

Appellant must show statutory authority for making the charge. 57 Ark. 487. The courts can only administer the law as it is written. 25 Ark. 235; 44 Ark. 31; 32 Ark. 45; 31 Ark. 266. The road tax is a county fund and properly chargeable with the treasurer's commission; but that is not true of the funds of a drainage district.

HART, J. Appellant as treasurer of Greene County filed his settlement with the county court, in which he claimed 2 per cent. commission on two sums of money belonging to Cache River Drainage District No. 1. The first item is the charge of 2 per cent. on $60,000, the proceeds of sale of the bonds of the district; the second is 2 per cent. on $6,149.24, being the annual assessments charged against the lands of the district to pay the annual interest on the bonds. The county court refused to allow appellant credit for commissions on either of said amounts; appellant appealed to the circuit court, and that court affirmed the judgment of the county court and rendered judgment in favor of the district.

The sole question for decision is whether a county treasurer is entitled to charge and retain commissions as against the funds belonging to a drainage district organized under the general laws of this State. To authorize a county court to allow a claim of fees for services rendered by an officer, there must be specific statutory authority to the officer to make a charge for the service. *Logan County* v. *Trimm,* 57 Ark. 487. In this case counsel for appellant claims that such authority is given by section 3508, Kirby's Digest. It is as follows:

"The county treasurer shall be allowed fees as follows: In all cases where the amount received does not exceed one

thousand dollars in any one year, four per centum; on all sums over one thousand dollars, not exceeding two per centum, to be paid out of the respective funds."

To support their contention, they cite the case of *Hodges* v. *Prairie County*, 80 Ark. 62, where the court allowed the treasurer commissions under section 3508 to be charged against the road tax levied and collected under authority of Constitutional Amendment No. 5. We do not think this case sustains the contention of appellant, because the court in the opinion expressly declares that the money collected under the road tax amendment is a county fund, and on that account the treasurer is entitled to commissions under section 3508. In that case the court said that the school fund is not a county fund, but belongs to each school district separately. The county treasurer is not entitled to commissions against the school fund under section 3508, but under section 3509 which is specially directed to the school fund. We think the fees allowed the treasurer under section 3508 are commissions on all the county revenue. The drainage district fund is not a county fund, but is a fund belonging to the drainage district. Each district levies and disburses its own funds.

The Legislature has not provided any compensation for the county treasurer in regard to these funds, and the courts can provide none.

The judgment will be affirmed.

THOMAS v. CROOM.

Opinion delivered January 15, 1912.

1. FRAUDS, STATUTE OF—AGREEMENT NOT TO BE PERFORMED WITHIN YEAR.—An agreement for a lease of land for a year, to begin at a future date, whose consideration, in part, was an agreement of the lessees to make certain improvements and do certain work upon the land, during the lease, though not in writing, does not fall within the statute of frauds. (Page 111.)
2. APPEAL AND ERROR—HARMLESS ERROR—INSTRUCTION.—The error of instructing the jury, in an action on contract, on the issue as to whether the contract was within the statute of frauds was not prejudicial where the jury found that an enforceable contract existed between the parties. (Page 112.)

3. LANDLORD AND TENANT—COVENANT—BREACH.—In a contract of lease there is an implied covenant that the demised premises shall be open to entry to the lessee at the time fixed in the lease for the beginning of the term; and if the lessee is prevented from obtaining possession by some one else holding the premises, the covenant is broken, and the lessee entitled to recover damages. (Page 112.)

4. SAME—BREACH OF COVENANT—DAMAGES.—The measure of damages for breach of an implied covenant for possession in a contract of lease is the difference between the fair rental value of the demised premises and the rental price named in the lease; and where the rental value is not proved, the lessee can recover only nominal damages. (Page 113.)

Appeal from Yell Circuit Court, Dardanelle District; *Hugh Basham*, Judge; affirmed.

U. L. Meade, for appellant.

Plaintiff's demurrer to defendant's answer should have been sustained. 65 Ark. 604; 19 Ark. 23; *Id.* 39. If the consideration to be paid is entire and single, then the contract must be held to be entire. 52 Ark. 257; 59 Pa. St. 420; 5 Gray 492; 2 Cush. 1. The contract was not within the statute of frauds. 91 Ark. 149; 37 Kan. 437; 15 Pac. 586; 48 Ill. App. 140; 50 N. Y. Sup. Ct. 63; 8 Ohio Dec. 219. The measure of damages is the difference between the price to be paid and the actual value of the land at the time of the breach. 3 Suth. Dam., pp. 149. 150; 4 Seld. 115; 42 Ark. 257.

Bullock & Davis, for appellee.

The measure of damages in such cases is the difference between the rent reserved and the value of the premises at the time of the breach. 42 Ark. 257; 63 S. E. 1037; 21 L. R. A. (N. S.) 239; 59 Ia. 572; 13 N. W. 714; 88 S. W. 981; *Id.* 822; 46 So. 642; 79 Ala. 452; 58 Am. R. 601; 8 S. E. 58; 45 Ill. 205; 29 S. W. 358; 20 Ia. 238; 8 N. Y. 115; 128 S. W. 530; 109 N. W. 383; 98 Tenn. 440; 39 S. W. 724; 36 L. R. A. 862; 29 W. Va. 765; 2 S. E. 827; 111 N. W. 359; 57 Conn. 480; 5 L. R. A. 572. A recovery of damages based on profits that others in the same business have made at the same time and place will be denied. Joyce on Dam., p. 1908; 72 Ga. 280; 120 Wis. 314; 97 N. W. 952.

FRAUENTHAL, J. This was an action instituted by appellants to recover damages for the breach of an alleged contract leasing to them certain lands in Yell County for the year 1910.

In their complaint appellants alleged that the appellee, by verbal contract, had leased to them said land for a term of one year beginning January 1, 1910, for which they agreed to pay $7 per acre for the rent thereof, and that appellee had failed and refused to deliver the possession of said land to them on said January 1, 1910, or on any day thereafter, although requested and demanded so to do. They alleged that by reason of the breach of said contract they were damaged in the sum of $5,000, for which they asked judgment. The appellee denied that an unconditional contract for the lease of said land had been made, and also pleaded the statute of frauds in bar of the action upon the ground that the alleged contract of lease and improvement of the land rested in parol and was not to be performed within one year next after making same. Upon the trial of the case, the jury returned a verdict in favor of the appellants, assessing their damages at $1. From the judgment rendered thereon, both parties have appealed to this court.

It appears from the testimony that the land in question had been rented to one Allen Brasher during the year of 1909, and that he was in possession thereof at the time the alleged lease contract was entered into between the appellants and appellee. There is a conflict in the testimony as to the terms of said alleged contract. On the part of appellants, the testimony tended to prove that in September, 1909, the parties entered into a parol contract whereby the appellee leased to appellants said land for a term beginning on January 1, 1910, and continuing for one year thereafter, and that appellants were to pay the sum of $7 per acre for the rent thereof. It was also agreed that appellants should make certain improvements upon the land in event the appellee should desire them to do so, and that he would pay therefor a price which would be subsequently agreed upon. On the other hand, the testimony on the part of the appellee tended to prove that he leased said land to appellants only upon condition that he should obtain possession thereof from said Brasher; that on January 1, 1910, said Brasher refused to surrender possession of the land, and he thereupon instituted an action of unlawful detainer against him in order to obtain possession thereof, but that he was unsuccessful in that litigation. No special damages were alleged in the complaint, and none were proved by the appellants,

and it was conceded by both parties that $7 per acre was the usual and customary price for the rent of the same character of land in the locality where the land in controversy was situated at the time the contract was entered into and the term was to begin. There was no testimony introduced or offered tending to show the rental value of this land during the year of 1910. The appellants offered to prove by the witness Brasher the following: "That he cultivated the land in controversy during the year 1910, and raised from said land 49 square bales of cotton and nine round bales, and sold all but three square bales all the way from 13 to 14¾ cents a pound, averaging a little above 14 cents; and produced about $12 per bale of seed; and that he paid the landlord $7 per acre rent for the land; and rented 24 acres of said land for money rent at $180, which he has collected; and, after paying said rent and cost of production and gathering of the crop, made a profit on said land of $2,211.50." Objection was made to the introduction of this testimony, and said objection was by the court sustained.

It is urged by counsel for appellants that the judgment should be reversed because the court erred in its rulings relative to certain instructions and in its refusal to permit the introduction of the above testimony. The appellee in his cross appeal urges that the judgment should be reversed, in so far as it adjudged nominal damages and costs against him, because the alleged parol contract of lease was within the operation of the statute of frauds. It is contended by counsel for appellee that the alleged contract of lease, according to the testimony most favorable to appellants, was entire and indivisible; that a part of the consideration thereof consisted in the agreement of appellants to make certain improvements and to do certain work upon the land, and that this was not to be performed in one year from the making of the contract; that for this reason the parol contract fell within the statute of frauds, and no action could be maintained thereon. The contract was entered into in September, 1909, and while the term of the lease was to begin on January 1 following, and continue for one year thereafter, there was no definite time named for the performance of the promise for making improvements and doing the work on the land if that portion of the agreement was an indivisible part of the contract. A parol agreement to

do some act or to perform some service which fixes no definite time for its performance does not fall within the statute of frauds where, in view of the subject-matter of the contract and the understanding relative thereto, it is capable of full performance within one year after the making thereof. In the case at bar, no definite time was agreed upon within which the improvements were to have been made or the work to have been done, and they might have been performed within one year after the making of such contract. We are of the opinion, therefore, that the alleged contract herein sued on, although not in writing, did not, under any view of the testimony, fall within the operation of the statute of frauds. *Sullivan* v. *Winters*, 91 Ark. 149; *Higgins* v. *Gager*, 65 Ark. 604. We do not think that the instruction given by the court, submitting to the jury the question as to whether or not the alleged contract was enforceable because within the statute of frauds, was prejudicial to the appellants, for the reason that the jury returned a verdict in their favor. The jury, therefore, found that a subsisting and legally enforceable contract did exist between the parties relative to the lease of said land and, therefore, was not required to be in writing. The verdict of the jury, as far as the rights of appellants are concerned, was therefore not affected by any instruction given by the court relative to the statute of frauds, and for this reason the appellants were not prejudiced by any such instruction, even if it was erroneous.

Counsel for appellants earnestly contend that the court erred in refusing to allow the introduction of the above testimony relative to the amount of profit that was made by the occupying tenant on said land during the year of 1910, and also in giving to the jury the following instruction: "Gentlemen of the jury, you are instructed that if you find for the plaintiffs you can only find nominal damages." The question raised by this contention is, what is the measure of damages to which a lessee is entitled upon a breach of a contract of lease by the lessor in failing or refusing to give possession of the land? There is some conflict in the authorities as to the duties devolving upon the lessor to give possession of the demised premises to the lessee. In some courts it is held that when the lessor has given to the tenant the right of possession he has done all he is required to do as against third persons withholding pos-

session who do not claim under a prior or superior right derived from the lessor. These courts hold that, if the lessee is prevented from taking possession of the demised premises by a third person wrongfully holding same, it is solely his duty to oust such wrongdoer. We are of the opinion, however, that by virtue of a lease contract there is an implied covenant that the demised premises shall be open to entry to the lessee at the time fixed in the lease for the beginning of the term, and that if the lessee is prevented from obtaining possession by some one holding the premises then such covenant is violated, and the lessee is entitled to recover from the lessor the damages which may be sustained by him. This is the rule which has been adopted by this court. *Rose* v. *Wynn*, 42 Ark. 257.

The measure of damages for the breach of this implied covenant for possession is the difference between the rental value of the demised premises and the rental price named in the lease, together with such special damages as have necessarily resulted from such breach. The rule is thus stated in the case of *Rose* v. *Wynn, supra*: "In an action by a lessee against his lessor for damages for refusal or failure to deliver possession of the demised premises, the general rule for the measure of damages is the difference between the rent reserved and the value of the premises for the term; and if this value be not greater than the rent reserved, the lessee can in general recover only nominal damages, though the lessor without just cause refused to give possession. But if other damages have resulted as the direct and necessary or natural consequence of the lessor's breach of contract it seems that they, also, are recoverable." By "the value of the premises" used in the above opinion is meant, not the probable profits that might accrue to the lessee, but what the evidence shows would be a fair rental value of the demised premises for the term. In that case the court reversed a judgment granting damages to a lessee for a breach of a covenant for possession in a lease, and therein said: "In this case appellee did not prove that the rental value of the demised premises was greater than the rent which he contracted to pay. Nor did he prove any actual special damages within the above rule." So in the case of *Andrews* v. *Minter*, 75 Ark. 589, this court held: "For breach of a contract of lease, the lessee is entitled to recover the difference between the price he agreed

to pay and the rental value, with interest, together with any actual expenses incurred." See also *McElvaney* v. *Smith*, 76 Ark. 468; *Young* v. *Berman*, 96 Ark. 78; *Cohn* v. *Norton*, 57 Conn. 480; *Adair* v. *Bogle*, 20 Ia. 238; *Alexander* v. *Bishop*, 59 Ia. 572; *Sloan* v. *Hart* (N. C.) 21 L. R. A. (N. S.) 239. The probable profits to a lessee from the cultivation of demised land is not the true measure of his damages resulting from the breach of a covenant for possession, and can not be considered in determining the amount of such damages. *Smith* v. *Phillips* (Ky.) 29 S. W. 358. It follows that the court did not err in refusing to permit the introduction of the above testimony relative to what were the probable profits which were made upon the land during 1910 by the occupying tenant. It was in effect conceded by the parties upon the trial of this case, as is shown by the record, that the usual and customary price for the rent of the land in controversy for the term of the alleged lease was $7 per acre. This was the amount of the rent which was reserved in said alleged contract of lease. The appellants did not allege, nor did they prove or offer to prove, any special damages sustained by them by reason of the alleged breach of the contract. They did not prove or attempt to prove that the rental value of the land was greater than the rent reserved in the contract. It follows, therefore, that in view of the testimony which was adduced upon the trial of this case, and also of that which was offered, the appellants were not entitled to any greater damages than a nominal sum, even if there was an unconditional contract of lease made by the appellee to them of said land. Finding no prejudicial error in the trial of this case, the judgment must be affirmed.

HART, J., not participating.

HOSHALL v. BROWN.

Opinion delivered January 22, 1912.

1. ADMINISTRATION—EFFECT OF ALLOWANCE OF CLAIM.—The allowance of a claim by the probate court is a judgment by a court of competent jurisdiction. (Page 118.)
2. SAME—ALLOWANCE OF CLAIMS—REMEDY OF PARTIES.—Where parties who seek to set aside the allowance of claims in the probate court were

parties to the record when judgments of allowance were entered or became parties thereto before the term of court ended, their remedy to correct any errors in the allowance of such judgment, by fraud or otherwise, was by appeal. (Page 119.)

3. SAME—ALLOWANCE OF CLAIMS—REMEDY OF STRANGERS.—Where parties who seek to set aside the allowance of claims in the probate court did not become parties to the record during the term, then their remedy to set aside the allowance for fraud in procuring the judgment was by bill in equity. (Page 119.)

Appeal from St. Francis Circuit Court; *J. S. Thomas*, Special Judge; affirmed.

STATEMENT BY THE COURT.

On June 4, 1902, Henry P. Gorman, administrator in succession of the estate of Hiram Evans, deceased, acting under an order of the probate court, made a sale of certain lands belonging to said estate for the payment of debts which had been duly probated and allowed by the probate court. The sale was confirmed by the probate court, and an appeal was taken to the circuit court, where the sale was again confirmed. In both the probate and circuit courts exceptions were filed by the appellants to the report of the sale. These exceptions raised no objection to the regularity of the proceedings of the administrator in making the sale. It is not anywhere contended that the administrator did not pursue the orders of the court directing him to make the sale, or that he did not follow the requirements of the statute as to notice, appraisement, etc. The exceptions challenged the validity of the orders of the probate court allowing the claims against the estate of Hiram Evans, deceased, for the payment of which the order of sale was made, and to pay which the lands were afterwards sold under the orders of the probate court.

It is insisted in the various exceptions, which we deem it unnecessary to set out here, that the orders of the probate court allowing certain claims as expenses of the administration, and certain other claims as demands against the estate, were illegal and void for the reasons set up in the various exceptions.

The appellees asked and were permitted to be made parties to the proceeding for the confirmation of the sale. They filed a plea of *res judicata*. The appellants asked that the questions raised by their exceptions to the report of sale and

their objections to the confirmation thereof be tried by a jury, which the court refused.

The court proceeded to hear the issues submitted upon the exceptions and the plea of former adjudication on the evidence that was introduced by both parties and affirmed the judgment of the probate court and confirmed the sale. Appellants filed a motion for a new trial in which they set up, among other things, that the court erred in confirming the sale, notwithstanding that there was newly discovered evidence in the record, since the order of the probate court confirming the sale was made, which clearly showed that the lands had been sold to pay debts of a drug store which belonged to the firm of Marcus Collins and John J. Evans, and which was not the property of Hiram Evans at his death (April 13, 1891), and never had been; also that the court erred because when the order of sale was made no administrator of the estate had filed a settlement which had been confirmed or recorded by the probate court; and because the probate court had never found, upon a settlement of the administrator's account, what amount of assets were in his hands, or that the personal property left by Hiram Evans was insufficient for the payment of his debts at the time of his death; and because the petition for the sale by the administrator did not state the amount of the assets in his hands to pay claims, nor the amount of the assets which had gone into the hands of his predecessor, who had died without making a settlement of his account; and because it had never been made to appear that all of the other assets except the land had been properly applied in payment of claims against the estate.

The motion for a new trial also set up that "the court erred in holding that it had no right to inquire into the illegality of the proceedings of the probate court, and no right in an appeal case to pass upon questions of fraud arising from the probate court proceedings." And further alleged that the court erred "in holding that the decree of the probate court ordering the sale of the lands of Hiram Evans's estate was conclusive as to the validity of the debts in controversy and as to the insufficiency of the personal estate to pay them, and that the heirs were bound by said decree of the probate court."

J. R. Beasley, for appellants.

1. Probate sales must be in substantial compliance with our statutes; otherwise they are at least voidable. Kirby's Digest, § 3793. Jurisdictional facts must be stated and appear of record. 13 Cal. 288; 1 Hill (N. Y.) 133; Redf. L. & P. Sur. Ct. 618; 22 Ark. 118; 48 *Id.* 151; 55 *Id.* 562; 60 *Id.* 369.

2. Fraud vitiates all contracts, even judicial sales. 22 Ark. 222; 33 *Id.* 425; 40 *Id.* 189; 9 Wheat. 532; 1 Ch. Pl. (16 Am. Ed.) 608; 34 Ark. 63; 20 *Id.* 309; 2 Bl. Com. b. 3, § 432; 13 Ark. 512; 1 Pet. 328; 60 Ark. 369; 33 *Id.* 425; 55 *Id.* 562.

3. The court which first obtains jurisdiction * * * must proceed to judgment, and can not be ousted by subsequent proceedings in another court having no supervisory or appellate authority. 36 Fed. 337; 7 How. 612; 16 Ohio 373; 49 Ark. 75; 88 *Id.* 153.

4. The only legal way to sell the assets of a decedent's estate is to follow the statute. Kirby's Digest, § 154-9; 53 Ark. 559.

5. This court always cures jurisdictional defects in all lower courts. 52 Ark. 341. The history of Arkansas is written in the story of the wreck of dead men's estates through the ignorance of probate judges. 52 Ark. 341.

6. The personal property must be exhausted before the real estate can be sold. 33 N. Y. Sup. 389; 127 N. Y. 296; 13 Ark. 507.

7. No settlement of the estate has ever been made. No debts can be created after death. 34 Ark. 211; 17 *Id.* 567; 56 *Id.* 159.

8. Claims illegally exhibited or allowed are subject to review and cancellation, even on collateral attack. 60 Ark. 327; Kirby's Digest, § § 115, 84, 221-3; 56 Ark. 159.

9. The question raised here has never been determined in any former suit. 65 Ark. 467. There is no question of estoppel. 34 Ark. 63; 22 *Id.* 572; Coke, Lyt. vol. 3, 467-8; 36 Ark. 96; 11 *Id.* 264; 43 *Id.* 21; 15 *Id.* 319; 30 *Id.* 385; 40 *Id.* 26; 16 Pet. 62.

R. J. Williams and *Norton & Hughes,* for appellee.

1. If the administrator's report shows a sale in compliance with the order of court after proper appraisement and

notice, the confirmation is invulnerable, except for fraud, accident, mistake, etc. *Jackson* v. *Gorman*, 70 Ark. 88. The words "without prejudice" mean no bar to the assertion of any legal right, and the question of fraud is not barred by any statute. 70 Ark. 88.

2. *Res judicata*. 76 Ark. 423.

3. The appeal should have been dismissed.

4. Lands can not be sold solely to pay expenses of administration. 92 Ark. 611; 74 *Id.* 81.

5. When heirs assent to irregularities, they can never complain. 163 Mass. 174; 5 Humph. 524; 78 Va. 111.

WOOD, J., (after stating the facts). In *Jackson* v. *Gorman*, 70 Ark. 88, the order of sale of July 21, 1897, was held to be valid. The appellants in this case were parties to that suit. In their amended answer and cross bill to the petition for the new order of sale made in the probate court, which they were resisting, they attack the order of sale of July 21, 1897. This court, in that case, speaking of that order of sale, said:

"The probate court had acted, and, presumptively, upon the proper showing made, and the term had passed without objection raised. The conclusion is that everything was properly done."

This decision settles the question raised by the appellants as to the validity of the order of sale.

We deem it unnecessary to set out and discuss in detail the various exceptions presented in the probate court and in the circuit court to the confirmation of the sale made by the probate court, for, in our opinion, *Jackson* v. *Gorman, supra,* settles also adversely to them the various objections urged by appellants to the confirmation of the sale. In that case this court said:

"The amended answer and cross bill is mainly an attack upon the validity of the order of the probate court allowing the claims against the estate under the administration of James Evans, now also deceased, and made years ago. These allowances are in the nature of judgments, and after the expiration of the term are not within the control of the probate court. It follows that to attack them in the probate court would be in violation of all rules on the subject. The circuit court, on appeal, can have no other issues before it than had the probate

court from which the appeal is taken. These judgments of the probate court, moreover, were final after the expiration of the term at which they had been rendered, and could not be reopened by the probate court, and could only be called in question by appeal or by original bill in chancery on the allegation of fraud, accident or mistake.''

In the earlier case of *Carter* v. *Engles*, 35 Ark. 205, this court held that "the allowance of a claim in the probate court has the force and effect of a judgment.'' This court in that case also pointed out that where the allowance of a claim was procured by fraud between the creditor and the administrator, the remedy to parties interested was by appeal from the judgment of allowance, or, if the term had ended, by a proceeding in equity to set aside for fraud on the court in procuring the allowance. See other cases cited in the opinions above mentioned.

Kirby's Digest, § 125, provides: "The probate court shall have power to hear and determine all demands against any estate made agreeably to the provisions of this act, and cause a concise entry of the allowance to be made on the record, which shall have the same force and effect as a judgment."

This court, as early as 1843, in *Dooley* v. *Watkins*, 5 Ark. 705, in passing upon a similar provision, held that the allowance of a claim by the probate court has the force and effect of a judgment.

As late as 1909, this court, in the case of *Davis* v. *Rhea*, 90 Ark. 261, held that the allowance of a claim by the probate court was a judgment of a court of competent jurisdiction, which could only be set aside on account of fraud in the procurement thereof. The same was held in *James* v. *Gibson*, 73 Ark. 440, and in *Scott* v. *Penn*, 68 Ark. 492. Other earlier cases are *McMorrin* v. *Overholt*, 14 Ark. 244; *Wright* v. *Campbell*, 27 Ark. 637; *Wolf* v. *Banks*, 41 Ark. 104; *Brown* v. *Hanauer*, 48 Ark. 277.

So it is thoroughly settled by statute and the decisions of this court that the allowance of a claim by the probate court has the force and effect of a judgment. If the parties who are seeking to set aside the allowance of such claims were parties to the record when the judgments of allowance were entered, or became parties thereto before the term ended, their remedy to correct any errors in the allowance of such judgment, by

fraud or otherwise, would be by appeal. If they did not become parties to the record during the term, then their remedy to set aside the allowance for fraud in procuring the judgment would be by bill in equity, as shown in the cases of *Scott* v. *Penn, Jackson* v. *Gorman,* and *James* v. *Gibson, supra.*

The cases of *Burgett* v. *Apperson,* 52 Ark. 213, and *Gorman* v. *Bonner,* 80 Ark. 339, cited by learned counsel for appellants are not in conflict with the principles above announced, and are not, as we believe, applicable to the question under consideration.

In *Burgett* v. *Apperson, supra,* no attack was made on the judgment of allowance upon which the order of sale was based. The appellant, Miss Burgett, who was an infant and heir at law, was permitted in that case to correct certain erroneous proceedings that inhered in the sale of the land. It was expressly held in that case that there was a valid judgment upon which the order of sale and the sale itself were made, but the petitioner was not a party to the record when the confirmation of the sale took place, and she had lost her right of appeal by the erroneous action of the court in confirming the sale on a day not fixed by its order. She had, therefore, lost the right of appeal through no fault of her own, and was permitted to resort to the writ of certiorari to correct erroneous proceedings by the administrator in making the sale. It is said in that case: "It must be conceded that the probate court proceeded irregularly in every step taken in that tribunal after entering the circuit court's order of sale upon its record." In that case the lands were offered for sale without regard to their appraised value. The administrator at the time of the confirmation of the sale was an imbecile. The lands sold were the homestead of the petitioner. The debt for which they were sold amounted to $10,000, and the creditor purchased them at the sum of $17,000, when they were appraised at $79,340, and were offered in bulk at the sale to pay his debt.

Of course, if appellants were making an attack upon the proceedings of the administrator in making the sale, and not upon the judgment itself upon which the sale was based, the case of *Burgett* v. *Apperson* would be in point, but such is not the case.

In *Gorman* v. *Bonner* this court merely holds that one who

is sued at law on a legal liability and who allows judgment to go against him can not afterwards enjoin that judgment in equity upon some equitable grounds that were known to him before the judgment at law was rendered. In other words, that one who is sued at law must set up such defenses as he knew he had in that suit, and that if he fails to do so he can not afterwards seek relief against such judgment in a court of equity.

Another case upon which appellants rely is that of *Marshall* v. *Holmes*, 141 U. S. 589. In that case Mrs. Marshall sought by petition in the Federal court to enjoin certain judgments that had been rendered against her in the State of Louisiana. She alleged, among other things in her petition, that "all the judgments were obtained by false testimony and forged documents, and that equity and good conscience required that they be annulled and avoided." The petition set up specifically the facts upon which she alleged the injunction should be granted. In that case the court said: "The case evidently intended to be presented by the petition is one where, without negligence, laches or other fault upon the part of the petitioner, Mayer has fraudulently obtained judgment which he seeks, against conscience, to enforce by execution." The court further said: "It is the settled doctrine that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery."

The above cases, as we view them, have no application to the case at bar, for the reasons that the exceptions presented by appellants as objections to the confirmation of the sale in this case are nothing more nor less than a collateral attack upon the judgment of the probate court allowing the claims for the payment of which the lands were sold.

The order of the probate court allowing these claims, having the force and effect of a judgment, can not be attacked in this manner, according to the numerous decisions of our own court. Upon this view of the case it becomes unnecessary to pass upon the other question of *res judicata*. It follows

that the judgment of the circuit court was correct, and it is affirmed.

CARLLEE v. STATE.

Opinion delivered January 22, 1912.

1. CONTEMPTS—POWERS OF COURTS.—Courts of record and of general jurisdiction have inherent power to punish for contempts, and may go beyond the powers given by statute in order to enforce their constitutional powers when acts in contempt invade them. (Page 124.)
2. CONSTRUCTIVE CONTEMPTS—PROCEDURE.—In contempts not committed in the court's presence, the court may initiate the proceeding to punish the contemnor by a statement or order spread upon the record, but notice thereof should be given to the defendant and a reasonable time afforded him to make his defense. (Page 124.)
3. SAME—WHEN PROCEEDINGS QUASHED.—Where a majority of the court hold that a judgment punishing petitioners for contempt was erroneous, though they differ as to the particular errors committed, the judgment will be quashed on certiorari. (Page 128.)

Certiorari to Woodruff Circuit Court, Southern District; *Hance N. Hutton*, Judge; reversed.

STATEMENT BY THE COURT.

The petitioner, E. M. CarlLee, was adjudged guilty of contempt of court, fined $500 and six months' imprisonment in the county jail, and the case is before us on petition for certiorari to quash the judgment.

The facts necessary to state are as follows:

A citation was issued by the circuit clerk of Woodruff County on January 6 to the petitioner, in vacation, notifying him to appear in the circuit court on the first day of the March term, 1911, on Monday, March 6, to show cause why he should not be punished for criminal contempt for causing to be printed on or about the 3d day of September, 1910, in the *Arkansas Gazette*, a daily newspaper published in the city of Little Rock, of general circulation in the State, and Woodruff County, a certain article, setting it out, criticising the action of Judge Hutton, the judge of the circuit court, in the trial of a certain proceeding in his court and reflecting upon the dignity and integrity of the court.

Petitioner appeared in the court at the March term solely for the purpose of objecting to the jurisdiction, and filed a motion to dismiss, claiming privilege as a member of the General Assembly of the State of Arkansas, being a senator from his district, while the Legislature was in session on March 6, 1910, the day he was cited to appear.

This motion being overruled, he filed another motion, and objected to the jurisdiction of the court, alleging:

"That he respectfully submits that this honorable court is without jurisdiction to require the said E. M. CarlLee to respond to said rule for the reason that there was no affidavit or sworn information filed in this proceeding, upon which to issue process, rule or summons as is herein attempted.

"He further respectfully submits that there is no sworn statement of facts or information as required by law in such proceedings, and therefore it is improper and illegal to require the said E. M. CarlLee to respond to the rule issued in this proceeding."

The court overruled this motion, to which he excepted, and, expressly reserving his exceptions to the ruling of the court, he filed a response, denying that he caused the publication of the article set out in the citation and that he was guilty of contempt.

After hearing the testimony of witnesses and the petitioner, the court adjudged him guilty of criminal contempt and fixed his punishment at a fine of $500, with six months' confinement in the county jail, and remanded him to the custody of the sheriff.

Petitioner admitted that the article, as set out in the citation, appeared in the *Arkansas Gazette*, a newspaper published in the State, of general circulation in Woodruff County, and ———— Dew testified that he was the city editor for said paper, identified the article as published, and stated that he called for Mr. CarlLee over the long distance 'phone at Augusta, and requested a statement concerning the charge brought against him, Mr. Ludwig and Cain, in the circuit court of Woodruff County, for publication; that some one answered the 'phone, and said he was CarlLee, and dictated the statement over the 'phone virtually as it was printed. That he was very careful to take it as given, and

when he didn't understand had the person talking to repeat and talk slowly, that no mistake might be made, and none was made.

CarlLee denied having had any conversation at all with Dew over the 'phone and any acquaintance with him, but admitted that he did talk over the 'phone with Mr. Kiger, another reporter on the *Gazette*, making some of the statements set out in the publication, but denied all that portion of the same that would reflect in any wise upon the court. That he was personally well known to Kiger, and knew his voice over the 'phone, and knew that he was talking to him. Dew stated further that he was working in Kiger's place the night the message was received, that he (Kiger) might be off duty and spend the evening with his mother, who was visiting him.

Roy D. Campbell, for petitioner.

1. The judgment is void for want of notice. 22 Ark. 151; Kirby's Digest, § § 722, 3989; Hughes, Cr. Pr. § § 1734-5-6-7 to 1742, and notes 12-18, pp. 447-9; 89 Ark. 72, etc.

2. The penalty is excessive. Const. Ark. art. 7, § 26; Kirby's Digest, § 719; 34 Cyc. 1029, and cases cited.

3. The commitment is irregular and void. Kirby's Digest, § § 721-3, 730; 46 Neb. 402; Hughes, Cr. Pr. § 1769; 9 Cyc. 50; 87 Ark. 45.

R. J. Williams, for respondent.

KIRBY, J., (after stating the facts). It is contended that the circuit court was without authority to punish the petitioner for a criminal contempt, not committed in its immediate view and presence, without an affidavit or information bringing the facts to its knowledge first made.

Courts of record and general jurisdiction have inherent power to punish for contempts and the conferment of the power by statute upon a superior court of record is deemed no more than declaratory of the common law. Such court may go beyond the powers given by statute in order to preserve and enforce its constitutional powers when acts in contempt invade them. Rapalje on Contempts, § 1; art. 7, § 26, Constitution 1874; *State* v. *Morrill*, 16 Ark. 384.

This charge was of criminal contempt, being directed against the dignity, integrity and authority of the court, and

constructive, not having been committed in its immediate presence.

In Brown on Jurisdiction, § 116, it is said: "In constructive contempts, the court can only act upon a showing of the facts invoking jurisdiction, and time should be given the accused to resist the charge."

Our statute provides "contempts committed in the immediate view and presence of the court may be punished summarily; in other cases, the party charged shall be notified of the accusation and have a reasonable time to make his defense." Section 722, Kirby's Digest.

In *York* v. *State*, 89 Ark. 76, the court said: "As to the mode of procedure in cases of contempt not committed in the immediate view and presence of the court, the authorities are well agreed that the contempt must be brought before the court on affidavits of persons who witnessed it, or have knowledge of it." Citing and quoting from *State* v. *Henthorne*, 26 Pac. 937.

But that proceeding was to punish as for contempt the violation of an injunction issued by the court, and the statute provides that it shall be done upon affidavit of breach of the injunction against the party committing the same. Section 3989, Kirby's Digest.

Nevertheless, it is contended that that case was for a civil contempt, growing out of conduct in disobedience of process for the protection of the rights of a party to a judicial proceeding, and that the rule as to procedure therein does not control here.

The authorities all agree that in cases of criminal contempt of this kind the accused is entitled to a distinct notice of the accusation against him and must be given a reasonable opportunity to present his defense, or, as expressed in our statute, "shall be notified of the accusation and have a reasonable time to make his defense."

There was no affidavit filed in this cause, setting out the publication and charge against the petitioner before the citation was issued, neither was there any statement of the facts constituting the charge made of record and signed by the judge in vacation, nor any order of the court, while in session, reciting that it had come to its knowledge that such publication had

been made, setting it out, and directing a citation to issue against the petitioner to show cause why he should not be punished for contempt for causing the publication and, if any such procedure was necessary, the petitioner did not waive it, having objected to the jurisdiction of the court specifically on that account.

In the case of *State* v. *Morrill*, 16 Ark. 386, the publication made was in a newspaper in Arkansas County, reflecting upon the Supreme Court in relation to a decision made by it. An attorney of the court, living there, called the court's attention to the publication, sending it a copy thereof and expressing an opinion that the court should take some notice of it. The court concluded that it was due to the honor and dignity of the State, and its own usefulness, not to pass the matter by without some official action, and to institute an inquiry as to whether its constitutional privilege had not been invaded by the publication and, "accordingly, an order was made, reciting the publication, and directing that the defendant be summoned to appear before the court at its present term to show cause why proceedings should not be had against him as for criminal contempt. No attachment, but a mere summons was issued in the outset, because the constitutional power of the court to punish as for contempt in such cases had not been determined, and was supposed to be not altogether free from doubt." Such was the statement of the procedure therein. A like course was pursued by the Supreme Court of California, In re *Shay*, 117 Pac. 442.

A great many of the authorities hold that it is necessary to decide whether the charge constitutes a civil or criminal contempt in order to determine the procedure for its punishment, and many of them seem to hold that if the contempt arises in disobedience of a judgment or order in a civil suit for the protection of the rights of one of the parties therein in a judicial proceeding it is a civil contempt, and that the accused can not be proceeded against without an affidavit of the charge first filed.

It appears to us, however, and especially in this State, when the punishment is inflicted for disobedience to the order of, and to compel a proper regard for, the dignity and authority of the court making it, and the proceeding is in the name of the State against the accused, as in other criminal offenses

and the fine and imprisonment are paid and discharged in the same way as fines and imprisonment inflicted in misdemeanor cases are satisfied, that there is in effect no difference.

The York case, *supra*, seems to be authority for this conclusion, and the United States Supreme Court appears to hold the same view. *Gompers* v. *Buck Stove & Range Co.*, 221 U. S. 448.

The spectacle of a court of record and general jurisdiction being without power to initiate a proceeding to punish for contempt the author of publications in the press of the State reflecting upon the dignity, integrity and honor of the court and judges, and calculated to bring it and them into public disfavor and contempt, without an affidavit of some third person first made setting out the charge, would be pitiful in the extreme, and was not contemplated by our statutes and under our Constitution. The court would thus be rendered impotent, powerless to protect its authority and enforce its mandates and retain the respect and confidence of the people, for whose benefit it was organized and exists, except by the grace of some third person.

Under our system of procedure, the accused is entitled to be informed with reasonable certainty of the facts constituting the offense with which he is charged and an opportunity to make defense thereto—his day in court. The different kinds of procedure have been outlined for the punishment of other offenses, but the statute, as to this one, says only that he shall be notified of the accusation and have a reasonable opportunity to make his defense.

There must be an accusation before the accused can be notified of it, and there is no reason why the court in session can not recite that the matter offending has come to its knowledge, setting it out in an order, and direct a citation thereon to show cause. This was done by the Supreme Court in the case of the *State* v. *Morrill*, *supra*, and was as effectual notice of the charge or accusation as an affidavit or information would have been. The summons and warrant of arrest are but to notify and bring the accused into court to answer the charges there made against him and the citation in this case, although it contains the whole matter constituting the offense with which the petitioner was attempted to be charged, was not a charge of record for him to answer, or an accusation within the meaning

of the statute, the notice having been issued in vacation, by authority of the clerk alone, so far as the record shows, there being no order of the court authorizing the issuance of the citation, and without an order of the court first made setting out the charge, or a statement thereof made of record and signed by the judge of the court in vacation.

The petitioner could have waived this irregularity in the procedure by appearing in court and making his defense, without objecting thereto, but he did not do this; he raised the objection and insisted upon it throughout.

It may be said that, since he could have waived the affidavit, certificate or order of record constituting the charge or accusation, having been in court and exercised his right to defend, he thereby did do so, and that no prejudice resulted to him on that account. This is the view held by Chief Justice McCULLOCH and Justice WOOD. But there is no difference between this and the case of a prisoner appearing and defending against a charge upon an insufficient indictment, when by objecting to it properly he may have it quashed, while, if no objection is made, he may be convicted and punished thereunder; and since objection was here made duly and in due time, the objection should have been sustained, and the court erred in overruling the motion to dismiss.

HART and FRAUENTHAL, JJ., are of the opinion that the court was without power to initiate the contempt proceeding as attempted, and that it was necessary that an affidavit or information setting out the charge should have been first filed, within the doctrine announced in the case of *State* v. *York, supra*.

This opinion is, therefore, only authoritative as to the power of the court to initiate the proceeding; the CHIEF JUSTICE, Mr. Justice WOOD and the writer concurring in this view.

It follows, however, since the other two Justices are of opinion that the court was without power to proceed without an affidavit first made, and the writer that the court erred in refusing to dismiss the proceeding upon the grounds set out for the reasons as already expressed, that the judgment must be quashed. It is so ordered.

McCULLOCH, C. J. I concur in the conclusion that in this character of contempt cases the court can initiate the pro-

ceedings, and that its jurisdiction to punish for contempt does not depend on the filing of an affidavit or information by some third person, as in cases of civil contempt. *York* v. *State*, 89 Ark. 76. The correct view is aptly stated as follows by the New York court in a case involving the construction of a statute identical with our statute on the subject:

"The statute does not require that the charge should be made upon affidavit or other sworn testimony. The charge may undoubtedly be made by the court, as it is alleged that it was in this case, and the charge is clearly specified in the order to show cause and a time appointed for showing cause, and the relator was duly notified of the accusation, and an opportunity given to him to make his defense. * * * It is an error to suppose that in a case like the present the jurisdiction of the court to make the order to show cause depends upon the presentation of affidavits or other evidence to substantiate the charge. The order contains the charge, and I apprehend that, in practice, such evidence will rarely be furnished, as it is not made the duty of any officer connected with the administration of justice, or any other person, to make charges or accusations of facts constituting criminal contempts. It is a duty imposed upon all courts to preserve order in court, and see to it that its proceedings are not interrupted, or that the respect and authority due to the court are not impaired. And the statute, to enable the court to discharge this duty, confers the necessary power upon the court. The court may act upon its own motion and make the accusation, causing the party accused to be notified, and giving him a reasonable time to make his defense." *Greeley* v. *The Court*, 27 Howard's Practice, 14.

In addition to the case just quoted from the following authorities sustain this view: In re *Cheeseman*, 49 N. J. Law, 115; *Telegram Newspaper Co.* v. *Commonwealth*, 172 Mass. 294, 44 L. R. A. 159; Ex parte *Steinman*, 95 Pa. St. 220; In re *Moore*, 63 N. C. 397; *Langdon* v. *Judges*, 76 Mich. 358; *People* v. *Wilson*, 64 Ill. 195; *State* v. *Frew*, 24 W. Va. 416; *State* v. *Shepard*, 177 Mo. 203.

The cases which hold to the contrary entirely ignore the distinction between civil contempts, where the court can not proceed unless so moved by a party aggrieved, and criminal contempts, where only the maintenance of the court's dignity

is involved. In the latter class of cases it is primarily the duty of the court itself to see that it is not brought into public contempt by words or conduct of individuals. It is not bound to wait for some third person to initiate proceedings, for it would be anomalous to say that the first duty rests with the court, and yet it must wait for some individual to institute proceedings before the court can take any steps to maintain its own dignity. I think no one can read Judge ENGLISH'S opinion in the Morrill case (16 Ark. 384) without being impressed with the idea that such was the view of the court on the subject. Indeed, a careful analysis of the decision leads to the conclusion that that was what the court regarded as the proper practice, for the court did not treat the letter of the attorney as the basis of the proceedings. The court proceeded entirely on its own initiative in bringing the accused to the bar of the court to answer for the alleged contempt.

In *Cossart* v. *State,* 14 Ark. 538, Chief Justice WATKINS used the following language: "The power of punishing summarily and upon its own motion contempts offered to its dignity and lawful authority is one inherent in every court of judicature. The offense is against the court itself, and if the tribunal have no power to punish in such case, in order to protect itself against insult, it becomes contemptible, and powerless also in fulfillment of its important and responsible duties for the public good."

That case was a proceeding to punish as for contempt a contumacious witness who refused to testify in a case pending before the court, but the learned Chief Justice was attempting to lay down a principle which is applicable to all cases involving, not civil rights, but only the dignity of the court itself.

Since the majority of the court hold that the court can initiate proceedings of this kind, I think it should follow that when an accused has been given due notice, as in this case, of the particular form of his alleged contempt, the ends of justice are fully met, and that after he has been brought into court under such citation, none of his rights have been prejudiced by the court's failure to enter of record an order reciting the charge. The accused when he came into court had due notice of the charge which he was called on to meet, and that is all the statute required. The citation had served its purpose, in bringing

the accused into court, and, having had notice of the charge, he was not prejudiced by the fact that it had not been previously entered on the record during the sitting of the court. The court could have ordered a new citation, and can do so yet. Therefore no prejudice resulted from the proceeding without a new citation. It is making too strict a rule to say that the court must make an order of citation in advance before it can proceed to punish for contempt.

As to the amount of punishment inflicted, I am of the opinion that the statutory limitation applies, and that, as the contemptuous conduct was not committed in the immediate presence of the court and did not consist of disobedience of the process of the court, the punishment should not have exceeded that provided by the statute.

WOOD, J.: I concur.

HELENA v. DUNLAP.

Opinion delivered January 22, 1912.

1. MUNICIPAL CORPORATIONS—AUTOMOBILE PRIVILEGE TAX.—Kirby's Digest, section 5649, authorizing cities of the first class to require residents to pay a tax for the privilege of keeping and using wheeled vehicles, in so far as it applies to automobiles, is repealed by Acts 1911, c. 134, section 13, providing that "the owner of a motor vehicle who shall have obtained a certificate from the Secretary of State as hereinbefore provided shall not be required to obtain any other license or permits to use and operate the same." (Page 133.)
2. CONSTITUTIONAL LAW—CLASS LEGISLATION.—Legislation pertaining merely to members of a class, such as the owners of automobiles, is not a denial of the equal protection of the laws where it affects alike all persons of the class affected. (Page 136.)

Appeal from Phillips Circuit Court; *Hance N. Hutton*, Judge; affirmed.

STATEMENT BY THE COURT.

Helena is a city of the first class, and its council passed an ordinance, requiring the residents of said city, owning and using vehicles of any description whatever, except bicycles, upon the streets of the city, to obtain a license from the city collector for the privilege. J. B. Dunlap was a resident of the city, and

owned and operated upon its streets an automobile for his private use. He obtained a license in compliance with the provisions of Act No. 134, passed by the General Assembly of the State of Arkansas at its 1911 session, but refused to obtain a license from the city collector as required by the ordinance. He was duly arrested and convicted in the police court for a violation of the ordinances. On appeal to the circuit court, Dunlap was discharged, the court holding that under the provisions of Act 134 of the General Assembly at its 1911 session, the ordinance was void as to persons owning and operating automobiles for private purposes only. The city of Helena has duly prosecuted an appeal to this court.

W. G. Dinning, city attorney, for appellant.

1. The terms of Act No. 134, Acts 1911, are not repugnant to section 5649, Kirby's Digest. The purpose of the act is undoubtedly to provide for uniformity of regulation of the operation of machines over the highways and streets of the State to the end that drivers may not be subjected to varying local restrictions in different municipalities.

It can not be insisted that the provision in section 13 of the act that no owner of such vehicle shall, after he has complied with the provisions of the act, "be required to obtain any other license or permit to use and operate the same," is sufficient to take away the right of a city of the first class to impose a tax upon automobile owners as in the case of owners of other kinds of vehicles. Neither does the provision to the effect that such owner, after having complied with the provisions of the act, shall not be "excluded or prohibited or limited in the free use of his said motor vehicle," relate directly or indirectly to the power of municipalities to require such owner to pay a tax. Municipalities are not referred to in this connection in any manner whatever.

2. If, however, it should be found that there is a repugnancy between the two acts, then that part of the later act which is repugnant to the former statute is void and inoperative because it creates an unlawful and unreasonable discrimination between citizens. 70 Ark. 549; 75 Ark. 542, 545; 85 Ark. 509.

John I. Moore, for appellee.

1. The act in terms repeals all acts and ordinances in

conflict therewith. It is inconsistent with and repugnant to section 5649, Kirby's Digest, and therefore repeals it by implication, if not in terms. See sections 13 and 20 of the act. The act covers the "entire ground of the subject-matter of the former statute." 70 Ark. 25, 27.

2. The act is constitutional. 74 N. E. 1035; 70 Ark. 549; 87 Pac. (Cal.) 481.

HART, J., (after stating the facts). The ordinance in question was passed pursuant to the authority conferred by section 5649 of Kirby's Digest. The statute is as follows: "Cities of the first class are hereby authorized to require residents of such city to pay a tax for the privilege of keeping and using wheeled vehicles, except bicycles, but such tax shall be appropriated and used exclusively for repairing and improving the streets of such city."

In the case of *Fort Smith* v. *Scruggs*, 70 Ark. 549, the act was held valid. The court said: "The act, we think, plainly shows that there was no intention to authorize a tax upon vehicles or other property. It authorizes only a tax upon the privilege of keeping and using vehicles upon the streets of the city, and it requires that this tax shall be used exclusively for repairing and improving the streets of the city."

It is conceded that the only question presented by this appeal is to determine whether or not section 5649 of Kirby's Digest, in so far as it applies to automobiles, was repealed by Act No. 134 of the acts of the General Assembly of the State of Arkansas at its 1911 session. The latter act contains twenty sections, and section 13, which particularly applies to the question at issue, is in part as follows: "The owner of a motor vehicle who shall have obtained a certificate from the Secretary of State as hereinbefore provided shall not be required to obtain any other license or permits to use and operate the same. * * * Except in this section provided, no city, town or village or other municipality shall have power to make any ordinance, by-laws, or resolutions limiting or restricting the use of (or) speed of motor vehicles, and no ordinance, by-laws or resolution heretofore or hereafter made by any city, village or town or other municipal corporation within the State, by whatsoever name known or designated in respect to or limiting the speed of motor vehicles, shall have any force, effect or va-

lidity, and they are hereby declared to be of no validity or effect." The section also contains a proviso that nothing in the act contained shall be construed to affect the power of municipal corporations to make and enforce ordinances, rules and regulations affecting motor vehicles which are used within their limits for public hire.

Section 20 defines the public highways and local officers governed by said act:

"Section 20. Public highways shall include any highway, county road, State road, public street, avenue, alley, park, parkway, driveway, or any other public road or public place in any county, city or village, incorporated town or towns. Local authorities shall include all officers of counties, cities, villages, incorporated town or towns and townships."

There was no express repeal of section 5649 of Kirby's Digest by the statute enacted in 1911. In regard to repeals by implication, in the case of *Wilson* v. *Massie*, 70 Ark. 25, the court said: "The rule is that where the Legislature takes up a whole subject anew, and covers the entire ground of the subject-matter of a former statute, and evidently intends it as a substitute for it, the prior act will be repealed thereby, although there may be no express words to that effect, and there may be in the old act provisions not embraced in the new."

The statute, enacted in 1911, is very broad in its terms. It is plain that it intended to regulate the use of automobiles throughout the entire State, and, with certain exceptions stated in the act, to prescribe the only rules in respect thereto. The act provides that the owners of motor vehicles shall obtain a license from the Secretary of State and pay a fee therefor, and, when that is done, he shall not be required to obtain any other license or permit to use and operate the same. The act further regulates the speed of motor vehicles on the public highways and the streets of cities and towns, and expressly provides no city or town shall have power to make any ordinance limiting or restricting the use of or speed of motor vehicles, and that no ordinance heretofore or hereafter made in respect to limiting the speed of motor vehicles shall have any force, effect or validity and is declared to be of no validity or effect. Cities and towns are given the power to make rules and regulations in respect to motor vehicles used for hire. In fact,

authority that cities and towns may exercise with respect to the use of motor vehicles are expressly enumerated in the act, and all other powers with regard thereto are expressly prohibited.

In discussing a precisely similar question, in the case of *Buffalo* v. *Lewis*, 192 N. Y. 193, the court held (quoting from syllabus): "The motor vehicle law (L. 1904, ch. 538) was clearly designed as a new, complete and general enactment to take the place of all the previous statutes, ordinances or rules relating to the use of motor vehicles upon the streets and highways of this State, and must be held to have repealed all former statutes relating to such subject-matter, even if such former acts are not in all respects repugnant to its provisions. The common council of the city of Buffalo had, therefore, no power, in 1907, to enact an ordinance in pursuance of the provision of chapter 31 of the Laws of 1904, amending section 17 of the city charter (p. 1891, ch. 105), and authorizing it to enact an ordinance imposing a tax upon the owners of motor vehicles for the privilege of operating them upon the streets of such city, since the provisions of the statute in question must be considered as repealed by the subsequent enactment of the motor vehicle law, and that statute expressly provides that, with certain exceptions not applicable to the question under consideration, local authorities shall have no power to pass, enforce or maintain any ordinance, rule or regulation requiring of any owner or operator of a motor vehicle any license, or permit, to use the public highway contrary to or inconsistent with its provisions." In discussing the subject the court said:

"In this case the intention of the Legislature to repeal all laws inconsistent with and contrary to it and to make the act complete and exclusive is further shown in reserving to municipalities the right to limit by ordinance, rule or regulation the speed of motor vehicles on the public highways, and to make, enforce and maintain further ordinances, rules or regulations affecting motor vehicles which are offered for public hire." See also *State* v. *Thurston*, 28 R. I. 265, 66 Atl. 580.

We think it plain that the two statutes are inconsistent, and that the act of 1911 was intended to supplant the prior statute with respect to the use and regulation of motor vehicles. The later act was evidently intended to cover the whole subject,

and its provisions are full and complete in that respect. The provisions of the two statutes as to motor vehicles are in direct conflict, and the prior act must give way to the later statute on the subject. Statutes having for their object the regulation of the use and operation of motor vehicles in the streets, roads and highways of the State are generally upheld as a valid exercise of the police power, and are not unconstitutional as class legislation. In determining the constitutionality of a statute of this kind, the Supreme Court of Illinois in the case of *Christy* v. *Elliott*, 216 Ill. 31, said: "It is a matter of common knowledge that an automobile is likely to frighten horses. It is propelled by a power within itself, is of unusual shape and form, is capable of a high rate of speed, and produces a puffing noise when in motion. All this makes such a horseless vehicle a source of danger to persons travelling upon the highway in vehicles drawn by horses."

Such laws as the act here in question have never been regarded as class legislation. Simply because they affect one class and not another, inasmuch as they affect all members of the same class alike, and the classification involved in the law is founded upon a reasonable basis, if these laws be otherwise unobjectionable, all that can be required in these cases is that they be general in their application to the class or locality to which they apply. They are then public in character, and of their propriety and policy the Legislature must judge. (Cooley's Const. Lim. [16 ed.] 479-481). In *Barbier* v. *Connolly*, 113 U. S. 32, the Supreme Court of the United States said "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment which amendment referred to by the court is the Fourteenth Amendment to the Constitution of the United States, which provides that 'no State shall * * * deny to any person within its jurisdiction the equal protection of the laws.'" *Christy* v. *Elliott*, 216 Ill. 31, 3 A. & E. Ann. Cases, 487, and case note, 1 L. R. A. (N. S.) 215, and case note; *State* v. *Swagerty*, 203 Mo. 517, 11 A. & E. Ann. Cas. 725, and case note; *Mahoney* v. *Maxfield*, 102 Minn. 377, 12 A. & E. Ann. Cas. 289, and case note. Motor cars

are large, powerful and capable of great speed; and, if carelessly handled, are very dangerous to the travelling public. They can be run a great distance in one day, and it is well known that the owners of automobiles do not confine the use and operation of their cars to the limits of the city or town in which they reside; but frequently drive long distances in the surrounding country and to other cities and towns. On the other hand, it is well known that vehicles drawn by horses or other animals are chiefly used in the city where their owners reside. Therefore the Legislature saw fit to leave to cities of the first class the authority to tax resident owners on the privilege of using vehicles drawn by muscular power, and to provide new and exclusive rules and regulations as to the use and operation of motor vehicles. As to the wisdom and expediency of passing the act, we have no concern. The statute is plain, and was within the power of the Legislature to enact.

The judgment will therefore be affirmed.

CARROLL v. TEXARKANA GAS & ELECTRIC COMPANY.

Opinion delivered January 29, 1912.

NEW TRIAL—ERROR IN AWARDING NOMINAL DAMAGES.—Where, in an action for damages to person and property, the jury award merely nominal damages when the undisputed evidence shows that plaintiff is entitled to recover substantial damages, a new trial should be awarded.

Appeal from Miller Circuit Court; *Jacob M. Carter*, Judge; reversed.

STATEMENT BY THE COURT.

This suit was brought by appellant in the Miller Circuit Court against appellee for damages for personal injuries to him and injuries to his horse and buggy, alleged to have been caused while driving along the street by his horse stepping or falling, in the night time, into an excavation in the street in the city of Texarkana, negligently left open and unguarded by appellee, the damage being alleged at $1,000 to himself, $100 to his horse and $5 to his buggy.

Defendant, after denying it, admitted making the excavation; denied that same was carelessly left open, that the

plaintiff drove his horse into the ditch, and that he or his horse or buggy were injured at all; alleged that the excavation was guarded and protected with red lights, and that plaintiff was guilty of contributory negligence in driving or falling into same.

It was virtually undisputed that appellant was injured by his horse falling into a ditch in the street and throwing or jerking him violently against the buggy, was confined to his bed for several days, suffered great pain, and was not able to perform his usual work for a period of three or four months. He incurred $10 or $12 liability for doctors' bills and medicine for being treated for the injury; his horse was damaged in about the sum of $75 and it had cost him $4.80 to repair the buggy.

The court instructed the jury, and they returned a verdict in favor of appellant, and assessed his damage at $1, and from the judgment he appealed.

L. A. Byrne, for appellant.

William H. Arnold, for appellee.

KIRBY, J., (after stating the facts). No complaint is made of any of the instructions given, nor of the introduction or rejection of testimony, but only that the verdict was contrary to the law and the evidence.

The jury found by their verdict for the appellant that the appellee had negligently left open and unguarded an excavation in the street of the city, into which appellant drove in the night and was injured, but it assessed only one dollar damages for the injury, although the testimony was virtually undisputed that the damages suffered by appellant on account of such injuries amounted to a much larger sum.

If appellant was entitled to a verdict in his favor, as the jury have found upon sufficient testimony that he was, they should not have disregarded the undisputed evidence relative to the damages in fixing the amount thereof and found contrary thereto. Having done so, the court should have granted the motion for a new trial. *Dunbar* v. *Cowger,* 68 Ark. 446.

The court erred in refusing to sustain the motion, and the judgment is reversed and the case remanded for a new trial.

JOHNSON v. STATE.

Opinion delivered January 29, 1912.

EMBEZZLEMENT—BREACH OF AGREEMENT.—Where defendant was employed to procure a loan for the prosecuting witness, and was paid a fee of ten dollars, which he agreed to refund in case he failed to procure the loan upon default in procuring the loan his failure to refund the fee would constitute a breach of contract merely, and not an act of embezzlement.

Appeal from Pulaski Circuit Court; *F. Guy Fulk*, Judge; reversed.

STATEMENT BY THE COURT.

An information was filed by the prosecuting attorney in a justice's court in Pulaski County, charging appellant with the embezzlement of ten dollars from Jennie Houston. He was tried and convicted, and from the judgment appealed to the circuit court, where he was again tried and convicted, and his punishment assessed at ten dollars and one day in jail.

The testimony shows that Jennie Houston, the prosecuting witness, first employed one C. M. Farrington to obtain a loan of five hundred dollars for her on some real estate located in the town of Roland. She paid him twenty dollars for his services; then he went to Hot Springs, and when she called at his office, she found appellant, who had an office with him, but was not a partner, in the office. That she employed him to procure the loan for her, gave him a ten dollar fee therefor, and agreed to pay him a commission of one-half of two per cent. of the amount of the loan secured for her in addition. He refused to accept the employment, except upon a written contract, and they repaired to an attorney's office, and had the following contract—description of land omitted—drawn up, which was duly executed by them:

"That, for and in consideration of the sum of ten ($10) dollars to me in hand paid by Jennie Houston, of Little Rock, Arkansas, party of the first part, receipt of which is hereby acknowledged; the party of the second part contract and agree to use our best efforts to secure a loan of four hundred and thirty ($430) for the party of the first part on the following described land, towit: * * * (description is here omitted)

"That the party of the second part be allowed a reasonable time to secure said loan and in addition to the $10 paid

in advance, if such loan is secured in a reasonable time, the party of the first part agrees to pay them a commission of one-half of two per cent. on the amount borrowed on the land as above described.

"The party of the second part do not contract to insure that they can secure this loan, but agree, promise and contract that they will use their best efforts with their friends and people who have money to loan, and try to secure the loan for the party of the first part within a reasonable time, without any further expense to the party of the first part, except the $10 cash, which has already been paid and the further sum of one-half of two per cent."

She testified that it was her understanding that appellant was to give her back the ten dollars in case he did not procure the loan, and that after the contract was executed "he told me outside of Mr. Kerby's office that he would give me the money back if he didn't procure the loan. My attorney, Green, tried to collect the $10 and advised this prosecution."

J. P. Kerby, the attorney, testified that the parties came to his office, and he drew up the contract for them to sign, and the prosecuting witness had a twenty-dollar bill. That after the contract was executed she and appellant went out to get the bill changed, and appellant returned and paid him five dollars for writing up the contract. Nothing was said in his presence about a refund of the ten dollars in the event a loan was not procured.

Appellant testified that he was employed to procure the loan, executed the contract in evidence, but made no promise, whatever, to return the ten dollars, in the event he did not procure the loan; that he told the prosecuting witness that he would do his best to get the money in a reasonable time, but that he was unable to procure the loan because her property was covered by a debt; that he reported that fact to her.

One Baker testified that he was in appellant's office when the prosecuting witness was talking about getting the loan, and heard him tell her if he didn't procure the loan he would give her money back, but this was said before the contract was drawn up, and he didn't hear him say anything about it afterwards.

The court instructed the jury, refusing to give all the in-

structions requested by appellant, and they returned a verdict of guilty. From the judgment he appealed.

C. T. Lindsey, for appellant.

A written contract is itself the highest evidence of the agreement between the parties. 54 Ill. 349; 38 Conn. 15; 42 Wis. 36; 7 Gray, 217.

Hal L. Norwood, Attorney General, and *W. H. Rector*, Assistant, for appellee.

The evidence shows the appellant was guilty of embezzlement, and the case was submitted under proper instructions; let the verdict stand.

KIRBY, J., (after stating the facts). No exceptions having been saved to the instructions given by the court, they can not be reviewed here.

It is insisted that the verdict is not sustained by the evidence, and that it was contrary to law, and that the court erred in refusing to instruct a verdict for appellant, and we have concluded this contention is correct.

The contract of employment was written and executed by the parties and the money paid in accordance with its terms; and if appellant agreed to refund the money in case he failed to procure the loan, as the prosecuting witness states he did, but which fact he denies, it is singular that it was not so specified in the contract. It was a valid contract, made without fraud practiced by appellant, or any misunderstanding of its terms by the prosecuting witness; and if there was afterwards an agreement to return the ten dollars in case of not procuring the loan and a failure to do so, it was but a breach of such agreement, for which no criminal prosecution would lie.

In either event, if it had been so specified in the written contract, or if he afterwards agreed to return the money in case of failure to procure the loan, which he denies, he would not have been guilty of larceny or embezzlement in refusing to return it. It would have been but a breach of the terms of the contract, for which he could not be held criminally liable.

The evidence does not show that he agreed to return the money, and he denied, when called upon to do so, that he had made any such contract or agreement.

The evidence is not sufficient, in our opinion, to support

the verdict, and the judgment is reversed, and the case dismissed.

STRICKLIN v. GALLOWAY.

Opinion delivered February 5, 1912.

ADMINISTRATION—WHEN COSTS INCURRED BY EXECUTOR.—Where heirs filed exceptions to an executor's settlement, the executor does not represent the estate in the contest over the approval of his accounts, but represents himself, and the costs incurred by him are recoverable from him individually.

Appeal from Pulaski Circuit Court; *F. Guy Fulk*, Judge; motion to quash execution overruled.

James A. Comer and *John McClure*, for appellants.

The contest in the circuit court was not between the *estate* of Elizabeth S. Shall, deceased, and the devisees under her will, but between these devisees and the executor over the question whether certain credits claimed by him in his accounts of settlement were legal and proper charges against decedent's estate. The error of the circuit court in dismissing the appeal from the probate court was invited by the executor, and this caused the appeal to the Supreme Court. It was purely a personal controversy between the devisees and the executor, in which the latter failed, and he should pay the costs, not the estate. 74 Ark. 171; 3 Ark. 272; 38 Ala. 687; 28 Ind. App. 340; 4 Fla. 411; 24 Ala. 302; 14 L. R. A. 696; 16 Mass. 531; 45 Mo. App. 620; 41 N. Y. 322.

J. F. Loughborough, for appellee.

Execution can not issue against an executor. 51 Ark. 361-366; 55 Ark. 310; 64 Ark. 355.

PER CURIAM. The appellee, D. F. S. Galloway, moves the court to quash an execution issued against him by the clerk of this court for the collection of costs of appeal adjudged against him on reversal in the case of *Stricklin* v. *Galloway*, 99 Ark. 56. He was the executor of the estate of Elizabeth Shall, and the appellants, as heirs, filed exceptions to his settlement account in the probate court. They appealed to the circuit court, and there, on motion of appellee, the appeal was dis-

missed, and they appealed to this court, where the cause was reversed and remanded with instructions to overrule the motion to dismiss, and for further proceedings. The costs of the appeal were adjudged against the appellee. His contention now is that he appeared in the proceedings in his representative capacity, and was not personally responsible for costs. He is mistaken in his contention with reference to the position he occupies in the controversy. It is not to be doubted that, where an executor or administrator represents the estate in litigation brought by or against him as such representative, he is not personally liable for costs incurred in the proceedings. But in this proceeding he did not act as the representative of the estate; he acted in his individual capacity in resisting the attack made upon his settlement account by the heirs who excepted thereto. When he presented his account to the probate court for adjustment, any distributee of the estate had the right to file exceptions thereto; and when that was done, it raised an issue between the executor, on the one hand, and the distributee who excepted to the account, on the other hand. The losing party to that controversy should pay the costs, and in no event should the costs be adjudged against the estate. In such a controversy the executor or administrator does not represent the estate. The authorities cited by counsel for appellants in their brief sustain this view. The same principle was announced by this court in *Adamson* v. *Parker*, 74 Ark. 171, though the question arose in a somewhat different way. Appellee, in resisting the attack upon his settlement account, improperly moved for a dismissal of the appeal to the circuit court, and thereby caused that court to commit the error and caused the appeal to this court, which was the only way in which the error could be corrected. Appellants were entitled to their costs incurred on the appeal, and the same can not be adjudged against the estate, but were properly awarded against appellee, who was responsible for the error. The petition to quash the execution is therefore denied.

HART, J., dissents.

JACKSON v. LOFTIN.

Opinion delivered February 5, 1912.

1. COSTS—RECOVERY AT COMMON LAW.—The right to recover costs did not exist at common law, and the statutes must be looked to for the authority to recover costs in any given case. (Page 144.)
2. SAME—LIABILITY OF COUNTY.—Kirby's Digest, section 6338, authorizing prosecuting attorneys in certain cases to file information before justices of the peace, and providing that "in such cases no bond shall be required for costs of prosecution," does not expressly or impliedly make the county liable for costs where there has been an acquittal in such cases. (Page 145.)

Appeal from Jackson Circuit Court; *Charles Coffin*, Judge; reversed.

Otis W. Scarborough, for appellant.

A county is not liable for costs accrued in prosecuting misdemeanor cases in justice of the peace courts on information, where the defendants are acquitted. The right to recover costs rests upon statutes only. 60 Ark. 194; 95 Ark. 85; 32 Ark. 51, 52; 25 Ark. 235; Kirby's Digest, § 1458; 56 Ark. 581; 57 Ark. 487; 64 Ark. 203; 23 Ark. 540; 39 Ark. 291; 46 Ark. 147.

Ira J. Mack, for appellee.

Since under the statute the justice of the peace must proceed with a case when the prosecuting attorney files information, and since in all other misdemeanor prosecutions he can require bonds to protect the officers in the payment of their fees, whereas the prosecuting attorney may proceed without such bond, the "fair intendment" of the statute is that, in such cases, in the event of acquittal, the county shall pay the costs, it receiving the benefit of all convictions under Kirby's Digest, § 7183. 57 Ark. 487; 52 Ark. 192.

WOOD, J. The question on this appeal is: "Are counties liable for costs in misdemeanor cases tried in justices' courts where the defendants are acquitted?"

This court held in *Wilson* v. *Fussell*, 60 Ark. 194: "That the right to recover costs did not exist at common law. It rests upon statute only, and it is to the statute we must look for the authority to recover costs in any given case." See also *Buckley* v. *Williams*, 84 Ark. 187; *Buchanan* v. *Parham*, 95 Ark. 81.

The appellee contends that he is entitled to his costs under section 6338 of Kirby's Digest, giving authority to the prosecuting attorney in certain cases to file information before a justice of the peace, and making it the duty of the justice of the peace in those cases to issue a warrant for the arrest of the offender; and providing, "In such cases no bond shall be required for costs of prosecution."

The appellee contends that, inasmuch as he was required to perform the services under the above statute, and as he did not have authority to require bond in such cases, the county is liable for his services, since, if the offender had been convicted, the county would have received the benefit of the fine.

Appellee insisted that the statute, by fair intendment, makes the county liable for the costs where there has been an acquittal. The statute does not expressly nor by fair intendment make the county liable for costs where there has been an acquittal in the misdemeanor cases mentioned therein. See *Logan County* v. *Trimm,* 57 Ark. 487.

Section 1458 of Kirby's Digest prohibits the county court from allowing "to any officer any fee not specifically allowed such officer by law, and in no case shall constructive fees be allowed to or paid officers by any county of this State." See *Logan County* v. *Roady,* 56 Ark. 581; *Prairie County* v. *Vaughan,* 64 Ark. 203.

Section 3534 of Kirby's Digest provides that "officers required to perform any duty for which no fees are allowed shall be entitled to such pay as would be allowed for similar services." But section 1458, *supra,* was enacted after section 3534, and therefore expressly takes counties out of the operation of the latter section. *Logan County* v. *Trimm, supra.* Moreover, section 3534, *supra,* can have no application to counties, for counties are not mentioned therein, and it is a general statute. It is a well settled rule of law "that in the construction of statutes declaring or affecting rights and interests, general words do not include the State or affect its rights, unless it be especially named, or it be clear by necessary implication, that the State was intended to be included. Counties are civil divisions of the State for political and judicial purposes, and are its auxiliaries and instrumentalities in the administration of its government." *Cole* v. *White County,* 32 Ark. 45.

The services performed by appellee which the statute required, but for which no allowance is made, is one of the burdens attached to the office which appellee took when he was elected thereto.

The judgment of the circuit court allowing the fees is erroneous, and is therefore reversed, and the cause dismissed.

GRAY v. STONE.

Opinion delivered January 22, 1912.

1. LIFE INSURANCE—DUTY OF INSURED TO EXAMINE POLICY.—It is the duty of the insured to examine his policy within a reasonable time after its delivery to him and to reject it if it is not what he contracts for; and if he fails to do this, he will be deemed to have accepted it, and can not avoid liability for payment of the premium note. (Page 150.)
2. SAME—EFFECT OF MISTAKE IN APPLICATION.—Insured can not escape liability for payment of his premium notes upon the ground that his age was incorrectly stated in his application where the insurance company had been previously notified of such mistake, but made no offer to return a premium already paid by him and cancel the policy. (Page 150.)
3. SAME—INSURANCE COMPANY BOUND BY AGENT'S KNOWLEDGE.—Where, at the time assured applied for the insurance in question, he told the insurer's agent his correct age, and it was written by the agent incorrectly in the application, either by mistake or otherwise, the insurer would be bound by the knowledge of its agent. (Page 151.)
4. SAME—PREMIUM NOTE—DEFENSE.—Where a husband gave his note for the premium of a policy on the life of his wife, he will be bound thereby, although the policy was not what he understood it would be, if he neither returned nor offered to return the policy. (Page 151.)

Appeal from Howard Circuit Court; *Jefferson T. Cowling*, Judge; reversed.

STATEMENT BY THE COURT.

This is a suit on a promissory note for $135.93, executed May 18, 1910, by W. C. Stone and due J. L. Gray on December 1, thereafter.

The answer admitted the execution of the note, and that it had not been paid, but alleged that it was made in settlement of a premium on two policies of life insurance, one upon his own life, the amount of the premium being $83.20, and the other upon the life of his wife, the premium amounting to $52.70.

That Gray was the agent of the life insurance companies issuing the policies, and solicited the risks. That he agreed to pay the premium on the policy on his wife's life only on the condition that he should be made beneficiary in the policy, and that the policy was issued contrary to such agreement on the life of his wife and payable to her estate in the event of her death. That he received no benefit or consideration whatever on account of its issuance, and that, relative to the premium on his own policy, he stated in his application that his age at his nearest birthday would be sixty-one years. That the agent, intentionally or by mistake, wrote it in the application sixty years. That it was the rule of the companies issuing the policies not to issue a policy on the life of any person exceeding the age of sixty years, and that if his age had been correctly stated in the application no policy would have been issued, and that, having been falsely stated, it would avoid the policy, and that the note was wholly without consideration or benefit to him on that account. That all these facts were known to the agent who took the note at the time the application was made, and the note was then executed and long before the policies were issued. That, as soon as he discovered the mistake as to his age, he wrote to the company offering to surrender the policy if his note was returned, and, after discovering that his wife's policy was made otherwise than as agreed, he notified Gray, who refused to take up the policy or deliver the note, and that by reason of these facts the consideration of the note sued on had wholly failed.

The testimony tended to show that W. C. Stone executed the note sued on in payment for the premium for one year on two policies of life insurance, one upon his own and the other upon the life of his wife. That he told the agent at the time that at his next nearest birthday he would be sixty-one years of age; told him that he was born in June, 1849; that the agent wrote it in the application sixty years, stating the date of his birth to be June, 1850. That he told the agent, after being advised that he could not write a policy on the joint lives of himself and wife, that he would take out one on his own life for his sister, and one on his wife's life for himself as beneficiary, and he said the agent told him that under the law he would be entitled to the money due upon the policy upon the death of

his wife without being made beneficiary therein. The policies were issued and delivered some time after the premium note was given and a receipt signed by both W. C. Stone and his wife, acknowledging receipt of the policies, and "the same being as applied for and said policies comply fully with the terms and conditions as represented to me by the agent," and a warranty that each was in good health and had paid the premium required. W. C. Stone afterwards discovered that his age was stated in the policy as sixty years. He then went down to Dr. Wright, the examiner of the insurance company, and asked him to notify the agent, Mr. Gray, to call and see him when he was next in the community. He also wrote the company on November 25, 1910, and received a reply November 28, 1910, acknowledging the information as to his correct birthday, and agreeing to date the policy back to December 21, 1909, reducing his age to sixty years and requiring him to pay another annual premium. Appellee refused to accept this proposition, not caring to pay two annual premiums, but he didn't return nor offer to return the policy on his own life, nor did he complain to the company at the time of writing about it that the policy on his wife's life was other than as applied for. He stated in his testimony, however, that he had no children by his wife, who had children of her own before he married her, and that if he had known the policy had been made payable to her estate, instead of to himself, he would not have signed the note.

The appellant testified that he took the applications for the policies of insurance and the note in payment of the premiums due therefor, and paid to the insurance company the amount of the first premium due it before the issuance of the policies. That he told Stone at the time the applications were made that his company would not issue a policy upon the life of his wife payable to him, but that the policy would have to be made payable to her estate, and she could make him her beneficiary. That Stone gave him his age as nearest sixty, his recollection being he would be sixty on the 21st day of the coming June. That he would not have written it if he had not said it was his age. That Stone's brother came to him before Christmas, and long after the note was due, and told him of the complaint about the incorrect age in his own policy; that he delivered the policies to him and his wife, told them to examine

them, and they signed the receipt therefor. He didn't remember whether appellee gave him the date of his birth or not; that he didn't give him the date of his birth as 1849, for if he had done so he would have figured it out and found it incorrect. He denied telling Stone before he signed the note that the policy on his wife's life would be payable to him and made no agreement to that effect. He remembered saying that he would be the beneficiary, being under the impression that if she had no children he would get her estate.

The court refused to give a peremptory instruction for the plaintiff and several other of his requested instructions, gave three instructions for the defendant, over plaintiff's objections, and one numbered 2 for the plaintiff, as follows:

"No. 2. The jury are instructed that, if the defendant did not wish to accept the policy issued to him, he should have returned it to the company issuing it, or the agent to whom he executed the note, or offered to do so within a reasonable time. And if he failed to do so he is liable on such note for the premium therefor."

The jury returned a verdict for the defendant, and from the judgment thereon plaintiff appealed.

W. C. Rodgers, for appellant.

1. The court erred in refusing to give appellant's instruction to render a verdict. "*Ignorantia legis neminem excusat.*" 14 Ark. 291; 61 *Id.* 588; 69 *Id.* 309; 74 *Id.* 180; 90 *Id.* 367.

2. Fraud without injury is no ground of relief. 40 Ark. 393-407; 43 *Id.* 462; 53 *Id.* 278; 71 *Id.* 309; 74 *Id.* 70; 77 *Id.* 273.

3. One who takes out a policy of insurance must examine his policy. It was his duty to read and know the contents. After a reasonable time, the policy holder will be deemed to have accepted. 86 Ark. 284; 87 Fed. 63.

4. One can not complain of an alleged fraud, and at the same time hold on to the fruits thereof. 59 Ark. 259. The peremptory instruction was wrong, and the verdict of the jury was in the face of the court's instructions. 74 Ark. 441; 87 *Id.* 366; 76 *Id.* 227; *Ib.* 73; 65 *Id.* 68; 54 *Id.* 602; 61 *Id.* 156; 64 *Id.* 337; 72 *Id.* 445.

5. To escape liability the company should have returned, or offered to return, the premium. 97 Ark. 588.

6. The instructions were abstract. 75 Ark. 239; 74 *Id.* 22; 61 *Id.* 560; 76 *Id.* 560; 56 *Id.* 461; 37 *Id.* 591; 14 *Id.* 537; 36 *Id.* 646; 54 *Id.* 339. The judgment should be reversed for error in the court's charge to the jury, and in refusing to give the prayers requested. Cases *supra.*

W. P. Feazel, for appellee.

1. The appellee is not liable because of (1) lack of mutuality, (2) total failure of consideration. 95 Ark. 156; 56 *Id.* 438; 68 *Id.* 278.

2. There is no error in the court's charge. 90 Ark. 585; 92 *Id.* 509. A contract obtained by fraud may always be repudiated without offering to return the premium. 57 Ark. 615; 82 *Id.* 105; 42 *Id.* 208.

3. Fraud avoids a contract *ab initio.* 35 Ark. 483; 17 Cyc. 695, note 14; 73 Ark. 470; 83 *Id.* 15; 72 *Id.* 343; 146 N. C. 578; 125 Am. St. 523; 106 *Id.* 160.

KIRBY, J., (after stating the facts). The undisputed testimony shows that the two policies of insurance applied for were written, delivered to and receipted for by Stone and his wife, and the note sued on executed in payment of the premium. That neither of said policies was ever returned or offered to be returned by appellee to the agent of the company or to the company itself, and that he in fact refused to return the policies or either of them and kept them; neither did he make complaint to the company or to the agent at all until after his note became due, and then only as to his own policy, contending that his age was incorrectly set out therein. This complaint was made more than six months after the application was made and long after the delivery of the policies.

The insured should examine his policy upon its delivery to him, and is bound to do so within at least a reasonable time thereafter and to reject it if it is not what he contracted for; and if he fails to do this, he will be deemed to have accepted it, and can not avoid liability for payment of the premium note. *Remmel* v. *Griffin,* 81 Ark. 269; *Smith* v. *Smith,* 86 Ark. 285.

He made no objection to this form of policy issued to his wife, nor did he offer, until long after the premium note was

due, to surrender or return this policy, and he declined and refused, he says himself, to return the policy issued upon his own life, after he discovered and notified the company of a mistake made therein as to his correct age.

It is also undisputed that appellant paid to the insurance company the amount of money required for its first premium on the policy, that they were duly issued and delivered, and the company, not having offered to return the premium and cancel the policy after it was notified of the incorrect age contained therein, was bound by the terms of the policy to its payment without regard to the correctness of the age. *Minneapolis F. & M. Ins. Co.* v. *Norman,* 74 Ark. 190, 193; *Bloom* v. *Home Ins. Agency,* 91 Ark. 367.

If appellee told the agent, at the time of making his application for insurance, his correct age, as he claims to have done, and it was written by the agent in the application, by mistake or otherwise, incorrectly, the company would, nevertheless, be bound to the payment of the policy issued and delivered thereon, the knowledge of its agent, authorized to solicit insurance and fill blanks, being regarded the knowledge of the company. *Insurance Co.* v. *Brodie,* 52 Ark. 11; *Franklin Life Ins. Co.* v. *Galligan,* 71 Ark. 295; *Mutual Reserve Fund Ins. Co.* v. *Farmer,* 65 Ark. 581.

In any event, appellee had the right to pay the premium upon any sort of a policy upon the life of his wife that she would accept herself, and, not having returned nor offered to return the policy, which was delivered to her and accepted by her with his knowledge, after ascertaining that same was not payable to him as beneficiary as he understood it should be he can not avoid payment of the premium note for failure of consideration.

The court erred in refusing to give appellant's requested peremptory instruction. The judgment is reversed, and the cause remanded with directions to enter a judgment for the amount of the note sued on.

BLACKBURN v. TEXARKANA GAS & ELECTRIC COMPANY.

Opinion delivered January 29, 1912.

1. CONTRACT—ENTIRETY—EFFECT OF PART PERFORMANCE—There can be no recovery where there is an entire contract to do certain work for a stipulated price for the whole, and only part thereof is performed, and such part is not accepted, (Page 157.)
2. SAME—EFFECT OF MAKING PERFORMANCE IMPOSSIBLE.—Where one of the parties to a contract puts it out of the power of the other to perform or refuses to abide by its terms, the other may sue for a recovery thereon. (Page 157.)
3. SAME—DRILLING WELL—CONSTRUCTION.—Under a contract for the driving of a well to be encased with standard eight-inch well casing the contractor is required to encase the well for its entire depth. (Page 158.)
4. VOLUNTARY PAYMENT—RECOVERY.—Where one voluntarily makes a payment upon a claim with knowledge of the facts, or under such circumstances that he is affected with such knowledge, he can not recover such payment upon the ground that the asserted claim was unenforceable. (Page 159.)
5. SAME—EFFECT OF MISTAKE.—Money paid by one person to another in mutual ignorance of facts which, if known, would have apprised them that the payment was not due may be recovered, although such ignorance was not caused by any wrongful act of the payee. (Page 159.)

Appeal from Miller Circuit Court; *Jacob M. Carter*, Judge; affirmed.

L. A. Byrne, for appellant.

When the terms of a contract are ambiguous, the conduct of the parties under the contract furnishes the best guide for the interpretation thereof. 55 Ark. 414; 52 Ark. 65; 49 Ark. 129; 88 Ark. 364. It is to be construed most strongly against the party who drafted it. 73 Ark. 338; 74 Ark. 41; 90 Ark. 88. A breach by one party to a contract releases the other, and he may recover whatever is due him under the contract. 22 Ark. 258; 38 Ark. 174; 65 Ark. 320; 67 Ark. 156; 64 Ark. 228; 79 Ark. 271; 89 Ark. 368. Readiness to perform and tender of performance is equal to performance. 39 Ark. 280; 39 Ark. 340; 64 Ark. 228. Money voluntarily paid can not be recovered. 72 Ark. 552.

William H. Arnold, for appellee.

The failure of the consideration justifies the defendant in its counterclaim. 5 Neb. 187. And it is entitled to recover

the money paid. 132 U. S. 271; 9 M. & W. 54; 73 Ark. 567.

FRAUENTHAL, J. This is an action instituted by J. E. Blackburn to recover the balance which he claimed was due him for drilling a well for the defendant. In the complaint it was alleged that the well was drilled and completed in compliance with the terms of a written contract, and that defendant had accepted same and made a partial payment thereon; that thereafter a verbal agreement was made, whereby the plaintiff was to drill the well to a greater depth, and that defendant agreed to pay the cost of the labor for such additional drilling, and of certain appliances which were furnished. He claimed that there was under the written contract payable to him the sum of $840, upon which he had received $400, leaving a balance of $440 thereon still due; that for the work and cost of certain appliances in drilling the well beyond the contract depth there was due $277.50; thus making a total of $717.50 due, for which he sought judgment.

The defendant denied that plaintiff had completed the well in compliance with the terms of the written contract, or that it had made any verbal contract for additional drilling, and claimed that it was not due the plaintiff anything for the drilling of the well. It also pleaded as a counterclaim the amount of $400 which it had paid to plaintiff, alleging that the same was paid upon condition that the well was or would be completed in full compliance with the terms of the written contract, which was not done; and it sought a recovery of the said counterclaim.

The case was tried by a jury, and the court gave a peremptory instruction by which it directed them to return a verdict in favor of defendant for the amount of such counterclaim, less a small cost of some appliances for which defendant admitted it had agreed to pay. The jury returned a verdict in accordance with said instruction.

The defendant owned a plant run by steam, and desired a well drilled which would supply it with a sufficient quantity of water for its boilers in the operation of its engines. Considering the evidence adduced upon the trial of the case most favorably to the contention of plaintiff, it established the following facts:

On November 17, 1909, the parties entered into a written contract for the drilling of a well, which is as follows:

"At a price of $4 per foot complete for all work, material and superintendence I propose to drill upon the premises occupied by your electric light plant, south of the Cotton Belt tracks at some point designated by your general manager, a well for water, same to be encased with the standard 8-inch well casing and to be equipped with one or more strainers as the necessities of the case may demand for getting the water from the different strata. I agree that at a depth not to exceed 145 feet that this will produce a minimum flow of 40,000 gallons of water per day of 24 hours. Should you decide to go beyond 145 feet, we guarantee to you that at a depth not exceeding 210 feet that the minimum flow of water will be 60,000 gallons per day of 24 hours. You to make no payment on this contract at all until it is shown to the satisfaction of your general manager that the well will furnish the amount of water stated as per above. We further agree that if we find it necessary to drill to any greater depth than 145 feet to obtain 40,000 gallons per day or 210 feet to obtain 60,000 gallons per day that we will make no charge for material beyond a depth of 145 feet for 40,000 gallons or 210 feet for 60,000 gallons. We are to commence immediately upon receipt of notice from you and work to be completed with all possible dispatch. You to furnish steam and water for drilling said well."

At the time this contract was entered into, plaintiff was actually a member of a partnership composed of himself and J. H. Schley, which firm was engaged in the well-drilling business; and the contract, though signed alone by plaintiff, was really made for the partnership. But it appears that subsequently the partnership was dissolved, or by mutual consent said Schley withdrew from it, and that Blackburn continued as its owner and representative. In the lower court no objection was made to Blackburn proceeding as the sole plaintiff, or to the counterclaim being asserted solely against him; no objection was made on account of any defect of parties, either as to the cause of action prosecuted solely by said Blackburn or as to the action on the counterclaim against him individually; nor is any such question raised here. We only note that Schley was a partner of Blackburn at the execution of the contract in order to explain the use of some terms in the contract indicating that the drilling was to be done by more than one person.

The plaintiff proceeded under said written contract to drill the well until December 11, 1909, when he claimed he had drilled it to a depth of 210 feet. He then requested defendant's manager to measure the depth of the well, which he did and found that it had been drilled to the depth claimed. The water was then running out of the top of the well, and the plaintiff claimed that it would produce the quantity of water per day guaranteed by said contract. He asked for a payment upon the work in order to satisfy some indebtedness incurred by him during the drilling. It appears that the defendant's manager then made a payment to him of $400; but we think that the undisputed evidence shows that defendant's manager did not then accept the well or any work done thereon. The plaintiff testified that he told the manager that he had drilled the well to a depth of 210 feet, and that the manager then measured its depth and found his statement correct; that the manager then paid him $400 and said: "I don't want to pay any more until I let Mr. Markley know about the well." He said that he did not want to take all the responsibility on himself in accepting the well. He further testified that no test had been made of the quantity of water which the well would produce, and that he did not know what amount of water it would furnish at the depth of 210 feet.

W. L. Wood, the defendant's manager, testified that the plaintiff told him that he had the well down 210 feet, with full capacity as required by the contract, and that he desired him to measure it, which he did. He stated that the plaintiff represented that the well was all right, and that it would furnish the amount of water per day as guaranteed by the contract, and that this would be shown when the test thereof was made; that he paid the $400 relying upon this representation made by plaintiff, and with the understanding that the test which would thereafter be made would show that the well would produce the quantity of water guaranteed by the contract.

Neither of the parties testified that the defendant's manager accepted the well, or any work that was done thereon; and it clearly appears from the undisputed evidence that the payment was only made pending the test that should be thereafter made of the capacity of the well.

About that time, or shortly thereafter, a question arose

between the parties as to whether the plaintiff should encase the well for its entire depth. It appears that the plaintiff had drilled the well with a diameter of 10-5-8 inches from its top to the depth of 75 feet, and for that depth had encased it with eight-inch well casing. At that depth he claimed that he had struck hard rock formation, and for that reason it was not necessary to encase the well to a further depth. The defendant, however, insisted that the well should be encased for its entire depth, and, the plaintiff objecting thereto, defendant on January 8, 1910, agreed that it would pay for the casing material from the depth of 75 feet down, although it still claimed that under the contract plaintiff should pay therefor. In other words, the uncontroverted testimony shows that the defendant agreed to waive its right in that particular, and acceded to the demand of the defendant that it pay for such casing in order to get plaintiff to complete the well under the contract. Thereupon, plaintiff put in the additional casing, and the defendant paid for such material.

It appears that the defendant then secured pumps and tested the capacity of the well. The undisputed evidence shows that the well did not produce the quantity of water guaranteed by the contract. The largest quantity that any of the testimony shows that the well would produce was 36,000 gallons per day; and the preponderance of the evidence tends to prove that it would furnish from 12,000 to 20,000 gallons per day. The plaintiff then proceeded to drill the well beyond the depth of 210 feet, and went down for a further distance of 61.4 feet; but the uncontroverted testimony shows that the well at that depth did not produce a greater quantity than above stated, and therefore did not produce the quantity of water required by the contract. The plaintiff also insisted that the defendant was liable for and should pay him for the work of drilling the well beyond the depth of 210 feet, and made demand for payment of such work at the rate of $10 per day. The defendant refused to make such payment, contending that under the contract it was required to pay no greater sum than $840 for the well, no matter how deep the well was required to be drilled in order to obtain the quantity of water guaranteed by the contract. It would appear also that the water obtained at the depth greater than 210 feet became impregnated with for-

eign substances, making it unfit to be used in the boilers at defendant's plant, and that defendant raised objection to the quality of the water which was furnished. The plaintiff then ceased the drilling, and made demand for the payment of the balance which he claimed was due him under the contract and for the work of the additional drilling.

The right of plaintiff to recover herein must be determined by the written contract upon which his cause of action is primarily based. That contract is entire, with a stipulated price named for the performance of the whole contract. If, therefore, the entire contract was not performed, and the work done in drilling the well was not accepted, then plaintiff can not recover upon the written contract nor for the value of the work that he actually has done. There can be no recovery where there is an entire contract, with a stipulated price for the whole, and only part thereof is performed, and such part is not accepted. Under such circumstances, the price is not payable until the whole work is completed in accordance with the terms of the entire contract. *Manuel* v. *Campbell*, 3 Ark. 324; *Walworth* v. *Finnegan*, 33 Ark. 751; *Hibbard* v. *Kirby*, 38 Ark. 102; *Little Rock Well & Pump Co.* v. *Ferguson Lumber Co.*, 74 Ark. 24.

It is true that where one of the parties to a contract puts it out of the power of the other to comply therewith, or refuses to abide by its terms and breaches it, the other party may bring suit for a recovery thereon, before final completion; but this right is founded upon the doctrine that the contract has been complied with by the party seeking relief thereunder, and that the other party has breached it. *Price* v. *Thomas*, 15 Ark. 378; *Miller* v. *Thompson*, 22 Ark. 258; *Wiegel* v. *Boone*, 64 Ark. 228.

Before the plaintiff is entitled to a recovery in this case, therefore, it must appear that there was some evidence adduced that he complied with the terms of said written contract upon his part, and that the defendant breached it, or that the defendant accepted the work that was done. To determine this question, it is necessary to construe the written contract and consider it in the light of the testimony which was introduced. We are of the opinion that, by the terms of said written contract, the plaintiff obligated himself, first, to encase the well with standard eight-inch well casing for the entire depth thereof;

and, second, that he guaranteed that the well would produce 60,000 gallons of water per day at a depth of not exceeding 210 feet, and that if it did not produce that quantity of water at that depth he would drill to any greater depth necessary to produce that quantity at his own expense. In other words, under the terms of the above contract, the defendant was not to pay a greater sum than $840 for the well at a depth of 210 feet or more, and with a guaranteed capacity of 60,000 gallons of water per day.

The plaintiff claims that he was to encase the well only to a depth that was necessary, and not for its entire depth; that when he reached the rock formations it was not necessary to encase it through those strata. But the contract does not provide that the plaintiff shall encase the well only as the necessities thereof might require. It prescribes that the well shall be encased, and names the character of the casing; and this, we think, necessarily means that the entire well should be encased. The contract provides that strainers shall be furnished, and in the provision relative to the strainers it states that the strainers shall be furnished as the necessities of the case might require. The strainers were for the purpose of permitting the water to flow into the well; and the provision for the strainers, we think, manifestly indicates that the well should be entirely encased with the specified casing except in the places where the strainers were needed to permit the water to flow into the well between the various strata where it might be found. The fact that in the provision relative to the strainers the contract provides that they should be furnished only where necessary, and that there is no such provision relative to the casing, excludes the intention that the casing was only to be furnished when the necessities of the case required it.

Considered in its entirety, we think that the contract clearly shows that the parties intended and agreed that the plaintiff was to drill a well which should furnish 60,000 gallons of water per day at a depth of not exceeding 210 feet, and that plaintiff was to be paid therefor $840; that this was the capacity which the defendant desired the well to have, and that $840 was the total sum that it was to pay therefor. Therefore, if it was necessary to go any deeper to obtain that capacity, the defendant should be at no further cost or expense.

The uncontroverted evidence shows that the plaintiff did not drill a well which produced the quantity of water guaranteed by him in said written contract, and that he refused to drill the well deeper in order to obtain that guaranteed capacity at his own expense, but demanded, before drilling deeper, that the defendant should pay for the work in doing the drilling beyond that depth. The plaintiff therefore did not perform or comply with the terms of the written contract, and is not entitled to recover thereon. We do not think that there is any evidence indicating that any new or different contract was made, verbally or otherwise. At the most, the defendant only agreed to bear the cost of the additional casing that would be required to go beyond the depth of 75 feet; but there is no testimony indicating that the written contract was abandoned, or that plaintiff was relieved from any other obligation which he assumed thereunder. By the terms of the written contract, plaintiff was not entitled to recover for any work done by him beyond the depth of 210 feet, and there is no testimony showing that the defendant, verbally or otherwise, agreed to pay for such work. Under the undisputed testimony, therefore, plaintiff was not entitled to recover for the work done by him below the depth of 210 feet. As before stated, there is no testimony indicating that the defendant accepted the well or any work done thereon. The undisputed evidence shows that the payment of $400 was made, either upon the representation of the plaintiff that the well was completed and would produce the quantity of water guaranteed by the contract, and the capacity of which defendant was entirely ignorant of, or that the payment was made with the understanding and upon condition that the well would, upon the test thereafter to be made, produce the guaranteed quantity of water.

Where one voluntarily makes a payment upon a claim with knowledge of the facts, or under such circumstances that he is affected with such knowledge, then he can not recover back such payment upon the ground that the asserted claim was unenforceable. *Rector* v. *Collins*, 46 Ark. 167; *Vick* v. *Shinn*, 49 Ark. 70; *Crenshaw* v. *Collier*, 70 Ark. 5; *Lorimer* v. *Murphy*, 72 Ark. 552. But we think the rule is also well settled that money paid by one person to another in mutual ignorance of the facts which, if known, would have prevented such payment,

may be recovered back, although such mistake was not caused by any wrongful act of the party receiving such payment. *United States* v. *Barlow*, 132 U. S. 271; *Wate* v. *Leggett*, 8 Cowan 195; *Burr* v. *Veeder*, 3 Wend. 412; *Billings* v. *McCoy*, 5 Neb. 187.

In the case at bar, the uncontroverted testimony shows that the $400 was paid to the plaintiff, either upon the representation made by him that the well was of the required capacity, or with the understanding that it would thereafter be tested and that from such test it would be shown that it would produce such required capacity, and that if it did not the plaintiff would fully comply with the provisions of the written contract in drilling the well deeper until it did produce the quantity of water guaranteed in the contract. Under this undisputed evidence, the payment was not made upon any acceptance of the work done, nor was the defendant under any legal or contractual obligation to ascertain the capacity of the well before making the payment. The payment was made only to assist the plaintiff, and without any definite knowledge possessed by either party as to the capacity of the well, but with the understanding of both that the well should thereafter be tested in order to determine whether it was finally completed in accordance with and of the capacity guaranteed by the contract.

We are of the opinion, therefore, that under these circumstances the payment was made by defendant, in effect, upon consideration which failed, and therefore can be recovered back. The court did not commit any error which was prejudicial to the rights of the plaintiff by the instruction which it gave to the jury. The judgment is accordingly affirmed.

HAYS *v.* ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY.

Opinion delivered February 5, 1912.

RAILROADS—TRESPASSER ON TRACK—CONTRIBUTORY NEGLIGENCE.—It constitutes negligence *per se* for a person to go upon a railroad track without looking and listening for approaching trains, except where there is an implied invitation to go upon the track without taking those

precautions, or where the situation is such that the person is, in the exercise of reasonable care, misled into believing that no engine or cars are expected.

Appeal from Phillips Circuit Court; *Hance N. Hutton*, Judge; affirmed.

Fink & Dinning, for appellant.

1. The testimony shows that at the point where the injury occurred, the people, with the knowledge of the defendant and without objection, continually and habitually crossed the tracks, and had done so for years. The running of a locomotive without giving any warning or keeping a lookout, along by a station, by another train just arriving and over the spot where passengers alight from defendant's trains, is gross negligence, and defendant is liable, whether it was the engineer or the fireman who was negligent. This case calls for the application of the rule requiring increased vigilance and care in cities and towns where the population is dense. 81 Ark. 191; 129 S. W. (Ky.) 558; 11 S. W. (Ky.) 712. If appellee's testimony is accepted as true, it is still manifest that it was negligent; for it is affirmatively shown that the fireman was keeping no lookout, and that such failure was the proximate cause of the injury. 63 Ark. 184; 83 Ark. 61; 62 Ark. 186; 93 Ark. 28.

2. This case falls within the exceptions to the rule requiring persons to look and listen before going upon the tracks of a railroad. (*a*) Appellant's intestate was upon appellee's premises for the purpose of assisting an invalid passenger to alight from defendant's train; therefore there by appellee's implied invitation and assurance that he could cross the tracks with safety, and it owed him the duty to exercise, and the burden was upon it to show that it did exercise, reasonable care to protect him from injury. 2 Wood on Railroads, 1523-1525; 55 Ark. 428, 433; 76 Ark. 377, 387; 69 Ark. 496; 59 Ark. 122; 92 Ark. 403; 90 Ark. 278; 57 Ark. 141; 33 Cyc. 805; 138 S. W. (Ark.) 995; 135 S. W. (Ark.) 338; 94 Ark. 20; *Id.* 527. (*b*) The circumstances were so unusual that the deceased could not reasonably have expected the approach of a train at the time he went upon the track. 2 Wood on Railroads, 1523, 1525; 78 Ark. 358; 83 Ark. 61; 79 Ark. 137, 145; 85 Ark. 326; 207 U. S. 302, 52 L. Ed. 219; 100 Mass. 212, 97 Am. Dec. 96.

3. It is improper to give a peremptory instruction if, from all the facts and circumstances in proof, the minds of reasonable men might differ as to the conclusions to be drawn therefrom. It is only when reasonable minds can draw but one conclusion from the evidence that a court is warranted in giving a peremptory instruction. 89 Ark. 534.

E. B. Kinsworthy, P. R. Andrews and *W. E. Hemingway,* for appellee.

1. The court's peremptory instruction was demanded on the ground of Weedman's contributory negligence. The facts of the case do not bring it within either of the exceptions relied on by appellant, and the facts of every case relied upon by appellant to sustain his contention in this respect clearly distinguish it from this case.

There was nothing whatever unusual in the circumstances attending the occurrence, nothing whatever to place him off his guard, to startle him, or to cause him to do anything hurriedly and without proper care and caution.

There is nothing in the contention that deceased was at the place where he was injured by the implied invitation of appellee. If he expected to meet a passenger on the arriving train, the proper place to meet such passenger was at the depot platform, where that train's passengers would alight, and not on the track No. 2 where it was not necessary for him to be. 55 Ark. 435; 69 Ark. 498; 90 Ark. 285, 286; 48 Ark. 106-126.

2. The proof in the case does not disclose any negligence on the part of appellee's employees—and there is neither allegation nor proof of discovered peril; however, in the latter case, appellee would only be liable if the peril of Weedman had been discovered in time to have prevented the injury and failed to exercise reasonable care to do so. 90 Ark. 286.

McCULLOCH, C. J. Plaintiff's intestate, F. A. Weedman, was run over and injured by defendant's switch-engine at its station in the city of Helena, and he instituted this action to recover damages resulting from such injury. He died before the trial below, and the cause was revived in the name of plaintiff as administrator of his estate. On the trial of the case before a jury, after the testimony was all in, the court gave a peremptory instruction to the jury to return a verdict in favor of the

defendant, and a judgment was accordingly entered in defendant's favor, from which plaintiff appealed.

Stating the facts in their strongest light favorable to plaintiff's cause of action, they are about as follows: Defendant's passenger station at Helena faces east, and is situated a short distance within the levee which runs along the bank of the Mississippi River. The tracks run north and south between the station and the levee. Missouri Street runs east and west and intersects the tracks at right angles a short distance—a car's length or two—north of the station. North of Missouri Street the tracks are only used for the storage of cars. The first track next to the station is called Track No. 1, and the next one further east is called Track No. 2. There is a space of about thirty inches between coaches standing on these two tracks. The station is used by the Iron Mountain trains from Wynne, and also by the Arkansas Midland trains which come from Brinkley over another of defendant's branch roads. The Midland train comes in on Track No. 1, and the Iron Mountain train on Track No. 2, the latter being due at 9:50 A. M. and the former about ten minutes later. When the trains are in at the same time, it becomes necessary for debarking passengers from the Iron Mountain trains to walk along the narrow space between the trains and go clear around the Midland train. Weedman was about sixty-two years of age, and lived with his daughter over somewhere near the bank of the river, and came to the station that morning to meet his stepson, who was expected on the Iron Mountain train, and who was crippled and needed assistance in getting off the train. He reached the Missouri Street crossing just as the Midland train came in. The Iron Mountain train, though past due, was not in at that time, nor is there any evidence as to when it was expected or that it was in sight. The Midland engine, which was on track No. 1, was still attached to the train, and there was a switch-engine standing on track No. 2, north of the street. Plaintiff has two theories as to the way in which Weedman got on the track, either of which counsel contend is sustained by the evidence. We do not think the difference is very important, so far as the result is concerned, but the facts will be stated according to both theories. One witness, who was on the Midland train as it came in, testified that Weedman, com-

ing from the east, stepped upon track No. 2, ten or fifteen feet in front of the switch-engine, and turned south with his back to the engine, and in this situation was struck by the moving engine. The other witness testified that Weedman was standing on track No. 1 when the Midland train came in, and to avoid it he stepped over on track No. 2 with his face to the south, and in that situation was struck by the moving switch-engine coming from the north on track No. 2. We do not, as before stated, deem it very material to determine which of these theories should be accepted. It is undisputed that the switch-engine was in plain view, and that Weedman could have seen it approaching if he had looked. The fact that he did not see it, and that while his back was turned he was struck by the engine, is conclusive that he did not look. There is no contention in the case that the engineer or fireman saw Weedman's perilous position in time to have prevented the injury. So, there is no question of discovered peril in the case. The right to recover is based solely upon negligence of the engineer in failing to keep a lookout, and the evidence is sufficient to warrant the finding that the bell was ringing, but that no lookout was kept, and that if the engineer had kept a lookout he would have discovered Weedman's perilous position in time to have prevented injuring him.

It has been ruled in numerous decisions of this court that it constitutes negligence *per se* for a person to go upon a railroad track without looking and listening for approaching trains, except where there is an implied invitation to go upon the track without taking these precautions, or where the situation is such that the person is, in the exercise of reasonable care, misled into believing that no engine or cars are expected. The first exception is stated by this court in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Tomlinson,* 69 Ark. 489, and counsel for plaintiff seek to bring the case within the rule there stated. In that case Judge RIDDICK, speaking for the court, said:

"The rule that one should look and listen for approaching trains before attempting to pass a railway track is often applied in cases for injuries to travellers on highways at railway crossings. In such a case, where there is no invitation on the part of the company for the traveller to cross, the courts can say, as a matter of law, that he should look and listen for approaching trains;

and if he fails to do so, and by reason of such failure is injured, he can recover nothing by way of damages; for, even if the company be negligent, his own negligence contributes to his injury. But the case is different where the injured person comes on the track by the invitation of the railway company. In such a case he must still exercise ordinary care, but, as he has the right to rely to some extent upon an implied assurance of the company that the way is safe, the courts, not knowing to what extent his acts may be influenced by the conduct of the company, can not in such a case say as a matter of law that the mere failure to look and listen is such negligence as precludes a recovery. If, then, a passenger or his escort is injured while attempting to pass an intervening track to reach a depot or train when the circumstances justify him in believing that he is invited by the company to pass over the track, it becomes a question for the jury, after considering all the circumstances, to say whether or not he is guilty of a want of ordinary care."

That was a case where a passenger's escort was run over and killed while, in returning from a coach, he was crossing an intervening track. The plaintiff's case does not fall within that rule, for the Iron Mountain train was not coming in at that moment, it was not in sight, and there is no evidence of when it was expected, and there was no implied invitation for him to walk down track No. 2, as he did, and therefore no assurance that the way was clear for him to do so. His place, while waiting for the train, was at the station. Under the testimony in the case, he is bound to have seen the switch engine when he came on the track, and it was negligence for him to turn his back to it and start down the track. If the Iron Mountain train had been coming in at the time, and it was necessary for him to go to the coach entrance to meet the passenger, then there would have been an implied assurance that the way was clear, and it could not be said, as a matter of law, that he was bound to look and listen, for the invitation to go to the coaches to meet the passenger amounted to an implied assurance that the way was safe, and that no train would interfere with his safe passage.

Nor can the case, under the evidence adduced, be brought within the other exception. Weedman necessarily, as before stated, saw the switch engine when he came on the track, and, as no other train was approaching on that track at the time,

there was nothing to mislead him into believing that the switch engine would not be moved. If the Iron Mountain train had been approaching from the south, then the circumstances would have been such as to induce in his mind a belief that the switch engine would not be moved down the track, and under those circumstances, it could not be said, as a matter of law, that he was guilty of negligence.

The facts of the case do not either bring it within the case of *Choctaw, Oklahoma & Gulf Rd. Co.* v. *Baskins*, 78 Ark. 362, as insisted by counsel. It is unnecessary to discuss the difference between the two cases, for the points of difference are too obvious for comparison.

In any view of the case, plaintiff's intestate was, according to the undisputed facts, guilty of contributory negligence, and there can be no recovery of damages. The peremptory instruction was therefore correct, and the judgment is affirmed.

JACKSON COUNTY *v.* NUCKOLLS.

Opinion delivered February 5, 1912.

1. COUNTIES—LIABILITY FOR COSTS IN MISDEMEANORS.—The provision in Acts 1909, c. 207, section 7, that "the county in which the conviction is had for misdemeanor or felony shall pay all the costs of the prosecution from its appropriation for circuit court expenses," is not unconstitutional or invalid because it provides that the appropriation made by the quorum court for the expenses of all criminal proceedings should be designated as an appropriation for circuit court expenses. (Page 168.)
2. CONSTITUTIONAL LAW—STATUTES—VALIDITY.—The rule, in passing upon the validity of a statute, is to resolve every doubt in favor of its validity. (Page 168.)
3. COUNTIES—LIABILTIY FOR COSTS IN CRIMINAL CASES.—Under Acts 1909, p. 611, section 7, providing that the county in which a conviction is had for a misdemeanor or felony shall pay all the costs of the prosecution from its appropriation for circuit court expenses, the fees in misdemeanor cases before a justice of the peace are due as soon as the services are rendered, and must be allowed and paid as in cases of other costs, when the claims therefor are duly presented to the county court. (Page 169.)

Appeal from Jackson Circuit Court; *Charles Coffin*, Judge; affirmed.

Otis W. Scarborough, for appellant.

The levying of taxes for the county and making appropriations for the expenses of the county are vested solely in the quorum court, and the Legislature has no such power, except as applied to the State, and both are limited by the Constitution. 32 Ark. 676; 30 Ark. 101; Art. 16 § 11, Const.; Art. 7, § 30, Const. The action of the quorum court on any other matters except levying taxes and making appropriations for county expenses are void, and any act of the Legislature vesting it with any other power is unconstitutional and void. 36 Ark. 466; 32 Ark. 497. Making contracts and allowances for county expenses must be done by the county court when held by the county judge alone. 36 Ark. 641. The formation of the convict and road district and the contracts of the county court made pursuant thereto, in the absence of an express appropriation therefor by the quorum court, were in violation of the Constitution, § 12, art. 16, and the statute, Kirby's Digest, § 1502. 54 Ark. 645; 57 Fed. 1030; 61 Ark. 74; 85 Ark. 171; 93 Ark. 503. Fees in criminal cases can not be adjudged against a county except where there is express authority of law for so doing. 32 Ark. 45; 57 Ark. 487.

With or without a contract, the county court or the judge thereof can not work convicts confined in the county jail for nonpayment of fines and costs until the quorum court has made an appropriation therefor as provided by section 1104, Kirby's Digest. 68 Ark. 22; 85 Ark. 609.

Ira J. Mack, for appellee.

There is no contention but that the levy provided for in section 1499, Kirby's Digest, had been made.

The payment of costs in misdemeanor cases under the act 207 is no more a matter of contract than the payment of costs by the county in other instances. Neither is it a diversion of money appropriated for one purpose into another channel. It merely provides that the county shall be liable for certain fees, and that they shall be paid out of a certain fund.

Since the act does not provide a time when the fees are to be paid, the presumption is that they should be paid as other claims are paid, *i. e.*, when proper claims therefor are presented to the county court for allowance.

WOOD, J. The purpose of this appeal is to determine when fees in misdemeanor cases in justice-of-the-peace courts, on conviction of the accused, are to be allowed and paid to the officers of such courts, the parties convicted having been turned over to the sheriff and by him delivered to the warden of the convict road district, under the provisions of act No. 207 of the General Assembly, approved May 6, 1909. Section 7 of that act provides:

"The county in which the conviction is had for misdemeanor or felony shall pay all the costs of the prosecution from its appropriation for circuit court expenses, and any fine and costs paid by the convict shall be paid to any sheriff of the county in whatsoever court convicted, and such money shall be by said sheriff paid into the county treasury as aforesaid."

It was within the power of the Legislature to make counties liable for costs in misdemeanor cases tried before a justice of the peace where the parties charged are convicted, and to provide for the payment of such costs out of the funds appropriated for the payment of circuit court expenses. The Legislature had the power to enact that the quorum court, when it made its appropriation for expenses of the circuit court, should take into consideration the costs accruing in misdemeanor cases, upon conviction, in magistrates' courts and to group the costs with the expenses of the circuit court, and to make the appropriation for the entire expenses of both courts under the one head of expenses of circuit court. It would be an inapt designation, of course, on the part of the Legislature to call the costs accruing in magistrates' courts "expenses of circuit court," still it would not be unconstitutional for the Legislature to so enact. The rule is, in passing on the constitutionality of an act, to resolve every doubt in favor of its validity. *Railway Co.* v. *Smith*, 60 Ark. 221; *Martin* v. *State*, 79 Ark. 236; *Road Imp. Dist.* v. *Glover*, 86 Ark. 231.

Section 1499, subdivision 1, Kirby's Digest, page 478, provides that the quorum court shall make appropriation "to defray the lawful expenses of the several courts of record of the county or district and the lawful expenses of criminal proceedings in magistrates' courts, stating the expenses of each of said courts separately."

While the quorum court, under this provision, would have

to designate the amount of the expenses of each of said courts separately, there is nothing in the Constitution to inhibit the Legislature from enacting that the appropriation made for the payment of the expenses of these separate courts should be designated as funds for the payment of circuit court expenses.

As we construe the section under consideration, it is neither a levy nor an appropriation by the Legislature. It does not impinge upon the authority of the quorum court, which is the tribunal designated by the Constitution and statute for the purpose of levying taxes and making appropriations for the payment of court expenses, under section 30, article 7, of the Constitution and section 1499, subdivision 1, of Kirby's Digest.

The section under consideration makes no provision as to the time when the fees accruing in cases of conviction are to be paid. It provides for their payment, however, which necessarily implies that the fees are due as soon as the services are rendered, and should be allowed and paid, as in cases of other costs, when the claims therefor are duly presented to the county court.

The agreed statement of facts upon which appellee obtained judgment in his favor in the circuit court showed that he presented his fee bill account to the county court for the sum of $3.90 as fees for trying a misdemeanor case in his court as justice of the peace; that one Bill Scott was tried before him as such justice for a misdemeanor, towit; gaming; that he was convicted, fined and committed to the jail of the county of Jackson for the fine and costs assessed against him, and was by the sheriff of the county delivered to the warden of the convict road district of Jackson County, and was still in charge of said warden, and had not, up to the time appellee presented his claim for allowance, worked a sufficient number of days to pay his fine and costs; that a portion of the fine and costs at that time was still due; that the fees claimed by appellee were the regular fees allowed by law for such services.

Under the facts as thus presented, in our opinion neither the question of levy or appropriation is involved, and only the constitutionality of the section above mentioned is brought into question. The constitutionality of the other provisions of the act, in regard to hiring out convicts, etc., are not properly here, and we therefore do not pass upon them.

The judgment of the circuit court is correct, and it is affirmed.

PETTY v. STATE.

Opinion delivered February 5, 1912.

1. COUNTY COTTON WEIGHER ACT—SUFFICIENCY OF INDICTMENT.—An indictment for violating section 6 of the county cotton weigher act of 1905, as amended in 1907, which alleges that one S. was the duly elected, qualified and acting cotton weigher for the county, having his scales in the town for weighing cotton, and that defendant, knowing these facts, unlawfully did weigh cotton sold in the town, substantially alleges a violation of such act. (Page 173.)
2. INDICTMENT—STATUTORY OFFENSE.—It is not necessary that an indictment for a statutory offense follow the statute literally; charging the offense substantially in the statutory language being all that is required. (Page 174.)
3. COUNTY COTTON WEIGHER—VALIDITY OF STATUTE.—The county cotton weigher act is a valid exercise of the State's police power. (Page 174.)
4. CRIMINAL LAW—DIRECTING A VERDICT.—Where the uncontradicted evidence in a misdemeanor case showed that defendant was guilty of the offense charged, it was not error to direct a verdict against him. (Page 175.)

Appeal from Polk Circuit Court; *Jeff T. Cowling*, Judge; affirmed.

J. I. Alley, for appellant.

1. The demurrer to the indictment should have been sustained. It is material, to effectuate the purpose and intent of the act, that the weigher should have complied with the act by procuring the scales, having them tested as provided by law, and by placing them in a convenient place, easy of access for the public, and it should be alleged in the indictment. Acts 1905 p. 704-5-6, § 4. It is further defective in that it does not allege that the cotton weighed by appellant was presented to the public weigher and his weights demanded. *Id.* § 4, *proviso*. See also *Id.* § 6.

While in statutory offenses it is not necessary to set out in the indictment the precise words of the statute, it is necessary to set out all the facts necessary to constitute the offense. 77 Ark. 321; 47 Ark. 488; 62 Ark. 512; 90 Ark. 343. And nothing should be left to intendment. 93 Ark. 81; 47 Ark. 492.

2. The act is unconstitutional. Art. 2, § § 2, 8, Const. 58 Ark. 421; 33 W. Va. 179.

Hal. L. Norwood, Attorney General, and *William H. Rector*, Assistant, for appellee.

1. The indictment sufficiently complies with the requirements of the Criminal Code. It is not necessary in charging a statutory offense that an indictment follow literally the language of the statute. 90 Ark. 343; 77 Ark. 321; Kirby's Digest, § § 2228, 2241, 2242, 2243; 94 Ark. 87; 93 Ark. 406; 97 Ark. 6.

2. The act is constitutional, and similar acts have often been upheld. 69 Ark. 521; 81 Ark. 304; 211 U. S. 539; 94 Ark. 36; Tiedeman on State & Federal Control of Persons & Property, 261, 262, 300; Tiedeman on Police Power, 208; 123 Ia. 654; 12 Wis. 676; 34 Ark. 603; 70 Ark. 221.

WOOD, J. The Legislature of 1905 passed a special act providing for the election of a county cotton weigher for Polk and certain other counties. Sections 1 and 6 of this act were amended in 1907 to read as follows:

"Section 1. That at the next general election for State and county officers and every two years thereafter there shall be elected, in the same manner and under the same restrictions as is provided by law for the election of other officials, a county cotton weigher for the counties of Howard, Columbia, Polk, Montgomery, Nevada, White and Clark, who shall hold his office for the term of two years, or until his successor shall have been elected and qualified: *provided*, the law now in force in Columbia shall remain in full force and effect in Columbia County.

"Section 6. Any cotton weigher elected under the provisions of this act, or any deputy appointed, shall receive as compensation for his services ten cents for each bale of cotton weighed, and five cents for each wagon load of cotton, cotton seed, or other product that he may be called upon to weigh, and he shall make no extra charges for any kind of produce he may be called upon to weigh, said fees to be paid by the purchaser. And it is further provided that if any person or persons, other than the said cotton weigher or his legally appointed deputy, shall weigh or attempt to weigh any cotton sold or

marketed in the town or village where the said cotton weigher or his legally appointed deputy keeps his scales and is acting in his official capacity, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than ten dollars ($10) nor more than twenty-five dollars ($25), and each bale of cotton so weighed or attempted to be weighed shall constitute a separate offense."

The indictment in this case was drawn under section 6, as amended by the act of 1907, and, omitting formal parts, is as follows:

"The grand jury of Polk County, in the name and by the authority of the State of Arkansas, accuse George Petty of the crime of violating the cotton weighing law, committed as follows, towit: The said George Petty, in the county and State aforesaid, on the 10th of November, A. D. 1910, the said George Petty not being then and there duly elected, qualified and acting cotton weigher, or his deputy, for Polk County, Arkansas, and not having then and there the right and authority under the law to weigh cotton sold and marketed in the town of Mena, Polk County, Arkansas, did unlawfully weigh cotton sold and marketed in the town of Mena, Polk County, Arkansas, when one J. H. Sims was then and there the duly elected, qualified and acting cotton weigher for Polk County, Arkansas, and having then and there his scales for the purpose of weighing cotton sold and marketed in said town of Mena, Polk County, Arkansas, the said J. H. Sims, cotton weigher as aforesaid, was then and there acting in his official capacity as such cotton weigher and attempted to weigh cotton sold and marketed in the town of Mena, Polk County, Arkansas, as aforesaid, all of which the said George Petty then and there well knew, against the peace and dignity of the State of Arkansas."

A demurrer to the indictment was overruled, and exceptions saved. A plea of not guilty being entered by the defendant, the cause proceeded to trial.

It was in evidence and undenied that J. H. Sims was the duly elected, qualified and acting cotton weigher for Polk County, and had scales situated in the town of Mena for the purpose of weighing cotton. It is also undenied that George

Petty bought cotton and weighed it in the town of Mena, where official scales were situated.

The appellant testified, in substance, as follows: "I am the defendant. I have no recollection of weighing any cotton myself, but my clerks and employees weighed cotton on my scales. There was no cotton weighed by them on my scales except my own cotton, after I had already bought and branded it. I bought it before it was weighed, and settlement was to be made according to my scales. I reweighed some that had been weighed by Mr. Sims. I already had scales located at this place long before there was a weigher or even scales established by him.

"Sims had his scales about 120 feet from the platform, and the people had to come with their cotton and wait for Sims to weigh it and reload it on the wagon and carry it to the railroad platform before any of the men who bought cotton would receive it. Now, the reason they would not receive cotton on Sims' platform was because it cost money to transfer it from Sims' platform to where the railroad would issue bills of lading for it. Buyers would not pay for it there at Sims' platform, and the railroad would not issue bills of lading for it out there on a vacant lot. Before the seller could get any money for it after it was weighed by Sims, it had to be moved to where the company would receive it. I do not know what it was worth to reload and move the cotton. However, I always had to pay ten cents to get it moved per bale. Sometimes I paid for cotton as per Sims' weights, and some of the time by mine. I reweighed some of it for the reason there was complaint at Sims' weights. When I weighed, I charged ten cents, the same as the law allowed. I did not weigh cotton for the public. I only weighed my own cotton; in other words, I did not weigh for the other buyers."

Motions in arrest of judgment and for new trial were filed, overruled and exceptions saved; appeal prayed and perfected.

1. The indictment was valid. The indictment was framed under section 6 of the act of 1907 and follows substantially the language of that section. It was not necessary for the pleader to allege that the public cotton weigher had prepared a convenient place, easy of access to the public, for the performance of his duties, and that he had provided a pair of scales

which had been tested as required by law. These were requirements of the statute for the public weigher in prescribing his duties, but it is not essential to the validity of the indictment to set them out. The indictment specifically alleges that J. H. Sims was the "duly elected, qualified and acting cotton weigher for Polk County, and having then and there his scales for the purpose of weighing cotton sold and marketed in said town of Mena, and that he was then and there acting in his official capacity as such cotton weigher," and that the appellant knew these facts. These allegations were sufficient to call for and to have admitted evidence on the part of the State showing that the public weigher was complying with the requirements of the statute so far as he was concerned. It was not necessary for the indictment to allege that the cotton weighed by defendant, for which he was indicted, had been presented to the cotton weigher and a demand made upon him to weigh such cotton. There is no provision in the act that the services of the public weigher should be demanded except for cotton in the seed. The law made it the duty of all persons engaged in the business of buying and selling cotton in the bale to have same weighed by the public weigher; but whether demand was made upon the public weigher by persons buying and selling cotton to weigh the same or not, any one not a public weigher who undertook to weigh cotton in the bale that had not been weighed by the public weigher would be guilty of a violation of the statute.

It is not necessary for an indictment to follow the statute literally. Charging the offense substantially in the language is all that is required. *Richardson* v. *State*, 77 Ark 321; *State* v. *Peyton*, 93 Ark. 406; *Harding* v. *State*, 94 Ark. 65; *State* v. *Pearce*, 97 Ark. 6; sections 2228, 2241-2-3, Kirby's Digest.

2. The statute under which appellant was indicted is not unconstitutional.

In the case of *Wills* v. *Fort Smith*, 70 Ark. 221, an ordinance was under consideration, which provided as follows: "It shall be unlawful for any person hereafter to sell, barter or exchange coal in any quantity in the corporate limits of this city until they have first weighed the same upon the city scales of the city of Fort Smith and paid the weigher the sum of ten cents for the weighing of any load or part of a load of coal."

Judge RIDDICK, speaking for the court, in passing upon this statute, said: "Now, our statute expressly grants power to cities 'to provide for the measuring or weighing of any wood or other article of sale.' Under this statute the city had the power to require parties selling coal in the city to weigh the same on scales provided by the city, and to pay a reasonable fee for the weighing;" citing *Taylor* v. *Pine Bluff*, 34 Ark. 603. These cases are in point, and rule the question as to the validity of the act under consideration. The principles announced by this court also in the cases of *Woodson* v. *State*, 69 Ark. 521, and *McLean* v. *State*, 81 Ark. 304, when applied to the act under consideration, establish its validity.

The uncontradicted evidence showed that appellant was guilty of the offense charged, and therefore the court did not err in directing a verdict against him. The judgment is affirmed.

FRAUENTHAL, J., dissents.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* ANDREWS.

Opinion delivered February 5, 1912.

1. EXECUTIONS—DUTY OF OFFICER IN MAKING LEVY.—It is the duty of an officer, in making a levy under execution, to levy same upon property of the defendant within his jurisdiction sufficient to satisfy the execution and all proper fees and costs. (Page 177.)
2. SAME—AMOUNT OF PROPERTY.—In determining what amount of property to levy upon, the officer must exercise his own discretion, and should exercise the care and diligence which a reasonably prudent man would exercise under like circumstances, and should endeavor to obtain sufficient property to satisfy the execution without making an unreasonable levy. (Page 178.)
3. SAME—WHEN LEVY EXCESSIVE.—To render an officer liable for levying upon an excessive amount of property, it is necessary to allege and prove, not only that the property levied upon was excessive, but also that the officer knew that the defendant owned other property within the officer's jurisdiction upon which the execution could have been levied and of sufficient amount to satisfy it. (Page 179.)

Appeal from Boone Circuit Court; *George W. Reed*, Judge; affirmed.

W. E. Hemingway, E. B. Kinsworthy, Z. M. Horton, James H. Stevenson and *G. D. Henderson,* for appellant.

1. In order to sustain the allegation that a levy was excessive, it was not necessary that the judgment-debtor should have pointed out the property to be sold, or have given to the officer any list of property so selected to be levied upon or sold. 2 Freeman on Executions, 1412, 1413. Section 3230, Kirby's Digest, is not mandatory, but permissive. It is the duty of the officer to levy an execution upon sufficient property to satisfy the debt and cost, and in determining what is a sufficient levy for that purpose, he is left to his own judgment, *free from the restraint or control of either the plaintiff or defendant.* 10 Ark. 28, 33-34; 75 N. Y. Supp. 976, 71 App. Div. 351; Freeman on Executions, § 258. See also 5 Ark. 680; 14 Ark. 38. It is the duty of the officer to avoid excessive levies, and he is liable if the levy is excessive. 2 Freeman on Executions, § 253, pp. 1407, 1408; 7 B. Mon. (Ky.) 298; 2 Freeman on Ex., 1410-11-12.

2. The complaint was good on general demurrer. 17 Cyc. 1112; *Id.* 1113; 52 Mo. 518; 1 Bush 504; 6 Johns. Ch. 411; 30 Ia. 453; 28 Tex. 202, 91 Am. Dec. 309; 43 Mo. 294; 67 N. E. 398; 202 Ill. 624; 13 Ore. 538, 11 Pac. 295.

3. If appellee desired a more detailed statement of appellant's cause of action, the proper remedy was by motion to make the complaint more definite and certain, and not by demurrer. 60 Ark. 39; 52 Ark. 378; 94 Ark. 437.

FRAUENTHAL, J. This is an action instituted by the St. Louis, Iron Mountain & Southern Railway Company, to recover damages for an excessive levy made upon its property under an execution against it. The complaint in substance alleged that the defendant Frank Andrews on November 15, 1910, recovered judgment against it before a justice of the peace of Omaha Township in Boone County for the sum of $20.75, and on November 30, 1910, sued out an execution thereon and placed same in the hands of defendant, J. C. Hampton, who was constable of said township; that the constable, under said execution, levied upon a locomotive engine owned by the plaintiff, and that such levy was made at the advice of said Andrews. It was further alleged that the engine was of the value of $15,000, and that plaintiff owned other personal property in

said township, consisting of office furniture, railroad ties, handcars and tools of the value of $500 out of which the execution could have been made. It alleged that the constable wrongfully and in violation of his duty levied the execution upon said engine, which was then in use by plaintiff, and denied plaintiff the use of it for eight hours, and that the constable and said judgment-creditor advising the levy thereby became "wilful trespassers and liable to plaintiff for all damages suffered in consequence of such unlawful and excessive levy," which it laid at $500. It also alleged that the execution was paid in full on December 2, 1910.

To this complaint the defendant filed a demurrer upon the ground that it did not state facts sufficient to constitute a cause of action. Upon the hearing of the demurrer the court found that the complaint was defective in this: "that it fails to allege that the plaintiff, the judgment-debtor, against whom said execution was issued, selected what property should be sold, * * * or that the constable had knowledge of other property belonging to said judgment-debtor that might be levied upon besides said engine." It thereupon sustained said demurrer, and, the plaintiff refusing to plead further, the complaint was dismissed.

The cause of action in this case is based upon an excessive levy made by a constable upon plaintiff's property under writ of execution sued out upon a judgment recovered against it. No question is made attacking the legality of the judgment or execution or the validity of the levy, except that it was excessive. It is the duty of an officer, when an execution is placed in his hands, to levy same upon property owned by the defendant within his jurisdiction sufficient to satisfy the execution and all proper fees and costs. In determining what amount of property is sufficient out of which to secure satisfaction of the execution the officer is left to exercise his own judgment. He is not controlled in his discretion as to the amount of property that should be levied upon, either by the judgment-creditor or debtor. In determining what amount of property is sufficient to levy upon to satisfy the execution, the officer is required to exercise the care and diligence which a reasonably prudent man would exercise under like conditions and circumstances, endeavoring to obtain sufficient property to satisfy the execu-

tion and yet not making an unreasonable and unnecessary levy. In the case of *Lawson* v. *State*, 10 Ark. 28, this court declared the duty and liability of an officer into whose hands an execution had been placed for service as follows: "In obedience to the command of the writ, he should without delay levy on property sufficient to satisfy the debt and costs. In determining what is a sufficient levy for that purpose, he is left to exercise his own judgment free from the restraint or control of either the plaintiff or defendant, and is accountable to the plaintiff on the one hand if he fails to levy on as much as a reasonably prudent man would deem sufficient for that purpose (if so much is to be found within his legal grasp), and on the other hand to the defendant for an unreasonable and unnecessary levy on his property." An officer charged with the execution of final process should levy at once on property owned by the defendant within his jurisdiction sufficient to satisfy it. While on the one hand he should avoid making an inadequate levy, and on the other hand avoid making an excessive levy, yet he must not fail to make a levy if he finds property within his jurisdiction which is owned by the judgment-debtor, even though such property may be in value largely in excess of the debt, if he knows of no other property owned by the defendant within his jurisdiction upon which to make the levy. *Haynes* v. *Tunstall*, 5 Ark. 680; 2 Freeman on Execution, § 253. He is liable for a violation of his duty if he makes an excessive levy; but he is also liable if he fails to make a levy on property owned by the defendant in his jurisdiction. When the property owned by the defendant is of such character that it can not be separated, the officer must make a levy upon it, even though it may be of a value largely in excess of the judgment debt, in event he has no knowledge of any other property owned by the defendant within his jurisdiction. Under such circumstances it can not be said that such levy is excessive. The basis of the cause of action against an officer for an excessive levy is that he is a trespasser and can not set up a legal warrant for his action. He becomes a trespasser although acting under process, when he exceeds or abuses the authority given by such process. Before, however, he can be said to have exceeded or abused such authority, it must be shown that he acted oppressively or that he intended to do the defendant

a wrong under authority of the writ in his hands. This may be shown by proof that the amount of the property levied upon was unreasonable and unnecessary; but it can not be said that such levy is unreasonable or unnecessary, no matter how great the value of the property may be, if the judgment-debtor owned no other property within his jurisdiction upon which a levy could be made by the officer holding the execution. The officer can not be held liable for the excessive levy unless he knows that the defendant owns other property within his jurisdiction upon which such execution can be levied and out of which the judgment debt could be made. In the case of *Davis* v. *Webster*, 59 N. H. 471, it is said: "To make an officer a trespasser for exceeding or abusing his authority, he must be shown to have committed acts which persons of ordinary care and prudence would not under like circumstances have committed, and made such a departure from duty as to warrant the conclusion that he intended from the first to do wrong and used his legal authority as a cover for an illegal act."

By section 3230 of Kirby's Digest it is provided: "The person against whom any execution may be issued may select what property, real or personal, shall be sold to satisfy the same; and, if he give to the officer a list of the property so selected, sufficient to satisfy such execution, the officer shall levy upon such property, and no other, if it be sufficient, in his opinion, to satisfy such execution, and, if not, then upon such additional property as shall be sufficient." This statute gives to the judgment-debtor the privilege of selecting the property which the officer shall levy on, if it is sufficient to satisfy the execution. A failure, however, by the judgment-debtor to select the property to be levied upon will not justify the officer in making an excessive levy. If the officer refuses to levy upon the property selected by the judgment-debtor, or if he makes an excessive levy, he violates in either event his duty, and is liable for such special damages as the defendant may incur thereby. *Barfield* v. *Barfield*, 77 Ga. 83; *Commonwealth* v. *Lightfoot*, 7 B. Mon. 298; *French* v. *Snyder*, 30 Ill. 339. The presumption is that the officer acts in good faith, and the burden devolves upon the plaintiff to show that he has violated his duty. *Closson* v. *Morrison*, 47 N. H. 482. In order to show this, it is necessary to allege and prove, not only that the property levied upon was

excessive, but also that the officer knew that the defendant owned other property within his jurisdiction upon which the execution could have been levied and of sufficient amount to satisfy it. The lower court found that the complaint was defective for the reason, amongst other things, that it did not allege that the officer had knowledge of other property belonging to said judgment-debtor that might be levied upon besides said engine, and for that reason, among others, held that the demurrer should be sustained. The plaintiff refused to amend its complaint by making this allegation. This allegation, we do not think, can be reasonably inferred from the other allegation made in the complaint. Whether we consider the action of the court as a ruling that the complaint should be made more definite and certain in this particular, or as a ruling that the complaint was demurrable on this account, in either event the plaintiff refused to correct the complaint, which, we think, was defective in this regard. The court, therefore, did not err in dismissing the complaint, which, by reason of this defect, did not state a cause of action. The judgment is affirmed.

HART, J., dissents.

COLLINS v. STATE.

Opinion delivered February 5, 1912.

1. JURY—WHEN ERRONEOUS RULING PREJUDICIAL.—An erroneous ruling that a juror is competent upon a challenge for cause is ground for reversal where the accused exhausted his peremptory challenges in challenging other jurors before the completion of the panel. (Page 182.)
2. SAME—WHEN JUROR INCOMPETENT.—The entertainment of preconceived notions about the merits of a criminal case renders a juror *prima facie* incompetent; and where such is fixed and was formed from talking with witnesses who purported to know the facts, then such opinion renders the juror incompetent to act impartially as a juror. (Page 182.)
3. SAME—WHEN JUROR INCOMPETENT.—Where a juror in a murder case testified that on the night of the killing he talked with some of the witnesses and formed an opinion as to defendant's guilt, and then stated that he thought defendant ought to be lynched for the alleged crime, and that he was willing to assist in lynching him, he was not a competent juror. (Page 184.)
4. HOMICIDE—DUTY TO INSTRUCT AS TO LOWER DEGREES.—Where there is any evidence tending to show that the defendant was guilty of a

lower degree of homicide than murder, as where evidence tended to show that the killing was induced by anger suddenly aroused, or by surprise, or by fear or terror, the trial judge should instruct the jury in reference thereto when requested by the defendant. (Page 185.)

Appeal from Lee Circuit Court; *Hance N. Hutton*, Judge; reversed.

H. F. Roleson, for appellant.

1. The court erred in ruling that Ewing was a competent juror. 45 Ark. 165; 56 *Id.* 382; 69 *Id.* 322.

2. Defendant was entitled to an instruction on manslaughter. 74 Ark. 444, 454; 162 U. S. 313; 82 Ark. 97.

Hal L. Norwood, Attorney General, *Wm. H. Rector*, Assistant, for appellee.

1. There was no evidence upon which to predicate an instruction as to manslaughter; but, if so, the failure was harmless error.

2. Ewing was a competent juror.

FRAUENTHAL, J. The defendant John Collins was indicted for the crime of murder in the first degree, charged with killing M. E. Yarbrough. He was convicted of this crime by a petit jury, and has appealed to this court seeking a reversal of the judgment entered upon the verdict. Among the grounds assigned by him why the judgment should be reversed are the following: (1) that the court committed error by refusing to excuse for cause one E. H. Ewing, who was called as a juror to try the case; (2) because the court erred in the rulings made by it on various instructions; and (3) because there was not sufficient evidence to warrant the verdict that was returned by the jury.

In selecting the jury to try the defendant, one E. H. Ewing was summoned and called as a venireman. Upon his *voir dire* he made, in substance, amongst others, the following statement: that he had known the defendant about four months, and that he had heard something of the charge made against him; that he had formed and entertained an opinion as to the guilt or innocence of the defendant, but that it was based upon rumor; that he could lay aside and disregard the opinion which he had. The juror was accepted, but, before the panel of the jury was completed, he stated further upon his examination

that he was in the city of Marianna upon the night of the killing, and that he there stated that he thought that the defendant ought to be lynched, and that he was willing to assist in lynching him. The defendant moved the court to declare the said Ewing incompetent to serve as a juror in the case and to excuse him for cause. His motion was overruled by the court, to which ruling exception was duly made. The defendant then challenged the juror peremptorily. Thereupon, in the further selection of the jury, the defendant exhausted all of his peremptory challenges, before the panel of the jury was finally completed. It is insisted by the defendant that the venireman Ewing was incompetent, and that the court committed error in not sustaining the motion challenging him for cause and by such erroneous ruling he was prejudiced. He contends that he was thereby forced to take a juror whom he might have challenged, as he exhausted all his peremptory challenges. In the case of *Caldwell* v. *State*, 69 Ark. 322, this court held (quoting syllabus): "An erroneous ruling that a juror is competent upon a challenge for cause is ground for reversal where the accused exhausted his peremptory challenges in challenging other jurors before the completion of the panel." This has been the uniform ruling of this court, and in the case of *York* v. *State*, 91 Ark. 582, the same rule was again announced and reaffirmed. In that case the court said, "This court has uniformly held that if, after a court has erroneously overruled a challenge of a juror for cause, the defendant elected to challenge him peremptorily, he could not avail himself of the error unless he had exhausted his peremptory challenges," thereby holding that he could protect himself against such error, and would not be allowed to suffer by so doing if he exhausted his peremptory challenges before the completion of the jury. *Langford* v. *State*, 98 Ark. 327. It follows that, if the court erred in ruling that Ewing was a competent juror, the defendant was deprived of the right given to him by the law to obtain a fair and impartial trial, and he was therefore necessarily prejudiced by this ruling of the court.

In order that the defendant may have the opportunity to obtain a jury free from bias and prejudice to try him, it is provided by our statute (Kirby's Digest, § 2347) that each juror may be examined and cross examined on oath touching his

qualification. In order for a juror to be competent, he should be wholly indifferent, both as to the person who is tried and the case for which he is tried. He must be free from bias or prejudice or from any fixed opinion as to the merits of the case, so that he will act with entire impartiality in deciding the questions of fact and in arriving at his verdict. The bias or prejudice which will render a juror incompetent to sit in a case may arise from various causes, and depends largely upon the facts and circumstances of each case. This bias or prejudice may spring from an opinion which has been formed by the juror concerning the merits of the case. In the cases of *Polk* v. *State*, 45 Ark. 165, and *Vance* v. *State*, 56 Ark. 402, it was held that an opinion entertained by a juror requiring evidence to remove it rendered the juror incompetent; but in the cases of *Benton* v. *State*, 30 Ark. 328, *Casey* v. *State*, 37 Ark. 67, and *Sneed* v. *State*, 47 Ark. 180, it was held that an opinion by a juror relative to the merits of a case requiring evidence to remove it does not necessarily disqualify him from sitting in the case. In the case of *Hardin* v. *State*, 66 Ark. 53, these conflicting decisions are fully discussed, and the ruling made in the case of *Sneed* v. *State*, *supra*, was there approved and adopted, which is as follows: "The entertainment of preconceived notions about the merits of a criminal case renders a juror *prima facie* incompetent; but when it is shown that the impression is founded on rumor and not of a nature to influence his conduct, the disqualification is removed." Since then this rule relative to the competency of a juror has been adhered to and approved. But where it appears that the opinion of the juror concerning the case is fixed and was formed from talking with witnesses who purported to know the facts, then "such opinion renders him incompetent to act impartially as a juror in contemplation of law." *Caldwell* v. *State*, 69 Ark. 322. The manifest purpose of an examination of a juror upon his *voir dire* is to obtain those persons as triers of the guilt or innocence of the accused who do not possess a fixed opinion of the merits of the case or such a feeling with regard to the accused as would influence their verdict. If it appears that the juror has such a fixed opinion or such a feeling towards the defendant or his cause, then he does not possess, in contemplation of law, the ability to render an impartial verdict. It appears that the murder with which the

defendant was charged occurred in the vicinity of the city of Marianna. On the night after the killing and after the defendant had been arrested, the juror Ewing was in Marianna, and then stated that he thought the defendant ought to be lynched for the alleged crime for which he was being tried; and the juror further stated that he was willing to assist in lynching him. He had been asked whether he entertained an opinion as to the guilt or innocence of the defendant, and had answered that he did. It is true that he also stated that this opinion was based upon rumor, but he further stated that he heard some of the witnesses speak of the case and talked to one of them who, in the trial of the case, gave testimony relative to the dying declaration of the deceased as to the circumstances of the killing. He was also asked by the court "whether he felt that way now" (referring to his willingness to assist in lynching the defendant), and in answer thereto he said, "No." The juror lived in the community where this alleged murder was committed, and his statement made on his *voir dire* that on the night of the killing he was willing to lynch the defendant for the alleged crime indicates that great excitement existed, and resentment against defendant was entertained by the people of that community, to whom the juror thus expressed himself. It shows that he must have talked to others relative to the case and formed an opinion that the defendant deserved death and became possessed of such a feeling against the defendant that he was willing to assist in lynching him. The killing occurred on September 11, 1911, and the trial of the defendant for the crime was had on October 15, 1911. It may be that the juror was able to discard the opinion which he formed from his mind and this feeling from his heart; but we think that, under the circumstances and from his statements, this opinion and his prejudice towards the defendant were so pronounced that he was not a proper person to act as a juror in his trial. We feel convinced that under these circumstances and from the statements made by the juror he had such an opinion relative to the case and such a feeling towards the defendant and his cause that he did not possess that indifference both towards the State and the defendant and that freedom from bias and prejudice which the law demands one to have in order to render an impartial verdict. It follows that the court erred in ruling that Ewing was a com-

petent juror to try the case of the defendant, and that this erroneous ruling deprived the defendant of that fair and impartial trial which the law guarantees to him.

Inasmuch as the judgment in this case must be reversed for the above error, we have not deemed it necessary to note the other assignments of error pressed upon our attention by the defendant. Upon another trial it is not likely that these alleged errors will occur. In view of the fact, however, that another trial must be had, we think it proper to note that we are of opinion that the defendant was entitled to an instruction upon voluntary manslaughter. It appears from the testimony of the defendant that the killing occurred in the darkness of night, and that at the time he did not know that it was the deceased. The defendant and one Arthur Jones were riding in a buggy near the home of the deceased when Jones fired his pistol one or more times. Deceased came from his house and near to the buggy with a gun in his hands and cried to them to halt, and both Jones and the deceased began shooting at each other about the same time; that both Jones and the defendant were surprised by the appearance of the deceased near the buggy and by his attack made with gun in hand, and, not knowing who he was, they feared either that they would be robbed by him or receive injury to their persons from him; and that by reason of this fear and surprise Jones fired at the deceased. This, in short, is the testimony of the defendant himself, which though contradicted in many material points by other evidence in the case, nevertheless presented an issue which, under the law, he had a right to have submitted to and be determined by the jury upon proper instructions. It appears that the court instructed the jury relative to murder in the first and second degrees, but did not instruct them at all in reference to the crime of manslaughter or the punishment for that degree of homicide, although requested to do so by the defendant. The grade of a homicide may be reduced from murder to manslaughter by reason of a passion caused by a provocation apparently sufficient to make the passion irresistible. The passion may consist of anger or fear or terror. These are the causes from which the passion springs; and, whether induced by the one or other of these causes, it will reduce the grade of the homicide from murder to manslaughter. It is perfectly proper to show

that in a given case the passion did exist for the reason that it was induced by anger suddenly aroused, or by surprise, or by fear, or by terror; and where there is any evidence tending to show that the defendant was guilty of a lower grade of homicide than murder, the trial judge should instruct the jury in reference thereto when requested by the defendant. *Ringer* v. *State*, 74 Ark. 262; *Allison* v. *State*, 74 Ark. 453; *Williams* v. *State*, 100 Ark. 218; *Stevenson* v. *United States*, 162 U. S. 313; *Wallace* v. *United States*, 162 U. S. 466. Upon an examination of the evidence adduced upon the trial of this case, we are of opinion that there was some testimony warranting an instruction upon the crime of voluntary manslaughter.

For the error above indicated the judgment is reversed, and this cause remanded for new trial.

McCULLOCH, C. J., (dissenting). The venireman, Ewing, stated that the opinion which he had formed with reference to the guilt of the defendant was based entirely upon rumor, and that the feeling which prompted him, on the night of the killing, to express a willingness to assist in lynching the defendant arose from the rumors he had heard. He stated further that such feeling had entirely passed away, and that, notwithstanding the opinion he had formed on rumor, he could go into the jury box and give the defendant a fair and impartial trial according to the law and the evidence. It is true he stated that he talked with Doctor McLendon, who was one of the witnesses in the case, but he does not say that Doctor McLendon told him anything about the facts in the case. On the contrary, he states positively that the only opinion he had was based on rumor, and not on the testimony of witnesses. It seems clear to me that the juror was qualified, and that the court did not err in so holding. If an opinion based on rumor was not sufficient to disqualify him as a juror. I can not see why it should be held that he was disqualified on account of a disposition to lynch the accused, based on rumor, which had entirely passed away at the time of the trial and left his mind free from any such prejudice. The question was, whether the juror had formed or expressed an opinion not based on mere rumor, and whether the witness was free from bias and prejudice at the time of the trial. It is clear from the

statement of the juror that his opinion was based entirely upon rumor, and that the passion and prejudice which he felt towards the defendant on the night of the killing had entirely passed away. The fact that he had on the night of the killing entertained such a feeling should only be considered for the purpose of determining whether or not he entertained such feeling at the time he was called into the jury box; and if the court concluded that the prejudice had been entirely removed, there is no reason why the man was not competent to sit as a juror in the case. I think that, as the learned circuit judge heard the statement of the juror, and was in position to better determine the state of the latter's feeling, we ought not to disturb the conclusion reached by the court unless it clearly and distinctly appears that the juror at the time of the trial had such an opinion or entertained such feeling of prejudice against the accused that he was incapacitated to give the case a fair and dispassionate hearing.

SANDERS v. CARPENTER.

Opinion delivered February 5, 1912.

1. FRAUD—MISREPRESENTATION—SUFFICIENCY OF COMPLAINT.—A complaint asking for rescission of an exchange of property which alleges that defendant showed to plaintiff a certain tract of land covered with merchantable timber and falsely represented to him that he owned same, that, relying upon such representation, plaintiff conveyed an improved town lot for such land, and subsequently learned that the land belonged to the United States, states a cause of action. (Page 189.)
2. PLEADING—DEMURRER—INDEFINITENESS.—Objection that a pleading is indefinite or uncertain may be reached by motion, but not by demurrer. (Page 190.)

Appeal from Mississippi Chancery Court; *Edward D. Robertson,* Chancellor; reversed.

STATEMENT BY THE COURT.

The plaintiff brought suit against the defendants to cancel and set aside his conveyance of a certain lot in Blytheville to the defendants upon the following complaint, alleging: "That in August, 1909, M. P. Carpenter, one of the defendants, herein, showed to this plaintiff a tract of land covered with

merchantable timber in Chickasawba District, Mississippi County, Arkansas, and represented to said plaintiff that said land and timber was the property of M. P. Carpenter, defendant, and that same was a part of the southeast part of section twelve (12) and a part of section thirteen (13), all in township fourteen (14) north, range eleven (11) east, said county and State. That plaintiff was ignorant of the location of said timber, and believed that same was located on said section as represented by said Carpenter, although said Carpenter, at the time he made such representation, well knew that the timber shown to this plaintiff was on land belonging to the United States, and was a part of what is known on the Government plats and maps as Round Lake and is a tract of unsurveyed territory. That this plaintiff, relying upon the false and fraudulent representation of said M. P. Carpenter as above set out, agreed to give and did give to said M. P. Carpenter lot three (3) in Block "F," Richards' Addition to the town of Blytheville, Arkansas, with building which the plaintiff erected thereon, and in pursuance of said agreement this plaintiff on the.....day of.....1909, executed his deed to the above-described lot to Kate Catherine Carpenter, who is the wife of the said M. P. Carpenter, and having been executed to her at the request of her husband, the said M. P. Carpenter.

"That said M. P. Carpenter, as a consideration of said deed of conveyance to said lot, executed a contract, dated August 17, 1909, to this plaintiff to all of the merchantable timber, then growing on the following land in Mississippi County, Arkansas, except the oak timber, towit: on section thirteen (13) (except that which is now under a lease) and on the southeast part of section twelve (12), all in township fourteen (14) north, range eleven (11) east, Mississippi County, Arkansas, and gave the plaintiff three years in which to remove the timber. The said M. P. Carpenter falsely and fraudulently at the time represented to said plaintiff that the timber shown to this plaintiff was on the above-described land. This plaintiff further represents that he erected a saw mill near the land at a great expense and cut about fourteen thousand feet of timber from said land, believing, as was represented to him, that said M. P. Carpenter was the owner, but after cutting that amount he was notified by inspectors employed by the Government of

the United States to quit cutting timber as same belonged to the United States. The plaintiff now comes into court and offers to release and relinquish unto the said M. P. Carpenter any and all rights which he may have against said timber, and asks that the property heretofore conveyed to Mrs. Catherine Carpenter be divested of her and conveyed to this plaintiff.

"Therefore he prays that a summons may issue against the said M. P. Carpenter and Catherine Carpenter, and, upon a final hearing of this cause, they may be compelled by an order of this court to reconvey said house and lot to this plaintiff, together with the rental value of same, and for all general relief."

The defendants interposed a general demurrer to the complaint, which was sustained by the court, and, plaintiff declining to plead further, the complaint was dismissed for want of equity, and from the judgment he appealed.

Appellant pro se, for appellant.

1. There was no consideration for the sale. 47 Ark. 335; 60 *Id.* 39; 71 *Id.* 91; 46 *Id.* 542; 33 *Id.* 762; 1 Pom. Eq., § § 280, 370, 383; 2 *Id.* 747; 3 *Id.* 981-1293.

2. For the rules for assessing damages for cutting timber, see 106 U. S. 434; 33 Mich. 205; 46 Fed. 352; 149 U. S. 273; 4 Dill. 464.

3. The complaint stated a cause of action.

4. Plaintiff had a right to rely on the false and fraudulent representations made to him, and the deed should be cancelled. 71 Ark. 98.

Gravette & Alexander and *D. F. Taylor,* for appellee.

1. The complaint has no merit and stated no cause of action.

2. No case of false and fraudulent misrepresentations was made nor stated. 2 Pom. Eq. Jur., § 902.

KIRBY, J., (after stating the facts). The complaint alleges that M. P. Carpenter showed to the plaintiff a certain tract of land in Mississippi County, covered with merchantable timber, and represented to him that said land and timber was his property. That plaintiff was ignorant of the location of the timber, and believed that same was located on said land as represented to him by said Carpenter, "although said Carpen-

ter, at the time he made such representation, well knew that the timber shown to this plaintiff was on lands belonging to the United States, and was a part of what is known on the Government plats and maps as 'Round Lake,' and is a tract of unsurveyed territory." That plaintiff relied upon the false and fraudulent representations so made, and conveyed to said Carpenter's wife, Catherine Carpenter, the other defendant, at his request, the lot in Richards' Addition to Blytheville, in consideration of the sale and conveyance by Carpenter of all the merchantable timber growing on certain lands in Mississippi County, except the oak, describing the lands, and that the said M. P. Carpenter falsely and fraudulently represented to him, the said plaintiff, that the timber shown to him was on the above-described land. That he erected a sawmill at great expense near the land and after cutting a small amount of timber therefrom was stopped by the Government inspectors. Also offered to relinquish to Catherine Carpenter any rights which he may have against the timber and asked that the title to the lot be divested out of Mrs. Catherine Carpenter and conveyed to him. That defendants be compelled to reconvey said house and lot to the plaintiff and for all general relief.

We think it is sufficiently alleged that the defendant, M. P. Carpenter, falsely and fraudulently represented to plaintiff that he was the owner of certain lands, and that the timber shown by the defendant before the conveyance thereof to plaintiff was situated upon said lands, the ones described in the complaint, that such representation was material to the making of the contract, and an inducement therefor, and that the plaintiff relied upon the truth of such representation, as it was expected and intended he should do, by the defendant, when it was so knowingly made, to his injury. The position of the parties was such that the plaintiff had the right to rely upon the truth of the representation, as it is alleged he did do, in conveying the lot in question, which conveyance is now sought to be set aside and cancelled. The complaint is sufficient. *Neely* v. *Rembert*, 71 Ark. 98.

It may be that the complaint is indefinite and not altogether certain, but such a defect could have been reached by a motion to make it more definite and certain and not by demurrer. The court erred in sustaining the demurrer, and the

judgment is reversed and the cause remanded with directions to overrule it and for further proceedings.

FOLTZ v. ALFORD.

Opinion delivered February 5, 1912.

1. IMPROVEMENTS—BETTERMENT ACT—COLOR OF TITLE.—One who by mistake erects improvements upon the land of an adjacent proprietor, having no color of title thereto, can not claim such improvements under the betterment act. (Page 193.)
2. SAME—RECOVERY OF IMPROVEMENTS.—The equitable doctrine that one sued in equity to recover land may, independently of the betterment act, recover improvements made thereon by him in good faith is invoked against a plaintiff only when he seeks to enforce some equitable right. (Page 194.)
3. SAME—RECOVERY OF IMPROVEMENTS—GOOD FAITH.—One who placed improvements upon the land of another after he had been notified of the latter's ownership can not be said to have placed them in good faith. and will not be entitled to recover therefor. (Page 194.)

Appeal from Sebastian Chancery Court; Fort Smith District; *J. V. Bourland,* Chancellor; reversed.

H. C. Mechem, for appellants.

No betterments should have been allowed. 48 Ark. 187; 47 *Id.* 528; 59 *Id.* 146; 18 Mich. 142; 29 Wis. 663; 40 Ia. 213.

A. A. McDonald, for appellee.

The improvements were made in good faith by one claiming under color of title. 48 Ark. 187.

HART, J. Joseph R. Foltz and others brought an action in ejectment in the circuit court against L. M. Alford to recover a tract of ground in the city of Fort Smith, lying immediately south of lot 12, block 21, in Foltz's subdivision of Griffith & Nicks' Addition to the city of Fort Smith and being 140 feet in length and 50 feet in width.

The defendant in his answer denied that the plaintiffs were the owners of the tract of ground, and set up title in himself. As a further defense, defendant alleges that, relying on his title to the property, he has in good faith made valuable improvements by erecting thereon a building worth $1,500.

On motion of the defendant the case was transferred to the chancery court, and without objection was tried there.

Foltz's subdivision to Griffith & Nicks' Addition to the city of Fort Smith was created by a plat filed April 29, 1887, and consisted of blocks 21 and 22. The plat shows block 21 to be south of block 22, and the blocks are divided by Sykes Street 40 feet wide. No street is shown on the plat immediately south of block 21. Lot 12 of block 21 is in the southeast corner of, the block as platted into lots, and faces east. Immediately south of lot twelve is the tract of ground in controversy. In 1900 L. M. Alford purchased said lot 12 in block 21 and received adeed therefor.

In 1906 a plat was filed of Foltz subdivision No. 1, extended to Griffith & Nicks' Addition, showing blocks 8 to 19 and A to D. Blocks 21 and 22 did not appear on this plat.

In 1908 Alford, wishing to build a house on said lot 12, had it surveyed, and the surveyor by mistake located the lot fifty feet south of its true location, and located it on plaintiff's land. It does not certainly appear how the mistake was made, but it probably occurred in this way—the surveyor made the survey with reference to the plat filed in 1906, and did not look at the plat of blocks 21 and 22 filed in 1887. The property was all vacant, and the surveyors extended the streets as they appeared on the plat filed in 1906 and without any reference to the plat of 1887, and in this way the mistake was made. Be that as it may, the undisputed evidence shows the tract of ground in question was the property of the plaintiffs.

James A. Foltz testified: "I had charge of the property of the plaintiffs; and when I saw that the defendant was about to erect a house thereon, I suspected that it was on our land. After making some measurements, I concluded I was right. I then went to Mr. Alford, and told him that I did not know for sure, but that I thought he was about to erect his house or a part of it on our property. Mr. Alford said, "No," that he had had the property surveyed by a civil engineer. I told him that I still thought that there was a mistake. I then had the property surveyed, and found that he was erecting his house on our land. I again went to Mr. Alford. I found him in his back yard making concrete blocks with which to build his house, and told him that he was about to erect a house on our

ground. Foltz said: "I gave him good due warning long before the house was first started; he had no frame work nor roof on it."

L. M. Alford testified: "I had a survey made by two civil engineers, and, relying on their survey as being correct, I built a house on the property in question. The house is worth $1,500. I had the survey made because I wanted to know exactly where the property was before building on it, and, as above stated, relying on the correctness of the survey, I built my house."

We quote from his testimony as follows: "Q. Mr. Alford. while you were building your house, did you have any talk with Doctor Foltz or any of the Foltz heirs with regard to the title to lot 12?

"A. No. They never laid any claim to it then, but while I was building I met Dr. Foltz, and he stated that he owned a strip west of the bridge."

The chancellor found that the plaintiffs were the owners of the property, but also found that the defendant, believing himself to be the owner under color of title, improved the property, and that the value of the improvements was $1,500. Accordingly, it was decreed that plaintiffs were the legal owners of the property, and that they should have a writ of possession therefor, upon paying the defendant $1,500 with interest at the rate of six per cent. from the date of the decree. Plaintiffs excepted to so much of the decree as held that the defendant was entitled to recover for improvements, and have duly prosecuted an appeal to this court to reverse the decree in this respect.

The sole purpose of the appeal by the plaintiffs is to question the correctness of the chancellor's decree wherein the defendant was allowed the value of his improvements. The undisputed evidence shows that the plaintiffs are the owners of the tract of ground in controversy, and that the defendant built his house thereon because he made a mistake as to the location of his own lot. It follows that he did not have color of title so that he could claim improvements under the betterment act. *Beard* v. *Dansby*, 48 Ark. 183; *Anderson* v. *Williams*, 59 Ark. 144; *White* v. *Stokes*, 67 Ark. 184; *Beasley* v. *Equitable Sec. Co.*, 72 Ark. 601.

Neither can it be said that the defendant is entitled to his improvements, independently of the betterment act, under the doctrine that he has made improvements in good faith, which increases the value of the property of the plaintiffs, because this rule is only invoked against a plaintiff when he seeks to enforce some equitable right. 3 Pomeroy, Eq. Jur., (3 ed.) § 1241.

It is true the case was heard in the chancery court, but it was transferred there on the motion of the defendant, and the plaintiffs are seeking no equitable relief whatever.

In 21 Cyc. pages 17-8, it is said: "One making improvements on another's land through a *bona fide* mistake as to the boundary or location after due diligence to ascertain it is entitled to compensation for such improvements."

Assuming without deciding the question that this is a correct principle of law, we do not think it has any application to the facts in this case. Doctor Foltz testifies positively that he notified the defendant before he commenced the construction of his house that he thought it was on plaintiffs' land. The defendant claimed to have had it surveyed by competent engineers, and paid no attention to this notice. Doctor Foltz then had the ground surveyed and again went to the defendant, and warned him that he was building his house on the plaintiffs' ground. This testimony is not denied by the defendant. It is true that he says in general terms that the plaintiffs never laid any claim to the ground while he was building the house, but he does state that while he was building the house Dr. Foltz talked to him and stated that the plaintiffs owned a strip of ground west of the bridge. It will be noted that the defendant's deposition was taken after Doctor Foltz had testified, and he does not deny the conversation that Doctor Foltz says that he had with him in regard to the location of the lot. His whole testimony shows that he built his house on the strip of land in question because he relied on the correctness of the survey he had made and on that account paid no attention whatever to the warning or notice given him by Doctor Foltz.

It is well settled that, even under the betterment act, from the time a defendant is chargeable with notice, he improves the land at his own risk and can assert no just claim or tax the true owner for improvements such, perhaps, as he does

not desire to be made. *Porter* v. *Doe,* 10 Ark. 186; *Douglass* v. *Hunt,* 98 Ark. 320.

Reversed and remanded with directions to enter a decree in favor of the plaintiff.

JONES v. STATE.

Opinion delivered February 5, 1912.

1. HOMICIDE—SUFFICIENCY OF PROOF OF MURDER.—Testimony that defendant and another were shooting and cursing while passing along the highway, that defendant, who was a deputy sheriff, warned them that if they did not stop the shooting and cursing he would arrest them, that they cursed him and shot again, that he went to arrest them, and told them to halt whereupon defendant shot him, is sufficient to sustain a conviction of murder in the first degree. (Page 198.)
2. APPEAL AND ERROR—HARMLESS ERROR.—Where, in a prosecution for murder in the first degree, the court correctly instructed the jury as to murder in the first and second degrees, and the jury found defendant guilty of murder in the first degree, the court's refusal to instruct as to the offense of manslaughter could not have been prejudicial. (Page 200.)

Appeal from Lee Circuit Court; *Hance N. Hutton,* Judge; affirmed.

C. E. Daggett, for appellant.

1. There was no proof of malice nor premeditation, and the evidence does not support a conviction of murder in the first degree. 82 Ark. 97.

2. The court should have instructed as to manslaughter. 74 Ark. 444, 453; 162 U. S. 313; 156 *Id.* 51; 50 Ark. 545; 73 *Id.* 126; 71 *Id.* 86; 5 *Id.* 545.

Hal L. Norwood, Attorney General and *Wm, H. Rector,* Assistant, for appellee.

1. There is no evidence to reduce the offense to manslaughter.

2. The testimony supports the verdict.

HART, J. This is an appeal from a judgment convicting the defendant, Arthur Jones, of murder in the first degree, for killing M. E. Yarbrough. Mrs. M. E. Yarbrough testified:

"I was the wife of M. E. Yarbrough, and he was killed about dusk or dark on the 30th of September, 1911. We lived

on a hill about a mile from Marianna. About 7 o'clock that evening my husband and I were sitting on the porch playing with our two children. We heard some negroes coming down the road in a buggy. They were cursing and shot once. My husband got up and holloed at them to stop. He said that if they did not stop that shooting and noise he would arrest them. They answered with a curse word, and again shot up the hill. By this time they had got into a deep cut where they could not be seen. Mr. Yarbrough got his gun and went down to meet them when they got to the top of the hill. He was going to arrest them, and I went with him. When he got out to the road, he said: 'Halt!' and one of them said 'Shoot, you white-eyed s— of a b——!' One of the negroes shot Mr. Yarbrough twice, and Mr. Yarbrough shot at them twice. He fell on his knees, and holloed that he was shot. I called for help, but no one else seemed to be on the road. I dragged my husband back to the house, and it was about an hour before I got any help. My husband died the next morning at 4 o'clock. We could see the negroes when they first commenced shooting, and my husband told them that if they did not stop he would arrest them. They were about one hundred yards away when we first saw them. I saw them make the first two shots, and after that, as above stated, they disappeared in the cut, and I did not see them any more until they got to the top of the hill, and shot my husband when he tried to arrest them."

M. H. Ford testified: "I am sheriff of Lee County. M. E. Yarbrough was my deputy at the time he was killed, and had been for about six years. On the same night after the killing, the defendant voluntarily made a confession to me. He said that he had pulled out his pistol at the branch, and had tried to see if it would shoot. He said that when he got to the top of the hill, some one spoke to him, and that his companion said: 'Shoot him!' and that he, the defendant, at once shot Mr. Yarbrough. The defendant, at the time he made the confession, was wounded, and was in a physician's office."

Doctor McClendon testified: "I visited Mr. Yarbrough on the night he was shot. He had two wounds on the arm which shattered his elbow and severed the brachial artery, and the other was on his left hip. The wound in the hip went through the small intestines, and there were eight perforations

through the small bowels. His death was due to hemorrhage resulting from the gun shot wounds. He said that some people came down the hill cursing and shooting, and that he picked up his gun and went out to arrest them. He said when he got out there and told them to halt, one of them said: 'Shoot him!' and the shooting began."

The defendant testified as follows: "That he was in Marianna on the 30th of September, 1911, and that he left town in John Collins's buggy; that when he got to Calvin branch he and Collins were talking about the many robberies that had recently occurred along the road; that he took out a pistol that had been pawned to him and shot down in the road to see if the pistol would shoot, and then put the pistol in a sack in the buggy; that when he got up to the top of the hill some one holloed, 'Halt!' and he told Collins to drive on, and Collins said: 'Shoot him! shoot him!' and he reached down and got the pistol, but before he could get it up the man had fired, and the shot hit him in the hip and belly; that he could only see the smoke and shot out where the smoke was; that they drove on up the road, and he got sick and came on back to the oil mill and laid down, and Collins came to town and got a buggy and carried him to the doctor; that he only shot one time at the bridge; that he did not hear anybody hollo at him when he was down by the bridge; that the first time that he saw Mr. Yarbrough was when he came out and told him to halt; that he did not shoot until he was shot; that he did not know Mr. Yarbrough; that he did not know there was a house located where Mr. Yarbrough's is; that it is not true that either of them was using loud and ugly language; that Mr. Yarbrough did not hollo to them and tell them that if they did not stop he would arrest them; that it was dark before they left town; that he never saw Mrs. Yarbrough at the scene of the killing; that Yarbrough said nothing but 'Halt!' "

It is first earnestly insisted by counsel for defendant that the evidence did not warrant a verdict of murder in the first degree, but we can not agree with their contention. A careful consideration of the evidence on the part of the State shows the jury were warranted in finding that this was a premeditated and deliberate killing. Mrs. Yarbrough testifies that the negroes were cursing and shooting along the public highway;

that her husband saw and heard them, and warned them that if they did not stop he would arrest them. They cursed him and again fired. He went out to arrest them; and when he announced his purpose to them, one of them called him a vile epithet, and said "Shoot!" The other at once shot him. So it will be seen that the jury had a right to infer that all that was done and said was a part of the same transaction, and Yarbrough informed the defendant that he was about to arrest him, and the defendant without any provocation shot and killed him. From the evidence of the State, the jury might have inferred from the acts and conduct of the defendant that he intended to take the life of Yarbrough, and that the killing was done with premeditation and deliberation. Therefore we are of the opinion that the verdict was warranted by the evidence. *Howard* v. *State*, 82 Ark. 102; *Beene* v. *State*, 79 Ark. 460.

The court correctly instructed the jury on murder in the first degree and murder in the second degree and on the subject of reasonable doubt. No objection is made by counsel for the defendant to these instructions. In addition the court instructed the jury as follows:

"If, after you have considered all of the facts, you have reasonable doubt as to the defendant's guilt of any grade of offense, you will acquit him, and the form of your verdict will simply be, 'We, the jury, find the defendant not guilty.'

"You are further instructed that you can not find the defendant guilty of murder in the first degree unless you find from the evidence that at the time the fatal shots were fired there was a specific intent existing in the mind of the defendant to take the life of the deceased, and that the shots were fired by him with that purpose, and that such purpose was formed deliberately and premeditatedly, and that the mind of the defendant was fully conscious of the design to kill and was not the immediate offspring of rashness, negligence, or impetuous temper.

"You are instructed that it is the duty of an officer in making an arrest without a warrant to state to the defendant that he is an officer, and his purpose to arrest them, and if in this case the jury find that the deceased stepped to the side of the road and with a gun drawn called, 'Halt!' or 'Hold up!' with nothing further, the defendant would have a right to resist."

The record then shows that the defendant requested the

court to instruct the jury on the law of manslaughter, which the court refused to do. The refusal of the court to give any instruction on manslaughter is assigned by the defendant as error. Under the testimony given by the defendant, the jury might have believed that he shot Yarbrough under the belief that he was about to be assaulted by Yarbrough, but that he acted too hastily and without due care, and was therefore not justified in taking life under the circumstances. Under this view of the testimony the defendant was entitled to an instruction on voluntary manslaughter. *Allison* v. *State*, 74 Ark. 444.

The record does not disclose whether or not the defendant presented to the court proper instructions on manslaughter, but simply shows that the defendant asked the court to instruct the jury on manslaughter, which the court refused to do. Assuming, without deciding the question, that it was the duty of the court, under this state of the record, to have instructed the jury on voluntary manslaughter, we are of the opinion that the error was not prejudicial, and it is well settled in this State that the judgment will only be reversed for errors that are prejudicial to the rights of the defendant. *Lee* v. *State*, 73 Ark. 148; *Hayden* v. *State*, 55 Ark. 342. It will be noted from the instructions given by the court and copied above, that the jury were told that they could not convict the defendant at all if they had a reasonable doubt as to his guilt of any grade of offense, and that they could not convict him of murder in the first degree if the killing was the immediate offspring of rashness, negligence or an impetuous temper. The court also told the jury that it was the duty of an officer making an arrest without a warrant to state to the defendant that his purpose was to arrest him, and that if it should find that the deceased stepped to the side of the road with a gun drawn and called "Halt!" with nothing further, the defendant had a right to resist him. The jury returned a verdict of murder in the first degree, thereby finding that the killing was not the result of rashness, negligence or impetuous temper on the part of the defendant. It is admitted that the court correctly instructed the jury on murder in the second degree, and the jury might have found the defendant guilty of that offense if it had believed the testimony of the defendant. Hence it will be seen that the jury found a state of facts to which an instruction of manslaughter would be in-

applicable, and it becomes certain that the same verdict actually would have been rendered if the court had instructed the jury on manslaughter. The case is ruled by *Farris* v. *State*, 54 Ark. 4. There the court held:

"An error in rejecting a prayer for an instruction is not prejudicial if it appears that the jury found a state of facts to which it would have been inapplicable. Thus, where the court charged that defendant could not be convicted of murder in the second degree if he killed deceased in self-defense or in a sudden heat of passion upon provocation apparently sufficient to make the passion irresistible, and the jury found him guilty of murder in the second degree, and assessed his punishment at the longest term of imprisonment allowed by law for the offense found, the court's refusal to instruct as to the offense of manslaughter could not have been prejudicial, though there was evidence tending to establish manslaughter." See also *People* v. *O'Neil*, 67 Cal. 378; *Baker* v. *State*, 58 Ark. 513.

The judgment will be affirmed.

KIRBY, J., dissents.

HODGES v. BAYLEY.

Opinion delivered January 15, 1912.

1. ACCOUNT—SUFFICIENCY OF COMPLAINT.—An account filed as the basis of an action in the court of a justice of the peace is sufficient which alleges that defendant is indebted to plaintiff "to five per cent. commission on sale of grocery stock to Thornton & Co., on $1,018, $50.90." (Page 202.)
2. APPEAL AND ERROR—HARMLESS ERROR.—A defendant can not complain of the court's error in overruling a motion to make the complaint more definite and certain if he was not surprised by any testimony adduced by plaintiff nor deprived of any witness whose testimony he desired to introduce to sustain his defense. (Page 202.)
3. SAME—CONCLUSIVENESS OF VERDICT.—If there is any evidence adduced which is legally sufficient to sustain the verdict, it becomes conclusive upon appeal. (Page 202.)
4. BROKER—RIGHT TO COMMISSION.—A broker who has been employed to sell property is entitled to his commission where he has brought about between the principal and another negotiations which resulted in a sale which was consummated by the principal, though the principal sold upon terms different from those mentioned to the broker. (Page 203.)

5. SAME—AMOUNT OF COMPENSATION.—If the amount of a broker's commission is not agreed upon at the time of employment, the broker is entitled to recover a reasonable compensation. (Page 203.)

6. TRIAL—VERDICT—WAIVER OF SIGNATURE.—The requirement of Kirby's Digest, section 6204, that the verdict shall be written and signed by the foreman may be waived where an unsigned verdict is rendered in open court and duly received without objection and thereafter recorded. (Page 204.)

Appeal from Sebastian Circuit Court, Fort Smith District; *Daniel Hon,* Judge; affirmed.

T. S. Osborne, for appellant.

A broker is not entitled to commission unless he has a contract to that effect. 70 Ark. 385; 65 Ark. 278. Defendant was entitled to have plaintiff state his cause of action in more definite terms. Kirby's Digest, § 4564; *Id.* 6091, 4565. The verdict of the jury must be signed by some one of their number as foreman. Kirby's Digest, § 6204; 5 Ark. 444; 29 Am. & Eng. Ency. Law 1042.

P. E. Rowe, for appellee.

The facts are determined by the jury. 67 Ark. 399; 74 Ark. 478; 76 Ark. 115; 70 Ark. 512. The court did not err in refusing to require plaintiff to produce a broker's license. 89 Ark. 195. A statute requiring the verdict of a jury to be signed by their foreman is directory only. 23 S. E. 760; 2 Tex. 204; 24 S. W. 645; 20 Ia. 465; 34 Ind. 464; 6 Ia. 456; 25 Mo. App. 300; 30 Tex. App. 601.

FRAUENTHAL, J. This is a suit to recover a broker's commission which the plaintiff claimed he earned by procuring for defendant the sale of a stock of groceries owned by him. The action was instituted in a court of a justice of the peace upon the following account:

"G. J. Hodges,

"To T. A. Bayley, Dr.

"To 5 per cent. commission on sale of grocery stock to Thornton & Co., on $1,018.....$50.90"

The defendant moved the court to require the plaintiff to make the statement of his cause of action more definite and certain, and the motion was overruled. Upon appeal being taken to the circuit court, the motion was there renewed and overruled. The trial resulted in a verdict in favor of plaintiff.

It is urged that the court erred in refusing to require the plaintiff to make the statement of his cause of action more certain and definite. It is provided by section 4565 of Kirby's Digest that an action may be commenced in a court of a justice of the peace by filing an account upon which the suit is based. The object of the provision of the statute (Kirby's Digest, § 6147) requiring a party to make his pleading definite and certain is to inform the opposing party of the facts upon which the alleged claim is based, so as to enable him to prepare his defense. The account filed in this case, we think, was sufficient to advise the defendant of the nature of the claim for which plaintiff sought recovery, so that he might prepare any defense which he had thereto. The defendant does not claim that he was surprised by any testimony adduced by plaintiff or that he was unable to obtain any witness whose testimony he desired to introduce to sustain his defense. He was not prejudiced in any event, therefore, by his motion being overruled.

It is contended that the verdict is contrary to the evidence adduced upon the trial of the case. The testimony relative to the issue decisive of the rights of the parties was conflicting. The plaintiff was engaged in the brokerage business in the city of Fort Smith, selling real estate and personal property upon commission. He had an agent by the name of C. Peterson who testified that he entered into a contract with the defendant by which plaintiff was employed to sell his stock of goods. The amount of the commission to be paid plaintiff was not mentioned, but defendant listed his property with him, and a statement thereof was taken by said Peterson in which a price of $1,200 or $1,300 was placed upon the stock of groceries. The plaintiff procured one Thornton as a prospective purchaser, and introduced him to defendant, who thereafter sold his stock of groceries to him for $1,018. In his testimony the defendant denied that he had listed his property with plaintiff for sale, or that he had employed him in any way relative thereto. He admitted, however, that the purchaser, Thornton, had been introduced to him by plaintiff's agent, and, after he had consummated the sale, this agent demanded payment of plaintiff's commission, and that, while he denied owing him anything, he offered to pay him $10 if he was due him any amount.

It may be that the verdict is not sustained by the preponderance of the evidence which was adduced upon the trial of the case. But it is not the province of this court to say whether or not the verdict of a jury is contrary to the weight of the evidence. The rule is that, if there is any evidence adduced which is legally sufficient to sustain the verdict, it becomes conclusive in the consideration of the case upon appeal to this court.

It has been held that a broker who has been employed to sell property is entitled to his commission where he has brought about between the principal and another negotiations which resulted in a sale which was consummated by the principal. *Hunton* v. *Marshall*, 76 Ark. 375. The broker is entitled to his commission in such event, although the principal sold upon terms different from those mentioned to the broker. *Stiewel* v. *Lally*, 89 Ark. 195. If the amount of the commission is not agreed upon at the time of the employment, then the broker is entitled to recover a reasonable amount therefor. We think there was some testimony proving that defendant listed his property for sale with the plaintiff and employed him to secure a purchaser for his stock of goods, and that plaintiff was the procuring cause of the sale thereof which defendant consummated with Thornton; and there was also evidence showing that the amount of the commission recovered was a reasonable and customary compensation for like service rendered in making such sales. *Branch* v. *Moore*, 84 Ark. 464; *Poston* v. *Hall*, 97 Ark. 23.

It is also urged that the court erred in refusing to require plaintiff to produce his broker's license which was granted to him by the city of Fort Smith. It is not claimed that there was any ordinance prohibiting one from engaging in the brokerage business in that city without having first procured license or vitiating any contract made by an unlicensed person. In the absence of such an ordinance, plaintiff could not be defeated of a recovery because he had not procured a license to sell the character of property which was the subject-matter of this sale. *Stiewel* v. *Lally*, *supra*.

It is contended that the verdict returned was not signed by the foreman or any other member of the jury, and that for this reason it was error to enter judgment thereon. According to the common law, it was not essential that a verdict should be

signed by the foreman. 22 Enc. P. & P. 898. By section 6204 of Kirby's Digest it is provided: "The verdict shall be written, signed by the foreman and read by the court or clerk to the jury, and the inquiry made whether it is their verdict." This requirement, however, we think can be waived by a party; and it is waived by him when the unsigned verdict is rendered in open court and duly received without objection by either party to the cause and thereafter is duly recorded. In the case of *Northern Pacific Rd. Co.* v. *Urlin*, 158 U. S. 271, the Supreme Court of the United States, in passing upon a like objection, said: "The contention that the judgment below was invalid because the verdict of the jury was not signed by the foreman as required by a section of the Code of Montana is, in our opinion, without merit. The record discloses that when the verdict was rendered, at the request of defendant the jury was then and there polled by the clerk, and each of said jurors answered that the verdict as read was theirs, whereupon the plaintiff moved for judgment in accordance with the verdict, the motion was granted, and judgment was ordered accordingly. No objection was made or request that the verdict should be signed was then made by defendant, and we think that the court below was justified in treating the irregularity, if such it was, as having been waived." To the same effect see *Morrison* v. *Overton*, 20 Ia. 465; *Gurley* v. *O'Dwyer*, 61 Mo. App. 348; *Thompson* v. *Commonwealth* (Ky.) 15 S. W. 861; *Patterson* v. *Murphy*, 63 Ga. 281; *Chicago City R. Co.* v. *Cooney*, 196 Ill. 466. In the case at bar, the verdict was duly rendered in open court by the jury and received by the court without any objection by defendant and judgment entered thereon. It follows that he waived any right now to object to the judgment which was rendered upon this verdict. Finding no error which was committed in the trial of this case, the judgment is accordingly affirmed.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY v. STATE.

Opinion delivered January 29, 1912.

1. STATUTES—PROVINCE OF COURTS TO CONSTRUE.—It is the province of the court to construe the law and to instruct the jury definitely as to the interpretation of statutes. (Page 207.)
2. SAME—CONSTRUCTION.—In determining the meaning of words in a statute, the courts will consider what is the usual and ordinary interpretation given to them by those using them, and also consider them in reference to the subject-matter in the mind of the Legislature. (Page 208.)
3. SAME—CONSTRUCTION OF STATUTE—SOURCES OF INFORMATION.—In determining the meaning of a statute, the courts are not confined to the testimony of witnesses, but may call to their assistance persons who have information relative thereto, or may apply to any other available source to obtain such information. (Page 208.)
4. MASTER AND SERVANT—RAILROADS—DIVISION POINTS.—Under Acts of 1905, p. 593, making it unlawful for railroad companies or persons who own, control or operate any lines of railroad "to build, construct or repair railroad equipment without first erecting and maintaining at every division point a building or shed over the repair tracks, same to be provided with a floor, where such construction or repair [work] is permanently done," etc., a "division point" is either a place where the division officials of the road are located, or where trains are regularly changed and made up and train crews are regularly changed. (Page 208.)
5. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAW.—The act of May 1, 1905 (Acts 1905, p. 593), which applies only to railroad corporations or persons operating railroads and constructing and repairing railroad equipments, is not rendered unconstitutional by the fact that there are now other persons and corporations in the State who are engaged in the business of constructing and repairing railroad equipments in the State, if there were none such in the State when the act was passed. (Page 210.)
6. MASTER AND SERVANT—RAILROADS—DIVISION POINT.—The fact that some local trains end their runs at a certain place, and that the crews of such trains lay over there to make their return trip, does not constitute it a division point. (Page 213.)
7. MASTER AND SERVANT—PENAL STATUTE—CONSTRUCTION.—Acts 1905. p. 593, section 1, making it unlawful for any railroad company to repair railroad equipment without maintaining at every division point sheds over the repair tracks for the protection of employees against the weather, other provisions of which statute impose a penalty for its violation, is penal in its nature, and must be strictly construed. (Page 213.)

Appeal from Clark Circuit Court; *George W. Hays*, Judge on exchange; reversed.

W. V. Tompkins, E. B. Kinsworthy, and *W. E. Hemingway,* for appellants.

The court should have told the jury what a "division point" is. 63 Ark. 477; 99 Pac. 271; 9 Gill 331; 109 Ill. App. 560. The evidence does not sustain the verdict. 14 Ark. 286; 21 Ark. 370; 23 Ark. 101. The act is void for uncertainty and indefiniteness with respect to the places to which it applies 27 Fed. Cas. p. 1041; 19 Fed. 679; 52 Fed. 918; 35 Fed. 866; Pet. C. C. 122; 1 Paine 34; Bish. Stat. Crimes 41; Lieb. Herm. 156; 45 Ark. 159; 34 Ark. 224; 35 S. W. 129. To enforce it would be taking property without due process of law. 35 S. W. 129. It denies to the owners of railroads the equal protection of the laws. 183 U. S. 79; 194 U. S. 267; 184 U. S. 540; 75 Ark. 542; 86 Ark. 518.

Hal L. Norwood, Attorney General, and *W. H. Rector,* Assistant, for appellee.

The act is not void for uncertainty. 86 Ark. 518; 25 Ark. 101; 31 Ark. 701; Broom's Leg. Max. 247, 248; 3 Bing. 193. Dwarris, Stat. Const. 692; 1 Kent, Com. 162; 15 N. Y. 532; 28 Ark. 200; 2 Pet. 627; 7 Wall. 482; 100 U. S. 239; 40 Ark. 431; 99 N. Y. 43; 20 Ala. 54; 45 Ark. 158. The enforcement of the act would not deny the defendant the equal protection of the laws. 86 Ark. 518; 194 U. S. 267; 94 U. S. 155; 165 U. S. 649; *Id.* 150; 174 U. S. 96; 32 L. R. A. 857; 33 *Id.* 319; 207 U. S. 88; 127 U. S. 205; 169 U. S. 385; 120 U. S. 71; 170 U. S. 294; 214 U. S. 91; 81 Ark. 304; 211 U. S. 539; 185 U. S. 203; 25 L. R. A. 759; 26 *Id.* 317; 175 U. S. 348; 203 U. S. 284; 217 U. S. 114; 219 U. S. 453.

FRAUENTHAL, J. This is an appeal from a conviction of the defendant, St. Louis, Iron Mountain & Southern Railway Company, for the violation of the provisions of an act of the General Assembly approved May 1, 1905, entitled, "An act to provide for the protection of mechanics, laborers and other persons employed in the construction and repair of railroad equipment, and providing a punishment for violation thereof." The section of the act which defines the offense of which the defendant was convicted is as follows:

"Section 1. It shall be unlawful for any railroad company or corporation, or other persons who own, control or

operate any lines of railroad in the State of Arkansas, to build, construct or repair railroad equipment, without first erecting and maintaining at every division point a building or shed over the repair tracks, same to be provided with a floor, where such construction or repair [work] is permanently done, so as to provide that all men permanently employed in the construction and repair cars, trucks and other railroad equipment, shall be under shelter during snows, sleet, rain and other inclement weather." Acts 1905, p. 593.

The prosecution was instituted before a justice of the peace upon an information which in effect charged that the defendant had on June 15, 1910, repair tracks at Gurdon, which was alleged to be a division point on its line of railroad where repair work was permanently done and men permanently employed in the construction and repair of cars and other railroad equipment, and that it did not have a building or shed over the repair track so as to shelter such employees during snow, sleet, rain and other inclement weather. The trial resulted in a conviction, both before the justice of the peace and in the circuit court, to which an appeal was taken.

It is contended by counsel for defendant that the act is invalid because the term "division point," used therein for the purpose of specifying the place where the building or shed should be erected and maintained, has no well-understood meaning, rendering the act indefinite and uncertain. In this connection, it is urged that the lower court erred in failing to declare to the jury what a division point was and in leaving it for them to decide its meaning by instructing them in effect that they should take into consideration everything in connection with the transaction in order to determine whether or not Gurdon was a division point as contemplated by said act. The interpretation of the language used by the Legislature in its enactments is a matter exclusively for the court, and not for the jury. It is the duty of the court to construe and expound the law, and to instruct the jury definitely as to the interpretation of the statute, for the law must be certain and applied alike to all persons and by all juries. The sole province of the jury is to determine the facts in each particular case, and therefrom to decide whether the law, as announced to them by the court, has been violated. *Kansas City, Ft. S. & M. Ry. Co.* v. *Becker*,

63 Ark. 484. It therefore became the duty of the trial court in this case to definitely declare what a division point is as used in this statute. But the failure to so instruct the jury was not prejudicial if, under the undisputed evidence, Gurdon was such a division point. We are of the opinion that this term "division point," as used in this statute, has a certain and definite meaning. In determining what the meaning of these words is, we must look to see what is the usual and ordinary interpretation given to them by those using them, and also to consider them in reference to the subject-matter in the mind of the Legislature, as shown by this statute. "The true sense in which words are used in a statute is to be ascertained generally by taking them in their ordinary and popular signification, or, if they be terms of art, in their technical meaning. But it is also a cardinal rule of exposition that the intention is to be deduced from the whole, and every part of the statute, taken and compared together—from the words and context, and such construction adopted as will effectuate the intention of the lawmakers." *Green* v. *Weller*, 32 Miss. 650; Potter's Dwarris on Stat. 197, 201. The court is presumed to know whether or not these words have a definite signification and what is their exact meaning. It may seek every source for information as to such meaning, and is not confined to the testimony of any witness who may have given testimony as to his knowledge relative thereto. For the purpose of considering and advising itself as to the true interpretation of this term, the court may call to its assistance persons who may have information relative thereto, or may apply to any other available source to obtain this information, But the testimony of any person called to its aid is simply for the purpose of advising the court, and not to give evidence before the jury. Such testimony or information is solely for the court in aiding it in declaring what the term means and thus to announce what the law is. Thus in the case of *Louisiana & Ark. Ry. Co.* v. *State*, 85 Ark. 12, it became necessary to determine whether or not a statute requiring a station to be erected at a particular place along the line of railroad was reasonable. It was there held that the question of the reasonableness of such statute was one of law for the court to determine. It was determined in that case that the court was not bound by the facts presented or agreed upon by the parties

relative to the reasonableness of having such station erected, but should possess itself of all information obtainable upon the subject, and, for that purpose, might apply to any source which it deemed proper. And so in the case at bar the court must determine whether the term "division point" has a certain and definite meaning, and what that meaning is. In order to possess itself of information, it may seek all such available means and sources as it deems proper and, from the information thus acquired, declare what is really within common knowledge. Proceeding in this manner, we know that railroad corporations have departments, officials and employees for the management of their affairs and properties. A railroad corporation has organized departments to which are intrusted certain duties; amongst these is the duty to provide and keep in proper repair and to operate the equipment which its passenger and freight traffic may require. In order to effectively conduct and operate its trains, its line of railroad is separated into divisions. The division is the longest undivided part of its line, and within such division the operation of its trains is managed and supervised by separate and distinct officials, who are known as division officers, with different titles, according to their varied duties. Within such division, there is a place or point where these officials are located, and such place is known as division headquarters. This is the place where the division officials who manage, control and superintend the operation and repair of trains and equipments which are employed within such division are located. Such a place is a division point. But, in considering the use of this term relative to the subject-matter of this statute, we think that it has an additional meaning. Each division has its beginning and end fixed upon the line of railroad. At these limits of the divisions, trains are made up and employees operating such trains take charge thereof to make their runs from one end of the division to the other. At these places, upon the end or beginning of a division, the trains end their runs. Here engines and cars are inspected and repaired, or taken out of the train altogether, and the train is in effect made up again and either returned upon its trip on the same division or sent on to another division in the course of its run. Here the employees or crews operating the trains leave them and take their rest preparatory for another run, or the crews of the

trains are here changed. At the place where this is done regularly and constantly, or substantially so, it is usual that the engines and cars are repaired or new ones constructed. Such work is also ordinarily done at the place where the division headquarters are located. These places, then, are division points. There are also places along the line where incidentally and occasionally local trains end their runs and crews lay over and are changed. But such places where this is only occasionally and incidentally done do not, we think, constitute division points within the purview of this statute. Local trains may end their runs, or crews may be incidentally or occasionally changed, at a great many places along the line where there is no permanency or constancy or regularity in such course of operating the trains, but we think it may be inferred from the statute, which provides that the work done must be permanent and the employment of the men permanent at such places, that the Legislature also intended that the places where the trains end their runs and the crews lay over and are changed should be those where this is regularly and constantly done, or substantially so. The fact that a train is occasionally or incidentally changed at a place, or a local train ends its run at a place on the line, and crews are there occasionally changed, would not constitute such place a division point. Nor would the fact that at such place a few trains do not change or a few crews do not lay over determine that such a place is not a division point. The features characterizing the place along the line as a division point, within the meaning of this statute, are determined either by the fact that the point is a place where the division officials are located, or by the fact that the place is one where trains are regularly changed and made up, and crews are regularly changed, or substantially so.

It is urged that the act is invalid because it deprives the defendant of the equal protection of the law and thereby contravenes the Fourteenth Amendment of the Constitution of the United States. This contention is made upon the ground that the act only applies to persons and corporations owning and operating railroads, and thereby makes a classification that is unreasonable and arbitrary. It is urged that there are other persons and corporations in the State who do not own and operate railroads, but who are engaged in the business of construct-

ing and repairing railroad equipments in the State, and at the trial of this case testimony was introduced proving this fact. The defendant urges that there is no distinction between the character of business done by these other persons and corporations and that which is done by railroad corporations in the repair and construction of railroad equipments, and therefore that there is no reason for excluding these other persons and corporations engaged in a like character of business from the operation of this act while visiting the persons and corporations owning and operating railroads with its exactions and penalties. But we think there is a distinction between the two classes. In the case of the *St. Louis, Iron Mountain & Southern Ry. Co.* v. *State*, 86 Ark. 518, this act was construed to mean that the work must be done at division points constantly, and the men must be there regularly employed. Those who own and operate railroads are not only engaged in constructing and repairing railroad equipments, but they are also engaged in operating trains and transporting property and persons intrusted to their care. The repairs upon or the construction of equipments which they make may be called for quickly while such property is in transit, and the safety of their employees may be better subserved by the protection afforded them in inclement weather which might not apply to those engaged in a like character of business and making similar repairs who have a longer time in which to make them and an opportunity to await better weather in which to make them. In the case of Ex parte *Byles*, 93 Ark. 612, it is said: "Unless the classification be clearly unreasonable and arbitrary and without just distinction as a foundation, the Legislature being primarily the judges of that, it is the duty of the courts to respect and uphold the legislative determination." We think there are other reasons for making the classification, but we do not deem it necessary to further discuss them because we are of the opinion that the constitutionality of this act in this particular has been upheld in the case of the *St. Louis, I. M. & S. Ry. Co.* v. *State, supra.* In that case the prosecution for a violation of this act was before the court, and it was contended that the act was unconstitutional because it made an arbitrary classification and thus violated the equality clause of the Fourteenth Amendment. The court in that case held that the act

was not unconstitutional upon that ground, and said: "The court is unable to find the classification here made offensive to the equality clause of the Constitution as construed by the Supreme Court of the United States, whose decisions are binding on this subject." It is true, the court in that case, in discussing the constitutionality of the act, stated that it was not shown that, as a matter of fact, the law operated only upon one corporation, although others in like and similar condition were not affected by it. But the court also stated that the condition then existing in the State as found by the Legislature was that no other corporations or persons were engaged in such business in the State. That was the condition which existed in the State at that time, and if, since then, the condition is changed, that would not invalidate the law. The statute was passed to meet conditions existing at the time of its enactment; and if the statute was then valid, its validity continued. If conditions have actually changed since this enactment, the Legislature may, in its wisdom, extend the provisions of the statute to other corporations. As was said by this court relative to a somewhat similar contention made in the case of Ex parte *Byles, supra*: "Moreover, the Legislature doubtless made investigation and found that lightning rods, steel stove ranges, clocks, pumps, buggies and carriages are the articles which constitute the stock of peddlers of this day in the State, and the present legislation was designed to meet the conditions which were found to exist. This it was proper and right for the Legislature to do, and the fact that the precise conditions are found not to be met will not invalidate what the Legislature has done." If the act in question was valid when passed upon in 1908, when the opinion was rendered in the case of *St. Louis, I. M. & S. Ry. Co.* v. *State, supra,* it has not been invalidated by reason of any change in conditions which may have occurred since then. The act was then declared to be constitutional, and we see no reason to overrule that decision.

The remaining question to be determined is whether or not the evidence is sufficient to show that Gurdon is a division point. The testimony shows that Gurdon is a station on defendant's line, and that it is not a place where the division headquarters or the division officials are located. The division in which Gurdon is situated is known as the Natchez division,

and its headquarters, where the division officials are located, is at Ferriday, Louisiana. The testimony tended to prove that local trains from Felsenthal and Womble ended their runs at Gurdon, and that there was a day and night crew of these trains there all the time; that the engineer and fireman on the south end "tied up" at this place for the night. But there was no testimony tending to prove that this was a place where the trains were regularly changed or the train crews regularly changed, or substantially so. Local trains only ended their runs at this place, and no train running on the main line in this division ended its run there. The evidence at the most only shows that Gurdon is a place where some local trains end their runs, and where crews only on such trains lay over to make their return trips. This, we think, does not constitute Gurdon a division point, within the purview of this act. This act is penal in its nature, and must therefore be strictly construed. Before a conviction can be had thereunder, it is not only necessary to prove that construction and repair work is constantly done and men regularly employed at this place, but it is also necessary to show that the place is a division point. The evidence does not show this. We are of the opinion that the evidence relative to this question has been fully developed upon the trial in the lower court; and, such evidence failing to show that Gurdon is a division point, it would serve no useful purpose to remand this case for a new trial. The judgment is accordingly reversed, and the case is dismissed.

KIRBY, J., dissents, thinking that proof shows that Gurdon is a division point within the meaning of the act as herein announced.

COMPTON v. STATE.

Opinion delivered November 27, 1911.

1. CRIMINAL LAW—ARREST OF JUDGMENT.—Under Kirby's Digest, section 2427, the only ground upon which a judgment may be arrested is that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court. (Page 217.)

2. EMBEZZLEMENT.—NATURE OF OFFENSE.—Though Kirby's Digest, section 1837, defining embezzlement, concludes by providing that the person so committing an act of embezzlement shall be deemed guilty of larceny, yet embezzlement is regarded as a distinct crime. (Page 217.)

3. STATUTES—CONSTRUCTION.—Every statute, where it is practicable, must be so construed that every part and provision contained in it may have some operation. (Page 218.)

4. STATUTES—CONSTRUCTION.—EJUSDEM GENERIS—Where an act attempted to enumerate the several species of a generic class, and follows the enumeration by a general term more comprehensive than the class, the act will be restrained in its operation because it is discerned that the Legislature so intended; but where the detailed enumeration embraces all the things capable of being classed as of their kind, and general words are added, they must be applied to things of a kind different from those enumerated. (Page 219.)

5. EMBEZZLEMENT—DEFENSE—EVIDENCE.—In a prosecution of a school director for embezzlement in raising a school warrant, drawn to pay a balance due, to an attorney for services rendered for the district in certain litigation, evidence of a resolution of the school board that defendant was to receive $75 if the litigation was settled without suit, and $100 if suit was brought, was properly excluded in the absence of any evidence to connect such resolution with the raising of the warrant. (Page 223.)

6. APPEAL AND ERROR—HARMLESS ERROR.—Where the instructions given on behalf of the State were correct, accused was not prejudiced by the giving of incorrect and contradictory instructions at his instance. (Page 225.)

7. EMBEZZLEMENT—STATUTE CONSTRUED.—Kirby's Digest, section 1837, defining the offense of embezzlement by any clerk, apprentice or servant, employee, agent or attorney of any private person or of any copartnership, except clerks, apprentices, servants and employees within the age of sixteen years, or any officer, clerk, servant, employee, agent or attorney of any incorporated company or any person employed in any such capacity, who shall embezzle or convert to his own use * * * *without the consent of his master or employer,*" etc., is not applicable to the case of an officer of a school district who embezzles its funds, since the district could not consent to an embezzlement of its funds. (Page 225.)

8. SAME—CONSTRUCTION OF STATUTE.—Kirby's Digest, section 1839, defining the crime of embezzlement "by any carrier or other bailee," is not confined to bailees of the generic class "carriers," but embraces all bailees. (Page 226.)

9. SAME—DEFENSE.—Where defendant, as an officer of a school board, had authority to fill out a warrant for an obligation of the district, but fraudulently filled it out for an excessive amount and converted the excess to his own use, he will not be heard to say that he did not come into possession of such excess rightfully and therefore was not a bailee. (Page 227.)

Appeal from Lee Circuit Court; *Hance N. Hutton,* Judge; affirmed.

Joseph W. House, George W. Murphy, Charles E. Daggett, R. D. Smith and *H. F. Roleson,* for appellant.

1. The motion in arrest of judgment should have been sustained. Embezzlement being purely a statutory offense, no offense is stated if there is no statute covering the particular charge in the indictment. In this case section 1837 of Kirby's Digest could not be applicable because that statute does not apply to public officers, nor agents of any public or municipal corporation. The term "incorporated company" applies only to private corporations. 22 N. Y. 243. Even if it be held to apply to an officer of a public corporation, still, under its terms, the money must come into the hands of the defendant by virtue of his office. On the face of the indictment, it does not appear that the defendant was an officer into whose hands any public funds could legally come. If what the indictment states as facts are facts, it has no legal basis on which to stand. Finally, it does not conclude *contra pacem.* 19 Ark. 613; 47 Ark. 230; 56 Ark. 515; 34 Ark. 693; Kirby's Digest, § 7663. See also 22 N. Y. 245; 2 Bishop, Crim. Law, (5 ed.) § § 352, 353, 360, 363; 74 N. W. 319; 124 U. S. 525, 31 L. Ed. 634; 33 Ky. L. Rep. 97, 112 S. W. 586; 110 Mo. 209, 19 S. W. 650; 26 O. St. 265; 47 N. E. 138; 119 S. W. 85; 77 Ark. 412; 8 Tex. App. 406; 116 Mass. 1.

2. The court erred in giving on its own motion, and at the instance of the State's attorney, instructions which were in conflict with other instructions given at the request of the defendant. 77 Ark. 200; 76 Ark. 224; 65 Ark. 65.

Hal L. Norwood, Attorney General, and *William H. Rector,* Assistant, for appellee.

1. The indictment sufficiently alleges and the evidence sufficiently shows that appellant converted the money of the school district to his own use with the intention to defraud the district. The indictment is sustainable either under section 1837 or 1842, Kirby's Digest. The evidence shows that he was in possession of the money by virtue of the fact that he was secretary of the school board, and as such was a public officer. Throop's Public Officers, § 7 (cases cited in note 3); Mechem's Public Offices & Officers, § 714, *et seq.*; 34 Ark. 562; 80 Ark. 263; 136 S. W. 947.

2. The disposition of the first proposition will dispose of the question of the sufficiency of the evidence to support the verdict. If the indictment is good, there is undoubtedly sufficient evidence to support the verdict.

HART, J. The defendant, W. A. Compton, has appealed from the judgment of conviction for the crime of embezzlement. The indictment, caption and formal parts omitted, is as follows:

"The said W. A. Compton in the county and State aforesaid on the 4th day of October, 1907, then and there being a duly elected, qualified and acting member of the Board of Directors of Special School District No. 1 of Marianna, which said school district is a corporation organized under the laws of the State of Arkansas, and the said W. A. Compton, then and there being the duly elected and acting secretary of the board of directors, and then and there as such secretary having authority under the law to draw warrants on the county treasurer of Lee for money payable out of the funds of said school district, did draw a warrant on the county treasurer of Lee County, payable to himself, out of the funds of said school district, which said warrant, drawn and signed by the said W. A. Compton as said secretary and also signed by the president of the board of directors of said school district, is in words and figures as follows:

"District School Fund, District No.

No. 10-4-1907.

Treasurer of Lee County, Arkansas:

"Pay to W. A. Compton, Sec'y, or order the sum of one hundred and fifty.....100 dollars out of the Special School District Fund, Marianna.

"For fee to S. H. Mann in school cases.

"H. B. Derrick, Jr., Pres.

"W. A. Compton, Sec'y.

"Directors."

"And then and there he, the said W. A. Compton, having said warrant in his possession, by reason of his said office as secretary of said board of directors, the said warrant being payable to him, the said W. A. Compton, secretary, or order, did indorse the same in blank as secretary, on the back thereof, and then and there did present and deliver the same to the Bank

of Marianna, and then and there the said Bank of Marianna did present said warrant, drawn as aforesaid, to the treasurer of Lee County, and then and there did receive from the said treasurer of said Lee County $150 out of the funds belonging to the Special School District No. 1 of Marianna, and then and there he, the said W. A. Compton, by virtue of his said office did receive from the Bank of Marianna the sum of $100 of said sum of $150 received from the Bank of Marianna, of the treasurer of Lee County, Arkansas, of gold, silver and paper money, the property of the said school district, of the value of $100, and then and there unlawfully and feloniously did embezzle and convert the same to his own use, and so, the said W. A. Compton, the sum of $100, of gold, silver and paper money, of the value of $100, the property of Special School District No. 1 of Marianna, unlawfully and feloniously did steal, take and carry away, against the peace and dignity of the State of Arkansas "

No demurrer to the indictment was filed, but the defendant filed a motion in arrest of judgment. The statute provides that the only ground upon which a judgment shall be arrested is that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court. Kirby's Digest, § 2427; *Ince* v. *State*, 77 Ark. 426.

Counsel for defendant rely for a reversal of the judgment chiefly upon the ground that there is no statute under which the indictment in this case could be drafted. They claim that no offense is charged under any of the sections of our statute relating to embezzlement.

Section 1837 of Kirby's Digest reads as follows: "If any clerk, apprentice or servant, employee, agent or attorney, of any private person, or of any copartnership, except clerks, apprentices, servants and employees within the age of sixteen years, or any officer, clerk, servant, employee, agent or attorney, of any incorporated company, or any person employed in any such capacity, shall embezzle or convert to his own use, or shall take, make way with, or secrete, with intent to embezzle or convert to his own use, without the consent of his master or employer, any money, goods or rights in action, or any valuable security or effects whatsoever belonging to any other person, which shall have come to his possession, or under his

care or custody, by virtue of such employment, office, agency or attorneyship, he shall be deemed guilty of larceny and on conviction shall be punished as in cases of larceny."

It is contended that the allegations of the indictment do not bring the defendant within the category of persons who may be guilty of embezzlement under this section of our statute. Embezzlement is purely a statutory offense. While our statute concludes by providing that the person so committing an act of embezzlement shall be deemed guilty of larceny, yet embezzlement is regarded as a separate and distinct crime, and is so treated in our decisions. It is evident that the allegations of the indictment do not bring the defendant within the class of persons in the statute designated as clerks, apprentices or servants of any private person or copartnership, or officers, agents, clerks or servants of any incorporated company. The particular inquiry then is, what is the meaning of the clause, "or any person employed in any such capacity?" It is a fundamental rule of construction "that every statute, where it is practicable, must be so construed that every part and provision contained in it may have some operation." *Dunn* v. *State*, 2 Ark. at p. 250. In like manner, the section in question is to be construed as a whole, and the meaning to be attached to any particular word or clause is to be ascertained from the context. In other words, "a statute must receive such reasonable construction as will, if possible, make all its parts harmonize with each other, and render them consistent with its scope and object." 2 Lewis' Sutherland, Stat. Con., (2 ed.) § 368. This rule of interpretation was recognized and applied by the court in the case of *Matthews* v. *Kimball*, 70 Ark. at p. 458. In the discussion of the application of the rule the court quoted approvingly from Black on Interpretation of Laws, p. 143, as follows: "The general object of an act sometimes requires that the final general term shall not be restricted in meaning by its more specific predecessors." Continuing, the court quoted the following from Sutherland, Stat. Const., p. 360: "The enumeration of particular things is sometimes so complete and exhaustive as to leave nothing which can be called *ejusdem generis*. If the particular words exhaust a whole genus, the general words must refer to some larger genus." So, too, in the case of *Wallis*

v. *State*, 54 Ark. 611, in discussing the rule of *ejusdem generis*, the court said:

"Where an act attempted to enumerate the several species of a generic class, and follows the enumeration by a general term more comprehensive than the class, the act will be restrained in its operation because it is discerned that the Legislature so intended, but where the detailed enumeration embraces all the things capable of being classed as of their kind, and general words are added, they must be applied to things of a different kind from those enumerated. For the rule does not require the entire rejection of general words, and is to be used in harmony with the elemental canon of construction that no word is to be treated as unmeaning if a construction can be found that will preserve it and make it effectual."

This was an embezzlement case, and the court held: (quoting from syllabus): "The statute defining the crime of embezzlement by 'any carrier or other bailee' is not confined to bailees of the generic class 'carriers,' but embraces all bailees."

In the application of the rule to the present case, we think that the words, "in any such capacity" refers to the relation or position of the person employed and not to the class of persons who employed him. Any other construction would render the clause meaningless; for the statute by an enumeration in detail has already exhausted the classes of persons who might be guilty of embezzlement of the property of a private person, copartnership or private corporation. The general words "or any person employed in any such capacity" must be given a meaning outside of the classes indicated by the particular words, or we must say that they are without meaning as used in the section in question, and thereby sacrifice the general to preserve the particular words. Therefore, we are of the opinion that the words, "any person employed in any such capacity" mean any person employed in the capacity of officer, agent, servant, etc. When so construed, section 1837 does not limit the persons who may be guilty of embezzlement to those employed by private persons, private corporations or partnerships, but includes as well any person employed in the capacity of agent, or servant, etc.

The indictment in question alleges that the defendant was secretary of the school board, and that as such he had authority

to draw warrants on the treasurer of the county payable out of the funds of the school district; that he did draw a warrant on the county treasurer payable to himself, and that the same was also signed by the president of the board. The warrant is set out in the indictment, and shows that it was drawn to pay S. H. Mann for legal services due him by the school board. This is sufficient to show the trust relation of the defendant to the school board, and that he was acting in the matter for the board. Hence the allegations of the indictment bring him within the class of persons named in the statute, viz: a person acting in the capacity of agent. The indictment also alleges in direct terms that the defendant received one hundred dollars of the money belonging to the school district and embezzled it. It is next insisted that the indictment is void because it does not allege that the funds came into the possession of the defendant by virtue of his agency or employment. In our judgment the allegations of the indictment show that the defendant was an agent within the meaning of section 1837 of Kirby's Digest. Hence the objection amounts to no more than to urge that the money did not come into the defendant's hands, to use the language of the statute, "by virtue of such employment or office."

In this regard the indictment, after alleging the relation of the defendant to the school board, continues as follows: "and then and there he, the said W. A. Compton, having said warrant in his possession by reason of his said office as secretary of said board of directors, the said warrant being payable to him, the said W. A. Compton, or order, did indorse the same in blank as secretary on the back thereof, and then and there did present and deliver the same to the Bank of Marianna and then and there the said Bank of Marianna did present said warrant to the treasurer of Lee County, and then and there did receive from the said treasurer of said county $150 out of the funds belonging to the said Special School District No. 1 of Marianna, and then and there he, the said W. A. Compton, by virtue of his said office did receive from the Bank of Marianna the sum of $100 of said sum of $150 received," etc.

In determining a similar contention in the case of *State* v. *Scoggins*, 85 Ark. 43, the court said: "The indictment after alleging the relation of appellee to the railway company as that

of 'agent' says: 'And having then and there in his custody and possession as such agent as aforesaid.' These words are equivalent to charging that the funds alleged to have been embezzled came into the custody and possession of appellee by virtue of such employment as agent or by virtue of his agency. Words used in an indictment must be construed according to their usual acceptation in common language. Section 2242, Kirby's Digest. When we speak of one holding funds 'as agent,' every one understands that the words 'as agent' describe the relation in which, or by which, the funds are held. When these words 'as agent' are used in this connection, they are not *descriptio personae* at all, but they tell how the funds are held. In the usual acceptation, the meaning can be nothing else than that appellee was in possession of the funds, and such funds had come into 'his possession or under his care or custody by virtue of his employment as agent.' The language of our statute is 'which shall have come to his possession, or under his care or custody, by virtue of such employment or office;' and the exact language of the statute was followed in the indictment. In express terms it is alleged that 'the said W. A. Compton, by virtue of his said office, did receive from the Bank of Marianna the sum of $100 of said sum of $150,' etc."

As stated in the case of *State* v. *Costin*, 89 N. C. 511 "The possession and care are not confined to such as came in the ordinary course of business, but as well such as came by virtue of the relation." Continuing the court said: "The words 'by virtue' are very broad and serve well to effectuate the object for which they were employed. Hence it has been held, in construing a statute similar to the one under consideration, that where the thing embezzled came into the possession of the servant, out of the ordinary course of employment, in pursuance to a special direction from the master to receive it, the act came within the meaning of the statute" Therefore, it can not be said that the indictment does not allege that the money came into the possession of the defendant "by virtue of such employment or office" and in consequence does not charge the offense of embezzlement under the section of our statute under consideration. The proof shows that it was the custom of the president of the school board to sign warrants

in blank, and for the defendant to fill in the warrants for the proper amount; that the board only owed Mann $50, and that the defendant did not have authority to draw a warrant for $150, as it is admitted he did do; and that he did not have authority to receive $100 of the amount of said warrant. Consequently, counsel for defendant contend that the defendant, having acted beyond the scope of his authority in drawing the warrant for a greater amount than he was authorized by the school board, and also in receiving the $100, did not receive the money by virtue of his agency or office. In deciding a precisely similar question in the case of *People* v. *Gallagher*, 100 Cal. 466, the court held: (quoting from syllabus):

"1. Where the secretary of a corporation receives blank checks properly signed by the corporation's officers, with authority to fill them up in amounts aggregating a certain sum, and to draw the money and pay the creditors of the corporation, but he fills them up for larger amounts than he was authorized to insert, and draws the money and converts it to his own use, he receives the money 'by virtue of his employment' as agent of the corporation, and is guilty of embezzlement."

"2. If an agent obtains the money of his principal in the capacity of an agent, but in a manner not authorized, and fraudulently converts the same to his own use, he receives it 'in the course of his employment' as agent, and is guilty of embezzlement."

The court in its opinion quotes from Bishop as follows: "That in reason, whenever a man claims to be a servant while getting into his possession by force of this claim the property to be embezzled, he should be held to be such on his trial for the embezzlement. Why should not the rule of estoppel known throughout the entire civil department of our jurisdiction apply in the criminal? If it applies here, then it settles the question," etc. Bishop on Crim. Law, (3 ed.) § 367. The court adds that in the seventh edition of the same work, like language, with some additions, is used at § 364 of volume 2.

In discussing the same question, in the case of *State* v. *Costin, supra,* the Supreme Court of North Carolina said: "He (referring to the servant) is estopped in this respect. He can not be allowed thus to take advantage of his own wrong and evade the law." This is an application of the maxim of law,

recognized and established, that no man shall take advantage of his own wrong. The application of the doctrine of estoppel in criminal cases was recognized by this court in the case of *Fleener* v. *State,* 58 Ark. 98. See also *Smith* v. *State,* 53 Tex. Crim. 117, 15 Am. & Eng. Ann. Cas. 435; Ex parte *Hadley,* 31 Cal. 108; *Ker* v. *People,* 110 Ill. 629. The warrant set out in the indictment was introduced in evidence.

S. H. Mann testified: "I was employed by the Special School District as counsel in litigation had by the board against the contractors of the school building. I received $50 on March 22, 1906. The next remittance was for $55 was in a letter dated June 2, 1908. Fifty dollars was the balance of my fee and $5 was my railroad fare. That is all I ever received from the school district, and was the full amount of the fee to which I was entitled."

H. B. Derrick testified for the State:

"I was a member of the Board of Directors of Special School District of Marianna for a number of years, including the years 1906, 1907 and 1908. I was elected president of the board in 1907. The defendant, Compton, was elected secretary of the board in May, 1906. I was secretary of the board in March, 1906, preceding the defendant. When the question first arose about the school building, I was secretary of the board, and S. D. Johnston was president, and we employed Judge Compton and Mr. Mann to look after the suit. We were to pay Judge Compton $50 and Mr. Mann $100. This litigation was the only litigation we ever had. Fifty dollars of Mr. Mann's fee was paid in advance, and Judge Compton got his fee of $50 in advance. (Witness refers to page 50 of the school record, dated March 30, 1906). I gave Judge Compton a warrant for the money for him and Mr. Mann. (Witness identified the warrant dated October 4, 1907, described in the indictment). This warrant shows that it was issued on the 4th day of October, 1907, to pay Mr. Mann for his services. The witness also identified warrant for $150 dated June 2, 1908, which is shown at the bottom of page 67 of the transcript.

On cross examination the witness stated that he would sign warrants in blank most of the time. Whenever the district had any bills to pay, the secretary would come to him and he

would give him a warrant signed in blank. "We would both sign them. When I would sign them in blank, he would go and raise them." The warrant named in the indictment had no evidence of any erasures, but the defendant raised them after witness signed them. Witness knew that the defendant was going to fill them in. Defendant would ask witness for a signed warrant, and he would give it to him whenever there were any bills to pay. Witness states that Judge Compton was never employed in any other litigation but the school house case. Other evidence showed that the defendant indorsed the warrant to the Bank of Marianna for collection. That bank collected the money from the Lee County Bank as agent of the treasurer of Lee County. The defendant received the money from the Bank of Marianna after it was collected. Warrants were introduced in evidence showing a payment to S. H. Mann, retainer fee, $50, and to W A. Compton, retainer fee, $50. Warrants showing payment of the costs of the suit were also introduced. The defendant introduced in evidence the receipted bills of the sheriff for $11.20 and that of the clerk for $52.65 for costs in the school house case. A mere recitation of the evidence is sufficient to show that the jury were warranted in finding the defendant guilty. The defendant offered to introduce in evidence page 52 of the records of the school board. The record is dated February 15, 1906, and in substance shows that the defendant was to receive as a fee $75 if the controversy with the contractors about the school house was settled without suit, and if suit was brought, he was to receive one hundred dollars. The court refused to allow the introduction of the record, and counsel for defendant insist that the ruling of the court is erroneous. We can not agree with them. The defendant did not offer to connect the record with the transaction under consideration. The warrant described in the indictment was drawn in favor of the defendant for the fee of S. H. Mann, and was drawn for $150. At that time only $55 was due Mann, and he only received that amount. The defendant received the whole amount of the warrant. He has not introduced any evidence tending to show that he used any of the money in payment of any amount alleged due himself by the school district. In the absence of such evidence, the warrant on its face showing that it was for the fee of S. H. Mann, we do not

think the record in question was competent evidence. It is next urged that it should have been admitted as evidence tending to contradict Derrick. Such contradiction, however, for the reasons above stated, would have been on a collateral matter and consequently immaterial.

The instructions given by the court were contradictory, but it follows from the views we have hereinbefore expressed that the instructions given in behalf of the State were correct. It can not matter to the defendant that the instructions asked by him were not correct, or that the jury refused to follow them; for he was not prejudiced thereby. All he had a right to ask was that the case should be submitted to the jury upon correct instructions and upon competent evidence. This was done, and the judgment must be affirmed.

McCULLOCH, C. J., dissents.

ON REHEARING.

Opinion delivered January 22, 1912.

HART, J. It is earnestly insisted by counsel for appellant that the language of section 1837 of Kirby's Digest plainly precludes the idea that its provisions were intended to extend to others than clerks, apprentices, servants, employees, agents and attorneys, of private persons and corporations and to like employees of incorporated companies Immediately following the phrase "or any person employed in any such capacity" is the following: "who shall embezzle or convert to his own use, * * * without the consent of his master or employer, any money," etc. They urge that the phrase, "without the consent of his master or employer," limits the employees intended to those of private persons, copartnerships or private corporations. They urge that neither the school district nor the members of the school board could consent that its employees or agents should embezzle or convert to their own use the funds belonging to the school district. School funds and the manner in which they are dealt with are definitely regulated by law, and the school board can not consent that school funds should be embezzled or converted to the use of the employees or agents of the school board. A majority of the court are of the opinion that this argument is sound and unanswerable, and

that the allegations made in the indictment do not bring appellant within the category of persons enumerated in section 1837 of Kirby's Digest. While recognizing the strength and force of the argument of learned counsel for appellant, I am still inclined to the views expressed in the original opinion. It follows, however, from the opinion of the majority that so much of our original opinion as holds that the indictment charges appellant with the offense of embezzlement, under section 1837 of Kirby's Digest, is overruled. The remainder of the opinion is still adhered to, and for the reason hereinafter given will be adopted as a part of this opinion on rehearing.

The Attorney General contended that the indictment was valid under section 1839 of Kirby's Digest, but on account of the views expressed in our original opinion we did not deem it necessary to determine his contention in this respect. It now becomes necessary for us to do so. Section 1839 reads as follows

"If any carrier or other bailee shall embezzle, or convert to his own use, or make way with, or secrete with intent to embezzle, or convert to his own use, any money, goods, rights in action, property, effects or valuable security which shall have come to his possession or have been delivered to him, or placed under his care or custody, such bailee, although he shall not break any trunk, package, box or other thing in which he received them, shall be deemed guilty of larceny, and on conviction shall be punished as in cases of larceny."

In construing this section of the statute in the case of *Wallis* v. *State*, 54 Ark. 611, the court held:

"First. The statute defining the crime of embezzlement by 'any carrier or other bailee' (Section 1839, Kirby's Digest) is not confined to bailees of the generic class 'carriers,' but embraces all bailees.

"Second. An attorney who has collected funds belonging to a client is a bailee and not a debtor of such client.

"Third. An attorney employed under the act of March 31, 1885, to collect demands due to the school fund is guilty of embezzlement if he converts to his own use money so collected, notwithstanding the act provides that he may retain as a fee for collection 10 per cent. of the gross amount collected.

"Fourth. To constitute the crime of embezzlement

under this statute, it is unnecessary to prove a demand."

So in this case, under the allegations of the indictment and the proof made, we are of the opinion that appellant occupied toward the school fund that came into his possession the relation of bailee and not that of debtor.

In our original opinion we made quotations from the cases of the *State* v. *Costin*, 89 N. C., 511, and *People* v. *Gallagher*, 100 Cal. 466, and we see no substantial reason why the principles of law announced in those cases should not apply in a case like this. The proof in the case shows that whenever the school district had any bills to pay a warrant for the amount owed by the school district would be signed in blank, and appellant as secretary of the board would afterwards fill in the amounts. The warrant in question in this case was signed in blank, and was designed to pay S. H. Mann for legal services performed for the school district. Pursuant to the usual custom, it was delivered to appellant with directions for him to fill it out for the proper amount and pay Mann. Appellant made the warrant payable to himself for a greater amount than was due Mann. The warrant shows on its face that it was given in payment of legal services to Mann. Appellant received it for the express purpose of paying Mann for his legal services. He then fraudulently converted to his own use $100 of said amount. He can not now be allowed to take advantage of his own wrong and evade the law by saying that he had no right to raise the warrant and by that means come into possession of more money than was necessary to pay Mann. The statute is too broad and comprehensive in its purpose to allow such a distinction to destroy in a large measure its usefulness. It is insisted that under the principles announced in the cases of *Settles* v. *State*, 92 Ark. 202, and *Dotson* v. *State*, 51 Ark. 122, the defendant is not guilty of embezzlement under this section of the statute.

In the Settles case we held that a delivery of chattels upon a sale made on condition that the title shall pass on the payment of the purchase money at a future day is something more than a bailment. It gives the buyer a conditional title, and for this reason we held that the defendant was not a bailee within the meaning of the statute.

In the Dotson case a horse was delivered to the defendant

to be sold for the bailor, and the court held that if it was expressly or impliedly understood that the defendant should deliver to the bailor the money received for the horse he was a bailee, for it was within the meaning of the statute. The court said: "The word 'bailee,' when used in statutes declaring what acts of embezzlement shall constitute a public offense, is not to be understood," says Mr. Wharton, "in its large, but in its limited sense, as including simply those bailees who are authorized to keep, to transfer, or to deliver and who receive the goods first *bona fide* and then fraudulently convert."

"When it does not appear that any fiduciary duty is imposed on the defendant to restore the specific goods of which the alleged bailment is composed, a bailment under the statute is not constituted, though it is otherwise when a specific thing, whether money, securities, or goods, is received in trust and then appropriated." (Citing 1 Wharton, Cr. Law, (9 ed.) § 1055 and other authorities.)

In the application of these principles to the present case, we find that the money of the school district was delivered to the defendant in trust for the specific purpose of paying Mann for legal services owed him by the school district, and that the defendant in no sense was to receive any benefit from the transaction, or to acquire any interest in the money received by him. The money belonged to the school district, and was received by the defendant solely, and solely and exclusively for the benefit of the bailor, and in no sense for the benefit of the bailee. Hence the defendant was a bailee in its limited or restricted sense. They strongly insist, however, that because the defendant acquired possession of the excess, which he converted to his own use contrary to his duties in the matter, he did not receive it *bona fide* and is not guilty of embezzlement. As said by Mr. Bishop, why should not the rule of estoppel, known throughout the entire civil department of our jurisprudence, apply equally in the criminal? If it is applied here, then it settles the question; for by it when a man has received a thing of another by virtue of his fiduciary relation to him, he can not turn around and deny that he received it in that capacity. 1 Bishop's New Criminal Law, (8 ed.) § 364. The defendant here received the money of the school district by virtue of his re-

lation of trust and confidence to the members of the school board, and the money was received wholly and exclusively for the benefit of the school district. That is to say, it was received by him for the sole and express purpose of paying a debt of the school district, and he can not take advantage of his own wrong and escape the penalties of the statute by saying that he was not a bailee of the excess for the reason that he received it by virtue of his own wrongful act. The fact remains that he came into possession of it by virtue of the fiduciary relation he sustained to those in control of the fund. See, also, *State* v. *Costin*, 89 N. C. 511; *People* v. *Gallagher*, 100 Cal. 466, cited and commented on in our original opinion to which reference is here made.

As stated in our original opinion, no demurrer to the indictment was filed. A motion in arrest of judgment was filed; but under our statute the only ground upon which a judgment shall be arrested is that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court. The indictment, stripped of its verbiage, leaves sufficient matter to apprise the appellant that the charge against him is for embezzlement. The language of the indictment, so far as respects the nature of the offense and the character of the crime charged, sets forth the fiduciary relation or the capacity in which the appellant acted and the means by which the funds came into his possession; and it also charged a fraudulent conversion of the funds by the appellant, and that they belonged to the school district. Indeed, it may be said that the appellant was apprised by the indictment of the precise nature of the charge made against him. *Fulton* v. *State*, 13 Ark. 168.

It follows that the motion for a rehearing will be denied.

McCULLOCH, C. J., (dissenting). I agree with the majority that, for the reasons stated in the opinion, the indictment can not be sustained under section 1837 of Kirby's Digest. It appears to have been prepared under section 1842, but it can not be sustained under that statute for several reasons; first, that school directors do not fall within the terms of the statute, nor are they custodians of any public funds, and the indictment does not contain the required allegation that appellant had taken the oath of office. *Wood* v. *State*, 47 Ark. 488. It is

now held by this court that the indictment is good under section 1839, which makes it embezzlement for any "carrier or other bailee" to embezzle or convert to his own use property "which shall have come to his possession or have been delivered to him or placed under his care or custody." The indictment can not, in my opinion, be sustained under that section of the statute, for the word "bailee" as there used must be construed in its limited sense, and not in the broad sense which includes one who wrongfully comes into possession of the property of another *Dotson* v. *State,* 51 Ark. 119; *Settles* v. *State,* 92 Ark. 202; Whart. Crim. Law, § 1855; *Krause* v. *Com.,* 93 Pa. St. 148. Any other view entirely eliminated the distinction between larceny and embezzlement, which in one case involves an unlawful taking of property and in the other unlawful conversion. *Fulton* v. *State,* 13 Ark. 168. The facts alleged in the indictment do not, however, make out a case under section 1839. If the indictment had alleged that defendant embezzled funds of the district which the school board had drawn out of the county treasury and intrusted to him for some purpose, or that the school board had authorized him to draw a warrant on the treasurer and to receive the money thereon and pay it over to a creditor of the district, and that he embezzled such funds, I am not prepared to say that it would not have been a good indictment under this section. But it falls far short of alleging such a state of facts. It does not allege that defendant was intrusted with funds of the district for any purpose, nor that he received the funds as the property of the district, nor that he failed to account to the owner for the funds so collected. The substance of the allegations is that he and the president of the board drew a warrant, which specified that it was for a fee due S. H. Mann, and which was payable to the order of defendant as secretary. Now, reading these allegations in the light of the statute, which requires that all school warrants shall be drawn in favor of the person to whom the money is due, it can only be construed to mean either that the warrant was rightfully drawn in favor of defendant as agent of Mr. Mann, or that it was fraudulently and wrongfully drawn in defendant's favor. In the former case, the money became the property of Mr. Mann on being drawn from the treasury, and defendant is not charged with embezzling the property of Mr. Mann. It is

true the allegation is that, after the money was drawn out of the treasury, it was the property of the school district, but that is merely the statement of a conclusion, and one, too, that is inconsistent with the facts stated; for, if the warrant was rightfully drawn by the president and secretary, the money received thereon did not become the property of the district. Nor is the defendant charged with having fraudulently drawn the warrant. I can not see how, in any view of the contradictory allegations of the indictment, it can be said that sufficient facts are stated to make out a public offense. It is not sufficient merely to allege, in an indictment for embezzlement under this statute, that the accused embezzled and converted to his own use property belonging to another person. It is essential that it be charged that the property came into the hands of the accused as bailee for the person named, or facts should be alleged sufficient to show that funds came into his possession as bailee of said person. Here the allegation is that the funds came into the defendant's hands as secretary of the school board, which could not under the law be true. In the absence of a specific allegation that he was entrusted with the funds by the school board for a certain purpose, the language of the indictment can only mean either that the warrant was rightfully drawn and the funds, when received from the treasurer, became the property of Mr. Mann, or that the warrant was fraudulently drawn on the treasurer. There is nothing in the indictment which amounts to an allegation that the defendant was a bailee of the school district, and, in my opinion, the indictment, without containing such an allegation, does not charge a public offense. The case made by Mr. Derrick's testimony is that defendant was authorized by the school board to draw and collect a warrant for $50.00 due Mr. Mann, and that he fraudulently drew the warrant for $100.00 in excess of the amount due Mr. Mann and converted the excess to his own use. The indictment does not even hint at that state of facts, and the proof is wholly at variance with the accusation. As the indictment does not state facts sufficient to constitute a public offense, the defect could be taken advantage of by motion in arrest of judgment as well as by demurrer.

GIERS v. HUDSON.

Opinion delivered December 18, 1911.

1. PARENT AND CHILD—TRANSACTIONS BETWEEN.—Where a daughter, though of age, remains under her father's roof, any contract, conveyance or business transaction between them will be closely scrutinized by the courts. (Page 239.)
2. SAME—WHEN CONVEYANCE FROM DAUGHTER UPHELD.—A conveyance from a daughter to her father, made while she lived with him, will not be permitted to stand unless the transaction is characterized by the utmost fairness and good faith on the father's part. (Page 240.)
3. FAMILY SETTLEMENTS—WHEN UPHELD.—Family settlements are to be encouraged, and, when fairly made, strong reasons must exist calling for interference on the part of a court of equity. (Page 243.)

Appeal from Ouachita Chancery Court; *Zachariah T. Wood*, Chancellor; affirmed.

Thornton & Thornton and *Powell & Taylor*, for appellant.

1. The demurrer to the answer was properly sustained, as the claims of appellee Hudson against his deceased wife's estate were not legal, valid claims; and if they were, equity had no jurisdiction to allow judgments for them. 33 Ark. 727; 48 Ark. 544; 90 *Id.* 444.

2. If there was *any* consideration, it was grossly inadequate. If Hudson advanced or expended money, it was an advancement which the law presumes to be a gift. 36 Ark. 566, 586; 40 Ark. 67; 45 *Id.* 484; 48 *Id.* 17; 52 *Id.* 188; 63 *Id.* 374; 68 *Id.* 405; 70 *Id.* 145; 76 *Id.* 389; 86 *Id.* 448; 71 *Id.* 373.

3. Hudson's claims were barred by laches. 37 Ark. 155; 47 *Id.* 475; 56 *Id.* 663; 73 *Id.* 440.

4. A life tenant should not be allowed for permanent improvements except out of the rents and profits. 23 Pa. St. 305; 2 Swan. (Tenn.) 362; 50 S. W. 33; 98 S. W. 1031; Tiedeman on Real Prop., 68.

5. Deeds should be cancelled for fraud, imposition, deceit, concealment, inadequacy of consideration and mistake of their purport and effect. Appellant was overreached, at least, by one who stood in a confidential relation. 74 Ark. 68 and 71 Ark. 185 are not applicable to this case. 32 N. J. Eq. 594; 13 Pac. 434; 31 Ban. (N. Y.) 9; 6 N. Y. 268; 62 Pac. 714; 27 *Id.* 940; Story, Eq. Jur., 309-317; Kerr, Fraud & Mistake,

150-3, 177-9; Bigelow, Fraud, 250-264; 43 N. E. 336; 18 N. W. 918; 4 Mylne & C. 277; 57 Ill. 186; 8 DeG., M. & G. 133; 7 *Id.* 597; 31 Barb. 9; 8 How. 183; Pom. Eq. Jur., par. 961; 2 Ves. 547; 9 *Id.* 292, note; Hoff. Ch. 267; 15 Beav. 299; 7 *Id.* 551; 1 Ired. Eq. 460; 34 Beav. 457; 44 Mo. 465; 2 Lead. Cases Eq. 556 and notes; 46 Iowa, 684; 122 N. W. 444; 90 *Id.* 583; 88 *Id.* 452; 81 Ala. 530; 9 *Id.* 662; 23 *Id.* 690; 69 Ala. 555; 75 *Id.* 555; 63 Md. 371; S. R. 10 Eq. 10; Adams, Eq. 184; 74 Ark. 231; 58 N. E. 480; 142 Ill. 160; 2 Pom. Eq. Jur., par. 953, (3 ed.) 951, 961, 927, 928; *Id.* par. 948-955-6, 962; 38 Ark. 428; 40 *Id.* 28.

6. Because of the fiduciary relations existing, the deeds are voidable at her option. 23 Ark. 622; 26 Ark. 446; 54 Ark. 632; 55 *Id.* 85; 78 Ark. 111; 89 *Id.* 169 *Id.* 169; k. S. R. 142.

Warren & Smith and *Gaughan & Sifford,* for appellee.

1. No fraud was practiced; nor was there any concealment, nor deceit. The consideration was adequate. There was no undue influence; the act was voluntary and free after a clear explanation. The presumption is that a benefit was intended the child in discharge of a moral and parental duty. 173 U. S. 20; 31 Fed. Cases, 598; 74 Ala. 619; 81 *Id.* 541; 60 Am. Rep. 175; 1 So. 217; 8 App. D. C. 284; 109 Ill. 73; 211 *Id.* 607; 98 Ky. 114; 50 N. H. 498; 9 W. N. C. 259; 1 Chester Co. Rep. 425; 54 Pa. 484; 16 Tex. 583; 19 Tex. Civ. App. 335; 47 S. W. 61; 2 Wash. 632; 27 Pac. 456; 21 W. Va. 479; 8 How. 201; 9 Otto 210; 2 Cliff. 154-5.

2. A conveyance to a parent by a child is *prima facie* valid, and the proof of undue influence is on the party attacking. 173 U. S. 17; 13 Fed. Cases, 598; 160 Ill. 73-4; 12 Pet. 24; 109 Ill. Sup. Ct. Rep. 198; 74 Ala. 619; 1 Perry on Trusts, § 201; 12 Pet. 253; 98 Ky. 115; 8 How. 183; 24 Tex. Rep. 427; 21 W. Va. 469; 32 N. J. Eq. 594; 120 Mo. 253; Eaton Eq. 328; Bisp. Eq. (7 ed.) § 235; 173 U. S. 21; 118 *Id.* 127, 134; 135 *Id.* 167, 172-3.

3. A careful review of the following cases show they all stand upon incontestable proof of fraud, misrepresentation and overreaching on part of defendant. 32 N. J. E. 723; 72 Mo. 669; 65 Mo. 378; 70 *Id.* 580; 62 *Id.* 226; 46 How. Pr. 389; 26 Beav. 594; 2 Wash. C. C. 397; 1 Edw. 338; 7 DeG., McN.

& G. 597; 1 Jurist (N S.) 932; 2 Dr. & W. 470; 7 Beavan, 557; 15 *Id.* 278; 31 Barb. (N. Y.) 268; 13 Pac. 434; 5 Mo. App. 33; 7 Beav. 557; 31 Barb. 9; 6 Hun 80; 62 Pac. 714.

4. Compromises and family arrangements or settlements are always favored. 2 Pom. Eq. Jur. (3 ed.), § 962, note 3, 928; 1 Perry, Trusts (6 ed.) § 201, 189, note (a).

5. The influence which invalidates such deeds must be of such nature as to deprive the grantor of his free agency. 173 Ill. 539; 147 *Id.* 370; 168 Mass. 107; 118 Pa. St. 359; 120 Mo. 252; 11 Wash. 79; 33 Ore. 486; 81 Ky. 10. Some good substantial reason must be shown where a person of full age and sound mind executes even a voluntary deed, and then seeks to set it aside. Godefroi, Law of Trusts, (2 ed.) 109; 31 Beav. 629, 244; 3 D. J. & S. 487; 19 C. D. 403; 173 Ill. 550; 147 Ill. 370. Especially is his true of family settlements. 98 Ark. 93; 84 Ark. 610.

McCULLOCH, C. J. On August 31, 1909, the plaintiff, Miss Berenice Hudson Giers, instituted this action in the chancery court of Ouachita County against her father, Dr. G. W. Hudson, of Camden, Arkansas, to cancel two deeds which she and her brother, Woodland Hudson, had, on September 24, 1907, executed to her father, conveying to him their several interests in certain real estate formerly owned by their mother, Doctor Hudson's deceased wife, and in which Doctor Hudson had an interest as tenant by the curtesy. In his answer Doctor Hudson stated that one of the deeds was intended as a conveyance to him in trust for his said children for certain purposes and upon the prayer of plaintiff's complaint, without objection on the part of the defendant, the court canceled that deed So that feature of the case has passed out, leaving only the issue as to the deed conveying the lot which is known as the "home" place. At the time of her death in the year 1900, Mrs. Hudson owned the "home" place, which had been conveyed to her some years before that time by her mother, Mrs. Woodland. She also owned another improved lot, known as the "Thal" place, which Doctor Hudson had purchased and paid for and caused to be conveyed to her. Both of these places are situated in the city of Camden. She also owned an undivided third of certain other property embraced in the other deed which the court canceled. Doctor Hudson had, of course, a curtesy estate in the

"Thal" place, and also in the "home" place, subject to the homestead right of his children during minority. He married again in 1902, and had another child, the issue of the last marriage. Mrs. Hudson left surviving two other daughters, who subsequently married and died childless, leaving plaintiff and her brother Woodland as their heirs at law. So, at the time of the execution of the deed in controversy, plaintiff and her brother owned the "home" place and the "Thal' place, subject to the father's estate as tenant by the curtesy. The plaintiff was at that time twenty-two years of age and unmarried. She married shortly afterwards, and up to that time lived with her father. Her brother was about nineteen years of age, but his disabilities had been removed. He refused to join his sister in this action to cancel the deed to his father. The plaintiff bases her prayer for relief on two grounds: first, that the execution of said deed was procured by fraud and deception on the part of the defendant in falsely representing to her that the effect of the deed was to convey only a life estate in the property, and in asserting false claims against the property, and, second, that the consideration therefor was inadequate, which on account of the confidential relation she asserts is sufficient to call for rescission. The defendant denied the allegations of fraud, and pleaded the adequacy of the consideration for the execution of the deed. The chancellor found in favor of the defendant on both issues, and rendered a decree dismissing the complaint for want of equity as to that transaction.

The witnesses to the transaction which constitutes the subject-matter of this controversy were the plaintiff herself and the defendant and Woodland Hudson, the brother who joined in the conveyance, and E. B. McCall, an attorney-at-law, who, as notary, took the acknowledgments to the execution of the deed. The plaintiff and defendant were equally interested in the result of the controversy. Woodland Hudson was entirely disinterested pecuniarily, though he could not have been indifferent to such a controversy between his father and sister, and his sympathy would naturally be with one or the other. Mr. McCall had no interest whatever in the result of the suit, and he appears to be unbiased, either by sympathy or prejudice. The plaintiff was, as before stated, living with her father at the time the deed was executed, and they were living

in the house on the lot in controversy which had constituted the family residence for many years. She was a highly intelligent young woman, her father having given her the best of educational advantages, but she had had no business experience. She was absent from home for two years while attending school at Holly Springs, Mississippi, and at St. Louis, and returned home a few months before the execution of this deed.

She testified that the first that was ever said to her about signing any paper was on September 23, 1907, the evening before the deed was executed, when her father said, "Now, you are going to get married, and your brother is going away, and I want you to sign a paper giving me the use of the 'home' place for my lifetime, but at my death to come back to you and your brother." She testified that very little was said by her father at that time, and no explanation was given, but that he renewed the request the next morning, and said that he would bring Mr. McCall to the house in a short time for the purpose of having the paper signed, and that she replied, "I don't want to sign it," and he said, "If you don't, I will disinherit you." She states that soon afterwards her father returned with Mr. McCall, and while they were all in the library or office together, her brother Woodland being also present, the request was renewed for her signature to the paper, which she says was never called a deed in her presence. She narrates as follows what then occurred: "Mr. McCall came and said, 'I come to you to sign this paper,' and I said, 'I don't understand it.' My father said, 'She does understand, but don't want to sign them.' Mr. McCall said: 'Well, Miss Berenice, you are giving your father the use of the "home" place for his lifetime, and at his death it is to come back to you and your brother.' I had agreed to do that for my father, and that was my understanding of these instruments. * * * As soon as I signed it, my father grabbed the paper, and I asked, 'Is that all right?' and he replied, 'Everything is all right; you have nothing to fear.' "

She recites in another part of her testimony that she made a remark to McCall: "I don't see why I must sign this paper for my father, because he will be perfectly welcome to live here all his life." She also states that she did not read the instrument, and did not know it was a deed. She testified that

afterwards, either during the afternoon of the same day or the next morning, her father told her that he would give the "Thal" place to her and her brother, saying, "I will give you the 'Thal' place as a gift, so you can realize something for your own use, as you are going to be married, and will need some money, and you will not have to come back to me all the time." The above is a fair epitome of her testimony covering the execution of the deed. She further testified that she never made the discovery that she had conveyed the property to her father until she and her brother sold a part of the 'Thal" place in the fall of 1909, when, in looking over the records with her husband, her attention was called to the record of this deed.

Doctor Hudson, the defendant, testified that, prior to the execution of the deed, he had several conversations with his son and daughter concerning the settlement or adjustment of matters with reference to the property left by their mother, his first wife. He says that in those conversations he spoke of the unsatisfactory condition in which the property stood with reference to his life estate and his claims against the property, and that he finally proposed to them that, if they would convey the "home" place to him absolutely by warranty deed, he would, in consideration thereof, relinquish to them his life estate in the "Thal" place, and also relinquish certain other claims, the nature of which will be explained later in this opinion. He says that the various conversations between him and them covered a period of a month or more, and that they assented to his proposal and seemed satisfied, or at least that they didnot reject it; that he had the deed prepared and gave it to Mr. McCall to take the acknowledgments, and requested the latter to explain the matter fully to his daughter; that he was not present when the deed was executed, and did not make any of the statements attributed to him by his daughter in her testimony. He denied that he ever coerced his daughter into signing the deed, or threatened her in any way, or that he misrepresented any fact to her, or concealed anything.

Woodland Hudson testified that during the summer of 1907 he was away from home, and returned on September 15, 1907, in response to a letter from his father requesting him to come for the purpose of adjusting matters concerning the

property left by his mother; that on his return, and from then up to the time of executing the deed, his father had a number of conversations with him and his sister, in which he explained to them the condition of the property and his claims against the same, and proposed to relinquish his claims, including his life estate in the "Thal" place, in consideration of their conveying to him their interest in the "home" place; that he further explained to them that the "home" place would thereby become a part of his estate, in which they would share *pro rata* at his death, but that that would be a matter in his control, as the property would belong to him absolutely. He further testified that he and his sister had several conversations in the absence of their father concerning the matter, and that he fully comprehended his father's explanation of all the matters and assented to the proposal, but that his sister did not seem to understand it fully, and did not appear to ful y understand it until the final explanation was made by Mr. McCall when the deed was signed. He relates the occurrences at the signing of the deed; says his father was not present; that McCall explained everything fully to his sister; that the deed was explained and read over to her. He states that McCall's explanation concerning her sharing in her father's estate at his death was not different from the explanation of his father to her. His testimony is in direct conflict with plaintiff's testimony as to what occurred. He states, however, that in one of the conversations between his father and sister she expressed a willingness to sign a deed conveying a life estate, but that his father wanted an absolute deed and told her so.

Mr. McCall testified that he had no interest in the controversy, and had nothing to do with the transaction except, at the request of Doctor Hudson, to go out to the latter's residence and explain the matter fully to his daughter and take the acknowledgments; that he did this, making the explanation to her that Doctor Hudson made to him; that he told her that he had come for her to sign the deed, and explained that her executing the deed would not bar her from sharing in her father's estate, but that she would share in it like the other heirs; he said that he spoke of the deed to her *not as papers* but as a deed, and that she had the deed in her hand, but he does not remember whether he read it over to her or not. He stated that Doctor Hudson

was not present at his interview with plaintiff when the deed was signed, and that the conversation testified to by plaintiff did not occur. He denied specifically that he said to to her, "You are just giving your father the use of the 'home' place for life." Mr. McCall's testimony, it will be seen, is flatly contradictory of that of plaintiff as to what occurred on that occasion.

The record in the case is very voluminous, but the above is thought to be a sufficient statement to give a correct idea of the state of the evidence upon which the chancellor based his findings in favor of the defendant upholding the deed.

The law is too well settled in this class of cases to leave any doubt as to what principles should be applied in determining the questions at issue. The industry of learned counsel on each side has brought to our attention in their briefs all of the authorities bearing on the subject, which will be set out in the abstract and need not be cited again here.

The plaintiff had attained the age of legal majority several years before the execution of the deed, but she still resided with her father, and is deemed to have remained, to some extent at least, under his parental control. Under those circumstances, any contract, conveyance, or business transaction between them must be scanned with the closest scrutiny. Yet the deed is not void merely because of the existence of the parental relation, but it should be declared void unless free from the objection of fraud, duress, undue influence, misrepresentation or concealment of facts, or inadequacy of price. It will not be permitted to stand unless the transaction is characterized by the utmost fairness and good faith on the part of the parent who accepted the conveyance from his child. The following language of Lord Chancellor Cranworth in the case of *Savery* v. *King*, 5 H. of L. Cases, 627, forms the basis of much of the learning on this subject and accurately states the controlling principle in this class of cases:

"The legal right of a person who has attained his age of twenty-one to execute deeds and deal with his property is indisputable. But where a son, recently after attaining his majority, makes over property to his father without consideration, or for an inadequate consideration, a court of equity expects that the father shall be able to justify what has been

done; to show, at all events, that the son was really a free agent, that he had adequate independent advice, that he was not taking an imprudent step under parental influence, and that he perfectly understood the nature and extent of the sacrifice he was making, and that he was desirous of making it."

This court in the case of *Million* v. *Taylor*, 38 Ark. 428, in speaking of a business transaction between brother and sister, where the proof showed that a state of great confidence existed, held that the transaction must have been characterized with the utmost good faith before it could be upheld.

In *Reeder* v. *Meredith*, 78 Ark. 111, this court quoted with approval the following statement of the law from Perry on Trusts:

"Section 195. A trustee may buy from the *cestui que trust*, provided there is a distinct and clear contract, ascertained after a jealous and scrupulous examination of all the circumstances; that the *cestui que trust* intended the trustee to buy, and there is fair consideration and no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee; the trustee must clear the transaction of every shadow of suspicion. * * * Any withholding of information, or ignorance of the facts or of his rights on the part of the *cestui que trust*, or any inadequacy of price, will make such purchaser a constructive trustee."

Now, it is equally well settled that this rule which requires a close scrutiny of such transactions is not enforced for the purpose of defeating the contract between parties merely because confidential relationship exists, but it is enforced solely for the purpose of discovering what the real intention of the parties was and to prevent one occupying such a relation of trust from securing an unfair advantage by reason thereof. In the case of *Hannaford* v. *Dowdle*, 75 Ark. 127, which involved an attack by the heirs of a deceased wife upon a conveyance made by her to her husband, we said:

"Appellees invoked the elementary rule of law that gifts from the wife to the husband are to be scrutinized with great jealousy. Citation of authority is unnecessary to sustain this salutary rule. But, after all, the demand for such scrutiny is to ascertain, and not to defeat when ascertained, the real intention of the parties, where the transaction is free from fraud.

Notwithstanding that relation, the court will, after having ascertained the intent of the parties to the transaction and found that there has been no fraud or imposition, uphold rather than frustrate their acts."

The Supreme Court of the United States, in *Jenkins* v. *Pye*, 12 Peters, 241, after laying down with utmost strictness the rule that a conveyance from a child to the parent should be scrutinized with care, said:

"But to consider a parent disqualified to take a voluntary deed from his child, without consideration, on account of their relationship, is assuming a principle at war with all filial as well as parental duty and affection, and acting on the presumption that a parent, instead of wishing to promote the interest and welfare, would be seeking to overreach and defraud his child."

Judge Story concurred in the judgment of the court in *Jenkins* v. *Pye*, and in the last edition of his Commentaries, which underwent his revision as has been stated upon good authority, he laid down the following doctrine on the subject:

"The natural and just influence which a parent has over a child renders it peculiarly important for courts of justice to watch over and protect the interests of the latter; and therefore all contracts and conveyances whereby benefits are secured by children to their parents are objects of jealousy; and if they are not entered into with scrupulous good faith, and are not reasonable under the circumstances, they will be set aside, unless third persons have acquired an interest under them, especially where the original purposes for which they have been obtained are perverted, or used as a mere cover. But we are not to indulge undue suspicion of jealousy, or to make unfavorable presumptions as a matter of course in cases of this sort." 1 Story, Eq. Jur. (4 ed.) § 309.

In *Towson* v. *Moore*, 173 U. S. 17, Mr. Justice Gray, after a very exhaustive review of the authorities, states the rule thus:

"The principles established by these authorities may be summed up as follows: In the case of a child's gift of its property to a parent, the circumstances attending the transaction should be vigilantly and carefully scrutinized by the court, in order to ascertain whether there has been undue influence

in procuring it; but it can not be deemed *prima facie* void; the presumption is in favor of its validity; and, in order to set it aside, the court must be satisfied that it was not the voluntary act of the donor."

A careful consideration of the testimony in this case convinces us that the chancellor was not wrong in reaching the conclusion that this transaction between father and daughter was free from fraud or imposition. To reach any other conclusion we would be compelled to accept the unsupported statement of the plaintiff herself against that of her father, who is only interested to the same extent that she is in the result of the litigation, and also the testimony of two other witnesses, who are altogether disinterested. She is flatly contradicted upon nearly every important point by the testimony of each of these witnesses. She says that her father only asked her to convey the property to him for his lifetime, but in this she is contradicted by both her brother and her father. She says that Mr. McCall made the same statement to her when she executed the deed, but in this she is contradicted by McCall as well as by her brother, who was present. All of the other witnesses positively contradict her statement that her father was present when the deed was executed. Her contention throughout this litigation is that she did not know that she was signing a deed, but thought it was merely a contract or "paper," as she described it, giving her father the right to use the place as long as he lived. After considering the testimony, we are forced to the conclusion that, though she was ignorant of business transactions and not advised as to the methods and forms of conveying property, yet it was clearly brought to her knowledge and understanding that she was making an absolute and irrevocable conveyance to her father of all her interest in this property. Her counsel insists that, as she did not, under the circumstances, know the full legal effect of a conveyance, she was misled by the statement of her father and of McCall to the effect that the execution of the deed did not bar her of her right to share in her father's estate at his death, into believing that after all the effect of the deed was only to convey a life estate, and that the property would at her father's death revert to her and her brother without her stepmother and half-brother having the right to participate therein. In the face, however

of the positive statements of these witnesses, it is not possible for us in reason to accord that much lack of understanding to the plaintiff, for the testimony is too plain to question that she fully understood that the conveyance was absolute. We can only repeat that to accept her version of this matter would be to take her unsupported word against that of three other witnesses. She shows that she was not versed in business matters and in forms of conveyances, but she was intelligent and well educated and evidently understood the meaning of language to the extent that she could comprehend, when explained, the effect of a transaction of that kind.

Attention is called to the fact that none of the witnesses say that it was fully explained to her that her father's second wife and the children of that marriage would share in this and any other property owned by her father at the time of his death. There was, however, no misrepresentation as to the effect of the conveyance in this respect, and she must have known, under the explanation given to her, that they would share in any property that the husband and father owned at the time of his death. In fact, Woodland Hudson testified that, though his father explained to the plaintiff that she would, as one of his heirs, share in his estate at his death, yet the disposal of his property was entirely with him, and that the conveyance which he sought would place the property absolutely at his disposal.

It should be borne in mind that this conveyance was not a donation to the father, nor was it, strictly speaking, a sale and purchase. It was more in the nature of a family settlement, which is always encouraged by the courts and upheld when fairly entered into. In the recent case of *Martin* v. *Martin,* 98 Ark. 93, it was said:

"Courts of equity have uniformly upheld and sustained family arrangements in reference to property where no fraud or imposition was practiced. The motive in such cases is to preserve the peace and harmony of families. The consideration of the transaction and the strict legal rights of the parties are not closely scrutinized in such settlements, but equity is anxious to encourage and enforce them. As is said in the case of *Pate* v. *Johnson,* 15 Ark. 275: 'Amicable and family settlements are to be encouraged, and when fairly made * * * strong reasons

must exist to warrant interference on the part of a court of equity.' "

In the case of *Baker* v. *Bradley*, 7 De Gex, M. & G. Rep. 597, which was decided only a few months prior to the decision in *Savery* v. *King, supra,* and while Lord Cranworth was Lord Chancellor, one of the justices, in delivering his opinion, said:

"Transactions between parent and child may proceed upon arrangements between them for the settlement of property, or of their rights in property in which they are interested. In such cases this court regards the transactions with favor. It does not minutely weigh the coniderations on one side or the other. Even ignorance of rights, if equal on both sides, may not avail to impeach the transaction. On the other hand, the transaction may be one of bounty from the child to the parent, soon after the child has attained twenty-one. In such cases this court views the transaction with jealousy, and anxiously interposes its protection to guard the child from the exercise of parental influence."

Now, as to the alleged consideration to this conveyance: Doctor Hudson was at that time sixty-five years of age, and had a life expectancy of about twelve years The market value of the "home" place at that time was $8,000 and that of the "Thal" place $5,300. The "home" place was occupied by Doctor Hudson as a place of residence, and the "Thal" place was divided into two parts, each with a dwelling-house on it, and the two houses thereon rented for $33 per month. He had a life interest as tenant by the curtesy in the Thal place, and also in the "home" place, subject to the homestead right of his son, Woodland, who was soon to become of age. He had advanced to his two deceased daughters at the time of their respective marriages a sum of money which, with interest up to the time of this conveyance, amounted to $1,491.25. He had exacted from them obligation in writing for repayment of those sums, which became a charge upon their estates inherited by the plaintiff and her brother. This charge he proposed to assert and offered the relinquishment thereof as a part of the consideration of this conveyance. He had, subsequent to the death of his wife, paid off a mortgage on the property amounting to $1,031.98, and he also claimed the right of reimbursement for this. In addition to this, he asserted a claim for the sum of $1,900 paid in dis-

charge of another mortgage on the property in the year 1899, which was before the death of his wife. The effect of the settlement was that Doctor Hudson, in exchange for the reversionary interest of his children in the "home" place, gave up his life interest in the "Thal" place and also relinquished the other claims above enumerated. In addition to that, he urged the moral claim that the "Thal" place was purchased and improved with his own money and conveyed to their mother, and that the "home" place was in a dilapidated condition when conveyed to their mother, and that he had greatly improved the same and brought it up to its present value. We think that the consideration was not so inadequate as under the circumstances called for a cancellation of the conveyance, nor are we prepared to say from this testimony that it was not for the best interest of the plaintiff to make this settlement. She had no such interest in either the "home" place or the "Thal" place as would yield her any income until the death of her father. Her interest was of a speculative and uncertain value, and it is doubtful whether he could have realized any very substantial sum by a sale of her interest. A reversionary interest scarcely ever has any definite market value, but, on the contrary, the value is highly speculative. By this settlement plaintiff and her brother acquired a certain and definite marketable interest in the property, which not only yielded a present income from the rents but which could be realized upon by sale. In fact, they sold a portion of the "Thal" place for $2,300 in less than two years after this transaction occurred.

It is unnecessary for us to pass on the question whether or not all of the charges which Doctor Hudson asserted against the property were sustainable in law. Sufficient it is to say that the evidence convinces us that he asserted these claims in perfect good faith, that he informed his daughter of the existence and nature thereof, and that with a clear understanding of them she entered into a settlement with him and executed the conveyance pursuant to that settlement. If, with a clear knowledge of all the facts and without any fraud or undue influence on the part of her father, she freely and voluntarily executed the conveyance in settlement of their rights, then she ought to be and is bound by her act.

This is, of course, an unfortunate controversy, which is to be

deplored, but upon a careful consideration of all the evidence in the case we are of the opinion that the plaintiff has entirely failed to establish a state of facts which would justify a court of equity in setting aside the settlement made with her father and cancelling the conveyance which she made to him.

Decree affirmed.

HART and KIRBY, JJ., dissent.

WESTERN UNION TELEGRAPH COMPANY v. IVY.

Opinion delivered January 1, 1912.

1. DAMAGES—DUTY OF INJURED PARTY TO PREVENT.—The principle that the injured party must reasonably exert himself to prevent damage applies to cases arising out of tort as well as those arising out of contract. (Page 251.)
2. TELEGRAPH COMPANY—DUTY TO MITIGATE DAMAGES.—Where the sender of a telegram had an opportunity to secure the information desired by answering a telephone call from the addressee, and refused to do so, he can recover only nominal damages for the negligent nondelivery of the telegram. (Page 251.)

Appeal from Pulaski Circuit Court; *F. Guy Fulk*, Judge; reversed.

STATEMENT BY THE COURT.

This is a suit for damages growing out of the failure to deliver the following telegram:

"Hot Springs, Ark., August 30, 1907.

"E. V. St. Clair, Terre Haute, Indiana. Ship body of Leo Ivy to Traskwood, Arkansas. Thirty dollars for expenses. H. McCafferty, Undertaker."

Leo Ivy was the fifteen-year old son of the appellee, by his former wife, and for whom he had a very great affection. The boy died in Terre Haute suddenly, and the first information his father had of his death came from a report of it to him by a neighbor to whom it was telephoned. She could not remember the name of the undertaker, who had the remains in possession in Terre Haute, but thought it was Hickman. Appellee, greatly desiring to have the body of his son interred in the family burying grounds, near Traskwood, and prevent its burial in the potter's field in Terre Haute, among paupers and strangers, endeavored to communicate with the undertaker in

charge of the remains, who was E. V. Sinclair. He called Hickman, an undertaker in Terre Haute, over the long distance 'phone, who informed him that he did not have the remains and asked if he should get them. Appellee told him "No," that he would communicate with the undertaker who had them in possession. He then consulted McCafferty, the undertaker at Hot Springs, told him the situation and that he only had $25.00. McCafferty told him not to worry, that he would get the body, and they both went to the telegraph office, where McCafferty told the agent in charge of the conditions and of the desire to bring the remains to Arkansas. The agent wrote out the message sued on, and it was forwarded without any information given by him at that time, relative to the strike existing on appellant's lines, which fact was known by McCafferty in a general way. After sending the message, he went back to Mrs. Parvins, the lady who had received the information of the death over her 'phone, and advised him of it, to telephone his daughter. Mrs. Parvin then told him of a long distance telephone call for him from Terre Haute, not giving the name of the party, who desired to talk with him. He refused to go to the telephone to answer the call, as he had no money to pay for it, admitting that he knew the message must be about the body of his son, and said to Mrs. Parvin that he had made all arrangements, had wired for the body through the telegraph company and got McCafferty to take the matter up for him and was resting on McCafferty's judgment, and depending on the telegram. He had given McCafferty all the money he had, either $23 or $25, and McCafferty had guaranteed the balance, but he might have made arrangements to borrow money to pay for the long distance message if he had tried to. He thought the telegram was sufficient, and was disgusted with Mrs. Parvin's service, who had forgotten the name of the undertaker in the first instance and caused him to expend $4.00 in 'phoning to Hickman.

It was E. V. Sinclair who had the body in charge, who called appellee over the long distance 'phone, and, being advised that Ivy would not accept the message and pay for it, he told the operator to get him, and that he (Sinclair) would pay for the message, and received the reply that Ivy would not come to the 'phone.

He also stated that he would not have shipped the body

for $30, had the telegram been delivered to him, as it would have required $65 to cover the expenses; the express charges alone amounting to $35. Neither would he have shipped the body had he received the telegram, and it had said $65, until the money was put up with the express company, and he would have notified them to deposit it with the express company first; stated also that there was no undertaker in Terre Haute named St. Clair, and that his name and address was in all of the telephone directories of the city as a funeral director and in the undertakers' list and also in the city directory under the head of undertakers, and also in the classified list of business firms; that he would have probably got the telegram had it reached Terre Haute; that he received the body of Leo Ivy on August 28, and buried it on the 31st about 4 o'clock in the afternoon, in the Highland Lawn Cemetery, in the paupers' section; that the paupers from the poor farm were not buried there; that he thought those who died in the city prison were buried in the same section; that there are persons there, whose graves are paid for and that the negroes have a separate place set apart for them; that there was no undertaker by the name of E. V. St. Clair in the city, and that he did not know of any one of that name there; that he did not receive the message sued upon. He did receive a message, after the burial, directed the same way; that the expense of disinterment and shipping the remains after burial would be about $125.

Mrs. Parvin testified: That on the morning the message was sent there was a 'phone call at her house from Memphis for Mr. Ivy. She went to Mr. Newcomb's house, and found Mr. Ivy there and told him that she had a message that his son, Leo, was dead in Terre Haute; that she had forgotten the name of the undertaker. They got an undertaker in Hot Springs to call over the names of two or three of the undertakers in Terre Haute, and she thought Hickman sounded like the name given. They decided to call up Hickman, and he told them the body was at Sinclair's. She called Mr. Ivy and told him the name of the undertaker. After this a telephone call came for Mr. Ivy from Terre Haute. They called at her house. Mr Ivy was there, and she called him to the 'phone. He answered the 'phone, and she heard him say: "I haven't any more to do with it; I have turned it over to McCafferty."

She did not know what was said at the other end of the line. That was in the afternoon of the 30th.

The plaintiff and his family went to Traskwood on the next morning, Saturday, August 31, and they incurred about $40 expense in railroad fare, board, and making arrangements for the burial of the body. In the afternoon, about 4 o'clock he telephoned McCafferty in Hot Springs to know if he had heard from the message, and McCafferty told him that he had not, but to be patient. He waited until Sunday afternoon, and 'phoned McCafferty again, who urged him to wait. He took the train back to Hot Springs about 10 o'clock Sunday night, on September 1, and could not get communication over the 'phone with Terre Haute.

The testimony shows that the printed words stamped on the message, "SUBJECT TO INDEFINITE DELAY," were not put there by the clerk at the receiving office, when the message was taken for transmission, but at the general office, after it had been sent in.

The defendant offered to prove that a strike was in effect on its lines; that the message upon its receipt was immediately forwarded to St. Louis, and sent from there to Terre Haute, after that office had been called and had answered, but had not in fact been received at the place of destination, and it was thought that some striking employee or some employee in sympathy with the strikers had answered the call and diverted the message to damage the company.

This testimony the court refused to admit because the plaintiff had not been notified of the strike at the time of sending the message.

This case was tried in the Federal court, and is reported in 177 Federal Reporter, 63, and it was stipulated that the evidence introduced in the trial in that court, as shown by the printed record, should be used on the trial in this, subject to objections for incompetency and irrelevancy.

The court instructed the jury, giving certain instructions requested by the plaintiff, over defendant's objections; declined to give defendant's request for a peremptory instruction and certain other instructions requested by it.

The jury returned a verdict for $1,000 for the plaintiff, and from the judgment thereon the defendant appealed.

George H. Fearons and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

Whipple & Whipple, for appellee.

KIRBY, J., (after stating the facts). There are several assignments of error, but such only will be noticed as we regard necessary to consider in the determination of the cause.

It is insisted strongly that the court erred in not directing a verdict for the appellant, and we agree with this contention. The damages proved in this case and resulting, aside and separate from mental anguish, amounted to about $40, and the remainder of the verdict must have been allowed on account of mental anguish. If it be conceded that such damages would have resulted from the failure to deliver the telegram, which is not altogether certain, since the undertaker having the body for interment stated that he would not have forwarded it for the amount mentioned in the telegram nor for the larger amount he would have charged until it was secured by being put up with the express company, all of which presupposes that negotiations would have continued from the receipt of the telegram by Sinclair until satisfactorily concluded by the depositing by appellee of the amount necessary to procure a shipment of the body with the express company; but we do not deem it necessary to pass upon this question. The testimony is undisputed, however that the undertaker, to whom the telegram was intended to be sent, and who had the body in charge, after the telegram was sent from Hot Springs, called the appellee over the long distance 'phone at Hot Springs, having been advised by Hickman, who had previously been called up on the 'phone by appellee and inquired of concerning the body of his son, about which he had telegraphed to Terre Haute, and also sent the 'phone message. That he declined to answer the call and talk with the undertaker, giving as his reason that he did not have the $4.00 to expend in payment for the call, and that he relied upon the telegram that he had already sent.

It is further undisputed that Sinclair instructed the telephone operator at Hot Springs, upon being advised that appellee had no money to pay for the message, that he would pay for it, and that she then advised him, Sinclair, that appellee refused to come to the 'phone. Appellee does not deny that he

talked over Mrs. Parvin's 'phone to the central office, after being notified of the long distance call from Terre Haute for him after his telegram was sent, and told the operator, "I haven't any more to do with it. I have turned it over to McCafferty." Although he did say that he had no notice that the person desiring to talk with him would pay the expense of the message.

It can not be doubted that appellee could have secured all the information he desired by answering the telephone call of Sinclair, and have had ample opportunity to make any arrangement within his power to procure the shipment of the body of his son for burial or interment in the family burying grounds, and thus prevented all damage resulting from the failure of the delivery of his telegram by so doing. A slight exertion on his part in merely answering the 'phone, and in any event a trifling expenditure of $4.00, and remaining a little while at the 'phone, over which he declined to receive the long distance message from the central office at Hot Springs, would have prevented all but nominal damages. It was clearly his duty to use reasonable effort to lessen any damage that might result from defendant's breach of its contract and negligence in failing to deliver the telegram.

The rule is: "That where a party is entitled to the benefit of a contract and can save himself from a loss arising from the breach of it, at a trifling expense or with reasonable exertions, it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent." *Warren* v. *Stoddard* 105 U. S. 224, 26 L. Ed. 1117; *St. Louis, I. M. & S. Ry. Co.* v. *Ayres*, 67 Ark. 371.

And it makes no difference whether this case be regarded as one arising out of contract or tort, since the principle that the injured party must reasonably exert himself to prevent damage applies alike to cases of both kinds. Sutherland on Damages, § 90.

Appellee insists, however, that the jury was properly instructed as to contributory negligence, and that it was a question for them, and, having found in his favor, the judgment should be affirmed.

As already stated, the evidence is undisputed, and we do

not think it can be said that the minds of reasonable men would differ as to the duty of appellee to answer the long distance call which could have been in reply to his telegram, and which he knew was about the same matter, and receive information of everything he desired to know, and which was necessary to securing the shipment of the body of his son for burial and thereby prevent any but nominal damages resulting from plaintiff's failure to deliver the telegram, and, such being the case, it was not a question for the jury.

Plaintiff, having failed to perform this simple duty, is not entitled to recover more than nominal damages, and the judgment is reversed, and judgment will be entered here for such damages.

It is so ordered.

HOLMAN v. LOWRANCE.

Opinion delivered January 29, 1912.

1. JUDGMENT—VACATING AT SUBSEQUENT TERM.—The court is without authority to vacate a judgment rendered at a former term under Kirby's Digest, section 4431, unless the plaintiff alleges a valid defense to the action and makes *prima facie* proof of the truth of such defense if it is denied. (Page 255.)
2. SAME—VACATION—BURDEN OF PROOF.—In an action to vacate a judgment rendered at a former term of court upon the ground that there was no service of process on the plaintiff, the burden of proof was upon the plaintiff, the officer's return of service being *prima facie* true. (Page 255.)
3. SPECIFIC PERFORMANCE—FORM OF DECREE.—A decree for specific performance must provide for full performance by plaintiff; and if there are acts to be done on plaintiff's part before he is entitled to performance by defendant, the decree should be so framed that defendant can not be compelled to perform except upon condition that plaintiff do such acts. (Page 255.)

Appeal from Pulaski Chancery Court; *John E. Martineau*, Chancellor; affirmed.

STATEMENT BY THE COURT.

Lowrance first filed a suit in the Pulaski Chancery Court against James Holman for specific performance of a contract to convey a forty-acre tract of land. A decree was entered on September 20, 1910, by default, reciting that "the defendant,

James Holman, although duly summoned, by virtue of the statute in such cases made and provided, appearing not, neither answered nor demurred; the plaintiff announcing ready for trial and the court, after hearing the evidence and being fully advised in the premises, doth find that the plaintiff is the rightful owner of the following described lands, etc.," and decreed that defendant should execute a deed to the said described lands upon payment of the purchase money.

On November 29, 1910, appellant filed his complaint to set aside and vacate said judgment, alleging that it was rendered without notice, and that the sheriff's return of service of summons upon him in the first instance was wholly false, and that he did not sell nor agree to sell said lands to appellee, and that Hamiter was not his agent for such sale; that he received none of the purchase money therefor, and that the land was of the value of $500, instead of $120, the price upon and for which the decree was rendered.

Appellee answered, denying the allegations of the complaint, and alleged that service was had, and that the decree was duly rendered upon the evidence adduced. The testimony was conflicting as to whether or not the summons was served, the deputy who made the return swearing positively that he duly served the summons upon appellant by delivering him a copy thereof at Billy Stifel's saloon in Little Rock and told the attorney within three days thereafter that he had served the summons, while the appellant stated that he did not deliver him a copy of the summons at the time and place, as stated, by the officer, nor at all, and denied that he was at that place at all upon the day of the service. Two other witnesses testified that they were with appellant virtually all of that day, but about ten minutes, when he was in the Southern Trust Building, and that he could not have been served with summons at the saloon, where the officer stated the service took place, since he was not there; that if he was served it must have been in the Southern Trust Building, and while they were not present. Another deputy sheriff testified that when the service was inquired about by the attorney in this case, Erber, the deputy, who delivered the first summons, said: "Yes, I served this on him in the back of Billy Stifel's saloon." He said he had served a subpoena on him at Scotts.

The testimony was also in conflict as to whether appellant made a sale of the land, he stating that he did not authorize Hamiter to sell his land, that he did not sell it, and that he had refused to take the money paid by appellee for it, and brought this proceeding to vacate the judgment as soon as he discovered it had been rendered. On the other hand, the testimony tended to show that he agreed to sell the land; that his agent first accepted a five dollar payment from appellee, who took possession of the tract, and until the deed could be made, and that the whole purchase money was paid to his agent.

The chancellor found that the term of court at which the first decree was rendered had expired, and "that the said James Holman had been duly and in due time summoned to appear and answer the complaint filed against him by the said Robert N. Lowrance, and that the return of the sheriff was true, and the decree rendered was in accordance with law and equity," and dismissed the petition to vacate for want of equity. From this decree Holman appealed.

Since the appeals were brought to this court the death of James Holman was suggested, and the causes revived in the name of his administrator and heirs.

Marshall & Coffman, for appellant.

Want of service is ground for vacation of a judgment. 63 Ark. 323. Provision should have been made for the court to say when the money should be paid in. A failure to do so is fatal. 14 App. Div. 106; 16 S. W. 1078; 91 Pac. 92; 118 S. W. 768; 7 S. W. 781; 14 S. W. 453. The decree should be set aside for want of sufficient allegation in the complaint upon which to base a decree. 91 Pac. 92; 73 Ark. 491; 78 Ark. 158; 150 Fed. 458; 7 Ark. 445; 20 Ark. 12.

Dan W. Jones and *Walker Danaher*, for appellee.

The burden is upon appellant to show that the proof does not sustain the court's rulings. 72 Ark. 21; 79 Ark. 263; 5 Ark. 126, 54 Ark. 159; 45 Ark. 240; 44 Ark. 74; 40 Ark. 185; 94 Ark. 115. The question of notice can be determined only by the record. 49 Ark. 397. The remedy is against the officer for a false return. 40 Ark. 141; 39 Ark. 70; 44 Ark. 202; 25 Ark. 313; 36 Ark. 217; 30 Ark. 70; 31 Ark. 609. All the evidence not being in the record the decree will not be disturbed.

63 Ark. 513; 72 Ark. 265; 25 Ark. 60; 55 Ark. 30; 57 Ark. 49; *Id.* 628; 53 Ark. 476; 48 Ark. 331; 58 Ark. 314.

KIRBY, J., (after stating the facts). This proceeding was instituted to vacate a judgment rendered at a former term of court under section 4431 of Kirby's Digest, it being alleged that said judgment was rendered against appellant without notice and obtained by fraud practiced by the successful party, and also that no sale of the lands for a specific performance of which the decree therein was rendered had been authorized or made by appellant, and no money whatever received therefor.

It is necessary, in addition to alleging one of the grounds specified in said section, also to allege a valid defense to the action in which the judgment sought to be vacated was rendered and to make a *prima facie* proof of the truth of such defense if it is denied, the court being without authority to grant the relief until the ground therefor is established and "it is adjudged that there is a valid defense to the action." Kirby's Digest, § § 4431 and 4434; *Chambliss* v. *Reppy*, 54 Ark. 541; *Knights of Maccabees* v. *Gordon*, 83 Ark. 21; *Ayers* v. *Anderson-Tully Co.*, 89 Ark. 163

The burden of proof is upon the appellant, and the officer's return of service was *prima facie* true, and the chancellor found, upon conflicting evidence, that appellant was duly notified of the pendency of the suit and the service of the summons therein as returned by the officer, and dismissed the complaint for want of equity; and we can not say that his finding was clearly against the preponderance of the testimony.

Not having established the first ground for vacating the decree, it was not necessary to pass upon the question of the validity of the defense to the action.

It is further insisted that the court erred in the rendition of the decree in the first cause, in effect divesting the title of the lands out of Holman and vesting it in the appellee without retaining the matter in its control to see that the purchase money first directed to be paid upon the execution of the deed was paid.

A decree for specific performance on the part of the defendant, without finding or requiring performance by the plaintiff of his part of the agreement, is erroneous, and it should not be left to the plaintiff to determine when he shall perform the con-

dition or whether he has performed it, and that question should be reserved and a time for performance should be fixed. 80 Enc. Pleading & Practice, 496; 16 Cyc. 483.

The decree must provide for full performance by plaintiff; and if there are acts to be done on plaintiff's part before he is entitled to performance by defendant, the decree should be so framed that defendant can not be compelled to perform except upon the condition that plaintiff do such acts. 36 Cyc. 756; *Mason* v. *Atkins*, 73 Ark. 491.

It appears from the testimony that $115 of the $120, purchase money of the lands, was paid to Dan W. Jones, who was not the agent of Holman, the defendant in the suit, and the remaining $5.00 of the purchase money to John Hamiter, whose agency was denied by Holman. It is true the decree only required the defendant to execute to the plaintiff a deed conveying the lands upon the payment by the plaintiff of the agreed purchase price of $120, but, in default of his doing so within ten days from its date, the court further decreed "that the title of said land shall be and is hereby divested out of defendant and vested in plaintiff," without reserving the right to decide whether the condition was complied with and the payment made before the title was divested. It should have required the money paid into court for defendant before divesting the title, and, if that was not done, denied any relief to the plaintiff and dismissed his complaint for want of equity.

The law does not contemplate, in a suit for and decree of specific performance of a contract for the sale of lands, that the defendant shall be required to make a conveyance of the lands and then be remitted to an action against some third party, to whom money may have been paid by the plaintiff without authority, for the recovery thereof.

For the error indicated, the decree is reversed, and the cause remanded with directions to enter a decree in accordance with this opinion.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY v. WELLS.

Opinion delivered January 29, 1912

1. HIGHWAYS—CONTRIBUTORY NEGLIGENCE OF TRAVELLER.—A person who, in the lawful use of a highway, meets with an obstacle may yet proceed if it is consistent with reasonable care so to do; and this is generally a question for the jury, depending upon the nature of the obstruction and all the circumstances surrounding the party. (Page 258.)
2. RAILROAD—OBSTRUCTION OF CROSSING—PROXIMATE CAUSE.—The partial obstruction by a railroad company of a crossing, either by partially blocking the crossing with cars, or by allowing a fallen tree to obstruct the way, or by permitting the crossing to become out of repair, constituted negligence; and where a traveller was injured by reason thereof while in the exercise of due care, such negligence was the proximate cause of his injuries. (Page 259.)

Appeal from Franklin Circuit Court; *Jeptha H. Evans*, Judge; affirmed.

W. E. Hemingway and *Lovick P. Miles*, for appellant.

A verdict should have been directed for the appellant. 7 Wall. 44; 94 U. S. 469; 105 U. S. 249. The injury complained of must be the direct consequence of the defendant's negligence; otherwise, plaintiff is not entitled to recover. 56 Ark. 263; 115 Mass. 304; 58 Ark. 158; 55 Ark. 520; 200 Ill. 456; 114 Pac. 611.

Sam R. Chew, for appellee.

Permitting a train to stand across a public highway for thirty-seven minutes is negligence *per se*, and renders the railway company liable for all damages or injuries that follow, or may reasonably be expected to follow from such negligent conduct. 152 U. S. 262; 111 U. S. 228; 88 Ark. 243; 53 Ark. 201; 75 Ill. 96; 27 Fla. 157; 9 So. 661; 20 N. W. 321; 66 Ark. 363; 65 N. E. 508; 75 Ark. 530; 52 Ark. 368; 75 Ark. 133.

McCULLOCH, C. J. The General Assembly of 1907 enacted a statute providing that it shall be unlawful, in the operation of railroads, to permit freight trains "to remain standing across any public highway, street, alley, or farm crossing * * * for more than ten minutes" or to "fail to leave a space of sixty feet across such public highway," etc. Appellant, in violation of this statute, partially blocked a street crossing

in the town of Ozark, Arkansas, and appellee sued for and recovered damages for personal injuries received while attempting to cross the track. The evidence shows that the train stood over the crossing and completely blocked it for about thirty-seven minutes, and then was cut and an opening of about twenty-five feet was made between the cars. The cars still covered the greater portion of the space which had been prepared for the crossing of vehicles, and those who attempted to pass over while the train stood there, including appellee, were forced to go outside of the beaten track, along a rough and unprepared way, where it was very rocky and there was no planking to smooth the way over the rails. Appellee was driving a hack, and, stopping forty or fifty feet from the crossing, waited for a considerable time for it to be opened. After it was partially opened, he discussed with another traveller the advisability of attempting to cross, and decided to do so. The unblocked part of the crossing was covered to some extent with weeds and grass, which obstructed a view of the rocks and other obstacles. Appellee started to drive over the crossing, after others had crossed, but when the wheels of his vehicle struck the rail at the place where there was no planking, it "skidded," and threw one side of the vehicle higher than the other, causing him to lose his balance and fall out of the hack. There is no controversy as to the extent of his injuries nor as to the excessiveness of the amount of damages recovered. The question whether appellee was guilty of negligence in attempting to drive over the partially blocked crossing was properly submitted to the jury, for it can not be said as a matter of law that it constituted negligence for him to do so.

"A person who in the lawful use of a highway, meets with an obstacle may yet proceed if it is consistent with reasonable care so to do; and this is generally a question for the jury, depending upon the nature of the obstruction and all the circumstances surrounding the party." *Mahoney* v. *Ry. Co.*, 104 Mass. 73.

This court, in *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Box*, 52 Ark. 368, quoted with approval the above language of the Massachusetts court, and added that "a traveller is not compelled to abandon the use of the only highway conveniently accessible to him merely because he is apprised that it is out of repair."

The only point urged upon our attention here by learned counsel for appellant is that the unlawful failure of the trainmen to open the crossing was not the proximate cause of appellee's injury. We do not agree with counsel in that contention. The partial blocking of the crossing for a longer time than the statute permits constituted negligence. Travellers are not compelled to abandon a partially obstructed crossing if its use in that condition is consistent with reasonable care for their own safety. In other words, the partial blocking of the crossing, in violation of the statute, constituted negligence on the part of the railway company, and it became then a question for the jury to determine, under the peculiar facts and circumstances of the case, whether the traveller was guilty of contributory negligence in attempting to cross. *St. Louis, I. M. & S. Ry. Co.* v. *Box, supra.*

It does not matter whether the obstruction was caused by partially blocking the crossing with cars, or by allowing a fallen tree to obstruct the way, or by permitting the crossing to get out of repair. If it constituted an act of negligence, and on account thereof injuries resulted to a traveller who was in the exercise of due care, such negligence would be the proximate cause of the injury. The opinion of this court in the recent case of *Curtis* v. *St. Louis & S. F. Rd. Co.*, 96 Ark. 394, has some bearing on this question. There the railway company had completely blocked a crossing with a freight train in violation of a city ordinance, and a pedestrian was injured by the moving of the train while he was attempting to cross between two of the cars. The opinion seems to recognize that the railway company was negligent in obstructing the crossing and in moving the train without any effort to warn or protect travellers. But the court held that the plaintiff was guilty of contributory negligence in attempting to cross between the cars and could not recover. We quoted with approval the following statement found in 2 Thompson on Negligence, § 1674:

"If the train is lawfully obstructing the crossing, that is to say, if it has not obstructed it for a greater length of time than that prescribed by statute or ordinance or, in the absence of statute or ordinance, for an unreasonable length of time, then a pedestrian who attempts to continue his journey upon

the highway by climbing over or between the cars does so at his own risk. * * * But, after the train has obstructed the crossing beyond the length of time prescribed by statute or ordinance or beyond a reasonable time in the absence of statute or ordinance, then the railway company is guilty of an unlawful obstruction of the highway; the right of passage on the part of the public is restored."

The case of *Paine* v. *Grand Trunk Ry. Co.*, 58 N. H. 611, though the opinion does not discuss the question especially, is authority for holding that, in a case like this, the obstruction of a highway by a train is the proximate cause of injuries sustained by a traveller who attempts to cross.

We conclude that the negligence in partially obstructing the crossing was the proximate cause of appellee's injury, the jury having found upon sufficient evidence that he was not guilty of negligence himself in attempting to cross The circumstances are totally different from the facts in the Curtis case, *supra*, with reference to the conduct of the traveller in attempting to cross between the cars in a train which was likely to be moved at any moment. Appellee was not injured by the moving of the train as in the Curtis case.

These being the only questions in the case, we think that the judgment of the circuit court was correct, and the same is therefore affirmed.

WOOD, J., (concurring). I concur in the judgment. Although the appellant was negligent in partly blocking the highway beyond the time mentioned in the statute, such negligence would not be the proximate cause of the injury unless it was calculated to mislead a person of ordinary prudence, travelling by vehicle, and to cause such person to believe that he could pass the highway in safety notwithstanding its partially blocked condition. If appellee in the exercise of ordinary care could have seen that the highway in its partly blocked condition was dangerous or unsafe, then, if he undertook to pass over same, and was injured in the attempt, he would be negligent, and in such case his negligence would be the proximate and only cause of his injury. Therefore, in my opinion, the only theory upon which appellant can be held liable is that its negligence created a misleading condition.

Appellant, after having the highway completely blocked

beyond the allowed time, cut its cars and opened up a passage way of sufficient width to enable appellee's wagon to pass, but not safely. This conduct on the part of appellant was tantamount to saying to the waiting traveller: "Although I have delayed you beyond the time allowed by law, I have now opened the way so that you may safely pass." It seems to me that this act of appellant was an implied invitation to appellee to go across the highway through the opening just made by appellant, and an implied assurance on the part of appellant that appellee might safely do so, when in reality appellant had negligently failed to make the opening sufficient. In my opinion, under these circumstances, the jury was warranted in finding that appellant's negligence was the proximate cause of the injury, and that appellee was not guilty of contributory negligence.

SCHOOL DISTRICT OF HARTFORD v. WEST HARTFORD SPECIAL SCHOOL DISTRICT.

Opinion delivered January 29, 1912.

1. SCHOOLS—APPROPRIATION OF SCHOOL TAX.—The provision in art. 14, section 3, of Const. 1874, that a tax levied for school purposes shall not be appropriated "for any other purpose" does not mean that a tax voted for school building purposes shall not be appropriated for any other school purpose, but only that it shall be used for school purposes. (Page 263.)
2. SAME—APPROPRIATION OF SCHOOL TAX.—Const. 1874, art. 14, section 2, providing that no school tax shall be appropriated "to any other district than that for which it was levied," does not prohibit the Legislature from providing for an apportionment of school tax collected by a district where a portion of its territory has been annexed to another district. (Page 263.)
3. STATUTES—SPECIAL LAWS—LEGISLATIVE POWER.—Const. 1874, art. 5, section 24, forbidding the enactment of special laws "where the courts have jurisdiction to grant the powers or the privileges or the relief asked for," does not refer to jurisdiction granted to courts by the Legislature, but to cases where the courts have jurisdiction, independently of any statute, to grant the relief sought. (Page 264.)
4. SCHOOL DISTRICT—VALIDITY OF SPECIAL ACT.—The act of April 17, 1911, providing for the annexation of certain school territory to appellant from appellee, and providing for an apportionment of the school tax raised by appellee between the two districts, is not in viola-

tion of art. 14, section 3, Const. 1874, providing that no tax levied for school purposes be "appropriated to any other purpose nor to any other district than that for which it was levied." (Page 264.)

Appeal from Sebastian Chancery Court, Greenwood District; *J. V. Bourland,* Chancellor; reversed.

George W. Dodd, for appellant.

The court erred in holding the statute unconstitutional. 24 Ark. 621; 45 Ark. 400; 50 Ark. 513; 60 Ark. 343. The constitutionality of a statute will not be determined if the case can be decided on other grounds. 60 Ark. 221; *Id.* 240; 77 Ark. 383; 79 Ark. 236; 86 Ark. 231. Legislative acts are upheld when possible. 27 Ark. 202; 77 Ark. 250; 86 Ark. 465. The statute is valid, unless prohibited by the Constitution. 60 Ark. 343; 56 Ark. 354.

Hill, Brizzolara & Fitzhugh, for appellee.

The act of 1911 is unconstitutional. While a building fund is a fund for school purposes, yet school funds are divided into building funds and teacher's funds. 49 Ark. 94; 70 Ark. 471.

HART, J. Appellee, West Hartford Special School District, was created by a special act of the Legislature at its 1907 session. By a special act approved April 17, 1911, the School District of Hartford, the appellant, was enlarged by the annexation thereto of certain contiguous territory then forming a part of West Hartford Special School District. Section 2 of the act of 1911 provided that the county court of the Greenwood District of Sebastian County should proceed to ascertain, as nearly as possible, the exact amount of revenue paid into the county treasury during the year 1910, "on account of the real estate, personal property, polls and scholastic population embraced within the territory" transferred by the provisions of the act. The section further provided for a transfer of the funds, when so ascertained, from the West Hartford Special School District to the School District of Hartford. Pursuant to the provisions of this act, upon the petition of appellee, the county court proceeded to ascertain the amount of school taxes received from that portion of the territory of appellee district which had been annexed to appellant district and made an or-

der directing the amount so found to be turned over to the credit of appellant district. Appellee instituted this action in the chancery court against the appellant district and the county judge and county treasurer to enjoin them from transferring said funds to the credit of appellant district. The chancellor was of the opinion that section 2 of the act of 1911, which conferred upon the county court the authority to ascertain the amount of revenue paid into the county treasury on account of the territory transferred by the terms of the act, and which directed the amount so ascertained to be transferred from the credit of appellee to the credit of appellant district, is in conflict with section 3 of art. 14 of the Constitution, and is therefore void. A decree was accordingly entered. To reverse that decree this appeal is prosecuted.

It is contended by counsel for appellee that section 2 of the act of 1911, which provides for an apportionment of the funds between the two districts as above set forth is in violation of section 3, art. 14, of the Constitution, and this view was adopted by the chancellor. The section is as follows:

"The General Assembly shall provide by general laws for the support of common schools by tax, which shall never exceed in any one year two mills on the dollar on the taxable property of the State, and by an annual *per capita* tax of one dollar to be assessed on every male inhabitant of this State over the age of 21 years. Provided, the General Assembly may by general law authorize school districts to levy by a vote of the qualified electors of such district a tax not to exceed 7 mills on the dollar in any one year for school purposes. Provided, further, that any such tax shall not be appropriated to any other purpose nor to any other district than that for which it was levied."

They contend that section 2 of the act of 1911 violates both matters which are forbidden by the last provision of the section quoted. A tax of seven mills was voted in appellee district in the year 1909, and also in the year 1910; four mills being for the construction of a school house, and three mills for the payment of teachers. Counsel for appellee urge that the clause, "Provided, further, that any such tax shall not be appropriated to any other purpose," means that a tax voted for building purposes shall not be appropriated for any other purpose than that for erecting a school house. We can not

agree with that contention. The section of the Constitution in question provides that the General Assembly may by general laws authorize school districts to levy by a vote of the qualified electors of such district a tax not to exceed a certain rate. This is for all school purposes, and the particular rate which can be levied or used for the purpose of constructing school houses in the several school districts is not designated. Evidently, then, the section of the Constitution in question did not intend to place any restriction on the use of school funds, other than that they should be used for school purposes. If it had, appropriate language to effectuate that intent would have been used. If the framers of the Constitution did not divide the school fund into separate classes, but, on the contrary, did provide a maximum rate which might be levied for all school purposes, how can it be said that such fund is appropriated to another purpose when it is designed and intended to be used for any of the purposes for which it might be levied? The Constitution places no restriction upon the use of school funds other than that they must be devoted to the purposes for which they were levied.

Again, it is contended by counsel for appellee that the fund could not be apportioned between the districts because the section of the Constitution in question provides that no such tax shall be appropriated to any other district than that for which it was levied, and it is this phase of the question which has given us the most concern. In this connection, it may be said that, under the provisions of art. 14 of the Constitution, the Legislature has enacted statutes for the support and maintenance of common schools by taxes. The several counties of the State have been divided into school districts under both general and special laws, and school boards have been created to manage and control the interests and affairs of such districts. The legislative power in these respects is full and complete, and is conferred by the provisions of the Constitution. This power of the Legislature has been recognized many times by the court in determining questions relating to the formation of school districts, and the changing of the boundaries of districts already created. As a part of that power, it may make provision for the division of the property, and the apportionment of the funds of the old corporation when a portion of its ter-

ritory is transferred to the jurisdiction of another school district. The State is the beneficial owner of the fund, and the various school districts, in which the title to the property or funds vests, are trustees for the State, holding the property and devoting it to the use which the State directs. Section 2 of the act of 1911 simply changes the fund from the management of one school district to that of another. The board of school directors are only the agents or trustees appointed to carry out the school system. The fund in question was collected from certain designated territory, which was transferred from one school district to another, and the fund was transferred with it. We do not think the statute in question contravenes either the spirit or letter of the Constitution. In other words, in the case before us, there was a mere alteration of the lines of the district, and the fund transferred was raised by a tax on the people owning and residing upon the lands which were also transferred. In such case we do not think it can be said that the tax is appropriated to any other district than that for which it was levied. Such has been the construction placed upon this section of the Constitution by the previous decisions of this court. *School District No. 15* v. *School District of Waldron*, 63 Ark. 433; *Evins* v. *Batchelor*, 61 Ark. 521; *Beavers* v. *State*, 60 Ark. 124. While these cases do not directly discuss the question, they necessarily determine it, for they are all cases involving the apportionment of school funds upon the division of school districts, and recognize the validity of statutes providing therefor.

Finally, it is insisted by counsel for appellee that the power of the Legislature to apportion the funds is denied by the last clause of section 24, art. 5, of the Constitution which forbids the enactment of special laws "where the courts have jurisdiction to grant the powers or the privileges or the relief asked for." It is plain that this clause does not refer to the jurisdiction conferred upon courts by the statute; for the Legislature may enact laws on all subjects on which its legislation is not prohibited. The Legislature has the power to establish new school districts, or to alter existing ones, and this power may be deelgated to subordinate agencies or officers. Whatever power the Legislature has lawfully conferred upon county courts in these respects, it may take away and confer upon other agencies

or tribunals. Hence it is evident that the Constitution, in the clause under consideration, does not refer to jurisdiction granted to courts by the Legislature, but refers to cases where the courts have jurisdiction, independently of any statute, to grant the relief asked for.

It follows that the chancellor erred in holding section 2 of the act of 1911 unconstitutional, and the decree will be reversed, and the cause remanded with directions to dissolve the injunction and to dismiss the complaint for want of equity.

NICHOLS v. STATE.

Opinion delivered February 5, 1912.

1. VENUE—CHANGE OF—SECOND APPLICATION—DISCRETION OF COURT.—It was not error to refuse to entertain a second petition for change of venue in a criminal case until the first application had been acted upon. (Page 270.)
2. SAME—SECOND APPLICATION—WHEN PROPERLY DENIED.—Where a petition for change of venue in a criminal cause was denied on account of the insufficiency of the supporting affidavits, a petition subsequently filed which did not show that defendant was surprised by the testimony offered in support of the original application was properly denied. (Page 271.)
3. SAME—WHEN PROPERLY DENIED.—Where a petition for change of venue in a criminal cause was denied on account of the insufficiency of both of the supporting affidavits, a showing by defendant that he was surprised at the testimony of one of the supporting witnesses will not help him on a second application, as the statute requires the oath of two credible persons. (Page 271.)
4. SAME—WHEN PROPERLY DENIED.—Where a petition for change of venue in a criminal cause was denied because of the insufficiency of the supporting affidavits, refusal to permit a second application to be made was not an abuse of discretion where defendant failed promptly to announce his surprise at the testimony of his supporting witnesses. (Page 271.)
5. SAME—SUFFICIENCY OF EVIDENCE.—Evidence that a homicide took place in a certain township in the county is sufficient proof of the venue. (Page 271.)
6. HOMICIDE—EVIDENCE OF RELATIONS WITH DECEASED.—Where, in a prosecution of defendant for killing his wife, it appeared that they had been separated for nine months, and defendant was permitted to testify as to his wife's conduct while they lived together, and her feelings toward their children, it was not error to exclude his testimony as to the cause of the separation. (Page 272.)

7. SAME—PROVOCATION.—Where, in a prosecution of one for killing his wife, it appeared that they had been separated for many months, it was not error to instruct the jury that the previous conduct of the parties and their unpleasant relations did not reduce the crime to manslaughter or mitigate the crime. (Page 273.)

8. SAME—DUTY TO INSTRUCT AS TO MANSLAUGHTER.—It was not error to refuse to instruct as to manslaughter where there was no testimony tending to reduce the crime to that degree. (Page 274.)

Appeal from Jefferson Circuit Court; *Antonio B. Grace*, Judge; affirmed.

Appellant, pros se.

1. The court erred in overruling appellant's petition for change of venue. Kirby's Digest, § 2318; 98 Ark. 139; 54 Ark. 243.

2. It was error to exclude evidence offered by appellant to show the conduct of the deceased and appellant towards each other prior and up to the time of the killing. 21 Cyc. 894-f; 62 Ark. 119; 52 Ark. 303; 21 Cyc. 912; Wharton on Homicide 895; 137 Ala. 1; 24 Ky. Law Rep. 1174; 66 S. C. 419; 42 Tex. Cr. Rep. 269; 108 Tenn. 282; 124 Ga. 31.

3. The court in its instruction No. 20 erred in limiting the evidence of former difficulties between the parties to determining thereby who the aggressor was at the time of the killing. The jury had the right to consider all these facts and circumstances which evidently led up to the killing, in determining whether or not appellant was aroused and killed deceased upon a sudden impulse, and therefore was guilty of some lower degree of homicide than murder in the first degree.

4. Where there is any evidence tending to show a lower degree of homicide than murder in the first degree, it is the duty of the court to give instructions covering such lower degree. 74 Ark. 262; 52 Ark. 45; 50 Ark. 545.

Hal L. Norwood, Attorney General, and *William H. Rector*, Assistant, for appellee.

1. There was no error nor any abuse of discretion in overruling the petition for change of venue and the amended petitions. 95 Ark. 239, and cases there cited; 86 Ark. 357.

2. The testimony as to the conduct of the parties towards one another previous to the homicide was probably admissible as tending to show malice, ground for ill-will and hatred, and a motive on the part of appellant for the killing, and certainly

appellant has no ground to complain that part of it was excluded. It would not go to show provocation. 93 Ark. 409; 70 Ark. 272; 75 Ark. 142.

3. Appellant's own testimony excludes any idea of manslaughter, and the court correctly refused to instruct on that degree of homicide.

4. Venue may be proved by a proponderance of the testimony. 62 Ark. 497.

McCULLOCH, C. J. Appellant, W. T. Nichols, was indicted by the grand jury of Jefferson County for the crime of murder in the first degree, and his trial resulted in a conviction of that degree of homicide. He killed his wife. They were married in the year 1902, and in 1908 went to live near the house of appellant's father in Jefferson County, Arkansas. They lived there until December, 1910, when they separated, and lived apart thereafter. Appellant continued to live with his father, which was a few miles out in the country from Pine Bluff. The deceased lived in the city of Pine Bluff. They had three children—two girls under eight years old and a boy two or three years old— which, after the separation, remained with appellant. Divorce proceedings were pending, and the court made an order directing that deceased be permitted to have the children two days in each week. She went out to the home of appellant's father several times, and got the children, appellant being absent from home each time except the last, when the killing occurred. On September 16, 1911, deceased went out in a buggy to get the children, and was accompanied by a Mrs. Parnell, an acquaintance, who thus became a witness to the tragedy. When they got to the place, about 9 o'clock in the morning—that is, to the home of appellant's father—one of the little girls first came out, and then appellant, who took the child in his arms and came to the gate. He and deceased talked to each other for awhile in a friendly way, and deceased asked for the keys to the house across the road where they had formerly lived. He went into his father's house and got the keys, and proposed to go to the house with her. They went into the house where they had formerly lived, the two girls accompanying them and, according to the testimony of Mrs. Parnell, remained in the house about an hour, she (witness) remaining seated in the buggy out in the road in front of the

houses. When they came back, deceased walked to the buggy where Mrs. Parnell was seated, and asked appellant, "Willie, boy, are the children ready?" and he told her to "come and see." Deceased went up to the gate and stood there waiting for the children. In a few minutes the two girls came out, and appellant sat down on the front porch with the boy in his lap. Deceased called to the boy, asking him to come to her, but they couldn't get him to come. Deceased then walked to the porch and was begging the child to come to her, having in her hand at the time a cap which she had brought the child, and was begging him to come get it, when appellant arose, put the child down on the floor, walked down the steps, and grabbed deceased by the throat and appeared to be choking her. She staggered and fell down, and then got up, and was seen to be bloody. The appellant had cut her throat, as he admitted on the witness stand. She ran out the gate, the blood streaming from her, and soon thereafter died from the effects of the wound. Nothing unfriendly occurerd between the couple on that occasion, and no harsh words were spoken except that appellant says, while they were in the house together, she spoke cross to him. So far as the testimony shows, there was nothing harsh occurred between them until appellant walked down the steps to commit the awful deed, and even then there was nothing to show that his wife was doing anything to him to arouse, or to aggravate, his anger. This is Mrs. Parnell's account of the tragedy. Appellant's account of the affair, as detailed on the witness stand, does not differ materially from Mrs. Parnell's narrative, except as to just what occurred the moment before the killing. He testified as follows:

"I sat down there in a chair, and finally she came in right up close to the gallery floor, and I was sitting there near the edge of the floor, and when she walked in, the child threw its head right down (indicating) like that in between the arm of the chair and my knee and its feet or body lying down between my knees with his face next to me, and was holding to me and crying to keep from going, and she walked up, but I asked her to let them alone and not take them away. I says, 'Myrtle is going to school; let them alone and come after them on Friday next, in order not to take her away from school.' She said, 'That didn't make any difference—two or three days out of

school didn't make any difference;' and she walked up and tried to prevail on the child to come, and he would not do it; he would not look at her, and she got hold of his feet, and pulled him out of my lap, and on the impulse of the moment. it flew all over me that she had expressed herself that she wished her children were all dead and delivered, and coming in that manner to take them away from me caused me to rise to the height of anger to defend the child. I felt that I was the only one to defend it. When she pulled the child out of my lap, I stepped down the steps and plumb around her. I just throwed my arms around her neck, and I cut her throat. We fell down. I was weak, and we both fell, and she was lying on the ground when I cut her throat, we were both lying on the ground, kind of sideways.' On cross examination, he stated that, as soon as she got hold of the child, he made up his mind to kill her, and at once walked down from the porch and grabbed her. He admitted that she didn't speak a cross word to him or attempt any violence toward him. In other parts of his testimony, he related some of their domestic troubles, and said that she had frequently expressed a lack of affection for the children and expressed the wish that they were dead.

The first assignment of error is as to the ruling of the court in denying a petition for a change of venue. Appellant filed his petition in due form with two supporting witnesses. Those witnesses were examined orally, and, after hearing them testify, the court decided that they were not credible persons, and denied the prayer of the petition. Neither of the witnesses showed, on examination, sufficient knowledge or information on the subject to warrant them in making the affidavit, and the court did not err in its conclusion that they were not credible persons. The petition for change of venue was filed and the witnesses examined on October 11, 1911. The court took the matter under advisement and rendered its decision thereon October 17. In the meantime, on October 13, appellant presented another petition for change of venue, with two other supporting witnesses. He therein stated, on oath, that he was surprised at the testimony of one of the supporting witnesses to the former petition. The court refused to permit the petition to be filed on the ground that the former petition was still pending. After the court made the ruling on October 17,

denying the change of venue, appellant filed a third petition, supported by the same witnesses as in the second petition, but omitting the statement contained in the second petition to the effect that appellant had been surprised at the testimony of one of the witnesses to the first petition. The court also overruled this, and appellant excepted. There are several sufficient reasons, we think, why it can not be said that the court erred in denying the last petition for change of venue. The trial judge was not in error in refusing to entertain another petition until he was ready to decide the first one, which he then had under advisement. When he announced his decision, appellant did not rest on the second petition, alleging surprise at the testimony of one of the witnesses, but filed a third petition omitting that allegation, and this amounted to an abandonment of the second petition, and brought the case clearly within the rule announced in *Duckworth* v. *State*, 86 Ark. 357.

Another reason why we can not hold that the court abused its discretion is that appellant only alleged, in his second petition, that he was surprised at the testimony of one of the supporting witnesses. As neither of the witnesses showed, on oral examination, sufficient information on the subject to warrant them in making the affidavit, even if appellant was surprised at the testimony of one of them (witness Harper), it would not have helped his cause if that witness had testified as he expected, for the statute requires the oath of two credible persons.

Another reason why we should not disturb the court's exercise of discretion in this matter is that appellant failed to promptly announce his surprise at the testimony of witness Harper, and the court might have concluded that the desire to present the second petition was a mere afterthought because the first effort resulted in failure. The question of allowing a defendant to present successive petitions for change of venue is one of discretion with the trial court, and the exercise of that discretion ought not to be disturbed unless it appears to have been improvidently exercised. *Duckworth* v. *State, supra.*

It is next contended that the venue was not sufficiently proved. The venue in a criminal case is an essential fact, and must be proved as alleged, but it need only be proved by a preponderance of the testimony (*Wilson* v. *State*, 62 Ark. 497),

and may be proved by circumstances. *Bloom* v. *State,* 68 Ark. 336; *Cage* v. *State,* 73 Ark. 484; *Douglass* v. *State,* 91 Ark. 492. Some of the witnesses described the farm house near which the killing occurred, and one witness stated that the place described was in Nivens Township, Jefferson County. *Smith* v. *State,* 90 Ark. 438. The court and jury took notice of the location of Nivens Township, and thus knew that it was not situated on the borders of Jefferson County. *St. Louis, I. M. & S. Ry. Co.* v. *State,* 68 Ark. 561.

During the progress of appellant's examination as a witness, he was permitted without objection to make statements as to his wife's conduct while they lived together, and afterwards toward him and toward their children. He stated that his wife had no affection for the children, and even expressed the wish that they were dead. He proved the same thing by his father, who testified in the case. Appellant was asked by his counsel to state why he and his wife separated—whose was the fault—and the court, of its own motion, excluded the question and answer, ruling at the time that the private relations between appellant and deceased during their married life, and the state of their feelings during that time, were not material. It was not competent to prove the unpleasant relations between him and deceased while they lived together, for it was too remote to have any bearing on the conduct of the parties at the time of the killing, so far as they tended to establish the guilt or innocence of appellant. They had been separated for nine months, and had had, so far as the records disclose no communication with each other since the separation. Nor is it conceivable, in the light of the undisputed evidence in this case, how the testimony could help appellant's cause or how he, was prejudiced by its exclusion. The court, however, subsequently let appellant prove his and deceased's conduct toward each other, and gave an instruction limiting its consideration to the purpose of showing which of the parties was the aggressor at the time of the killing. That instruction was objected to by appellant, and it reads as follows

"20. No previous difficulties, offensive language, quarrels or unpleasant domestic relations between the parties can be considered as furnishing that extreme degree of provocation which the law regards as necessary to arouse an irresistible

passion and reduce the killing to manslaughter. Evidence as to the previous language and conduct of the deceased can only be considered by you in connection with her actions at the time of the killing, in order to enable you to determine which of the parties was the aggressor if all the other evidence in the case leaves you in doubt on that question. Nor is such evidence received and to be considered in mitigation of a crime. If you are satisfied by the evidence, beyond a reasonable doubt that the defendant killed Minnie Nichols, and that such killing was willful—that is, that the act of killing was intentional; that is not justifiable or excusable as being done in necessary self-defense; that it was felonious—that is, done with an intent to commit an act which is made a felony by law; that it was done with malice as hereinbefore defined, and that it was done after premeditation and deliberation, that is, thinking about it beforehand for any period of time, however short, and resolving to take the life of the deceased, then defendant was guilty of murder in the first degree, and the previous unpleasant relations of the parties can not be considered in justification or mitigation of the offense."

The instruction was correct in telling the jury that the previous conduct of, and the unpleasant relations between, the parties did not furnish provocation for the killing, that it did not reduce the degree of homicide to manslaughter, and did not mitigate the crime. It was unnecessary to include the other part of the instruction, for there is no evidence that there was any difficulty between the parties at the time of the killing or that deceased was the aggressor. The undisputed evidence shows that deceased committed no hostile act toward appellant. and that she was merely trying to take the children, which she had the right to do under the orders of the court, and which appellant consented for her to do. That part of the instruction did not, however, prejudice appellant's rights in any wise. Appellant asked for instructions on manslaughter, but we are of the opinion that the court was correct in refusing them. In no view of the testimony could appellant's crime be reduced to manslaughter. There is nothing in his own testimony which frees him from the charge of murder, and the most that can be said of it, if entirely believed, is that it leaves some doubt whether there was deliberation and premeditation so as to con-

stitute murder in the first degree. Without provocation sufficient even to reduce the degree of the crime, he killed his unoffending wife, and the only excuse he offers is that he acted on a sudden impulse, caused by her attempt to take with force the unwilling child. Professor Wharton lays down the rule, which is no doubt correct, that "homicide committed in passion, excited by inadequate provocation is murder in the second degree, and not manslaughter," but that "the provocation must be judged by the *res gestae*, and the evidence must be confined to the facts and circumstances surrounding and preceding the killing." Wharton on Homicide, § 168. Of course, this statement of the law must be taken with the qualification that, "in order to reduce the crime to murder in the second degree, the killing must be done in a sudden heat of passion, and not after deliberation." That is doubtless what was meant by the learned author in his statement of the law.

The court gave correct instructions on the two degrees of murder, among other things telling the jury that "if the killing be unlawful, felonious and with malice, but done upon a sudden impulse and not as the result of an intention to kill previously formed in the mind of the slayer after deliberation and premeditation, then it is murder in the second degree."

The evidence in the case fully warranted the jury in finding that there was no provocation whatever for the killing, and that it was done after deliberation and with premeditation, so as to amount to murder in the first degree. The judgment will therefore be affirmed, and it is so ordered.

BASHAW v. VANCE.

Opinion delivered February 5, 1912.

PATENTS—NOTES—INNOCENT PURCHASER.—Under Kirby's Digest, section 513, providing that no person shall be considered an innocent holder of a note given in payment for any patent right or patent-right territory "though he may have given value for the same before maturity," there can be no such thing as an innocent holder for value of a note that is executed for a patent right or for patent-right territory.

Appeal from Hot Spring Chancery Court; *Jethro P. Henderson*, Chancellor; reversed.

Duffie & Duffie, for appellant.

The rights and liabilities of parties to a note executed for a patent right and patent-right territory form an exception to the law merchant, and are clearly defined by our statute. Kirby's Digest, § § 512-514. Under the statute the maker can make *all defenses* against the holder of such a note that could be made against the original payee, and no person is an innocent purchaser or holder, thereof, whether transferred before maturity or not. The statute is valid. 207 U. S. 257; 203 U. S. 358; 86 Ark. 155.

E. H. Vance, Jr., pro se.

All that appellee had to take notice of was that the note was given for an interest in a patent, and that the maker could interpose all defenses against him that he could have made against the original payee for fraud, imposition and want of consideration; but if there was no fraud perpetrated upon the maker in the execution and delivery of the note, if there has been no failure of consideration and no fraud or knowledge of fraud on the part of the assignee in the assignment to him, then appellee would be a *bona fide* holder and entitled to recover. 41 Ark. 242; 42 Ark. 22; 61 Ark. 81; 90 Ark. 93; 94 Ark. 426.

WOOD, J. The question in this case is whether or not the assignee of a note given for a patent right and patent-right territory for value before maturity is an innocent purchaser for value so as to preclude the maker of the note from setting up the defense of payment when sued by the assignee where there was no fraud or deception practiced upon the maker by the payee in the purchase of the patent right or patent-right territory.

It is contended by the appellee that the only defense against a holder of such note who has bought same before maturity and paid value therefor are fraud practiced upon the maker of the note at the time of its execution, or failure of consideration by reason of defect of title, or some legal defense to the payment of the note growing out of the original contract on which the note was executed.

The statute provides that the payer or drawer in all notes executed in payment of any patent right or patent-right territory shall be permitted to make all the defenses against any assignee, indorser, holder or purchaser of such note that could

have been made against the original payee, whether such note be assigned or transferred before maturity or not. The statute further provides that the vendors of patent rights who may effect the sale of same to any citizen of this State on a credit, and who take a negotiable instrument in payment of the same, shall have such instrument executed on a printed form, showing upon its face that it was executed in consideration of the patent right, etc.; and further provides: "No person shall be considered an innocent holder of the same before maturity, and the maker thereof may make defense to the collection of the same in the hands of any holder of said negotiable instrument."

It will be observed that the statute makes no exception in favor of the assignee in cases where there has been no fraud or deception practiced upon the maker of the note by the seller of the patent right. The statute is comprenhensive in its terms, and its language is unambiguous. There is really nothing left for construction.

The statute allows the "payer to make all the defenses against any assignee that could have been made against the original payee," and provides, "no person shall be considered an innocent holder of the same, though he may have given value for the same before maturity." Kirby's Digest, § § 513, 514. In other words, under the statute there can be no such thing as an innocent holder for value of a note that is executed in payment for a patent right and patent-right territory. Prospective purchasers of such note are given warning by the face of the paper and the law that they buy such paper at their peril.

The statute was enacted to promote wise public policies, and is a valid exercise of the police powers of the State to regulate and control commerce of the particular class mentioned therein. *Woods* v. *Carl*, 75 Ark. 328; *Columbia County Bank* v. *Emerson*, 86 Ark. 155; *Ozan Lumber Co.* v. *Union County Nat'l Bank*, 207 U. S. 257; *Woods* v. *Carl*, 203 U. S. 358.

A decided preponderance of the evidence shows that the appellee paid the note before the same was assigned to appellant. The cause on this point seems to have been fully developed.

The chancery court held that appellee was an innocent purchaser. The judgment in his favor is erroneous, and the cause is reversed, and the complaint dismissed for want of equity.

GRAHAM *v.* NIX.

Opinion delivered February 12, 1912.

1. COUNTIES—CHANGE OF COUNTY SEAT.—Const. 1874, art. 13, section 3, providing that no county seat shall be changed without the consent of a majority of the qualified voters of the county, refers to a removal of a county seat from one town to another and not to a removal from one site to another in the same town. (Page 280.)
2. SAME—CHANGE OF COUNTY SEAT.—Kirby's Digest, section 1115, making it unlawful to change any county seat without the consent of a majority of the qualified voters of the county, refers to a removal of a county seat from one town to another, and not from one lot to another in the same town. (Page 283.)
3. SAME—CHANGE OF LOCATION OF COUNTY SEAT.—Under its general jurisdiction over the internal improvement and local concerns of its county, the county court has authority to provide for the removal of a county seat from one lot in a town to another lot in the same town. (Page 286.)
4. SAME—JURISDICTION OF COUNTY COURT.—As the power of the county court over the location of public buildings is a continuing one, the county court, after ordering a courthouse to be built on a certain lot, may at a subsequent term order the courthouse to be built on another lot in the same town. (Page 286.)
5. SAME—ABUSE OF DISCRETION IN LOCATING COURTHOUSE.—For an abuse of the discretion of the county court in selecting the wrong site for courthouse, the remedy is by appeal. (Page 287.)

Appeal from Dallas Chancery Court; *J. M. Barker*, Chancellor; reversed.

Morton & Morton, P. G. Matlock, Gaughan & Sifford, and *Rose, Hemingway, Cantrell & Loughborough*, for appellants.

1. The Constitution on the removal of courthouses, county seats, seats of justice, etc., only applies to and contemplates a removal from one town to another. Removals of courthouses from one lot to another in the same town are within the jurisdiction of county courts. Const. Ark. art. 7, § 28; 26 Ark. 37; 50 *Id.* 447; 34 So. 171; Kirby's Digest, § § 1014, 1015; 63 Ark. 397; 68 *Id.* 340; 73 *Id.* 523; 93 *Id.* 1; 67 Miss. 1; 118 Ind. 51; 20 N. E. 642; Const. art. 13, § 3; 51 Ark. 540.

2. LEGISLATIVE USE. All the acts passed refer to removals from one town to another. Gould's Digest, ch. 44, § § 7, 12, 20, etc.; Acts 1869, p. 74; *Ib.* p. 34. JUDICIAL USE. See 5 Ark. 21; 21 *Id.* 441; 27 *Id.* 215; 28 *Id.* 207; 60 Ark. 158; 30 Ark.

474, 481; 33 *Id.* 192; 49 *Id.* 227, 54 *Id.* 414; 55 *Id.* 326. A town is always the "county seat," and the Legislature never meant to restrict the meaning to a lot of ground. Cases *supra*; Kirby's Digest, § § 1115 to 1123; 53 Ark. 553; 54 Ark. 645; 73 N. Y. Supp. 1098; 74 *Id.* 1142.

Miles & Wade and *Dan W. Jones*, for appellees.

1. The decree shows that the cause was heard upon oral testimony not included in the transcript. 94 Ark. 117; 45 *Id.* 240; 93 *Id.* 394; 85 *Id.* 101.

2. The school district land in Fordyce is the county seat. Kirby's Digest, § § 1115, 1117, 1121, 1129; Const. Ark. art. 13, § 3; 132 S. W. 214; 27 Ark. 202. It was so determined by ballot and the place and location of the courthouse fixed. Kirby's Digest, § 1115; 132 S. W. 214. The courts require strict compliance with the law. 11 Cyc. 371; 15 L. R. A. 501; 61 Ark. 477; 73 *Id.* 270.

3. The county seat has never been removed from the school land. A special act does not repeal the general law. 28 Ark. 502; 3 Bibb (Ky.) 180; 14 La. Ann. 667; 121 Ala. 363; 67 Conn. 261; 5 Bush. (Ky.) 301; 105 Mich. 70; 33 N. J. L. 363; 41 C. C. A. 667; 32 *Id.* 585-6. Further, the county court has exclusive jurisdiction. 33 Ark. 191; 73 Ark. 523.

4. The county court has finally settled the matter, and no other jurisdiction has power to modify or change its final judgment. 96 Ark. 427.

McCULLOCH, C. J. The county seat of Dallas County was, by vote of the people at an election duly held on August 29, 1908, removed from Princeton to Fordyce, and an order of removal was duly entered by the county court, after canvassing the returns, pursuant to the result of said election. Before the election for removal of the county seat was ordered, an abstract of title to a tract or lot in the town of Fordyce proposed to be donated as a site for the new courthouse was filed and presented with the petition of the citizens who asked for the removal. The proposed tract or lot was properly and accurately described, but, for the purpose of stating the case it will be referred to as the school district lot. Certain citizens of the county who objected to the removal from Princeton undertook

to contest the proceedings after the county court had, on October 6, 1908, entered its judgment declaring the result of the election and ordering the removal of the county seat pursuant thereto. On appeal to the circuit court it was decided that the removal proceedings were valid, and on appeal to this court that decision was affirmed. *Walsh* v. *Hampton*, 96 Ark. 427.

The county court in its order of October 6, 1908, appointed commissioners for the purpose of erecting a courthouse, and directed them to proceed to erect a suitable building on the tract or lot designated as aforesaid. This order of the county court was renewed on January 4, 1911, and the commissioners were then ordered to prepare for building the courthouse on the said lot. Subsequently the commissioners reported plans for the building, which plans were approved by the county court, and they were ordered to advertise for bids for the construction of the building. On May 31, 1911, the commissioners made report to the county court that they had let the contract to the lowest bidder, and this was approved by the court. They also reported at that time that they found that the original site donated (the school district lot) was not a suitable place on which to erect the courthouse, and that G. M. Hampton had proposed to donate and convey to the county certain other lots in the town of Fordyce for a courthouse site, and also that A. B. Banks had proposed to donate and convey to the county certain other lots in said town for a courthouse site. The county court thereupon made an order directing that if either of said parties should within ten days convey said lots as proposed the commissioners should accept one of said donations and proceed to erect the courthouse on the lot so donated, conveyed and accepted. On July 3 the commissioners reported that, "pursuant to the order of the court made on May 31, 1911, and the power vested in them by law," they had selected the Banks lots as the proper site upon which to erect the courthouse, and that said donor had executed a deed conveying said lots to the county in fee simple and that they had accepted the same as the site for the courthouse. The county court made an order approving and confirming said action of the commissioners in selecting said lots as the site for the courthouse and in accepting the donation. In the meantime the General Assembly of 1911 enacted a special

statute, which was approved by the Governor April 19, 1911, whereby said commissioners, appointed by the county court of Dallas County, were "authorized and impowered to receive by donation a lot, parcel or piece of ground within the corporate limits of the said city of Fordyce, for the purpose of building a courthouse thereon, and the same, when donated and deeded to the county for said purposes and accepted by said commissioners, shall be the site for the location of the courthouse of Dallas County."

Appellees, as citizens and taxpayers of the county,thereafter instituted this action in the chancery court of Dallas County to restrain the courthouse commissioners from proceeding to erect the new courthouse on the site last selected. The chancery court, on final hearing of the cause, decided that the school district lot had been established as the permanent county seat of Dallas County, and that the action of the commissioners and the order of the county court in selecting another site for the courthouse was void. The prayer of the complaint was granted, restraining the commissioners from erecting the courthouse on the Banks lot, and the commissioners appealed.

The conclusion of the learned chancellor was manifestly based on the view of the law that the removal of the county seat from Princeton by vote of the people was to the particular tract or lot of land in Fordyce proposed as the site for the courthouse, and that the county court had no power to change that designation and remove the courthouse to another site in Fordyce except upon another vote of the people as prescribed in the Constitution and statutes regulating the removal of county seats. Counsel for appellees base their defense of the decree on that view of the law.

This brings up for consideration the question as to what is meant in our laws concerning the removal of county seats by the provision for vote of the people. Does it mean that a vote is required on the question of changing the courthouse site from one lot to another in the same town or only on the removal of a county seat from one town to another? Is the county seat confined to the tract or lot of ground on which the courthouse is located, or is it the town designated as the county seat or seat of justice? The latter question seems to have been an-

swered by this court in an opinion written by Judge BATTLE giving a definition of the term "county seat."

"In every county of this State there is, and must be, a county seat. At it the county court is required to erect a good and sufficient courthouse and jail. The county, circuit and other courts held for the county must sit there. There is no other place designated by law for that purpose. The name 'county seat,' indicates the object of its creation. It is, as defined by the Century Dictionary, 'the seat of government of a county; the town in which the county and other courts are held, and where the county officers perform their functions.' *Williams* v. *Reutzel,* 60 Ark. 155. Other cases seem to give the same meaning to the term by referring to the town in every instance as the county seat. Ex parte *Blackburn,* 5 Ark. 21; *Rogers* v. *Sebastian County,* 21 Ark. 440; *Patterson* v. *Temple,* 27 Ark. 202; *McNair* v. *Williams,* 28 Ark. 200; *Maxey* v. *Mack,* 30 Ark. 472; *Russell* v. *Jacoway,* 33 Ark. 191; *Neal* v. *Shinn,* 49 Ark. 227; *Rucks* v. *Renfrow,* 54 Ark. 409; *Hudspeth* v. *State,* 55 Ark. 323.

The earliest legislation recorded on our statute books concerning removal of county seats is found in the Revised Statutes of 1838, which provided that whenever a majority of the taxable inhabitants of any county should petition the county court praying for removal of the "seat of justice," the court should order an election for the purpose of electing three commissioners "to locate the seat of justice." The statute further provided that the commissioners, after election and qualification, should "select a suitable site for the location of the seat of justice;" that they should be impowered "to receive donations in lands or money and building material for the purpose of building such public buildings as may be necessary for the use of the county at the place selected by them as the seat of justice;" and that they should have power "to make entry of land and * * * to subdivide and lay off into lots all such lands as they may acquire by entry, donation, or otherwise, and to dispose of the same at public auction." It further provided that the seat of justice established for a term of four years should not be changed "unless the county court shall cause a sufficient tax to be assessed on all taxable property within the county *to pay the owners of lands at such seat of justice*

for their lands and improvements," and in that event "the county court shall appoint three disinterested persons, not residents of the county, to value all lots and improvements in such seat of justice." Rev. St. c. 39.

It needs no comment or argument to show that the framers of that statute referred to the town as the seat of justice, and not merely to the courthouse site.

The statute above referred to remained in force until March 16, 1869, when it was superseded by another statute on the subject. The new act provided that whenever one-third of the electors of any county should petition the county court for the removal of the seat of justice to any other designated place the court should order an election, directing that the proposition to remove such seat of justice to the place named in the petition be submitted to the qualified electors of the county. It then provided that if the vote was in favor of removal the county court should appoint three commissioners "to select a site whereon to locate the county buildings," and that the commissioners should be impowered to purchase "not less than one nor more than fifty acres of land, and may receive as a donation such parcel of land or town lots including the place selected as the seat of justice."

It is manifest that the language of this statute, so far as concerns the removal of the county seat, refers to the removal to a town. This is evident from the provision for appointing commissioners to select the site after the election at which the removal is voted. It is plain, therefore, that up to this time the Legislature referred to the county seat or seat of justice as the town in which the courthouse was located. The law thus stood in that condition until the adoption of the Constitution of 1874, which was the first provision on that subject found in any Constitution of this State.

"No county seat shall be established or changed without the consent of a majority of the qualified voters of the county to be affected by such change, nor until the place at which it is proposed to establish or change such county seat shall be fully designated. Provided, that in the formation of new counties the county seat may be located temporarily by provisions of law." Art. XIII, § 3.

Now, it is fair to assume that the framers of the Con-

stitution used the term "county seat" in the sense that it was used in prior legislative enactments on the subject, and in the sense in which it had been used in decisions of this court. In *Vahlberg* v. *Keaton*, 51 Ark. 540, this court said:

"When the framers of a constitution employ terms which, in legislative and judicial interpretation, have received a definite meaning and application, which may be either more restricted or more general than when employed in other relations, it is a safe rule to give them that signification sanctioned by the legislative and judicial use."

This is also the meaning of the term when considered in its popular sense; and if we adopt that mode of interpretation, the same result is reached. We conclude, therefore, that the framers of the Constitution, in prescribing the conditions upon which a county seat may be removed, referred to removal from one town to another, and not from one courthouse site to another in the same town. This view of the constitutional provision obviates any inconsistency between that provision and later statutes on the subject of removal and another statute which has been brought forward from the Revised Statutes of 1838 authorizing the county court to "designate the place whereon to erect any county building on any lands belonging to the county at the established seat of justice thereof."

The next legislation on this subject was an act approved March 2, 1875, which remains in force to this day, and the first section of which reads as follows:

"Unless for the purpose of the temporarily location of county seats in the formation of new counties, it shall be unlawful to establish or change any county seat in this State without the consent of a majority of the qualified voters of the county to be affected by such change, nor until the place or places at which it is proposed to establish or change any county seat shall be fully designated, such designation embracing a complete and intelligible description of the proposed locations, together with an abstract of title thereto and the terms and conditions upon which the same can be purchased or donated by or to the county. Provided, the county court shall not order the election hereinafter provided for unless it shall be to satisfied that a good and valid title can and will be made to

the proposed new locations or one of them." Kirby's Digest, § 1115.

Other sections of that act read as follows:

"Before any of the orders of the county court contemplated by section 1121 shall be made, or, if made, before they shall be executed, the vendor or donor of the new location shall make or cause to be made and deliver to the county judge a good and sufficient deed, conveying to the county the land or location so sold or donated in fee simple, without reservation or condition, and also an abstract of the title papers, deeds and conveyances, and assurances by or through which the title thereof is derived, who shall file the same for record in the recorder's office of such county, to be recorded as other title deeds and papers. Then the place so deeded shall be the permanent county seat, and the title shall be vested in the county." Kirby's Digest, § 1122.

"When the deed to the new location shall have been executed and the title vested in the county, as provided in the preceding section, for the purpose and intention of this act, the county court is hereby authorized and impowered to appoint three discreet citizens as the county commissioners, who shall take an oath to faithfully demean themselves as such, and who, under the orders and directions of the county court in pursuance of the provisions of this act, shall superintend and contract for, in the name and behalf of the county, the clearing, grubbing and laying off such new location into suitable and convenient town lots and the erection or purchase of all needful buildings on such new location, preparatory to the actual removal and change of the county seat." Kirby's Digest, § 1123.

In the construction of this statute we should indulge the presumption that it was meant to conform to the constitutional provision on that subject and to only require an election by the people where it was required by the Constitution, leaving the county court with full power to act in matters not forbidden by the Constitution. It is true the language of this statute is peculiar and somewhat ambiguous in its provision for the designation of the new location, but we are of the opinion that this merely referred to a site for a courthouse in the event of a removal to the town designated. It was not intended as a requirement that there should be a vote of the people before a

county court could order a change in the location of the courthouse from one lot to another in the same town. The Constitution invests the county court with exclusive original jurisdiction "in all matters relating to county taxes, roads, bridges, ferries, * * * the disbursement of money for county purposes,and in every other case that may be necessary to the internal improvement and local concerns of the respective counties." Art. 7, § 28. In view of this broad provision as to the jurisdiction of county courts, it is hardly conceivable that the framers of the Constitution meant, by the provision for removal of county seats, which, we hold, referred to removals from one town to another, to restrict the power of the county court in ordering the removal of the courthouse from one lot to another, which may under some circumstances become immediately a matter of the highest local concern. It would require very plain and unambiguous language to force the conclusion that a restriction in that respect was intended.

The case of *Matkin* v. *Marengo County*, 137 Ala. 155, 34 Southern 171, is cited by counsel for appellants in support of their contention, and we find it to be directly in point. The Constitution of Alabama contains the following provision:

"No courthouse or county site shall be removed except by a majority vote of the qualified electors of said county voting at an election held for such purpose."

The county commissioners attempted to remove the courthouse from its location to another lot in the same town, and citizens attempted to restrain the removal on the ground that it was forbidden by the Constitution except by vote of the people. The court, in denying the petition said:

"The construction contended for by counsel for appellants, that 'courthouse site' should be held to mean the particular lot upon which the building is erected, is too narrow and unsupported by sound reason, and, if adopted, would likely lead to greater public detriment, in possible cases, than mere inconvenience. Our conclusion is, and we so decide, that it was and is intended by section 41 that no courthouse shall be removed from the town or city where located at the time of the adoption of the Constitution, except as provided in said section, and not that a new courthouse may not be erected within such town or city on a lot other than that upon which the old is

located, whenever determined necessary by the court or county commissioners, without first having submitted such question to a vote of the people."

Our conclusion, therefore, is that the county court possessed the power to change the site of the courthouse from the school district lot in Fordyce to the proposed location donated by Banks.

It is unnecessary to pass upon the constitutionality of the special statute authorizing the board of commissioners to select a site, for, as the county court had power to make the selection and order a removal to that site, and did so in this instance, it is unnecessary to say whether it must be put upon the authority of the county court or of the special statute.

It is contended that the order of the court entered October 6, 1908, declaring the result of the election and ordering the removal of the county seat, and the subsequent orders of that court directing the commisssioners to proceed to the construction of the courthouse on the school district lot, could not be set aside at a later term, and that the order of the county court in May, 1911, changing that order was void. The power of the county court over the location of public buildings is a continuing one. It is the same as if the building had been constructed on the school district lot, and afterwards the county court saw fit to dispose of that site and change to a new location in the town which constituted the county seat. If the county court had the power at all to order a change of the location of the courthouse, it had the power to make this change before the building was actually constructed as well as to wait until its order was carried out by the construction of the new building and then to order the change. There is nothing in the decision in *Walsh* v. *Hampton, supra,* which limits the power of the county court to make a new order with respect to the change of location. In that case we merely held that the order of the court, declaring the result of the election and ordering the removal, was final, and could not be vacated at a subsequent term; but that was a matter over which the county court had no continuing power. After it declared the result of the election and ordered the removal pursuant thereto, its power was exhausted. The difference between the two kinds of judgments lies in the continuing power of the county

court over the subject of county buildings, as distinguished from the power to declare the result of an election by the people.

The record shows that the chancellor heard oral testimony, which is not included in the transcript, and it is insisted that for this reason the presumption must be indulged that the decree was correct, and that an affirmance must therefore follow. The decision of the chancellor was incorrect upon the undisputed facts, and can not be aided by any presumption as to the oral testimony. That testimony could only have related to the issue as to which was the more desirable of the proposed sites; but as there was no charge of fraud practiced upon the county court in selecting the new site and ordering the change, that question could not have been material, for the county court had exclusive jurisdiction over the subject, which could not be controlled by the chancery court.

"As a general rule, in all cases involving the location, repair, removal and furnishing of county buildings, such as courthouses, jails, and public offices, the court or county commissioners exercise a discretion which can not be controlled by any judicial tribunal, in the absence of fraud, corruption or unfair dealing." 7 Am. & Eng. Enc. of Law (2 ed.) p. 996.

The remedy of appellants to correct an abuse by the county court of its power in selecting the wrong site was by appeal after making themselves parties to the proceedings in the county court. *Bowman* v. *Frith*, 73 Ark. 527.

Our conclusion upon the whole case is that the decree of the chancellor was erroneous, and that it should be reversed with directions to dismiss the complaint for want of equity.

It is so ordered.

GUS BLASS DRY GOODS COMPANY *v*, REINMAN.

Opinion delivered February 12, 1912.

1. NUISANCE—REMEDIES OF PROPERTY OWNER.—Every owner of property, whether in fee or for years, has the right to a remedy for the interference with or deprivation of its use or enjoyment, either by the recovery of damages when that affords adequate relief or by the restraining power of the court when damages are irreparable. (Page 290.)
2. SAME—WHO MAY SUE.—Where rights enjoyed by citizens as a part of the public are affected by a nuisance, the authority of the State or

municipality may be invoked by its representative officers either to abate the nuisance or to punish those maintaining it; but where special injury, differing from that sustained by the public, is inflicted upon an individual, he may sue in his own name. (Page 291.)

3. SAME—WHAT CONSTITUTES.—If one uses his property so unreasonably as to annoy, injure or endanger the comfort, repose, health or safety of another in the use of his property, he creates a nuisance, for which the court will grant relief. (Page 291.)

4. SAME—LIVERY STABLE.—While a livery stable in a city or town is not a nuisance *per se*, it becomes a nuisance where, by the unreasonable use thereof, it destroys the comfort of the adjoining owner so as to palpably and sensibly diminish or destroy the lawful use of his property. (Page 291.)

5. SAME—DEFENSE.—Where a livery stable is a nuisance to adjacent proprietors, it is no defense that the stable is conducted in a careful manner. (Page 292.)

6. SAME—WHEN ENJOINED.—Before equity will restrain or abate a nuisance, it must be constantly recurring, and from it there must result substantial inconvenience, loss of health, loss of trade, partial but substantial destruction of business or ruin of property or the deprivation of its use and enjoyment to a material extent. (Page 294.)

7. PLEADING—WHEN DEMURRER SUSTAINED.—In determining whether or not a demurrer to a complaint should be sustained, every allegation made therein, together with every inference reasonably deducible therefrom, must be considered. (Page 294.)

8. NUISANCE—JOINDER OF SEVERAL PARTIES.—Where, in a suit to enjoin a nuisance, several parties have a common interest in the injury and in the relief sought, they may join as parties plaintiff. (Page 294.)

9. SAME—RIGHT OF CORPORATION TO SUE.—A corporation may sue to enjoin a nuisance which renders physically uncomfortable and substantially diminishes the ordinary use, occupation and enjoyment of its property by its employees, agents and officers, whose occupancy of its premises is necessary to the conduct of its business. (Page 294.)

Appeal from Pulaski Chancery Court; *John E. Martineau*, Chancellor; reversed.

Charles Jacobson, for appellants.

1. A private corporation has the right to have a nuisance abated. Joyce on Nuisances, par. 442; 108 U. S. 317, 330.

2. Appellants can be joined as parties plaintiff. All are similarly injured at the same time and in the same way. Kirby's Digest, § 6005.

3. A nuisance may be both public and private. That which annoys the public generally or invades its rights, constitutes also a private nuisance where specific injury occurs.

Joyce on Nuisances, par. 14; 32 L. R. A. (N. S.) 525; 1 Cal. 426; 40 Ark. 87.

4. It is not necessary to allege negligence. Joyce on Nuisances, par. 18; 1 Cal. 426; 122 N. Y. 18; 18 Minn. 324; 63 N. Y. 568; 92 Ark. 542.

Watkins & Vinson, for appellees.

1. Livery stables are not nuisances *perse.* No carelessness nor negligence is alleged. 89 Ark. 175; 85 *Id.* 544; 93 *Id.* 362; 95 *Id.* 545; 108 U. S. 545.

2. The remedy is at law.

FRAUENTHAL, J. This is an action seeking to enjoin the defendants from maintaining a nuisance arising from the alleged wrongful management of a livery stable owned and conducted by them. The complaint contains substantially the following allegations: The plaintiffs are four domestic corporations occupying places of business upon Main Street, in the city of Little Rock; three of them are engaged in the retail dry goods business, and the other in the banking business. The defendants own and conduct a livery, sale and feed stable in a building which is located at the rear of the business houses occupied by plaintiffs, and separated therefrom by an alley twenty feet in width. In the conduct of their business, the plaintiffs employ a great many persons as clerks; a great many persons visit these stores for the purpose of shopping; and in the rear of the stores, and nearest to the defendant's stable, are located their offices where other employees and officials transact part of the companies' business. It is further alleged that the defendants "keep many horses, mules and other stock in their stable, also large quantities of hay, grain, and other highly inflammable material, and that said hay, grain and other inflammable material is stored in the rear end of their building bordering on said alley, and within about twenty feet of the rear end of the stores occupied by plaintiffs, and that by reason thereof plaintiffs' danger from fires is vastly increased and made more hazardous. That an offensive odor and stench from the animals and the droppings pour into their respective places of business and permeate the same, to the great annoyance and discomfort of the members composing said corporations who work therein, as also the employees who la-

bor therein, and of the customers who come there for the purpose of buying goods and other wares, to such an extent as to render them uncomfortable, and at times unfit them for the proper discharge of their duties, and that said annoyance and discomfort is continuing and permanent, and has been continuous, and is greatly injurious to plaintiffs' businesses, it causing an annoyance and discomfort to those desiring to purchase goods, and those waiting upon them as employees, and rendering said buildings unfitted for the purposes for which they are conducted by the plaintiffs." It is also alleged that the plaintiffs have no adequate remedy at law.

The defendants filed a demurrer to the complaint based upon the grounds: (1) that there was a defect in the parties plaintiff; (2) that plaintiffs, who are corporate and artificial bodies, could not maintain an action seeking injunctive relief from the injuries claimed to arise from the alleged nuisance; (3) because plaintiffs showed no special injury sustained by them different from that sustained by the public generally by reason of the alleged nuisance; and (4) because the complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and, as it is stated in argument, upon the ground that the complaint did not state facts sufficient to constitute a cause of action, in that it failed to allege that the defendants were guilty of negligence in the manner in which they managed and conducted the livery stable. Plaintiffs refused to plead further, and thereupon the complaint was dismissed.

The action instituted by the plaintiffs is based upon their right to be protected in the use and enjoyment of their property, which, it is in effect alleged, is impaired and partially destroyed by the alleged nuisance maintained by the defendants upon adjoining property. The use and enjoyment of property is the chief element which gives to it value; and the deprivation or impairment of such use and enjoyment is in effect a destruction of the property itself. Every owner of property, whether in fee or for years, has the right to a remedy for the interference with or the deprivation of its use and enjoyment, either by the recovery of damages when that affords adequate relief, or by the restraining power of the court when damages are irreparable. The use and enjoyment of one's property may be les-

sened or destroyed by injuries arising from a nuisance. Where the rights enjoyed by the citizens as a part of the public are affected by the nuisance, the authority of the State or municipality may be invoked by its representative officers, either to abate the nuisance or to punish those maintaining it. Where, however, the acts complained of constitute a private nuisance, the individual who sustains special injuries arising therefrom may obtain relief, either by the recovery of damages or by injunction, according to the degree of the injury. Any unwarrantable, unreasonable or unlawful use by a person of his own property, real or personal, whereby it works a special injury to another in the use and enjoyment of his property, will constitute a private nuisance. The same wrongful act and wrongful use of one's property may at once constitute both a public and private nuisance. Where a special injury, differing from that sustained by the public generally, is inflicted by such nuisance upon the individual, then the wrongful act complained of constitutes a private nuisance for which the individual is entitled to a remedy upon a suit brought in his own name. Every one has the right to the reasonable use and employment of his own property; but such use and employment of it is not reasonable if it deprives the adjoining owner of the lawful use and enjoyment of his property. If one uses and employs his own property in such an unwarrantable and unreasonable manner as to annoy, injure or endanger the comfort, repose, health or safety of another in the use of his property, then he creates a nuisance, for which the court will grant relief. A livery stable in a town or city is not necessarily a nuisance; or, as it is often expressed, it is not a nuisance *per se.* It may be, and ordinarily is, both harmless and useful. But if it is conducted or kept or used in an improper manner, if by the unwarrantable and unreasonable use thereof it destroys the comfort of the adjoining owner so as to palpably and sensibly diminish or destroy the lawful use and enjoyment of his property, then the livery stable becomes a nuisance. *Durfey* v. *Thalheimer* 85 Ark. 544; *Dargan* v. *Maddill,* 9 Ired. 244; *Kirkham* v. *Handy,* 11 Humph. (Tenn.) 406; *Shiras* v. *Olinger,* 50 Ia. 571; *Keiser* v. *Lovitt,* 85 Ind. 240; *St. James Church* v. *Arrington,* 36 Ala. 546; *Phillips* v. *Denver,* 19 Col. 179.

There are various trades and occupations which are useful

and even necessary to the existence and growth of towns and cities, but which may be so conducted as to render the use and enjoyment of adjacent property uncomfortable and intolerable, by infecting the air with noisome smells or qualities injurious to health, or by disturbing noises, and thereby constitute a nuisance. Their necessity and usefulness will not justify an improper and unwarrantable use of them whereby another is deprived of the enjoyment of his property. This well recognized doctrine applies to livery stables. If by the prosecution of the business a nuisance is created, it is no defense to say that it is carried on and conducted in a careful and prudent manner. The injury arising from the maintenance of the nuisance is just the same, whether the nuisance is created by the business itself or by the improper or negligent manner in which it is conducted. If the nuisance springs from the business itself, as from a slaughter house or from a glue factory, then it is a nuisance *per se*. If it flows from the improper, unreasonable or negligent manner in which the business is conducted, then it becomes a nuisance. But in either event the complaining party has a right to relief from its discomforting, injurious and baleful effects. As is said in 1 Wood on Nuisances, § 48. "The question of care is not an element in this class of wrongs; it is merely a question of results, and the fact that injurious results proceed from the business under such circumstances would have a tendency to show the business to be a nuisance *per se*, rather than to operate as an axcuse or defense, and the courts would feel compelled to say that under such circumstances the business is intolerable, except so far removed from residences and places of business as to be beyond the power of bestowing its ill results upon individuals or the public."

In the case of *Bohan* v. *Port Jervis Gas Light Co.*, (N. Y.) 9 L. R. A. 711, it is said: "The wants of mankind demand that property be put to many and various uses and employments, and one may have upon his property any kind of lawful business; and, so long as it is not a nuisance, and is not managed so as to become such, he is not responsible for any damage that his neighbor accidentally and unavoidably sustains. * * * But where the damage is the necessary consequence of just what the defendant is doing, or is incident to the business itself or

the manner in which it is conducted, the law of negligence has no application, and the law of nuisance applies."

Negligence is not an essential element to establish a cause of action for damages growing out of a nuisance, or for restraining its maintenance. If the damages necessarily result from acts committed by the defendants, or if they necessarily arise from and are incident to the business conducted by the defendants, the business constitutes a nuisance, and the complaining party is entitled to relief from the injuries arising therefrom, whether they result from negligence or not. The question which then arises is rather whether or not the resulting injuries or damages spring from the business conducted or the acts done, without regard to whether the buisness is negligently conducted or the acts are those of negligence. Joyce on Negligence, § 18.

These principles of law relating to nuisances are well settled and uniformly recognized by the courts. The difficult questions involved, and to be determined in each case, are whether or not the annoyance, discomfort and injury is sufficient in degree to constitute a nuisance, and, if so, whether or not an adequate relief can be obtained by an action for damages, and whether or not the damages are irreparable. It is only in cases where the damages are constantly recurring and irreparable that courts of equity will lend their aid in abating the nuisance or in restraining its maintenance. The right of the complaining party to relief necessarily depends upon the degree of the injury arising from the alleged nuisance, which is chiefly determined by the evidence. The injury and resultant damages flowing therefrom may be great or they may be slight; and the determination of the rights of the complaining party and his remedy must necessarily depend upon the varying circumstances of each case. It is well settled that the injury must not be fanciful or imaginary, nor such as to result in a trifling anoyance, inconvenience or discomfort which may affect those who possess too sensitive a nature or too fastidious a taste. The law is applied only to the normal man, the man of ordinary habits and ordinary sensibilities. The law only takes cognizance of sensible and substantial discomforts and inconveniences. The necessities of the life and growth of towns and cities require the establishment and continuance of certain occupations, business enterprises and works, in the conduct

of which some degree of annoyance and discomfort is necessarily incident. The jurisdiction of a court of equity to afford relief by interfering with a private nuisance, by way of injunction, is based upon the ground of preventing irreparable injury or the multiplicity of suits. The mere diminution in the value of property or of the business by the nuisance, without irreparable injury, will not furnish sufficient cause for equitable relief. The nuisance must be of a constantly recurring and permanent nature; and from such nuisance there must flow injuries causing substantial, tangible and material discomforts and inconvenience, which result in a loss of health, loss of trade, partial but substantial destruction of business or the ruin of property and the deprivation of its use and enjoyment to a material and substantial extent, before a court of equity will interfere by injunction to restrain the maintenance of or to abate the alleged evil. 2 Story's Equitable Jurisprudence, 926; Joyce on Nuisances, § 427; Wood on Nuisances, § 778.

In determining whether or not a demurrer to a complaint should be sustained, every allegation made therein, together with every inference which is reasonably deducible therefrom, must be considered. *Cox* v. *Smith*, 93 Ark. 371. Viewing the allegations of the complaint in this manner, we are of the opinion that it states facts sufficient to constitute a cause of action.

It is contended by counsel for defendant that there is a defect in the parties plaintiff, but we do not think that this contention is well taken. The several plaintiffs own separate properties, and for the actual damages thereto arising from the injuries caused by the alleged nuisance they could not bring a joint suit, but would be compelled to institute separate actions for such damages. This is because their interest in such actions and the remedy therefor would be distinct and separate. But where there is a community of interest by the several parties plaintiff in the relief sought, and where the very injury caused by the nuisance is common to all, then the several parties may be joined as parties plaintiff in the prosecution of the action of injunction founded upon such wrong. Joyce on Nuisances, § 446; 2 Wood on Nuisances 791; *Brady* v. *Weeks*, 3 Barb. (N. Y.) 157.

We are also of the opinion that a corporation may be

entitled to the relief granted by a court of equity against the maintenance of a nuisance which renders physically uncomfortable and substantially diminishes the ordinary use, occupation and enjoyment of its property by its employees, agents and officers, whose presence and occupancy of its premises is necessary to the conduct of its affairs and business.

In the case of *Baltimore & Potomac R. Co.* v. *Fifth Baptist Church,* 108 U. S. 318, Mr. Justice Field, in delivering the opinion of the court, says: "Private corporations are but associations of individuals united for some common purpose and permitted by the law to use a common name, and to change its members without a dissolution of the association. Whatever interferes with the comforatble use of their property, for the purpose of their formations, is as much the subject of complaint as though the members were united by some other than a corporate tie." Joyce on Nuisances, § 442; *Northern Pac. R. Co.* v. *Whalen,* 149 U. S. 157; *First Baptist Church* v. *Schenectady & Troy R. Co.,* 5 Barb. 79.

It follows that the court erred in its ruling in sustaining the demurrer to the complaint. The judgment will therefore be reversed, and this cause remanded with directions to overrule the demurrer, and for further proceedings.

WOLFE v. STATE.

Opinion delivered February 12, 1912.

1. APPEAL AND ERROR—MISDEMEANORS—PERFECTING RECORD.—It is not essential to give the Supreme Court jurisdiction in a misdemeanor case that the entire record of the proceedings of the trial court shall be lodged in the office of the clerk within sixty days, but if a transcript is lodged within the required time, and it can be seen from the bill of exceptions that there was a trial and a final judgment rendered, the court will entertain the appeal and permit the transcript to be amended to show the record entry of the final judgment. (Page 299.)
2. CRIMINAL LAW—EFFECT OF CONDITIONAL PLEA OF GUILTY.—A plea of guilty entered upon condition is not authorized by law, and will not support a judgment of conviction. (Page 300.)

Appeal from Mississippi Circuit Court, Osceola District; *Frank Smith,* Judge; reversed.

STATEMENT BY THE COURT.

A number of indictments were returned by the grand jury of Mississippi County against the appellant, charging him with violations of the liquor law. These indictments were returned against appellant at the October, 1911, term of the circuit court of Mississippi County for the Osceola District. Four cases are here on appeal, and they involve the same questions, and are considered and determined at the same time.

The appellant and the prosecuting attorney entered into an agreement in writing which is as follows:

"MEMORANDUM.

"First: No loops to be made by either The Whisper or any boat operated by Capt. Jos. E. Wolfe, and by loop is meant leaving a landing, going out into the river for the purpose of making sales and returning to the same landing or to any other landing within one mile of the first. This is not to prohibit doing the regular business from landing to landing.

"Second: No person to be carried from landing to landing without payment of regular fare except on passes issued at Memphis.

"Third: All cases on docket at Osceola and Blytheville for sales of liquor on said Whisper are to be continued for the term, that is for six months. If this agreement is kept by the said Captain Wolfe, all such cases are to be dismissed at the March term of said courts at cost of defendant. If this agreement is violated, the defendant shall pay fines and costs to the amount of two thousand dollars, and shall enter pleas of guilty in enough of these cases to aggregate that sum, other cases to be dismissed. But the defendant may be prosecuted in cases of violation for all future sales after this date.

"Fourth: The circuit judge shall determine upon a hearing of both parties after due notice whether or not this agreement has been kept in case complaint is made of the violation thereof.

"Fifth: No question will be made as to the venue of sales made in the regular course of the boat's trip, and cases will not be brought upon such sales if this agreement is otherwise performed.

"Sixth: This agreement applies to all cases on sales prior to this date, except where fines are already assessed.

"Seventh: No violation of the Sunday laws.

(Signed) "T. H. Carraway,
"Jos. E. Wolfe."

At an adjourned term of the circuit court held on the 10th day of November, 1911, at Osceola, complaint was made that this agreement had been violated, and appellant was cited to appear at a hearing to determine whether or not there had been a violation of the agreement.

The testimony of the various witnesses tends to show that whisky was sold on Sunday from appellant's boat, The Whisper, while she was opposite Osceola and out in the river on the Tennesee side about opposite a place called Plum Point. One of the witnesses testified that he kept the landing at Osceola. He "observed The Whisper Sunday three weeks ago; she was at Plum Point. She would go out from the bank and then go back, and go to the bank and back out."

One witness testified that he bought whisky on her on Sunday; that she was a little piece out from the bank.

The testimony shows that the whisky was not sold in Arkansas, but that the sales took place on the Tennessee side of the river.

The court entered up fines against appellant in the four cases aggreagting the sum of $2,000, and entered judgment accordingly. The appellant filed a motion for a new trial, in which, among other things, he set up the following:

"That the testimony of witnesses who have testified before the court at the hearing of this cause was of such a nature as to surprise the defendant and to place him in such a position that he could not have controverted such testimony at said hearing.

"Defendant says that, if granted a new trial in this cause, he will, with the permission of the court, withdraw the pleas of guilty heretofore entered and go to trial upon said indictments, and that, if allowed to do so, he will request that a jury be impaneled, and that he be allowed to enter pleas of not guilty as charged in the indictments to which he has entered pleas of guilty, and he further says that the only conditions upon which he entered said pleas of guilty were that he was willing to enter into said agreement and to keep said agreement faithfully for

the purpose of showing to this court that he had no intent to and would not violate the laws of the State of Arkansas. And defendant further states that, if a new trial is granted in this cause, he can and will produce evidence which will controvert the testimony of said witnesses above referred to."

The court overruled the motion, and the appellant, within sixty days, lodged what purported to be transcripts in the four cases in this court. These transcripts contain what is designated as the bills of exceptions. These bills of exceptions contain the testimony that was taken at the hearing of the issue as to whether or not appellant had violated his agreement. The memorandum above mentioned is also set forth, and the findings of the court. The bills of exception also contain the judgment of the court. But there is no record entry in the transcript showing the judgment of the court. This however has, since the transcript was lodged in this court, and after the expiration of sixty days, been supplied by certiorari.

The Appellant, pro se.

1. None of the sales were made in Arkansas nor in violation of the agreement. 40 Ark. 52.

2. Courts can only enforce the laws of their own jurisdiction. 94 Ark. 199.

3. Abuse of discretion in refusing to allow a defendant to withdraw a plea of guilty is reversible error. 12 Cyc. 352; 52 Kan. 566; 45 *Id.* 12.

Hal L. Norwood, Attorney General, and *Wm. H. Rector,* Assistant, for appellee.

1. The appeals should be dismissed: The final judgments were not lodged here within sixty days. Kirby's Digest, § § 1188, 2614; 26 Ark. 468; 27 *Id.* 336; 73 *Id.* 8; 35 S. W. 232; 51 *Id.* 959; 37 Mo. 31; 147 U. S. 695; 45 Mass. 421; 45 Fed. 4521; 2 Thompson on Trials, § 2771; 89 Ark. 482. No judgment can be perfected after the time for perfecting the appeal. Elliott, App. Proc. 128.

2. It is not the office of a bill of exceptions to show record entries. Nor can a bill of exceptions supply or contradict the record proper. 72 Ark. 320; 84 *Id.* 343. A recital in the bill of exceptions that a judgment was rendered is not sufficient. 165 U. S. 168; 137 Ind. 257; 61 Mo. 375; 51 *Id.* 199; 5 Col.

244; 53 Mo. 321, 77 Ala. 519; 16 So. 911; 55 Ill. App. 217; 35 *Id.* 217; 109 *Id.* 539; 26 Miss. 109; 51 Ga. 501; Ell. App. Proc. 282, note 4.

3. The agreement was violated. 94 Ark. 198. While there was no authority for the agreement (94 Ark. 198), nor for acceptance of a conditional plea of guilty, appellant can not complain. Kirby's Digest, § 2296; 54 Ark. 120; 88 *Id.* 290.

WOOD, J., (after stating the facts). 1. Upon the authority of *Gross* v. *State*, 89 Ark. 482, and other recent cases, the Attorney General contends that, inasmuch as the transcript filed with the clerk of this court within the sixty days did not show the record entry of a judgment against the appellant, his appeal was not perfected in time. These cases hold that to give this court jurisdiction on appeal the record must be lodged in the office of the clerk of the Supreme Court within sixty days after the judgment. See also section 2614, Kirby's Digest.

The majority of the court are of the opinion that this statute is complied with when there is a transcript filed within sixty days wherein the bill of exceptions is set out, which shows that a trial was had upon the testimony and a final judgment was rendered although that judgment is not copied as a part of the record. The transcript thus showing is sufficient to give this court jurisdiction, and, although the court will not look to the bill of exceptions to see what the judgment of the court was, as that is not the proper place for it, still the court will, upon filing of such transcript, permit the appellant to bring up by certiorari the record entry of the judgment. This has been done in this case, and we have now embodied, as a part of the record, the final judgment of the court from which the appeal has been prosecuted. In the opinion of the majority of the court it is not essential to give this court jurisdiction that the entire record of the proceedings of the trial court shall be lodged in the office of the clerk of the Supreme Court within the sixty days; but if a transcript is lodged within the sixty days, from which this court can see that there was a trial and a final judgment rendered, by a statement to that effect in the bill of exceptions, then the court will entertain the appeal and allow the transcript of the record to be amended to show the record entry of the final judgment. A recital in the bill of

exceptions to the effect that a judgment was rendered and a copy of the judgment itself set forth therein is not sufficient evidence of such judgment. *Gray* v. *Singer*, 137 Ind. 257; *Clark* v, *McDade*, 165 U. S. 168.

But where there is such a statement and such a copy in the bill of exceptions contained in the transcript lodged in this court, the court will entertain the appeal and allow the transcript to be amended so as to embody the record entry of the judgment in the court below. Of course, if the transcript can not be so amended for the reason that no final judgment has been rendered in the court below, then this court would dismiss the appeal, notwithstanding the statement in the bill of exceptions that there had been a final judgment, and even though a purported copy of such final judgment were contained in the bill of exceptions, for, in the last analysis, the court would have to look to the record proper for the judgment, and not to the bill of exceptions. *Arkadelphia Lbr. Co.* v. *Asman*, 72 Ark. 320; *Berger* v. *Houghton*, 84 Ark. 343.

2. Upon the issue as to whether or not the appellant had violated his agreement with the prosecuting attorney, as set forth in the bill of exceptions, the court found "that the defendant heretofore, during this term of court, entered his plea of guilty in this cause, and that the same was continued for the term in pursuance of an agreement made between the prosecuting attorney and the defendant and his counsel, which agreement was offered in evidence." The court further found "that said plea of guilty was entered upon the condition that the court's discretion to impose a fine under the defendant's plea should be exercised in the event only that the defendant violated the terms of the said agreement; and upon a consideration of all the evidence offered in this cause the court finds that said agreement was in fact violated by the defendant, and therefore the court should now impose a fine in this case."

It thus appears that the plea of guilty was entered in this case upon condition that the court would impose a fine under the plea only in the event that the defendant violated the terms of the agreement. In other words, if the appellant complied with the terms of his agreement not to sell liquor in the future as therein specified, then the court would not impose a fine upon him in the cases in which he had entered pleas of guilty.

The court expressly finds that the plea of guilty was entered upon condition, and the effect of the court's construction of the agreement was that it permitted the court to allow the appellant to enter pleas of guilty upon condition that the punishment which the law imposes for a violation of the statute would not be inflicted on appellant for past offenses provided appellant complied with the law in the future.

Now, the law does not authorize any such agreements as here entered into with the prosecuting attorney, and pleas of guilty can not be accepted on condition that the fines imposed by statute as a result of a violation of the law will be pretermitted provided the offenders do not commit similar offenses in the future. There is no authority in the statute "for a plea of guilty to be entered and received on any kind of condition, or for judgment to be suspended on condition." *Joiner* v. *State*, 94 Ark. 198.

Under the law a party is either guilty or not guilty; and when he enters a plea of guilty upon the indictment under a statute which he has violated, the law fixes the punishment, which it is not in the discretion of the court to withhold unless the plea of guilty is withdrawn. *Joiner* v. *State, supra.*

While it is within the discretion of the court to permit a plea of guilty to be withdrawn, it is not within the power of the court to withhold the punishment if the plea of guilty is not withdrawn. Kirby's Digest, § 2296.

In the case, since the court finds that the appellant's pleas of guilty were entered upon condition, it results that they were not such plea of guilty as the law authorizes or contemplates, and therefore the court was not justified in inflicting punishment upon such pleas. In the case of *Joiner* v. *State, supra,* "the record made by the clerk at the time showed that the pleas of guilty were entered unconditionally." The court should not in any case except a plea of guilty on condition, and can not render judgment upon a plea of guilty that has been entered upon condition. If the court has accepted and has entered on record a plea of guilty on condition, then the only authority which the court has over such a plea is to allow the same to be withdrawn and to allow a proper plea to be entered. The only plea is either guilty or not guilty.

This case differs from the case of *Joiner* v. *State, supra*, in the very fact that in that case the plea was entered unconditionally, whereas in this case, as found by the court, the plea was entered upon certain conditions. The question in *Joiner* v. *State* was as to whether the court could exercise its discretion to allow the appellant to withdraw his plea of guilty which, as appeared from the record, was properly entered, that is, unconditionally. That, under the statute, as we have seen, was within the court's discretion.

Here the question is as to whether or not the court has the discretion to allow a plea of guilty to be entered upon a condition, and thereafter render a judgment against and impose a punishment upon the party entering such plea because he had failed to comply with the conditions upon which the plea was entered. The whole proceeding was without authority of law and void. The court should have granted appellant's motion for a new trial and have allowed him to enter his plea of not guilty, as requested. It was not within the discretion of the court, upon the showing made in this record, to withhold such request.

The judgment is therefore reversed, and the cause is remanded with directions to allow appellant to enter his plea of not guilty and for further proceedings according to law.

McCULLOCH, C. J., and KIRBY, J., dissent.

JONES v. BANK OF HORATIO.

Opinion delivered February 12, 1912.

1. BILLS AND NOTES—EFFECT OF ALTERATION.—The alteration of a check, without the drawer's knowledge or consent, although done in such manner as to leave no mark or indication of an alteration observable by a man of ordinary prudence, avoids the check as to the drawer, even in the hands of one to whom it is negotiated before maturity for valuable consideration and without notice of such alteration. (Page 304.)

2. APPEAL AND EROR—ERRONEOUS CHARGE—HARMLESS ERROR.—An erroneous charge as to the burden of proof was harmless where it was favorable to appellants. (Page 305.)

3. TRIAL—REMARK OF COURT.—A remark by the court, in the jury's presence, to plaintiff's counsel that the introduction of the notes alleged to have been forged, together with proof of genuineness of plaintiff"

signature, made out a *prima facie* case in favor of defendant, was not prejudicial where the jury were instructed that the burden was on the defendant to show that no alterations had been made in the checks, especially where no request was made that the jury be instructed to disregard the court's remark. (Page 305.)

Appeal from Sevier Circuit Court; *Jeff T. Cowling*, Judge; affirmed.

Otis T. Wingo, for appellant.

Alteration of a check avoids it even in the hands of innocent holders. 49 Ark. 40; 1 Cent. Rep. 253; 100 N. Y. 50.

B. E. Isbell, for appellee.

FRAUENTHAL, J. The plaintiffs, Jones & Company, were customers of the defendant, which is an incorporated bank. They deposited with it $2,302.05, and from time to time drew checks on it which were promptly paid, except the last, which was protested, the defendant claiming that plaintiffs had overdrawn their account before its presentation. The plaintiffs claimed that they had drawn checks on defendant to the amount of $2,230.37, thus leaving a balance of $71.68 undrawn and due to them. They instituted this suit for the recovery of that sum, and also $3.15 the protest fees paid by them on the check which they claimed was wrongfully dishonored. On the other hand, the defendant claimed that the plaintiffs had drawn on it checks amounting to $2,354.37, which it had paid, thus making plaintiffs indebted to them in the sum of $52.32, the amount which they had overdrawn. By way of counterclaim, defendant asked for judgment for that sum.

The controversy grows out of the alleged invalidity of two checks presented to and paid by defendant. The two checks were signed by plaintiffs and made payable to one James Hale. The plaintiffs claimed that the two checks were altered after their issuance, and without their knowledge or consent, by being changed in date and raised in amounts. One of the plaintiffs, W. A. Flannigan, testified that he had signed both checks and delivered them to the payee; that one was dated January 28, 1911, and was for two dollars, and the other was dated February 9, 1911, and was for three dollars. When these two checks were presented to and paid by defendant, they appeared as dated February 11, 1911; and the first was

for $29 and the last for $100, both of which latter amounts the defendant paid thereon. The jury returned a verdict in favor of defendant for the amount of the counterclaim, and judgment was rendered accordingly.

It is urged by counsel for plaintiffs that the court erred in its refusal to give certain instructions asked by them. The plaintiffs admitted the genuineness of the signatures to both checks, but denied the genuineness of their dates and amounts. In effect, they requested the court to instruct the jury that, if they found that the checks had been altered as to amounts, then the defendant was not entitled to credit therefor; that it devolved upon defendant to establish by the preponderance of the evidence the genuineness of the checks in every material part, and if it failed to make such proof it was not entitled to credit for the checks, even though they found that the alleged alterations were so made as to leave no trace or appearance thereof upon their face. The court, however, instructed the jury in effect that if from the evidence they found that the two checks in controversy were drawn by the plaintiffs for the amounts as shown by the checks, which were presented at the trial, and that these checks were paid by defendant, then it was entitled to credit therefor. It further instructed the jury as follows: "But, on the contrary, if you find that the checks have been raised in amount and are not as they were when issued and put in circulation by Jones & Co., and the bank paid these checks after they had been altered, then the bank would be liable; in other words, it resolves itself down to whether or not they have been altered since they left Jones & Co., and in that the burden of proof is upon the defendant bank to prove that the checks have not been altered."

The original checks have not been brought up with the record. From the testimony, it appears that there is a conflict as to whether or not the alleged alterations were apparent on the face of the checks. It has been settled by this court that the alteration of a check duly signed and delivered, without the knowledge or consent of the drawer, "although done in such manner as to leave no mark or indication of an alteration observable by a man of ordinary prudence, avoids the check as to the drawer, even in the hands of one to whom it is negotiated before maturity for a valuable consideration and without notice

of the forgery." *Fordyce* v. *Kosminski,* 49 Ark. 40. But whether or not a check has been altered is a question of fact to be determined by a jury from the evidence adduced upon the trial of the case. There is a distinction made as to where the burden of proof rests relative to proving or disproving the genuineness of the check, bill or note, in cases where the alteration is apparent on the paper, and in cases where the paper appears fair upon its face. *Inglish* v. *Breneman,* 5 Ark. 378; *Chism* v. *Toomer,* 27 Ark. 108; *Gist* v. *Gans,* 30 Ark. 285; *LeMay* v. *Williams,* 32 Ark. 166; *Klein* v. *German National Bank,* 69 Ark. 140.

In the case at bar, however, it is not necessary to note or pass upon this question upon whom the burden of proof rests, because the court instructed the jury that the burden rested with the defendant to prove that the checks had not been altered. In no event, therefore, have the plaintiffs any ground for complaint relative to the instructions given on this question, for it was favorable to them.

It is also urged in this connection that the court erred in stating in the presence of the jury that the defendant had made out a *prima facie* case by proof of the genuineness of the signatures of the plaintiffs to the checks and the introduction thereof. It appears that during the progress of the trial defendant offered in evidence the two checks, after it had been admitted that both had been signed by plaintiffs. In the argument made before the court relative to the admissibility of the checks, the court remarked to the attorney that the introduction of the checks nade out a *prima facie* case for defendant, to which remark counsel for plaintiff excepted. This remark was, however, not directed to the jury, but to the attorney, and it can not be said that the jury considered it as an instruction influencing them. On the contrary, the court in the instructions given by it specifically told them that the burden of proof devolved upon defendant to show that no alterations had been made in the checks. It appears that the counsel for plaintiffs simply excepted to the remark thus made by the court to the attorneys, but it does not appear that he requested the court to state to the jury that they should not regard it; and we do not think that the remark thus made can

be considered such an abuse of discretion as to constitute error so prejudicial as to call for a reversal of the judgment.

It is earnestly insisted that the verdict is not supported by sufficient evidence. It appears from the testimony that plaintiffs were engaged in railroad construction work, and that James Hale was employed by them as a laborer. The testimony on the part of plaintiffs tended to prove that he worked for them a few days in January and February, and that the entire amount of his labor was less than $25; that part of this was paid by check, which he transferred to another person whom he owed, and which is not involved in this case. Mr. Flannigan, the person who signed the checks in controversy, testified that he wrote the entire written portions of both checks, and that the amounts as written by him had been raised in both checks. Defendant, however, introduced testimony of expert witnesses which tended to prove that neither of the checks presented in evidence had been raised or altered in the amount thereof. The written checks were exhibited to the jury; and these, taken in connection with this testimony of these witnesses expert in handwriting, were sufficient to sustain the verdict. The question as to whether the amounts in the checks had been raised was one peculiarly for the jury to decide under this testimony; and, they having determined the question under instructions of which plaintiffs can not complain, their verdict is final. The judgment is accordingly affirmed.

BATEMAN *v.* BOARD OF COMMISSIONERS OF IMPROVEMENT DISTRICT NO. 1 OF CLARENDON.

Opinion delivered February 12, 1912.

1. MUNICIPAL CORPORATIONS—IMPROVEMENTS—LIMITATION OF COST.—Under Kirby's Digest, section 5683, providing that no single improvement shall be undertaken which shall exceed in cost 20 per centum of the value of the real property in the district as shown by the last county assessment, interest to accrue on bonds issued to defray the expense of construction is, within the meaning of the statute, to be included as a part of the cost of the improvement. (Page 307.)

2. COURTS—DECISIONS—RULES OF PROPERTY.—A decision that interest to accrue on bonds issued for the cost of an improvement must be included in estimating the cost thereof, within Kirby's Digest, section

5683, limiting the cost of a single improvement to 20 per cent. of the assessed value of the real property of the district, is a rule of property, and should not be disturbed. (Page 308.)

3. MUNICIPAL CORPORATIONS—MAKING TWO IMPROVEMENTS IN ONE DISTRICT.—When two improvements cover the same territory and can be made as effectually by one as by two districts, one district may be created to make both improvements, but the cost thereof must be limited to the amount specified in Kirby's Digest, section 5683. (Page 308.)

Appeal from Monroe Chancery Court; *John M. Elliott*, Chancellor; reversed.

H. B. Bateman, pro se.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

McCULLOCH, C. J. An improvement district has been duly formed in the city of Clarendon, Arkansas, for the purpose of constructing a system of waterworks and sewerage, and appellant, a citizen and owner of real property in said district, instituted this action in the chancery court against the board of improvement to restrain the latter from entering into a contract for the construction of said improvement at a cost in excess of 20 per centum of the value of real property in the district and from issuing bonds in excess of said amount. The chancery court sustained a demurrer to appellant's complaint. It is alleged in the complaint that the board of improvement will, unless restrained from so doing, enter into a contract for making such improvement and issue bonds for the full amount of the cost thereof, and that the interest on the bonds will make the cost of the improvement exceed 20 per centum of the assessed value of real property in the district.

The statute regulating improvement districts in cities and towns provides among other things, that "no single improvement shall be undertaken which alone will exceed in cost 20 per centum of the value of the real property in such district as shown by the last county assessment." Kirby's Digest, § 5683.

The question presented is, whether interest to accrue on bonds issued to defray the expense of construction, is within the meaning of the statute, to be included as a part of the cost of the improvement. This court has already decided the question in the affirmative. *Fitzgerald* v. *Walker*, 55 Ark. 148.

It is insisted, however, by learned counsel for appellee that

the case cited above has been overruled by the recent case of *Webster* v. *Ferguson*, 95 Ark. 575. We do not think so. The question of cost of improvement in excess of the statutory limitation did not arise in the latter case. The question there was, whether the statement, in the petition of the property owners, which limited the cost of improvement to a certain amount, included interest, and we held that the statement of the amount referred to actual cost of improvement exclusive of interest.

It is next contended that the decision in *Fitzgerald* v. *Walker*, *supra*, is wrong, and that it should be overruled. This question was directly raised in that case, and the court decided it after what appears from the opinion to have been a very careful consideration. We see no reason, therefore, for overruling it. Besides, it should be treated as a rule of property, and on that account, if for no other, it should not be changed except by the Legislature. Many improvement districts have been organized in this State since that time, and many of them are now in existence with outstanding interest-bearing indebtedness. Property owners who signed petitions for improvement may have done so in reliance on the decision of this court that assessments could not lawfully be levied in excess of twenty per centum of the value of the real property in such district as shown by the last county assessment. At any rate, they had the right to rely on that decision, and are presumed to have done so, and for that reason the decision is a rule of property and should not be disturbed.

Again, it is contended that, though only one district was formed, it was for the purpose of making two improvements, and that each constitutes a distinct improvement which may, under the statute, be constructed at a cost of twenty per centum of the value of real property in the district. It is true that we have held that one district may, under some circumstances, be formed for the purpose of making two improvements. The two improvements must, however, be treated as one for the purpose of including them in one district. That is clearly the meaning of the opinion in the case wherein we passed upon that question. *Wilson* v. *Blanks*, 95 Ark. 496. Judge BATTLE, speaking for the court, said:

"If the two improvements cover the same territory, and can be made as fully and effectually and in the same manner,

and without prejudice to the rights of any of the property owners under the statutes, by one as they can be by two districts we see no valid reason why they should not be combined and made in such manner. In such way they can be treated as one improvement, and as such made in the manner prescribed by the statutes. * * * When, however, one district can not be used to make two improvements in the manner indicated, it would seem to be unauthorized by the statutes, and one district should be created for making each improvement, and in case of doubt is preferable."

When property owners elect to include two improvements in the formation of a district they must treat them as a single improvement and limit the cost to the amount specified in the statute. No machinery is provided for levying separate assessments in a single district for more than one improvement.

It follows that the chancery court erred in sustaining the demurrer to the complaint. Reversed and remanded with directions to overrule the demurrer.

REMSHARD v. RENSHAW.

Opinion delivered February 12, 1912.

1. TRUST—WHEN CONSTRUCTIVE TRUST ARISES.—Where a husband falsely represented to his second wife that he had no children, and, relying thereon, she permitted him to use her money in improving his home and paying off a mortgage thereon, equity will enforce a constructive trust in her favor at his death. (Page 311.)

2. SAME—WHEN CONSTRUCTIVE TRUST ENFORCED.—Whenever another's property has been wrongfully appropriated and converted into a different form, equity impresses a constructive trust upon the new shape it may take, and charges with a lien the product of a substitute for such property, so long as it can be ascertained. (Page 312.)

3. ADMINISTRATION—FINAL ACCOUNTS—EFFECT OF APPROVAL.—The judgment of a probate court approving the accounts of an administratrix is conclusive as to the amount of property received by her and the amounts distributed in payment of debts and expenses of administration. (Page 313.)

Appeal from Craighead Chancery Court, Western District; *Charles D. Frierson,* Chancellor; affirmed with modification.

J. F. Gautney, for appellant.

1. The court erred in charging the real estate with a trust for $946.00 and interest. The money was not paid *at the time of the purchase* by the *cestui que trust* with the understanding and agreement that she was to have an interest therein. 93 Ark. 93; 49 *Id.* 430; 54 *Id.* 499; 2 Johns. Ch. 406; 34 U. S. 1091; 21 *Id.* 570; Pom., Eq. Jur. § 1037. Mere payment of money on land or improvements after the purchase does not create a trust. 79 Ark. 164; 29 *Id.* 612; 40 *Id.* 62. The evidence of such a trust must be clear and convincing. 64 Ark. 155; 82 Ark. 569; 89 *Id.* 192.

2. The sum charged is excessive.

3. The court erred in denying appellants any part of the personal estate. The order of the probate court was void. Kirby's Digest, § § 169, 170-1. Even on collateral attack. 55 Ark. 562; 62 *Id.* 439; 65 *Id.* 566; 69 *Id.* 591.

Lamb & Caraway, for appellee.

1. The decree of April term, 1908, is a bar. Kirby's Digest, § 6259; 1 Ark. 503; 7 *Id.* 70; 20 *Id.* 97; 21 *Id.* 462; 72 *Id.* 613; 29 Cyc. 272. 21 A. & E. Enc. Law, 313.

2. The evidence shows a resulting trust. 64 Ark. 155; 70 *Id.* 145; 72 *Id.* 456; 73 *Id.* 310; 73 *Id.* 338; 136 S. W. 934; Perry on Trusts, § 170; Story, Eq. Jur. (1857 ed.) vol. 2, § 1237; Jones on Liens (1888) vol. 1, § 39; 6 N. E. 116.

McCULLOCH, C. J. George Remshard was a soldier of the United States in the Mexican war, and was honorably discharged from the military service in August, 1851, at Fort Constitution, in the State of New Hampshire. He was married to Elizabeth P. Boggs at the city of Philadelphia in the year 1855, and had five children, the issue of that marriage. He disappeared and deserted his family in 1876, and they heard nothing of him until after his death, which occurred in 1907 at Jonesboro, Arkansas, where he then resided. His wife, Elizabeth P., died in 1884, and, under the name of Renshaw, which he assumed after leaving his former home and family, he was married to appellee, Anna M., at Jonesboro, Arkansas, in February, 1890. He bore that name during the remainder of his life, and his wife and acquaintances knew him only by that name. He told his wife that he had no children or other kin-

dred. When he died, he owned a homestead in the city of Jonesboro, which he acquired after his intermarriage with appellee. He also owned, in addition to his household effects, other property consisting of money in bank. Appellee administered on the estate of her deceased husband, and paid all debts of said estate. She filed her final settlement account as such administratrix, showing that she had paid all the indebtedness of the estate and that the chancery court of Craighead County had rendered a decree vesting in her all the property of said decedent; and the probate court on July 15, 1908, entered an order approving said account and discharging her. She instituted an action in the chancery court of Craighead County against the unknown heirs of George Renshaw, and in April, 1908, that court rendered a decree reciting a finding that George Renshaw left no children or other heirs at law and vesting in her the title to all of the property of said decedent. Appellants, who are the children and grandchildren of George Remshard, instituted the present action on May 31, 1910, against appellee in the chancery court of Craighead County for the purpose of cancelling said former decree as a cloud on their title as heirs of said decedent to the real estate owned by him at the time of his death, and also requiring appellee to account to them for the personal estate of said decedent. The chancery court decided that, as to the real estate, appellee is entitled to a lien thereon for the sum of $1,542.08, which amount the court found had been used of her funds in constructing the dwelling house on the lot in question, and, as to the personal property, the court decided that appellants are barred by the judgment of the probate court confirming appellee's final settlement account as administratrix.

As the chancellor did not uphold the former decree vesting title to the real estate in appellee, but decreed the title to be in appellants subject to appellee's homestead right and her lien aforesaid, we need not consider the question of the validity of the former decree, and will confine ourselves to an inquiry whether the chancellor was correct in declaring a lien in appellee's favor. The evidence tends to establish the fact that appellee received from her own separate estate the sum of $946 in money, which was used by her husband in paying for the construction of the dwelling house on the lot in Jonesboro which

he had purchased. At least, a portion of the money was received after the house was completed, but it was used in discharging a mortgage on the property given for borrowed money used in building the house. Her husband represented to her that he had no children or other relatives, and that upon his death she would inherit all his property. In reliance upon those representations, she permitted him to use her money in paying for the construction of the house and in discharging the mortgage on the property. The chancellor found those to be the facts, and his decision in delcaring a lien in her favor was correct. The money used was a part of her own estate and remained her separate property as long as she chose. She parted with it and allowed her husband to use it in improving his own property and in discharging the mortgage lien solely on the faith of his false representations that the property would come back to her at his death because of there being no other heirs. The result is the same as if she had entrusted the money to him as her agent, and he had wrongfully used it in improving his own property and in discharging liens thereon. In that case he would be held to be a trustee for her, and a lien in her favor for the money wrongfully used would be declared on the property into which the money could be traced. *Atkinson* v. *Ward*, 47 Ark. 533. She is entitled to subrogation to the extent of the amount of her money used in discharging the mortgage lien. *Spurlock* v. *Spurlock*, 80 Ark. 37.

Counsel for appellants invoke the principle that a resulting trust will not be declared on account of payment of purchase money unless the same be paid at the time of the purchase. *Milner* v. *Freeman*, 40 Ark. 62; *Red Bud Realty Co.* v. *South*, 96 Ark. 281. That principle has, however, no application to the facts in the present case. Appellee is not seeking to enforce a resulting trust, but she seeks to enforce a lien by reason of a constructive trust arising from the wrongful use of her money. *Atkinson* v. *Ward, supra.* The court did not decree the title to be in her as *cestui que trust*, but merely declared a lien in her favor for the money wrongfully used in improving her husband's property and in discharging the prior lien. The evidence was sufficient to warrant the conclusion that the money was used in the way the appellee claimed.

"Whenever another's property has been thus wrongfully

appropriated and converted into a different form, equity impresses a constructive trust upon the new shape it may take, and the right to follow and claim, or charge with a lien, the product of or substitute for the original thing in the hands of the trustee 'only ceases,' as Lord Ellenborough says, 'when the means of ascertainment fails.'" *Atkinson* v. *Ward, supra.*

The contention of appellants, that this case is ruled by *Butterfield* v. *Butterfield,* 79 Ark. 164, can not be sustained for in that case there was merely a voluntary loan, by a sister to her brother, of money used in payment for property subsequent to the purchase thereof, and the court held that there was no resulting trust. The question of wrongful use of funds did not arise in that case.

The appellants insist that the chancellor allowed $56.28 too much in computing interest, and we find that contention to be correct. The decree to that extent will be modified. This error does not appear to have been called to the attention of the chancellor, otherwise it doubtless would have been corrected.

As to the personal property, appellee's settlement accounts as administratrix in the probate court were not successfully assailed for fraud, and the judgment of that court approving the final account is conclusive as to the amount of property received by her and the amounts distributed in the payment of debts and expenses of administration. Those accounts show that she received $1,004.76 in money, and paid out $375.15 on debts and expenses of administration. She was entitled to retain $300 in accordance with the provisions of section 3 of Kirby's Digest (there being no minor children), and the further sum of $150 under section 74 of the Digest (the estate being solvent), and, in addition thereto, she was entitled to the sum of $334 as her dower out of said funds. *Ex parte* Grooms, *post* p. 13. These amounts to which she was entitled aggregate the sum of $784.92, leaving a balance of $219.84, which is less than the amounts which she expended in the payment of debts and expenses of administration. It appears somewhere in evidence that there were household effects of the value of about $500, which she retained, but the evidence as abstracted by appellants does not show of what articles this property consisted. Appellee was entitled to take advantage of the provisions of section 72 of the Digest, which allows the widow to

retain "all the wearing apparel of the family for their own use, her wheels, looms, sewing machines, and other implements of industry, all yarn cloth, and clothing made up in the family for their use, and such grain, meat, vegetables, groceries and other provisions as may be necessary for herself and her own and her husband's family residing with her, for a period of twelve months; also, her household and kitchen furniture, beds and bedding, sufficient for herself and family residing with her."

The question, whether she had the right to retain all the household effects has not been argued, and therefore we need not inquire further whether all the articles fall within the provisions of section 72 above quoted.

Upon the whole, we think that the chancellor's decree was correct, whether based on correct reasons or not. With the modification indicated above, the decree is affirmed.

ROGERS v. STATE.

BARNHILL v. STATE.

Opinion delivered February 12, 1912.

INTERSTATE COMMERCE—PEDDLING.—Where a manufacturer of vehicles, having its place of business in another State, through its travelling salesmen, went from house to house soliciting orders in this State, and shipped the vehicles so ordered from its place of business to this State tagged with the purchaser's name, and sent a delivery man to make delivery of the vehicles within this State, and made sales in no other manner, such salesmen were guilty of violating the peddling statute of April 1, 1909.

Appeal from Greene Circuit Court; *W. J. Driver*, Judge; affirmed.

STATEMENT BY THE COURT.

These are two appeals prosecuted by the two defendants from judgments of conviction had upon separate trials. The facts and questions involved in the two cases are the same, and for that reason the appeals are considered together. The prosecutions were instituted before a justice of the peace upon separate informations charging the defendants with a violation of the peddling statute, approved April 1, 1909, which provides that, "before any person, either as owner, manufacturer or agent

shall travel over and through any county and peddle and sell any lightning rod, steel stove range, clock, pump, buggy, carriage or other vehicle, or either of said articles, he shall procure a license, " etc. Acts 1909, p. 292. The trials before the justice of the peace and in the circuit court, to which appeals had been taken, resulted in the conviction of the defendants. The cases were heard upon an agreed statement of facts, which is as follows:

"The Spaulding Manufacturing Company is a copartnership composed of H. W. Spaulding, F. E. Spaulding and E. H. Spaulding, all of whom are citizens and residents of Grinnell, Iowa, at which place is located the general office of the company and the factory, in which are manufactured the vehicles and wagons which they sell through traveling salesmen throughout Arkansas and other States in the Union. They have no factory at any other place than Grinnell, Iowa, and no regular place of business or branch house in the State of Arkansas. The manner in which the Spaulding Manufacturing Company had been, a long time prior to and at the time of this alleged offense, doing business in this State is as follows:

"The company has, and maintains, at Memphis, Tennessee, in carload lots stored in a wareroom, carriages, buggies and vehicles of different grades and kinds manufactured by them, which are in charge of an agent of the company. It also has a division superintendent, or manager, by the name of Will Warren, in charge of its salesmen in Greene County, Arkansas, and other counties in Arkansas. It also has in its employ a certain number of salesmen who travel over and through the counties in this State assigned to them going from place to place, taking orders and making contracts for the sale of vehicles, and among them is the defendant, Rogers, a part of whose territory assigned to him by the company being Greene County,Arkansas. Within the last twelve months, and only recently, the defendant, Rogers, has been travelling over and through Greene County, going from place to place therein, soliciting and taking orders and notes for buggies from residents of said county. Each salesman is furnished with one or more sample buggies, with which he travels over and through the county assigned to him, soliciting orders. In no case does the salesman sell the sample, and no sample has been sold or

delivered by said defendant, Rogers, nor does he solicit orders for the sale of such samples. Upon giving an order for a vehicle, the purchaser signs a note or memorandum of purchase, a blank form and copy of which is hereto attached, marked exhibit "A," stipulating for the delivery of said vehicle within a certain number of days, usually thirty. The purchaser also delivers to the salesman, at the time the order is made, his note for the purchase price of such buggy or vehicle. A copy of said form of note is hereto attached as exhibit "B" to this agreed statement of facts, both of which exhibits are hereby made a part hereof. All orders are transmitted by the salesmen to their respective division superintendents; in this instance the orders obtained by Rogers being transmitted by him to the said Warren. It is then the duty of the division superintendent to pass upon the financial responsibility of those giving the orders. If the said orders are by the said Warren approved, he then directs the representative of the company at Memphis, to make delivery on the same. The delivery is made as follows:

"The vehicles designated in the orders are selected by the company's agent in charge from the stock on hand according to the respective style mentioned in the contracts, and in sufficient numbers according to the styles sold, as shown by the orders, to supply those contracted for in any given community at any one interval, and are placed on board a car at Memphis, the wheels and shafts being first taken off of the body of the vehicle. The body of the vehicle is tagged with the name of its respective purchaser, the wheels or shaft, bearing no tag or name of the purchaser, being also loaded into the same car, and capable of identification with the body of which they are a part, by reason of the fact that they are suited for and a part of the buggy mentioned in the contract of purchase. The shipment is consigned to the order of the Spaulding Manufacturing Company, at a place near where the vehicles are to be delivered, in this instance, at Jonesboro, Craighead County, Arkansas. A representative of the Spaulding Manufacturing Company, called a delivery man, receives from the railroad company at Jonesboro the vehicles there consigned to his order. No storehouse is maintained at that point, the method of business being to unload the vehicles, to attach to the body of

each vehicle the wheels and the shafts belonging to, and of the grade and kind sold, which requires only a few moments to the vehicle. The vehicles are then delivered directly by the company's delivery man to their respective purchasers. The delivery man is usually a different person from the salesman taking the order.

"In accordance with this method and character of doing business, P. L. Rogers, the defendant, as an agent of the company on the.....days of September, 1911, travelled over and through Greene County, Arkansas, from place to place, and took orders from William Ridge, Mrs. Harris, and C. Hooker, in Greene County, Arkansas, having each of these to sign the usual order and note in manner and form as above described, which said orders were approved by the proper agent of the Spaulding Manufacturing Company. The vehicles have been delivered on said orders."

It was further agreed that no vehicle except the samples above mentioned were brought into the State or stored therein except for the purpose of delivery upon orders previously taken, and that no vehicle was sold except upon such order taken for the vehicle prior to the time it was brought into the State. It was further agreed that neither of the defendants, nor their employer, had taken out the license prescribed by the act.

A. C. Lyon, John M. Moore, W. B. Smith and *J. Merrick Moore*, for appellants.

The act is a direct interference with interstate commerce and void, as contended in 95 Ark. 464. 187 U. S. 632; 153 *Id.* 289; 218 *Id.* 124; 12 Wheat. 419, 444; 120 U. S. 489; 82 Ark. 314, 315; 127 U. S. 640; 153 *Id.* 289.

Hal L. Norwood, Attorney General, and *Wm. H. Rector*, Assistant, for appellee.

95 Ark. 464 is conclusive of these cases. The tagging of an original package with the purchaser's name is not necessarily an incident of interstate commerce. 203 U. S. 507. 218 U. S. 124 decides no new principle. The judgments are right, or 95 Ark. 464 should be overruled.

FRAUENTHAL, J., (after stating the facts). The facts of these cases are identical in every essential particular, except one, with the facts of the case of *Crenshaw* v. *State*, 95 Ark.

464, in which a prosecution for the violation of this statute was considered and a conviction thereunder sustained. The particular in which these cases apparently differ from the Crenshaw case is that in the case at bar the vehicles were separately tagged with the names of the respective purchasers at the time they were placed on board the cars at Memphis, Tennessee. The vehicles, however, were loaded and transported in one shipment and consigned to the Spaulding Manufacturing Company at Jonesboro, where they were unloaded and thereafter delivered to the purchasers who, only after inspection and acceptance, received them. In the Crenshaw case, the ranges were not tagged or noted with the names of the purchasers at the time they were delivered to the common carrier at St. Louis.

We do not think that the tagging of the vehicles with the names of the persons executing orders therefor, under the facts adduced in these cases, distinguishes them from the Crenshaw case in any particular that would declare the evidence in these cases lacking in any ingredient essential to constitute a violation of this statute, or that it would make the shipment a subject-matter of interstate commerce any more than the shipment involved in the Crenshaw case. The gist of the offense created by this statute does not consist in making sales without license but in peddling without license. As is held in the case of *Crenshaw* v. *State, supra,* in order to constitute peddling, there must be the element of travelling from place to place, over and through the county, for the purpose of making sales. The statute does not declare it an offense to make sales, nor does it seek to impose a license fee or tax on sales, but only makes it an offense for one to go about from place to place, from residence to residence, in and through the county in the prosecution of a wayfaring business, without procuring license, whether in making sales or in taking orders. As was said relative to a statute quite similar to this by the Supreme Court of the United States: "Its object in requiring peddlers to take out and pay for licenses and to exhibit their licenses on demand to any peace officer or to any citizen householder of the county appears to have been to protect the citizens of the State against the cheats and frauds and even thefts which, as the experience of ages has shown, are likely to attend itinerant and irresponsible peddling from place to place and from door to door."

Emert v. *Missouri,* 156 U. S. 296. This statute is directed at an itinerant occupation which may endanger the peace and safety of the citizens of the State, and not at a business which only involves the sale of property. It is but the exercise of the police power of the State, and, as was said in the above case of *Emert* v. *Missouri, supra,* "it is nowise repugnant to the power of Congress to regulate commerce among the several States, but is a valid exercise of the power of the State over persons in business within its borders."

The question as to the place at which the sale was made and at which the title to the property passed is not essentially different in these cases from that involved in the Crenshaw case; because in these cases it was provided in the orders given by the prospective purchasers of the vehicles that they were purchased in effect upon condition that when the vehicles were delivered to them in Greene County they should be approved by them after an inspection and acceptance thereof. So that the sales were not really consummated until the purchasers actually had inspected and accepted the vehicles in Greene County. The mere fact that the vehicles were tagged in the names of the prospective purchasers when the shipment was made at Memphis did not change the character of the act committed by these defendants, which consisted in going from house to house and residence to residence throughout the county in taking the orders, and thus in peddling. It is true that in the case of *Crenshaw* v. *State, supra,* the case of *Rearick* v. *Pennsylvania,* 203 U. S. 507, is referred to, and this court stated that the facts in that case differed from the Crenshaw case in that the ranges in the Crenshaw case were not tagged with the names of the purchasers. But the court did not base its opinion in that case upon the ground that the ranges were not tagged in the names of the purchasers, or that the Rearick case was decisive in event the ranges had been so tagged. It based its decision upon the ground that the act of peddling prohibited by this statute without license consisted in going about from place to place, over and through the county, for the purpose of making sales; that the statute regulating such acts was but the exercise of the police power of the State in protecting its citizens; that it in nowise affected interstate commerce or any business or thing which was the subject-matter of interstate

commerce. We are of the opinion that the facts in the cases at bar are, in every essential particular, analagous to those in the Crenshaw case. In the Crenshaw case the constitutionality of this peddling statute, under similar facts and conditions, was upheld, and we see no reason for changing that decision.

It has been held by the Supreme Court of the United States that State statutes requiring that notes, otherwise negotiable instruments, the consideration for which is a patent right or patented article, should be executed in a prescribed manner or otherwise be invalid as negotiable paper or even void, are not in contravention of any provision of the Federal Constitution or of any power given to Congress to legislate relative to the subject-matter of such transactions. This ruling is based upon the ground that such State legislation is but the exercise of the police power of the State in the protection of its citizens against fraud and imposition, which common experience has shown can be more easily perpetrated in cases where the sale of patent rights and patented articles is the subject-matter of the transaction. *Allen* v. *Riley*, 203 U. S. 347; *Woods* v. *Carl*, 203 U. S. 385; *Ozan Lumber Co.* v. *Union County Bank*, 207 U. S. 251.

In the latter case it is said: "The various itinerant venders of patented articles, whose fluency of speech and carelessness regarding the truth of their representations might almost be said to have become proverbial, were of course in the mind of the Legislature, and were included in this legislation. Indeed they are the principal people to be affected by it." In the latter case the transaction involved a contract of sale concerning a matter which was the subject of interstate commerce; and while the question as to whether or not such State legislation relative to patent notes was affected by reason of the fact that the patented article sold was shipped in interstate commerce was not expressly passed on in the opinion rendered by the Federal Supreme Court, it does appear to have met the attention of the United States Circuit Court of Appeals in that case, and is there noted. *Union County Bank* v. *Ozan Lumber Co.*, 179 Fed. 710. But in those cases legislation of this character is recognized as a valid police regulation enacted by the State for the peace and security of its citizens. The

peddling statute of this State, we think, is legislation of that character, and is for that reason valid.

The judgments are accordingly affirmed.

WOOD, J., dissents.

FISHER v. STATE.

Opinion delivered February 12, 1912.

LARCENY—SUFFICIENCY OF EVIDENCE.—A conviction of larceny of some sheep will not be sustained where the defendant did not exercise any control over the sheep, and did not have any connection with the theft except to ride in the wagon for a while with the boys who stole the sheep and were carrying them away.

Appeal from Garland Circuit Court; *Calvin T. Cotham*, Judge; reversed.

M. S. Cobb, for appellant.

Hal L. Norwood, Attorney General, and *Wm. H. Rector*, Assistant, for appellee.

HART, J. The indictment against the appellant, George Fisher, contained two counts: the first count charged him with the larceny of four sheep, and the second with receiving the sheep knowing them to have been stolen. The jury returned a verdict of not guilty on the first count, and convicted him on the second count. From the judgment of conviction the defendant has appealed.

The defendant and his brother, John Fisher, lived with their mother about twenty miles from Hot Springs. On the night of September 3, 1911, the brother, Gus Jones, Earl Lee, and Walter Careley, who were all at Mrs. Fisher's residence, concluded to go to Hot Springs. George Fisher went ahead of the other boys, intending to stop at a Mr. Gilliam's to borrow some money. The other boys at a later hour left Mrs. Fisher's in a wagon. When they arrived at Mrs. Nancy J. Garrett's place, they stole four of her sheep and put them in the wagon. When they arrived at Mr. Gilliam's, the defendant came out, and got in the wagon with them. One of the witnesses says that he laughed when he saw the sheep in the wagon, and made no objection to the boys carrying them. The other boys say that

he strongly objected to them carrying the sheep, and advised them to turn them loose. One of the boys says that the defendant drove the wagon a part of the time while he was in it. Later on he again got out of the wagon, and, not having succeeded in borrowing money from Gilliam, went to see another person. He borrowed $37.50 from him, and gave a mortgage to secure it, and then went on to the city of Hot Springs. He was not with the other boys after he left the wagon until after they had disposed of the sheep and divided the proceeds of sale. The other three boys proceeded on their journey, sold the sheep for $8, and each of them received $2 of the proceeds of the sale. The defendant did not have anything to do with the sale of the sheep, and the only reason he did not inform on the boys was because he did not want to tell on his brother. Under this state of the record, the sufficiency of the evidence to sustain the verdict is questioned.

It will be seen that the defendant did not have nor exercise any control whatever over the sheep, and did not in any wise aid in the disposal of them; he did not receive any portion of the proceeds of the sale, and did not have any connection whatever with the transaction except to ride in the wagon with the boys for a while. Under these circumstances, we do not think the evidence was sufficient to warrant the verdict.

The judgment will therefore be reversed, and the cause remanded for a new trial.

Ex parte GROOMS.

Opinion delivered February 12, 1912.

1. WIDOW'S ALLOWANCE—WHETHER IN LIEU OF DOWER.—Kirby's Digest, section 3, providing that "when any person shall die leaving a widow and minor children or widow or minor children, * * * where the personal estate exceeds in value the sum of three hundred dollars, the widow and minor children, or widow or minor children, as the case may be, may retain the amount of three hundred dollars out of such personal property at its appraised valuation," does not intend that such allowance shall be in lieu of dower. (Page 323.)

2. DOWER—IN PERSONALTY.—A widow's dower in personalty must be carved out of the specific estate of which the husband was seized at the

time of his death; that is, she is entitled to one-third out of each kind or class of personal property of which her husband died seized and possessed. (Page 325.)

3. SAME—HOW ESTIMATED.—In estimating the amount of a widow's dower in personalty the whole of the personal estate must be taken into consideration, including the property taken under the special provisions of Kirby's Digest, sections 3, 72 and 74; but she can not take from one class of property more than one-third thereof, as dower, in order to make up for a deficiency in another class created by reason of her having selected out of that class the above special provisions. (Page 325.)

Appeal from Jackson Circuit Court; *R. E. Jeffery*, Judge; reversed.

John W. & Joseph M. Stayton, for appellant.

An examination of the various statutes on the subject that have been in force at different times shows a clear intent on the part of the Legislature to give to the widow the amount provided for in section 3, Kirby's Digest, for herself and minor children, in addition to her dower rights and the benefits of sections 72 and 74. Act 1846, Digest 1848, section 3, chap. 4, p. 110; Gould's Digest, § 3; Gantt's Digest, § 6; Mansfield's Digest, § 3, amended by act 1881; amended again 1901 to the form now appearing in the present digest; 69 Ark. 94, 191; Kirby's Digest, § 73; 67 Ark. 278; 70 Ark. 246.

Similar provisions enacted in other States have been construed to be for the present support of the widow, and are absolute. 15 N. H. 74; 66 Ky. 241; 48 Mich. 271; 87 Mo. 437; 45 Ala. 264; 77 Mo. 162; 47 Pa. St. 230. And have been held to be in addition to dower. 134 S. W. 1097; 7 Ind. 354; 16 Ind. 110; 61 Ind. 255; 7 Ky. L. R. 149; 48 Mich. 271; 31 Me. 65; 72 Mo. 656; 25 Pa. St. 31; 34 Pa. St. 394; 33 Vt. 561.

MCCULLOCH, C. J. Under the statutes of this State, a widow is entitled, as a part of her dower, "to one-third part of the personal estate, including cash on hand, bonds, bills, notes, book accounts and evidences of debt whereof the husband died seized or possessed." Kirby's Digest, § 2708.

Section 3 of the Digest provides that "when any person shall die leaving a widow and minor children, or widow or minor children, * * * where the personal estate exceeds in value the sum of three hundred dollars, the widow and minor children, or widow or minor children, as the case may be, may retain the

amount of three hundred dollars out of such personal property at its appraised valuation."

Section 72 provides that, in addition to the amount mentioned in section 3, the widow shall be allowed to retain as her absolute property certain specific articles, consisting of wearing apparel, certain implements of industry, clothing for family use, and grain, meat, groceries and other provisions necessary for herself and family for a period of twelve months, and the household and kitchen furniture and effects sufficient for herself and family residing with her.

Section 74 provides that: "In addition to the property specified in section 72, the widow, when the estate is not insolvent, may take such personal property as she may wish, not to exceed the appraised value of one hundred and fifty dollars."

The question presented in this case is, whether the widow and minor children are entitled to the amount specified in section 3 in addition to the widow's dower. The court below decided that the provision was in lieu of dower, and not in addition thereto, and refused to allow the widow and minor children the amount provided for in section 3, for the reason that the widow's dower in the personalty of her deceased husband amounted to more than three hundred dollars. In *Stull* v. *Graham*. 60 Ark. 461, this court held that the widow is entitled to the specific articles enumerated in section 72, and, where the estate is not insolvent, to the amount specified in section 74, in addition to her dower consisting of one-third part of the personal estate. And in *Lambert* v. *Tucker*, 33 Ark. 416, the court held that "the widow is entitled to the $300 provided by section 3 of Kirby's Digest after the same has been duly appraised, and also the allowances mentioned in section 72; and, if the estate is solvent, then an additional $150 of the appraised value of the property, as provided by section 74."

The court has never had occasion heretofore to pass on the question now presented. The statute does not in express terms declare whether the provision of section 3 shall be in lieu of, or in addition to, dower, but it does declare in absolute terms that the widow and minor children may retain the amount of three hundred dollars out of the estate as their own. This court in *Quattlebaum* v. *Triplett*, 69 Ark. 91, said: "It seems evident that this legislation was intended to protect the widow and helpless

children of a deceased father," the point in that case being whether, under the statute as it then read, it applied to adult, as well as minor, children. It may be well to add that this provision is for the immediate protection of the widow and minor children, and that it is conferred regardless of the amount of dower to which the widow is entitled out of the estate. Where the lawmakers have conferred the rights expressly and unqualifiedly declared in the several sections referred to, it is difficult for the court, without attempting to legislate, to say that either of the special provisions is made in lieu of dower. If the provisions fo sections 72 and 74 are in addition to, and not in lieu of, dower, as held in *Stull* v. *Graham. supra,* it is difficult to find a reason why we should hold that the provisions of section 3 are in lieu of dower. At one time in the history of this legislation the operation of section 3 was limited to personal estates not exceeding eight hundred dollars in value, and there might have been some reason for saying that the limitation indicated an intention on the part of the lawmakers to make a provision in lieu of dower; but, since the statute has been amended so as to exclude this limitation and give the widow and minor children the amount regardless of the value of the estate, the reason for holding it to be a provision in lieu of dower wholly disappears. In *Horton* v. *Hilliard,* 58 Ark. 298, it was held that the homestead provision of the widow was in addition to dower and that the widow was entitled to dower in one-third of all the lands whereof her husband died seized, including the homestead. The reasoning of that case impels us to hold that the provisions now under discussion were intended to be in addition to dower. It follows therefore that the lower court erred.

The widow's dower in personal property must, as has heretofore been held by this court, "be carved out of the specific estate of which the husband was seized at the time of his death." *Hill* v. *Mitchell,* 5 Ark. 608; *Menifee* v. *Menifee,* 8 Ark. 9. We understand this to mean that the widow is entitled to one-third out of each kind or class of personal property of which her husband died seized and possessed. In estimating the amount she is entitled to as dower, the whole of the personal estate must be taken into consideration, including the property taken under the special provisions herein referred to; but she can not take

from one class of property more than one-third thereof, as dower, in order to make up for a deficiency in another class created by reason of her having selected out of that class the special provision authorized in the section referred to.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

GOODRUM v. MERCHANTS & PLANTERS BANK.

Opinion delivered January 8, 1912.

1. EVIDENCE—VARYING WRITING BY PAROL.—Where a written contract is plain, unambiguous and complete in its terms, parol evidence is not admissible to add to or vary it. Thus, where a bank cashier, apparently short in his accounts, conveyed land to a trustee to cover any shortage which might be found, it was inadmissible to prove that there was a contemporaneous understanding that such grantor was to be present when his accounts were to be examined. (Page 332.)

2. REFORMATION OF INSTRUMENT—MISTAKE.—To entitle a party to reform a written instrument upon the ground of mistake, it is essential to prove by clear and decisive testimony that the mistake was mutual and common to both parties. (Page 334.)

3. CONTRACTS—VALIDITY—COMPOUNDING OF FELONY.—Any contract, the consideration of which in whole or in part is to conceal a crime or to stifle a prosecution therefor is illegal and void, though it may represent a just debt and security for its payment. (Page 335.)

4. SAME—COMPOUNDING OF FELONY.—A deed of trust executed by a married woman to secure the payment of money embezzled by her husband is not void as given to compound a felony, in the absence of a promise on the part of the beneficiaries to forbear prosecution for the crime or to suppress evidence tending to prove it. (Page 340.)

5. HUSBAND AND WIFE—WIFE'S MORTGAGE FOR HUSBAND'S DEBTS.—A married woman may mortgage her separate property to secure the debt of her husband. (Page 340.)

6. MASTER—FAILURE TO TAKE OATH—WAIVER.—Where a party failed to object to the proceedings of a master at the time they were had upon the ground that the master was not sworn, he will be held to have waived the right to object. (Page 341.)

7. SAME—WHEN IRREGULARITY CURED.—Where a master took testimony and made his report without being sworn, but afterwards was sworn, and stated that all the proceedings had by him and findings made by him were correct, and it was agreed that the testimony taken on part of the defendant before the master should be read as if taken after the master was sworn, the proceedings and report were in effect made after he took the oath. (Page 342.)

8. EQUITY—WHEN RIGHT TO TRANSFER WAIVED.—One who goes to trial in a chancery court without asking for a jury or requesting a transfer to a law court will be held to have waived any right which he may have thereto. (Page 342.)

9. SAME—JURISDICTION—ACCOUNTS.—Equity has jurisdiction where extended accounts, difficult of determination, are involved. (Page 343.)

Appeal from Lonoke Chancery Court; *John E. Martineau*, Chancellor; affirmed.

STATEMENT BY THE COURT.

This was an action instituted by the Merchants & Planters Bank, of England, Arkansas, against J. C. Goodrum, Jr., and his wife, Belle Goodrum, seeking to require from them the execution of a deed for certain lands which they had, for that purpose, conveyed to a trustee, who refused to carry out the trust by conveying said lands to plaintiff. The conveyance to the trustee was subsequently treated and held by the chancellor to be a mortgage to secure certain indebtedness alleged to be due by said Goodrum to plaintiff, and the cause proceeded and was determined as an action to foreclose same. It was alleged in the complaint that J. C. Goodrum, Jr., was the cashier of plaintiff's bank, and had converted to his own use a large amount of its funds. Thereupon he and his wife entered into a written contract with the bank whereby they agreed that expert accountants should be selected to examine the books of the bank in order to determine whether or not said Goodrum was criminally short in his accounts with the bank. In order to secure the payment of such criminal shortage, if any, they agreed to convey to a trustee for the use of the plaintiff certain lands, and, in event the accountants should find and determine that said Goodrum was criminally short in his accounts with the bank, the trustee should convey said lands to the plaintiff in satisfaction thereof. In pursuance of that agreement, the deed of trust was executed a few days thereafter by the defendants, and thereupon accountants were selected to examine the books of the bank. It was alleged that by said examination it was found that said Goodrum was criminally short in his accounts with the bank. Thereupon the plaintiff demanded the execution by said trustee to it of a conveyance of said lands, which he refused to make. The defendants filed answers in which

they set up a number of defenses to the recovery sought by plaintiff, chief amongst which were the following:

1. They alleged that it was agreed at the time said contract was entered into that said Goodrum was to be present at the examination of the books made by the accountants, which plaintiff refused afterwards to permit, and that the plaintiff thereby breached the agreement, rendering it ineffective.

2. That the contract was contrary to public policy and illegal, because it was made upon the consideration and promise to compound any felony committed by Goodrum in embezzling the bank's funds.

3. That the execution of the contract and deed of trust was obtained by duress; and, finally,

4. That Goodrum had not wrongfully taken any of the funds of the bank and was not criminally short in his accounts with it.

The chancellor appointed a master with directions to take testimony and to make findings "as to what amount, if any, the defendant as cashier of plaintiff's bank, was criminally short in his accounts at the time he was relieved of duty in December, 1909;" and also "to ascertain and report any other matter or things that may be of service to the court in determining the rights and equities of all the parties to this action." A great mass of testimony was taken by the master. Hemade report, setting out in detail his findings. He found that said Goodrum was criminally short in his accounts with the bank, and that the said shortage amounted to $19,121. The chancellor confirmed the report of the master; he declared the trust deed a mortgage securing said shortage, and thereupon entered judgment in favor of plaintiff for the amount thereof and a decree foreclosing said mortgage.

The testimony relative to the various issues involved in this case is conflicting. We do not deem it necessary to set this out in detail. The determination of the issue relative to Goodrum's alleged shortage depends to a large extent upon the examination of the accounts and entries in the books, the effect of which can only be fully appreciated by a thorough inspection and examination of the numerous entries and lengthy accounts in connection with the testimony of the witnesses relative thereto. This we have endeavored carefully to do, and

we have concluded that the matters can be better understood by giving in a general way the result which we think the evidence establishes.

The Merchants & Planters Bank was organized and opened for business in September, 1902, and the defendant was then employed to take charge of the books of the bank as assistant cashier. A short time thereafter he was elected cashier, and continued as such until December, 1909, when his relations with the bank were severed. From the organization of the bank until his connection therewith was terminated, he had complete charge of the books, moneys and assets of the bank, and every entry made in the general ledger during that time was made by him, and practically all entries made in the individual ledger and other books of the bank were made by him or by his authority and with his knowledge. Prior to his employment with plaintiff's bank, he had been clerk of Lonoke County for several years and had worked in minor positions in one or two other banks in the State. It appears that the officials of the bank and the people of the community in which it was located had great confidence in his ability and integrity. The bank was capitalized at $25,000, and its stock was principally owned by one R. E. L. Eagle, who was its cashier at its organization, and was afterwards its president. He was recognized as its principal owner, and the chief arbiter of its affairs during the time that Goodrum was connected therewith. While said Eagle had the ultimate supervision of the bank, its affairs and business were principally, and almost exclusively, managed and conducted by said Goodrum. In December, 1909, said Eagle was negotiating for a sale of his stock to parties who were nonresidents of the State, and requested the cashier, Goodrum, to give him a statement of the banks' assets and liabilities to present to the prospective purchasers. It appears that Goodrum had kept the books of the bank apparently balanced until 1906, but after that time the accounts on the general ledger were not kept balanced. This, we think, according to the testimony, was not known either by Eagle or any other director of the bank. The cashier, Goodrum, in his testimony claimed that the sole reason why the books were not duly kept balanced after 1906 was that his duties were so manifold that he did not have time to do so; that proper assistance was not furnished him to do

the work required. Goodrum delayed making the statement requested from him, and, becoming impatient, Eagle endeavored to make a statement from the general ledger himself. He testified that he then learned for the first time that the accounts of the assets and liabilities would not balance. Becoming suspicious of the correctness of the books, he secured the services of one Frank Wittenberg, an expert accountant, to examine them. On December 6, 1909, this accountant began the examination of the books and continued same for a few days, when he reported that there was a deficit of $13,848.12 in the funds as shown by the accounts of the cashier, and that, in addition to this, it appeared that there was a shortage in the account of bills receivable of $2,777.15. Thereupon the president of the bank demanded that Goodrum should make good his shortage.

The charge that Goodrum was short in his accounts with the bank was published and made publicly known in the community where the bank was located. Goodrum insisted that he had done no wrongful act; that the apparent shortage was only due to bad bookkeeping, or that, if it occurred in any other way, it was not due to any act of his own. At his solicitation, or at the request of his wife, one T. M. Fletcher, who was sheriff of Lonoke County and a warm friend of said Goodrum, came to the town of England, where the bank was located, and another friend of Goodrum, J. M. Gates, accompanied him. As his friends and representatives, these persons endeavored to arrange and adjust these matters with the bank. They met with the president and some of the directors of the bank, and, after consultation, formulated a written contract by which the alleged shortage should be adjusted. This contract was thereafter signed by both Goodrum and his wife and the bank, and delivered to plaintiff, and, as to its material perts, is as follows:

"That whereas, the said J. C. Goodrum, Jr., has been in active charge of the assets and books of the said Merchants & Planters Bank of England, Arkansas, since its organization in 1902, up until the 11th day of December, 1909, and whereas an expert accountant, who has already gone over the books, has discovered inaccuracies and irregularities in said bank which show an apparent deficit of $13,848.24, and whereas the

said first party, J. C. Goodrum, Jr., denies any wrongful act on his part.

"It is therefore proposed and agreed upon between all the parties to this contract, and the said first parties hereby agree to deed in trust to W. P. Fletcher for the use and benefit of said bank their real property in Lonoke County, Arkansas, except the house in Lonoke, which is scratched out below, which includes the separate property of Mrs. Belle Goodrum, and also includes the home property situated in England, Arkansas, and also 80 acres of prairie land in said county, and in fact all real estate owned either by the said J. C. Goodrum, Jr., and the said Mrs. Belle Goodrum, whether owned jointly or separately, except the Lonoke house.

"This property is deeded in trust for and in consideration of making good to said bank any accounts that may hereafter be determined upon, that may be traced to the said J. C. Goodrum, Jr., on account of any criminal negligence, or acts which he has done, said amounts to be determined in the following manner: The said Goodrum, Jr., is to have the right to select a reputable accountant, and the said bank is to have the right to select one reputable accountant; these two accountants so selected shall immediately, as soon as practical, make a thorough investigation of the affairs of said bank from the time of its organization up until the.....day of December, 1909, when the said J. C. Goodrum, Jr., was relieved as cashier; and if, after a thorough investigation, said investigation should show that the said J. C. Goodrum, Jr., is in any manner criminally short in his accounts, then this conveyance to the said W. P. Fletcher, as trustee, shall become final and binding upon the said first parties to this contract in the amount of such shortage, but, should accountants ascertain that the said J. C. Goodrum, Jr., has committed no criminal act, and is not short in his accounts criminally, then the conveyance to the said W. P. Fletcher, trustee, shall become null and void. It is further understood and agreed that said deed in trust to the said W. P. Fletcher, as trustee, shall be executed by said first parties immediately after ascertaining a correct description of said real estate."

A few days thereafter, in conformity with the provisions of said contract, Goodrum and his wife conveyed to said trustee said lands and duly acknowledged the execution of the con-

veyance, which was delivered and duly recorded. In pursuance of said contract, the plaintiff selected said Wittenberg as its accountant, and Goodrum selected one Kuhn as his accountant, and these two then proceeded to examine the books of the bank. They first compared the statement made by said Wittenberg in his report to the bank, and corrected some minor errors found therein. They continued the examination for probably seven or eight days, during all of which time said Goodrum was present. About that time the accountant Wittenberg made complaint to the representatives of the bank that Goodrum was making alterations in some memorandum made by said Wittenberg, and thereupon those representing the bank demanded that Goodrum should not be present during the time that the accountants were examining the books, but should only be called when he was needed to explain any entry therein. To this Goodrum and his accountant objected, and refused to further proceed with the examination of the books unless Goodrum was permitted to be constantly present. The further examination of the books by the two accountants was then abandoned. The trustee then refused, upon demand, to make conveyance to the plaintiff of the property mentioned in the deed of trust. Thereupon this suit was instituted.

J. W. Blackwood and *Thomas C. Trimble*, for appellants.

F. T. Vaughan and *James A. Gray*, for appellees.

FRAUENTHAL, J., (after stating the facts). 1. It is contended by counsel for defendants that, at the time the written contract was entered into for the adjustment of the alleged shortage, it was agreed that Goodrum should be present during the entire examination made by the accountants of the books of the bank. It is claimed that this portion of the agreement was omitted from the written contract by mistake, which could be rectified by reformation, or that it did not add to or vary the terms of the written contract. They urge, on the contrary, that this portion of the agreement was either a part of the consideration of the contract or a condition precedent to its consummation, and that, in either event, it could be proved by parol evidence. We do not think, however, that this contention is correct. The written contract was signed and delivered, and was, therefore, fully executed. It is plain,

unambiguous and complete in its terms. One of its objects was to provide for an examination of the books of the bank and therefrom to determine the state of the accounts. The written contract sets out how this examination shall be made and by whom. It does not provide that the examination shall be made either by Goodrum or with his assistance. It is claimed that one of the chief inducements for making the contract was the agreement that Goodrum should be constantly present at such examination; his presence would be unnecessary unless it was also the purpose of such agreement that he would take part in and assist at such examination. We are of the opinion that this would be as distinct a term of the contract as if it had been agreed that, in the event of any disagreement between the two accountants, a third should be called in to make the examination of the books. This would add to the terms of the written contract. It has been uniformly held that where a written contract is plain, unambiguous and complete in its terms, parol evidence is not admissible to add to or vary it. It has been said by this court: "Antecedent propositions, correspondence and prior writings, as well as oral statements and representations, are deemed to be merged into the written contract which concerns the subject-matter of such antecedent negotiations when it is free of ambiguity and complete." *Barry-Wehmiller Machine Co.* v. *Thompson,* 83 Ark. 283. See, also, *Cox* v. *Smith,* 99 Ark. 218, and cases there cited. It has also been held by this court that where the written contract is complete in its terms it can not be varied by adding theretoor engrafting thereon any condition by parol evidence. *Lower* v. *Hickman,* 80 Ark. 505; *Johnson* v. *Hughes,* 83 Ark. 105; *Collins* v. *So. Brick Co.,* 92 Ark. 504. Nor would it be permissible, under the evidence adduced herein, to show by parol testimony this alleged term of the contract upon the ground that it was a condition precedent to the final completion thereof. It is not claimed by any witness that the contract and deed of trust, which were duly signed and delivered, were not fully executed. There is no testimony indicating that this written contract was not to be effective until this alleged condition or term was complied with. If such term of the contract was actually agreed to and was to be a part of the completed contract, then at most it was inadvertently and by mistake omitted

from the written instrument; but under the testimony it was not understood or agreed that the written contract should be be deemed finally executed until such condition should be complied with. It follows that this portion of the agreement alleged to have been omitted from the written contract can not be deemed a condition precedent to the completion of the contract. *American Sales Book Co.* v. *Whittaker,* 100 Ark. 360.

Nor, under the evidence adduced, can parol testimony of this alleged omitted portion of the contract be considered for the purpose of reforming the written instrument or deeming it a part of a reformed contract. It is true that this is a suit instituted in a court of chancery, and is to be determined by principles enforceable in such court, and that equity will reform a written contract on the ground of mistake. But, to entitle a party to reform a written instrument upon the ground of mistake, it is essential that the mistake be mutual and common to both parties; in other words, it must be found from the testimony that the instrument as written does not express the contract of either of the parties thereto. It is also necessary to prove such mutual mistake by testimony which is clear and decisive before a court of equity will add to or change by reformation the solemn terms of a written instrument. *Varner* v. *Turner,* 83 Ark. 131; *McGuigan* v. *Gaines,* 71 Ark. 614; *Goerke* v. *Rodgers,* 75 Ark. 72; *Cherry* v. *Brizzolara,* 89 Ark. 309. The testimony in the case at bar as to whether or not it was agreed, as a part of said contract, that Goodrum, the cashier, should be present at the examination to be made by the accountants is conflicting. We do not deem it necessary to set this testimony out in detail. Considering all of this testimony, we can not say that it appears beyond reasonable controversy that such agreement was made and entered into and understood to be a part of the contract, and that, by mistake, it was omitted therefrom. It follows, therefore, that the contract as written must be considered as containing all terms of the agreement which were then made, and we do not think that plaintiff violated any provision of the contract by objecting to the presence of Goodrum constantly during the examination of the books by the accountants. The contract was binding and enforceable, and could not thereafter be defeated by any act of Good-

rum or the accountant whom he had chosen attempting to avoid or annul its binding force.

2. It is earnestly insisted by counsel for defendants that the contract entered into and the deed of trust executed are illegal and void because, as a part of the consideration thereof, either express or implied, it was agreed that Goodrum should be protected or shielded from criminal prosecution for any embezzlement by him of the bank's funds. Especial insistence is made upon this defense, because the property conveyed by the deed of trust was principally that of the wife, and it is strongly urged that the chief, if not sole, motive inducing her to execute the contract and deed of trust was to secure immunity for her husband from criminal prosecution. The determination of this question has given us much concern. This question is one of fact. The principles of law involved in the determination thereof, are, we think, well settled. Any contract, the consideration of which, in whole or in part, is to conceal a crime or to stifle a prosecution therefor, is necessarily repugnant to public policy, and, for that reason, is illegal and void. Such an agreement constitutes the compounding of a felony, which is made a crime by the statute of this State, which provides:

"Every person who shall have a knowledge of the actual commission of any offense punishable with death, or of any felony, who shall take any money or any gratuity or receive any promise, engagement or undertaking therefor, upon agreement or understanding, express or implied, to compound or conceal such crime, or to abstain from any prosecution therefor, or withhold any evidence thereof, shall upon conviction be fined in any sum not less than three hundred dollars, and be imprisoned not less than three months." Kirby's Digest, § 1599.

Any contract, therefore, the consideration of which is to conceal or withhold evidence of a crime or to abstain from the prosecution therefor, is void, although it may represent a just debt and security for its payment. *Rogers* v. *Blythe,* 51 Ark. 519; *Kirkland* v. *Benjamin,* 67 Ark. 480; *Beal & Doyle Dry Goods Co.* v. *Barton,* 80 Ark. 326; *Johnson* v. *Graham Bros.,* 98 Ark. 274. But it is equally well settled that it is perfectly lawful for the parties to compromise and provide for the payment of the civil liability which arises from the commission

of an offense. The commission of crime may result, and usually does, in a private as well as a public wrong, and an obligation given in settlement of the civil liability arising from such wrong is not invalid because the offender is also liable for criminal prosecution. If the purpose of the agreement is to obtain security for the loss suffered, and not to suppress a criminal prosecution, then the contract therefor is perfectly valid. The rule of law is thus stated in 2 Chitty on Contracts, p. 991: "In all cases of offenses which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage any way he may think fit, but an agreement for suppressing evidence or for stifling or compounding a criminal prosecution for a felony is void." See also *Breathwit* v. *Rogers*, 32 Ark. 758; *Martin* v. *Tucker*, 35 Ark. 279; *Rogers* v. *Blythe*, 51 Ark. 519. Thus in the case of *Provident Association Society* v. *Edmunds*, 95 Tenn., p. 53, it was held that a note given in settlement of a deficit of an agent is not invalid because the agent was liable to criminal prosecution for his defalcation, in the absence of an agreement not to prosecute. In the case of *School District* v. *Collins*, (Dak.) 41 N. W. 466, the defense was that the note was given to compound a felony, and the court said: "In defenses of this kind, where it is sought to invalidate a written contract by parol evidence, it should be made to clearly appear that the arrangement was in contravention of public policy. Vague and indefinite statements are not sufficient. The understanding or agreement relied on must be positive and certain, entered into and relied on by both parties." In the case of *Barrett* v. *Webber*, 125 N. Y. 18, it was held that a mortgage given by a married woman to secure the payment of goods stolen by her husband is not void as given to compound a felony, in the absence of a promise on the part of the mortgagees to forbear prosecution for the crime or to suppress evidence tending to prove it. In the case of *Cass County Bank* v. *Bricker*, 34 Neb. 516, the court says: "In order to establish the offense of compounding a felony, it must appear that there was an agreement not to prosecute the case or to suppress evidence tending to prove it. The owner of the goods stolen has a right to receive compensation therefor." And in the case of *Swan* v. *Swan*,

21 Fed. 299, Judge Caldwell says: "No court ought to refuse its aid to enforce a contract on doubtful and uncertain grounds. The burden is on the defendant to show that its enforcement would be in violation of the settled public policy of the State or injurious to the morals of its people, and vague surmises are not to be indulged in." In a note to the case of *Schrim* v. *Wieman*, 7 A. & E. Ann. Cas. 1008, the rule is thus formulated and appears to be sustained by the weight of authority: "An agreement by which the owner of stolen or embezzled property accepts securities representing the value of his property, or part thereof, and given by way of compensation for the debt or loss, or for securing the same, is not invalid as compounding a felony where the agreement does not include an offer of immunity from criminal prosecution to the perpetrator of the crime." In the case at bar, the contract entered into was put in writing, stating fully all of its terms. Two personal friends of Goodrum represented him at the conference with the bank officials when this contract was entered into and drafted. One of them was the sheriff of the county, who, before going to the conference, stated to Goodrum that if he had taken the money of the bank, he should give up his property in order to make restitution, to which Goodrum acceded. At that time no mention was made of any immunity to Goodrum from prosecution. The terms of the contract were discussed at the conference with the bank officials and there agreed upon, and the attorney of the bank and parties representing Goodrum then proceeded to the attorney's office to draft the contract. At the conference, no mention was made of any prosecution or of any promise of immunity from prosecution. The matter of prosecution was not then spoken of at all. After the contract was drafted, Mr. Gates then, for the first time, mentioned the matter of immunity from prosecution, and endeavored to obtain an agreement to that effect if the matters were fixed up, but, instead of acceding to that request, the president of the bank refused to make such an agreement. It was understood by all parties that the president of the bank owned the principal part of its stock, and that its actions would be controlled entirely by him in the matter. It was understood by all present that no other official of the bank could make any agreement or arrangement by which the bank would be bound.

Mr. Gates, one of the personal friends of Goodrum, and who represented him at this conference, was asked:

"Q. Was there in that meeting, in the presence of all the parties there present, any agreement with either Mr. Eagle or the directors of that bank that they would not prosecute Mr. Goodrum provided he would sign a contract or deed his property?

"A. Do you mean in the rear of his bank?

"Q. Yes.

"A. There was not. I didn't hear it.

"Q. Was there anything mentioned in regard to it?

"A. There was not that I heard there."

He testified further that after the contract had been drafted in Mr. Gray's office, he then asked Mr. Eagle, or the bank directors, if they would agree not to prosecute Mr. Goodrum if he and his wife would sign the agreement, and that Mr. Eagle replied that he could not make such an agreement, and that if he was summoned before the grand jury he would tell the whole truth relative to the matter. He was further asked whether Mr. Eagle agreed at any time not to prosecute Mr. Goodrum, or to refrain or abstain from telling the whole truth in reference to the transaction if he was summoned before the grand jury, and he answered that he did not. He also stated that it was his understanding, and, as we think, his opinion, that it would not be the disposition of the bank to prosecute, but we can not say from his testimony that there was any agreement to that effect on the part of the bank. Mr. Fletcher, the other friend of Mr. Goodrum, testified relative to the entire matters of the agreement constituting the contract as follows: "The essence of that contract is this and nothing else: for consideration of Goodrum being allowed to take those books, with an accountant and their accountant, and all of their board of directors, if they so desire, show to the board of directors that he had not stolen $13,800, but, if he was not able to show that, confiscate his property by deed of trust to W. P. Fletcher, to be turned over to the bank to cover whatever shortage there may be. That is the essence of the contract." He further testified: "I was there as a citizen and officer, in a way as a citizen more, to try and bring about between these two neighbors, if possible, an understanding

over a business misunderstanding, or to bring together, if this man was criminal, the payment to this bank of what was due them. If he was not, let him have an opportunity to show them that he was not. Now, that is all there is to it." It is true that Mr. Swaim, one of the directors, also testified that he said that he was willing that there should be no prosecution, but, as before stated, it was understood by all parties that Mr. Eagle, and not Mr. Swaim, would represent the bank in its actions. Mr. Eagle testified that when he was asked if the bank would agree not to prosecute Goodrum he said: "Not on your tintype. I would'nt sign an agreement like that if I never got a dollar of the money back. I said: 'If you will turn this property back if there is a shortage, we won't lie around the courthouse and try to prosecute him; but if the grand jury calls on me and asks me to explain these books and asks me if the shortage occurred upon the expert's report, I will tell them every thing I know about it.' " We do not think that this statement of Mr. Eagle in effect that he would not go before the grand jury until summoned to appear was an implied agreement either to withhold testimony, conceal the crime or to stifle a prosecution under the facts and circumstances of this case. The charges made against Goodrum that he was short in his accounts with the bank, and criminally so, were not only known to all the directors and persons present at the conference, but they had been published to the world, and the knowledge thereof was rife amongst the people of that community, if not also amongst the people of the county. This is not a case where the charges were only known by a few persons, and upon their failure to divulge them they would not come to the notice or knowledge of the public or to those to whom the prosecution of crime is entrusted by the law. The charges were already within the knowledge of the public, and there could be no concealment thereof if any member of the public started a prosecution therefor. At the most, Eagle only stated that he would not instigate a prosecution. He also said that he not only refused to agree not to prosecute but, if asked by any public official, he would tell everything relative to the matter; instead of going of his own motion before the grand jury, he would await a summons that might come to him from the public authorities who, the testimony shows, had full knowledge of

these charges. Under these circumstances, we do not think that there was any agreement, either express or implied, to conceal a crime or to withhold any evidence thereof. Because he would remain passive relative to matters of which the public authorities had full knowledge, it can not be said that he thereby agreed to shield Goodrum from any public prosecution. *Davis* v. *State*, 95 Ark. 555. The chancellor found that the plaintiff did not agree, either expressly or by implication, to shield Goodrum from proseccution or to withhold any evidence which it had showing the commission of crime by him. We have examined all the testimony, and we can not say that his finding in this regard is clearly against the preponderance of the evidence. Under such circumstances, his finding should not be disturbed. It is true that Mr. Gates told Mrs. Goodrum that there would be no prosecution of her husband if the matter was arranged; but there is no testimony in the case that he had any authority to make any such representation to her from the plaintiff or any one connected with it, and the plaintiff, as mortgagee, can not, therefore, be bound by any representation that he made under these circumstances without its knowledge or direction. *Moyer* v. *Dodson*, 212 Pa. St. 344.

It is also claimed in this connection that Mrs. Goodrum executed the contract and deed of trust through duress by reason of a dread of prosecution of her husband; but we do not find from the testimony that any threat of prosecution of her husband was ever made to her by any one representing the plaintiff, or that any representative of the plaintiff induced her to execute the contract and deed of trust by any threat of such prosecution. It can not be said, therefore, that these instruments were executed by her through duress. *Compton* v. *Bunker Hill Bank*, 96 Ill. 301.

It is further urged that certain of the lands conveyed by the deed of trust were the separate property of the wife, and therefore should not be sold for an executory contract to pay the debt of the husband. But a married woman, under the laws of this State, may convey by mortgage her property in order to secure the debt of her husband, and the mortgage thus executed, it has been uniformly held, will be enforced. *Collins* v. *Wassell*, 34 Ark. 17; *Scott* v. *Ward*, 35 Ark. 480; *Petty* v. *Grisard*, 45 Ark. 117; *Goldsmith* v. *Lewine*, 70 Ark. 516.

3. It is urged that the testimony does not show that Goodrum was criminally short in his accounts with the bank, and that on this account recovery should not be had. We understand from the contract that if Goodrum himself had wrongfully taken any of the funds of the bank and converted same to his own use, then he would be criminally short in his accounts, within the meaning of this contract, and we think the contract was so understood by Goodrum and all the parties. He would not be liable for the payment of any moneys arising from errors in keeping the accounts or for any funds taken by any other person, but he would be liable under this contract for such moneys as he wrongfully took himself and converted. Under the law, he was civilly liable to the bank for such conversion, and an agreement to pay such liability was perfectly valid. We do not deem it necessary to enter into any discussion of the testimony relative to this shortage. It was fully investigated by the master and by the chancellor, and we have also endeavored carefully to examine it. The testimony is voluminous, and consists, amongst other things, of an examination and inspection of the books, papers and accounts of the bank, of alleged false entries and of altered figures. The master, in his report, states in detail the matters relating to these accounts and the evidence showing that Goodrum had wilfully made false entries therein and changed the figures thereof in many instances in order to cover moneys which he had wrongfully taken. The chancellor also examined Goodrum in open court in order to more fully understand these matters and to see if any explanation could be made thereof consistent with his claim, and it appears to us that the chancellor proceeded with a great deal of care. After this investigation, he confirmed the report of the master. The findings made by the master and the chancellor are not only persuasive upon us, but, after as careful an examination as we are able to make of this testimony, we are of the opinion that they are not contrary to the weight of the evidence. These findings must therefore stand.

4. Objection is made to the report of the master upon the ground that he was not sworn before beginning the performance of his duties. By section 6327 of Kirby's Digest it is provided that, before entering upon his duties, the master shall be sworn in open court to faithfully and impartially perform said duties,

and it is provided further that an entry of such oath should be made upon the record. It appears that, through inadvertence, the master did not take the oath thus required before beginning his duties; but the defendant and his counsel appeared before the master and during the extended time in which the testimony was taken by him no objection was made to his proceeding on this account. It is provided by the statute that the oath should be taken in open court, and it will be presumed that all parties were present in court when any step was taken in the progress of this case. The defendant is, therefore, presumed to have known whether or not the master was sworn and could have definitely learned this by an inspection of the record where, by statute, it is provided such oath should be noted. By failing to raise any objection to the proceedings of the master at the time they were had, we think that the defendant waived any right to object because the master was not sworn. 17 Enc. Pl. & Pr. 1016; 24 Cyc. 817; *Newcomb* v. *Wood*, 97 U. S. 581; *Nason* v. *Luddington*, 8 Daly (N. Y.) 149; *Garritty* v. *Hamburger*, 136 Ill. 499. After the master had made and filed his report, counsel for defendant, for the first time, raised objection thereto on the ground that he was not sworn. Thereupon, by direction of the chancellor, the master was duly sworn, and he then stated that all the proceedings had by him and all the findings made by him in his report were correct. By stipulation, duly signed by counsel for defendant, it was further agreed that all testimony taken on the part of defendant before the master should be read in evidence with the same and like effect as if taken before the master after he had taken the oath as required by law. Thereupon the chancellor considered the testimony returned and the report made by the master, and passed thereon. We are of the opinion that, even if it should be considered that the failure of the master to take the oath required by law was not a mere irregularity, his proceedings and report were in effect made after such oath had been duly taken by him, and that the law in this particular was in effect duly complied with.

5. Finally, it is urged that the court erred in not transferring this cause to the law court and thus granting to the defendant the right to have the issues involved in this case tried by jury. It appears that, after the master had made and filed

his final report, and after the trial of the case had begun and progressed to the point where the chancellor had partially, if not finally, passed upon the master's report, counsel for the defendant requested that the cause be transferred to the law court, in order that the issues might be tried by a jury. At this time all the testimony in the case had been taken, both parties had announced ready for trial before the chancellor, and the trial was proceeded with. Up to that time, the defendant had not made any request for a trial of the issues by a jury. If he was entitled to a trial by jury of the issues involved herein, we think that, in failing to ask for a jury or to request that the cause be transferred to a law court before the trial was actually begun, he waived any right to ask for a jury to try the issues. *Love* v. *Bryson*, 57 Ark. 590; *Gerstle* v. *Vandergriff*, 72 Ark. 261. But the matters involved in this suit were within the jurisdiction of a court of equity. Whether or not an issue involved in a cause over the subject-matter of which a court of chancery has jurisdiction shall be submitted to a jury is within the sound discretion of the chancellor, and when so submitted its finding would only be persuasive and not conclusive. *Hinkle* v. *Hinkle*, 55 Ark. 583. The defendant did not have an absolute right to a trial by a jury of an issue involved in a subject-matter over which the chancery court had jurisdiction, and this is especially true where extended accounts, difficult of determination, are involved. *State* v. *Churchill*, 48 Ark. 226; *Williams* v. *Citizens*, 40 Ark. 290. Upon an examination of the entire record, we can not say that the chancellor committed any error calling for a reversal of the decree which he entered in this case. His decree must accordingly be affirmed, and it is so ordered.

WOOD and HART, JJ., dissent.

HART, J., (dissenting). R. E. L. Eagle, the president of the bank on the 20th day of January, 1910, swore out a warrant before a justice of the peace charging J. C. Goodrum, Jr. with larceny and embezzlement. Eagle, according to the abstract of appellant, which is not challenged by appellee, testified in regard to this as follows: "He (referring to Goodrum) refused to comply with his contract, not as I understand it but refused to comply with the contract as the contract is itself. If Goodrum had carried out his contract, I would not have sworn out

that affidavit unless somebody made me do it." The plain meaning of this, even when read in connection with the testimony of Eagle as it appears in the opinion of the majority, is that there was at least an agreement between the parties that none of the bank officials would institute a prosecution against Goodrum. In short, the bank officials agreed that if the instruments in question were executed none of them would voluntarily prosecute Goodrum, and the papers were executed and received accordingly. Under this state of facts, we need go no further than our own decisions to ascertain the law of the case. In discussing the law applicable to a similar state of facts, Mr. Justice HEMINGWAY, speaking for the court in the case of *Shattuck* v. *Watson,* 53 Ark. 147, said: "It is a principle that guides equity courts in their administration of justice that he who invokes their aid must come with clean hands—that he who hath committed iniquity shall not have equity. It is the policy of the law that crime shall be prosecuted, and it prohibits under severe penalties the suppression of the prosecution. An injured party who agrees with the felon who robs him that he will not prosecute him, on condition that he return the stolen goods, or who takes a reward on such condition, violates the spirit as well as the letter of the law. The party who gives the reward and the party who receives it, on such condition, stand *in pari delicto.*" There the party who executed the mortgage invoked the aid of equity to cancel it, and the relief was denied; but the principle is the same. The law will give no aid to either of them, but leave them where they have placed themselves. Therefore I think the chancellor erred, and should have dismissed the complaint against Mrs. Goodrum for want of equity.

WOOD, J., concurs.

McDERMOTT v. KIMBALL LUMBER COMPANY.

Opinion delivered February 12, 1912.

1. SALES OF CHATTELS—WHEN TITLE PASSES.—Title to chattels sold passes where such is the intention of the seller and buyer, though something remains to be done, as, for example, the fixing of the quantity or amount of the property or the payment of the purchase money. (Page 348.)

2. SAME—SUFFICIENCY OF DELIVERY.— Where property is of such a nature and so situated that actual delivery can be made, that is necessary; but where the property is too ponderous and bulky for an actual change of its possession, a symbolical or constructive delivery, as by placing on it outward indicia of a change of possession and ownership, will be as effective as an actual delivery. (Page 349.)

3. SAME—SUFFICIENCY OF DELIVERY.—Where a pile of lumber was delivered in pursuance of a contract of sale, and was tagged in the vendee's name, and part of the purchase money paid, the title passed though it was thereafter to be hauled to another place and there measured and the balance of the purchase money, to be determined by such measurement, was then to be paid. (Page 350.)

Appeal from Ashley Circuit Court; *H. W. Wells*, Judge; affirmed.

James C. Norman, for appellant.

1. This case is ruled by 72 Ark. 141. Title does not pass while anything remains to be done to ascertain the quantity or price. Newmark on Sales, ch. 10, § 115; *Ib.* § 227; *Ib.* § § 9, 70, 294-5, 305; 89 S. W. 474; 28 Ky. Law Rep. 444, 657; 89 S. W. 648, 1130.

2. There is error in the court's charge.

George & Butler, for appellee.

1. Whether a contract is executed or executory depends solely on the intention of the parties. 35 Cyc. 277. This question is settled by the verdict. 72 Ark. 141 is not in point, but 68 Ark. 307, is. A sale may be complete where such is the intention, although something remains to be done subsequently as part of the consideration. 62 Ark. 592; 68 *Id.* 307; 37 *Id.* 483; 35 Cyc. 305-6, 322.

2. Instructions are not set out in the abstract. 95 Ark. 108; 95 *Id.* 123; 93 *Id.* 87.

FRAUENTHAL, J. This is an action of replevin instituted by E. O. McDermott to recover a certain lot of lumber, said to be about 22,000 feet. It was instituted against J. M. and W. H. Cox and the Kimball Lumber Company, and the latter defendant alone made defense. The lumber was manufactured by said J. M. Cox, who owned and operated a sawmill situated about one mile from Cypress, a railroad station. It appears that said Cox was operating his sawmill in December, 1909, at Wilmot, and then traded with plaintiff, who was conducting

a mercantile business at that place. He continued doing business with plaintiff and became indebted to him, and this indebtedness continued until in April or May, 1910, when it amounted to between eight and nine hundred dollars. In January, 1910, the manager of the Kimball Lumber Company wrote to said Cox that if he would move his plant to land owned by it near Cypress it would buy the lumber manufactured by him; that it would advance thereon $10 per thousand feet when the lumber was on the sticks at the mill, and would pay therefor when loaded on the cars at said railroad station certain named prices for specified grades of the lumber, ranging from $10 per thousand for No. 1 common to $28 per thousand for firsts and seconds. And it appears that said Cox accepted this proposition and proceeded to move the mill to a point near Cypress.

On March 5, 1910, when the mill plant was about half completed, Cox obtained from the Kimball Lumber Company $400, and gave a receipt therefor in which it was stated that he agreed to deliver lumber therefor in accordance with the terms of the above letter during the months of March and April, 1910, or for a period of sixty days thereafter, in event that that time was needed to make such delivery. Of this sum, Cox paid to plaintiff $175 on the indebtedness due by him, and informed him of the correspondence and agreement he had made with the Kimball Lumber Company for the sale of his lumber. On April 1, 1910, Cox began sawing lumber, and in the latter part of that month notified the Kimball Lumber Company to send its agent to estimate the amount of lumber then stacked at the mill. In pursuance of this request, the Kimball Lumber Company sent its agent, who on April 29, 1910, estimated the lumber then on the yard. At that time the lumber was stacked in piles at the mill, and this agent estimated the amount in each pile, and then placed upon each pile the amount so estimated by him, and also tagged or marked each pile with the name of the Kimball Lumber Company. This agent and said J. M. Cox, and his son and manager, W. H. Cox, testified that said J. M. Cox then sold and delivered the lumber to the Kimball Lumber Company, and that it was understood by the parties that the lumber was then the property of the Kimball Lumber Company. They testified that they estimated the lumber at 22,000 feet;

that, according to the contract, Mr. Cox was to receive $10 per thousand on such estimate, but had already received $400 thereon, which was more than the estimate entitled him to; that the remainder of the purchase money for said lumber was to be paid after it had been hauled to the railroad station and there graded and measured and placed on board the cars. The testimony on the part of the defendant tended further to prove that the Kimball Lumber Company directed and employed said Cox to move this lumber to the railroad station, which he did in the early part of June. Thereafter the plaintiff instituted this action and replevied the lumber.

It appears from the testimony in behalf of plaintiff that on May 2, 1910, said J. M. Cox was indebted to him in the sum of $860.80, and that they then entered into a written contract whereby, amongst other things, it was provided that said Cox did release and sell to said plaintiff "all the lumber stacked in the yards of the mill at Cypress or near that place, with the exception of the lumber taken up and sold to the Kimball Lumber Company." On May 28, 1910, Cox gave to plaintiff an order upon the Kimball Lumber Company for $424 which said company refused to honor or pay. Thereupon, and on June 1, 1910, in consideration of $424 due by him to the plaintiff, said Cox executed a bill of sale to the plaintiff in which it was stated that he did sell and deliver to him "the lumber (22,000 feet) that was inspected by the Kimball Lumber Company, they having refused to pay my roder in favor of Doctor McDermott;" and it is under this bill of sale that plaintiff claims title to the lumber.

The case was tried by a jury, which returned a verdict in favor of the Kimball Lumber Company for the lumber, and placed its value at $400. From the judgment entered upon this verdict both parties have appealed. Plaintiff has appealed for the purpose of reversing the judgment chiefly upon the ground that there was no delivery of the lumber to the Kimball Lumber Company, so as to complete the alleged sale thereof to it. The Kimball Lumber Company has appealed on the ground that the uncontroverted testimony shows that the value of the lumber was largely in excess of $400.

The court gave a number of instructions, both at the request of the plaintiff and of the defendant, relative to the

question as to whether or not the alleged sale of the lumber to the Kimball Lumber Company was completed and the title passed to it. We do not think that it would serve any u eful purpose to set these instructions out or to note them in detail. We are of the opinion that the court committed no prejudicial error in its rulings relative to the instructions given or refused, and that those given sufficiently presented to the jury the law applicable to this case. The question then to determine is whether or not there is sufficient evidence to sustain the finding of the jury that the alleged sale of the lumber to the Kimball Lumber Company was consummated by sufficient delivery thereof.

It is urged by counsel for plaintiff that a sale is not complete as long as anything remains to be done between the buyer and seller in relation to the goods, and that for this reason the alleged sale to the defendant under the evidence was not complete. If there was a sufficient delivery of the lumber to the defendant, then, under the testimony, the only thing that remained to be done between him and the seller, J. M. Cox, was for defendant to pay the remainder of the purchase money for the lumber after grading and measuring it. In the case of *Beller* v. *Black,* 19 Ark. 573, it was said: "The purchase money may remain to be paid, and yet the purchase be complete if the goods are delivered." It has been uniformly held by this court that the title to personal property will pass and the sale be complete if it is the intention of the parties to transfer the title on the one part and to accept the property on the other, and in pursuance thereof a delivery is made, even though something remains to be done, as, for example, the fixing of the quantity or amount of the property or the payment of the purchase money. *Chamblee* v. *McKenzie,* 31 Ark. 155; *Gans* v. *Holland,* 37 Ark. 483; *Shaul* v. *Harrington,* 54 Ark. 305; *Priest* v. *Hodges,* 90 Ark. 131; *Guion Merc. Co.* v. *Campbell,* 91 Ark. 240.

Thus, in the case of *Lynch* v. *Daggett,* 62 Ark. 592, it was held that a contract of sale was complete, although the property was thereafter to be moved by the seller to the place named. In the case of *Anderson Tully Co.* v. *Rozell,* 68 Ark. 307, it was held that a sale was complete and the title to lumber passed to the buyer, although it was thereafter to be hauled to another

place and there measured, and the balance of the purchase price determined by such measurement was then to be paid.

The question then recurs, was there a sufficient delivery of the lumber to the Kimball Lumber Company to make the sale complete as against the rights of the subsequent purchaser? In the sale of personal property, the delivery of the thing sold is essential as against the rights of third parties asserting a title, right or interest therein subsequently acquired from the seller. A delivery may be either actual or constructive, and in either event it will be effective to pass title. Where property is of such a nature and so situated that actual delivery thereof can be made, then that is necessary. Where the property is too ponderous and bulky for an actual change of its possession, a symbolical or constructive delivery thereof will be equivalent to and effective as an actual delivery. The delivery of such property may be made by doing everything necessary to identify it and by placing on it outward indicia to show a change of the possession and ownership.

In the case of *Little Rock & Ft. S. R. Co.* v. *Page,* 35 Ark. 304, it was held (quoting syllabus): "What constitutes delivery depends upon the situation and character of the property. Removal from the premises is not necessary. It is sufficient if the contract of sale has been definite and unconditional, and everything has been done in pursuance of it by the vendor, which is necessary to identify the property and separate it from other, so that it may be known what, specifically, has been sold."

In the case of *Smith* v. *Jones,* 63 Ark. 232, it was held (quoting syllabus): "Proof that the vendors of a large quantity of lumber directed the vendees to mark it in their name, which was accordingly done, is sufficient to support a finding that there was a delivery of the lumber in pursuance of sale." See also *King* v. *Jarman,* 35 Ark. 190.

It will thus be seen from these cases that the question as to whether or not a contract of sale is complete so as to pass title as against those subsequently obtaining an interest or claim to the property is determined by whether or not it was the intention of the parties to fully consummate the sale and pass the title, and whether or not such a delivery thereof was made as the nature of the property would admit of, and such outward indicia or marks of a change of ownership had been made so as

to advise third parties dealing therewith of such change of the ownership. *Lee Wilson & Co.* v. *Crittenden County Bank,* 98 Ark. 379.

In the case at bar the testimony on the part of the defendant shows that its agent was sent to the mill to estimate the lumber then stacked upon the yards and to take it up for the defendant. The lumber was stacked in piles, and this agent then estimated it in the presence of the seller, and after doing so marked upon each pile the number of feet it contained, and also the name of the Kimball Lumber Company, to whom the owner then sold it, and by these outward indicia of possession both the seller and the buyer intended to show that the lumber was actually delivered to the Kimball Lumber Company. Both the seller and the agent of the buyer testified that it was the intention then to make a complete sale of the lumber and pass the title thereto to the defendant. Of this the plaintiff was notified, because thereafter, on May 2, he entered into the above written contract with said Cox by which said Cox sold to him the other lumber and in this contract it is expressly stated that the lumber in controversy had been taken up and sold to the Kimball Lumber Company, and was excepted from said contract of sale to the plaintiff. In addition to this, at the time the lumber was estimated and marked in the name of the Kimball Lumber Company, an agreement was made between the defendant's agent and said Cox, the seller, that Cox would haul the lumber to the railroad station for the defendant, which was done; and this suit was not instituted until after such removal had been made.

We are of the opinion that there was sufficient evidence adduced upon the trial of this case to show a delivery of the lumber by said Cox to the Kimball Lumber Company on April 29, and that such delivery was made in pursuance of a sale which, according to the intention of both buyer and seller, was then complete; and that the title then passed to the Kimball Lumber Company, although it was understood that the balance of the purchase money was thereafter to be paid after the lumber had been graded and exact measurement made thereof. The title to the lumber having passed to the defendant on April 29, 1910, the plaintiff could not obtain

title thereto from Cox by the bill of sale executed to him on June 1, 1910.

It is urged by counsel for defendant that the uncontroverted evidence shows that the value of the lumber was far in excess of $400, and that it amounted at the lowest sum to $680, the price at which it was subsequently sold by the plaintiff. The defendant asks that the judgment be affirmed, in so far as it adjudges a recovery of the property to it, and it only seeks to have this judgment modified in regard to the value of the property. The verdict upon which this judgment is based is entire; and, even if it should be held that the judgment could be in part affirmed and in part modified, we do not think that such modification is warranted by the testimony relative to the value of this lumber. The lumber never had been graded, and there is no testimony as to its exact grades, or as to the amount that there was in the different grades. It appears from the letter of defendant introduced in evidence that the lumber of this character runs from common No. 1 to firsts and seconds, and that the value thereof ranges from $10 per M. to $28 per M. There were 22,000 feet of lumber replevied, and we can not say from this testimony whether it was of the value of $10 per M. or more. We can not say, therefore, from the testimony adduced that the jury were not warranted in finding the value of this lumber to be $400.

The judgment is accordingly affirmed.

MINOR v. MAPES.

Opinion delivered February 19, 1912.

1. NEGLIGENCE—USE OF STREETS.—While drivers of automobiles and other vehicles have the right to share the street with pedestrians, they must anticipate the presence of the latter and exercise reasonable care to avoid injuring them, commensurate with the danger reasonably to be anticipated. (Page 354.)

2. SAME—NEGLIGENCE OF AUTOMOBILE DRIVER.—Proof that the driver of an automobile running over twelve miles an hour, ran within four feet of a street car and collided with one who had just alighted from the car will sustain a finding that such driver was negligent. (Page 354.)

3. SAME—CONTRIBUTORY NEGLIGENCE.—As a general rule, it is not negligence as matter of law for a pedestrian to attempt to cross a public

street, not a railroad crossing, without looking up and down, but it is a question for the jury to say whether due care has been exercised by him in a particular instance. (Page 354.)

4. HUSBAND AND WIFE—LIABILITY FOR WIFE'S TORTS.—A husband is liable for torts committed by his wife, whether committed in or out of his presence, or whether committed at his command or not. (Page 355.)

Appeal from Garland Circuit Court; *Calvin T. Cotham*, Judge; affirmed.

Greaves & Martin, for appellant.

1. While the driver of an automobile is required to use all the care and caution which a careful and prudent person would exercise under the same circumstances, yet he has the right to assume, and act upon the assumption, that others using the highway will also exercise a like caution and not recklessly expose themselves to danger. It is only when a driver realizes that a footman is in a position of danger that he is required to exercise additional care to avoid a collision. 77 N. Y. Supp. 276.

Automobile drivers and pedestrians have equal rights to the use of the streets, and each is bound to exercise ordinary care for his own safety and to prevent injury to others. *Millsaps* v. *Brogden*, 97 Ark. 469. Under the rule laid down in this case, appellant was not negligent.

2. From appellee's own statement, he was guilty of contributory negligence, and the court should so have charged the jury. 76 Ark. 12; 95 Ark. 192. It was his duty in crossing the street to look along the street in the vicinity of the crossing, in both directions for a reasonable distance for coming vehicles 45 N. Y. 191, 6 Am. Rep. 66; 30 Am. Rep. 620; Beach on Contributory Negligence, § § 268-9; 58 N. Y. 631; Thomas, Negligence, 1140, 19 L. R. A. (N. S.) 160; 22 *Id.* 470.

3. Under the facts in the case the appellant is not liable, unless because of the relation of husband and wife. His *prima facie* liability because of that relation is a mere presumption such as could be overcome by proof, and there was evidence to overcome such presumption is this case. 44 Ark. 401; 86 Ark. 130. Since the court could from the evidence say as a matter of law that the *prima facie* presumption had been overcome by sufficient evidence, it should have instructed a verdict for the appellant. 75 Ark. 406, 409; 71 Ark. 445; 33 Ark. 146.

Appellee, pro se.

1. Appellant was guilty of gross negligence in running the automobile at excessive speed so near to the street car at a time when he knew that the street car had stopped to receive and discharge passengers, instead of running at a reasonable speed and a reasonable distance from the car track. 99 S. W. 247, 30 Ky. L. Rep. 500, 8 L. R. A. (N. S.) 1228. Appellant should have kept his automobile under such control that he could have readily stopped it in case of an emergency. He was under the duty to exercise all the care and caution which a careful and prudent driver would have exercised under the circumstances—the care commensurate with the known or reasonably to be apprehended danger. 77 N. Y. Supp. 276; 22 L. R. A. 635; 94 Ind. 72, 75; 39 Md. 243, 249; 81 Mo. App. 155, 163; 5 N. Y. Misc. 209, 210, 25 N. Y. Supp. 91; 54 Pa. St. 345; 93 Am. Dec. 708; 117 N. W. 531, 534.

2. There is no proof of contributory negligence on the part of appellee. Pedestrians have the same rights in the streets as vehicles. One is not required to stop and look in both directions before attempting to cross a street, and the law only requires of him that he act with ordinary prudence, and he has the right to presume, and act upon the presumption, that others will exercise the same prudence. 65 Atl. 778, 780; 67 Atl. 87.

3. The ownership of the automobile is not material, and the fact that his wife was driving it does not relieve him from liability. 44 Ark. 401.

McCULLOCH, C. J. Appellee sued appellant in the circuit court of Garland County to recover damages on account of personal injuries resulting from alleged negligence on the part of appellant in driving an automobile, or causing it to be driven, along Central Avenue in the city of Hot Springs. Appellant and his wife were in the machine at the time, the latter driving. Appellee alighted from a street car, at the front end of it, which was customary, and started across the track in front of the car to go to the opposite side of the street. He hesitated at first, but the motorman told him to go ahead, and he proceeded to cross. As he stepped beyond the end of the car, the automobile, which was running at a speed of ten or twelve miles per hour struck him and knocked him down. He was just stepping

on the other track, about four feet from the street car, when the automobile struck him. It was a rainy day, and he had his umbrella raised and was walking rapidly. He testified that the street car obstructed the view down the street, and that as he passed the car he looked down the street but didn't see the automobile approaching, and failed to see it until too late to get out of the way. There was a space of sixty feet between the street car and the other side of the street.

Appellant testified that he purchased the machine, and gave it to his wife for her own use—that she drove it herself, and that he never attempted to drive and knew nothing about handling a machine of that kind. There was testimony to the effect that appellant paid the city vehicle license fee for operating the machine.

The verdict was in appellee's favor for recovery of damages.

It is insisted that the evidence fails to establish negligence on the part of appellant, and that the undisputed evidence shows negligence on the part of appellee which bars recovery. We think that on both of those issues the verdict is sustained by sufficient evidence.

The machine was being operated at a rapid rate of speed, unnecessarily near the street car, though there was abundant space further out in the street for the machine to pass along. It was customary for passengers to alight from the front end of street cars, and it was reasonably to be anticipated that they might pass in front of a car going to the other side of the street. The jury was warranted in finding that it constituted negligence for an automobile driver to run the machine at a rapid speed so near a street car which had stopped for passengers to alight.

Automobilists and the drivers of other vehicles have the right to share the street with pedestrians, but they must anticipate the presence of the latter and exercise reasonable care to avoid injuring them. Care must be exercised commensurate with the danger reasonably to be anticipated. *Gregory* v. *Slaughter*, (Ky.) 99 S. W. 247, 8 L. R. A. (N. S.) 1228.

The question of contributory negligence on the part of appellee was one for the jury, and was properly submitted. It can not be held that the failure of a pedestrian upon a public street to look up and down the street before crossing constitutes,

under all circumstances, negligence as a matter of law. There is no statute or rule of law which raises a presumption of negligence from the failure of a pedestrian, on a public street, not at a railroad crossing, to look. The rule is, that a pedestrian, having equal rights with others to the use of the streets, must exercise ordinary care for his own safety, and this is generally a question for the jury to say whether such care has been exercised. *Millsaps* v. *Brogdon*, 97 Ark. 469.

It is next insisted that, according to the undisputed evidence, appellant did not own the machine nor control it, but was merely riding therein with his wife, who was driving, and that for that reason no liability on his part is established. It is contended, in other words, that, it being shown affirmatively that the wife was not acting under the compulsion of the husband, he is not responsible for negligence on her part which caused the injury. In this contention learned counsel are mistaken as to the law on the subject. At common law the husband was liable for torts committed by the wife, whether committed in or out of his presence, or whether committed at his command or not. Such is the law in this State now. *Kosminsky* v. *Goldberg*, 44 Ark. 401; *Jackson* v. *Williams*, 92 Ark. 486. The only difference is that where the tortious act is committed in the immediate presence and under the direct compulsion of the husband, the wife is not liable, and the husband alone is liable. In other instances, where the tort is committed in the absence of her husband or, if in his presence, without any control or compulsion on his part, the husband and wife are jointly liable and must be joined in the action, the liability of the husband ceasing upon the dissolution of the marriage relation. *Kosminsky* v. *Goldberg*, *supra*. No question was raised below as to the failure to join the wife as defendant in the action, and that question must be deemed as waived, and can not be raised here for the first time. *Townsley* v. *Yentsch*, 98 Ark. 312. But, aside from the question of the husband's common-law liability for torts of the wife, we are of the opinion that the evidence was sufficient to warrant the jury in finding negligence on the part of appellant. The rule is, that where one rides in a public conveyance, or merely upon the invitation of some third party, and exercises no control over the driver, and is not guilty of any positive act of negligence, the negligence

of the driver can not be imputed to him so as to render him liable for injuries to another person. *St. Louis & S. F. Rd. Co.* v. *McFall*, 75 Ark. 30; 1 Thompson on Negligence, 502; *Little* v. *Hackett*, 116 U. S. 366; *New York, L. E. & W. Rd. Co.* v. *Steinbrenner*, 47 N. J. Law 161, 23 A. & E. Rd. Cases, 330. This rule can not however, be extended so as to afford an avenue for the husband's escape from liability on account of negligent act of his wife or minor child with whom he is driving in an automobile or other vehicle. He is presumed to exercise some control over them under those circumstances, at least to the extent of preventing an act of negligence which is calculated to result in injury to other persons, and it is his positive duty to do so. In this instance the husband was sitting beside his wife, who was driving the machine, and whatever danger there was in driving too near the street car was as obvious to him as it was to her. He needed no knowledge or experience in the operation of the machine in order to apprise him of such danger. To say that the husband was not liable for the negligent act of the wife committed under those circumstances would be to absolve him entirely from any duty to fellow-travellers.

The court gave an instruction which is in conflict with some of the views we here express, but as it was in appellant's own favor and the verdict, notwithstanding that, was against him, he can not complain of it.

We are of the opinion that the verdict was supported by the evidence, and it is not contrary to any rule of law applicable to the facts of the case. The judgment is therefore affirmed.

ARMSTRONG v. STATE.

Opinion delivered February 19, 1912.

1. TRIAL—CRIMINAL LAW—SEPARATION OF JURORS.—Where, in a felony case, after directing the jury to keep together and placing them in charge of an officer, the judge permitted one of the jurors to separate from his fellows unaccompanied by an officer, this is ground for new trial unless it affirmatively appears that no prejudice resulted. (Page 358.)

2. INDICTMENT—MISNOMER OF PROSECUTRIX.—The fact that an indictment for rape describes the prosecutrix by her maiden name, instead of her married name, is immaterial where she was commonly known by the former name. (Page 360.)

Appeal from Pulaski Circuit Court, First Division; *Robert J. Lea,* Judge; reversed.

STATEMENT BY THE COURT.

Appellant was convicted of the crime of rape upon the person of Ella Hardcastle, and sentenced to be hanged.

The testimony shows that the rape was committed at night, at about 3 o'clock in the morning, by some one who entered the room, through a window, where the prosecuting witness was asleep. She was awakened by the striking of a match and by the light from it and the reflection of the electric light through the window, saw her assailant and, afterwards on the next day, when he was arrested, identified the defendant as the person.

The defense was an alibi, and the defendant and several other witnesses testified that he was at a different place at the time the rape was committed.

It appeared further that the prosecuting witness had been married, and that her husband's name was Musser, but that she had retained her maiden name and was commonly known by it; and that during the progress of the trial, after most of the testimony had been taken and the jury had been admonished and instructed, as the law requires, and placed in the charge of a deputy sheriff, especially sworn for that purpose to be kept together, that the officer in charge of the jury over night, during the adjournment of the court, at about 11 o'clock, called up the judge and reported that the wife of Mike Sullivan, one of the jurors, was in labor of childbirth, and was very ill, and that the juror desired to go home to his wife. The judge called the juror to the 'phone, admonished him to strictly heed the instructions the court had given to the jury, to let no act of his cast suspicion on the verdict of the jury that might be reached, and permitted him to go home, telling him to return as soon as he could, which he did about 7 o'clock the next morning, and remained with the other jurors until the end of the trial, they having been continuously kept together. No officer accompanied the juror that was permitted to separate from the others.

W. T. Tucker, for appellant.

1. The separation of the jury, not in charge of an officer, and without an order of court, impeached the purity of the

trial. 76 Ark. 487; 44 *Id.* 115; 57 *Id.* 1; 12 *Id.* 782; 95 *Id.* 428. The judge is not the court.

2. Defendant must be present when any substantive step is taken, and need not show prejudice. 44 Ark 331; 24 *Id.* 620; 50 *Id.* 492.

3. The name of the party injured must be alleged and proved as alleged. 3 Gr. Ev., § 22; 5 Ark. 72; 9 *Id.* 193; 32 *Id.* 609; 13 *Id.* 712; 34 *Id.* 720; 16 *Id.* 499.

4. It was error to refuse the instructions asked as to alibi and identity of the party. 147 Ill. 468; 83 Miss. 260; Brickwood's Sackett on Instructions, § 2446, (3 ed.); 68 Ill. 271; 3 Gr. Ev. (14 ed.) § 30; 5 Cush. (Mass.) 320.

5. It was error to refuse the instructions 22, 23 and 24, and the verdict is clearly against the evidence. 70 Ark. 385; 21 *Id.* 468; 24 *Id.* 224; 13 *Id.* 71; 39 *Id.* 491; 34 *Id.* 632; 10 *Id.* 492.

6. There was error in the court's charge as to reasonable doubt and presumption of innocence. 70 Ark. 341; 71 *Id.* 642. The guilt must be proved. 3 Gr. Ev. § 29 (14 ed.); 69 Ark. 538; 73 *Id.* 291; 29 *Id.* 266; 16 L. R. A. (N. S.) 260. As to reasonable doubt, see 73 Ark. 315; 81 *Id.* 16; 95 *Id.* 100; 69 *Id.* 537.

Hal L. Norwood, Attorney General, and *Wm. H. Rector*, Assistant, for appellee.

1. It was within the sound discretion of the court to allow one of the jurors to be separated from the rest. No prejudice is contended for. Kirby's Digest, § 2390; 32 Ark. 309.

2. There is no variance between the allegation and proof as to the name. She was commonly known as Hardcastle. This is sufficient. 16 Gray 1; 50 Miss. 81; 64 Me. 507; 67 N. C. 55; Russ & Ry. 510; 4 Fost & F. 1099; 20 N. H. 250; 7 Car. & P. 298; 25 Tex. 574; 44 Me. 469; 20 Grat. 825; 54 Me. 569; Joyce on Indictments, § 356; 104 N. Y. Supp. 277; 129 Ala. 16; 121 Ga. 193; 128 Ia. 518; 5 Ill. 172; 44 So. Rep. 184.

KIRBY, J., (after stating the facts). Of the many errors assigned in the motion for a new trial only such will be noticed as are necessary to the decision herein.

It is first strongly urged that the court erred in permitting the jury to separate during the trial before the case was sub-

mitted to them. It is within the discretion of the trial court to permit the jury to separate, or to keep them together, after admonishing them as the law requires, in the charge of a proper officer, before or after the case is submitted to them. Sections 2390-2393, Kirby's Digest. But this discretion of the court in allowing the separation of the jury should be exercised with the utmost caution, especially in trials for felonies, since it is possible for great prejudice to result from such separation. *Johnson* v. *State*, 32 Ark. 309.

In *Ferguson* v. *State*, 95 Ark. 430, the court said: "The rule as to the separation of jurors during a trial in a felony case is stated in *Maclin* v. *State*, 44 Ark. 115, 119, as follows: 'But it has long been the rule of this court in case of felony that a separation of a juror from his fellows pending the trial casts upon the State the burden of showing that no improper influence was brought to bear upon the juror during his absence. In other words, the mere fact that a juror separates from his fellows without the order of court is *prima facie* ground for a new trial, unless it affirmatively appears that the separating juror was not subjected to any noxious influence.' The object of this rule is apparent. The jury are kept together, and an officer is put in charge of them and directed to see that they do not separate to protect the defendant against outside influence. They are not allowed to have any communication with outside persons with respect to the guilt or innocence of the defendant on trial, and it is the duty of the officer in charge to see that they do not. This protection is due to the defendant, and the State should see that he receives it. It is not expected of him to employ some one to watch the jury and report any misconduct on their part. Hence, when they separate, the burden is upon the State to show, by circumstances or directly, that the absent juror was not subjected to any injurious influence."

It is true in this case the judge permitted this juror to separate from the others that he might attend his sick wife, and admonished him properly as to his conduct during his absence from the jury, and that he should return as soon as possible, but the court had already decided that it was necessary in order to secure the accused a fair trial that the jury should be kept together and placed them in charge of an officer properly

directed for that purpose. Having exercised the discretion to keep the jury together, the statutory requirements should have been complied with, in order to preserve the integrity of the trial, as was said in *Southerland* v. *State,* 76 Ark. 488.

Conceding, without deciding, that the judge, under the circumstances could permit it, he should have required an officer to accompany the juror, during his separation from the others, after having held that it was necessary that the jury be kept together. Not having done so, the case is not different from that where it is shown a juror was separated from the jury, without the court's order, after it was put in charge of the officer to be kept together, and such separation is *prima facie* ground for a new trial, unless it affirmatively appears that the separating juror was not subjected to any noxious influence. And the burden is upon the State to show that no prejudice in fact resulted from such separation, and it could have been discharged by the court having the juror sworn and questioning him as to his conduct during the separation, but, there being no testimony in this case to remove the presumption, the court erred in not granting a new trial.

It is further insisted that there was a fatal variance in the proof, it being alleged that the rape was committed upon Ella Hardcastle, and proved that she had been married and that her husband's name was Musser. We do not think this contention sound, however. She testified that she had not taken her husband's name, since he was away at medical school, and that she was a trained nurse and commonly known as Ella Hardcastle. Bishop on Criminal Procedure, 686; Joyce on Indictments, 356. See also *Ford* v. *State,* 129 Ala. 16; *Whittington* v. *State,* 121 Ga. 193; *Bartlett* v. *State,* 128 Ia. 518; *Durham* v. *People,* 5 Ill. 172; *Stallworth* v. *State,* 41 So. (Ala.) 184.

Numerous assignments of error are urged as to the giving and refusing of instructions, and especially because of the court's failure to give certain instructions upon reasonable doubt. Some of these instructions requested correctly stated the law, but the court gave numerous instructions correctly submitting the question and carefully guarding appellant's rights upon this phase of the law, and committed no error in refusing to give others upon the same point.

We have carefully examined the charge, and find it full, fair and correct, and that defendant's rights were in no wise prejudiced thereby.

For the error indicated the judgment is reversed, and the cause remanded for a new trial.

HART, J., (concurring). The court, in the exercise of its discretion, had ordered the jury to be kept together during the trial. I concur in the judgment of reversal on the ground that the action of the court in allowing the juror to separate from his fellow-jurymen was a substantive step in the trial. Under the common law, it is the right of the defendant on trial for a felony to be present when any substantive step is taken by the trial court in his case, and this rule is adhered to in this State, with certain exceptions under the statute, which it is not necessary to notice here; for the defendant was confined in jail, and his absence was enforced.

In the case of *Bearden* v. *State,* 44 Ark. 331, Chief Justice COCKRILL, speaking for the court, expressed the view that the swearing of the witnesses and putting them under the rule in a capital case in the absence of the defendant was a violation of his rights.

Subsequently, in the case of *Kinnemer* v. *State,* 66 Ark. 206, the court held that it is error in a felony case for the court, in defendant's absence, to reread the instructions to the jury, at their request, though they are read exactly as at first given, since the defendant had a right to know that such was the case, and to be present for that purpose. See also *Stroope* v. *State,* 72 Ark. 379. Likewise, I think the action of the court in permitting a separation of the jurors was a substantive step in the trial of the case.

It is true that the separation of the jurors was a matter within the discretion of the court, but any proceeding that is the subject of judicial discretion is susceptible to abuse. A case might arise in which the defendant would be in possession of facts and circumstances which, if imparted to the court, would influence it in the exercise of its discretion; at least, the defendant has a right to be present to see for himself that the court does not abuse its discretion.

MCCULLOCH, C. J., (dissenting). There is nothing in

the record tending to show whether or not the juror Sullivan was exposed to any influences which could have operated to the defendant's prejudice. All that the record discloses is that he was permitted by the court to go to the bedside of his wife, who was in childbirth. The result of the former decisions of this court is that where the jury is permitted to separate by an order of the court the burden is on the defendant to show that his rights were prejudiced thereby, or, in other words, that some juror was actually exposed to improper influences; on the other hand, where the court, in the exercise of its discretion, decides to keep the jury together and not allow the jurors to separate, and there is a violation of this order by a separation, then the burden is imposed on the State to make an affirmative showing that the separated jurors were not exposed to any improper influences. *Maclin* v. *State*, 44 Ark. 115; *Hamilton* v. *State*, 62 Ark. 543. The reason for this distinction is, that the statute vests in the trial court a discretion in such matters; and where the court, in its exercise, allows a separation of the jurors, it is the duty of the appellate court to indulge the presumption that it was a proper exercise of that discretion until the contrary is made to appear and proof is adduced showing that actual prejudice resulted. But where the court, in the exercise of its discretion, decides to keep the jurors together, the presumption is that there is some necessity for this, and that prejudice resulted from separation unless the contrary is affirmatively shown. In the present case the court ordered the jurors kept together, but in the special emergency which was presented the trial judge decided to let this particular juror go to the bedside of his wife. The court, by first making an order for the jury to be kept together, did not exhaust its powers, but the statutory discretion remained in the court during the progress of the trial. The direction given by the trial judge was an order of the court, even though it was given after the court has adjourned over until the next day. We ought, I think, to indulge the presumption, until the contrary appears, that there was no abuse of the court's discretion. It is probable that the learned trial judge knew the juror, his habits and character, and, knowing the particular circumstances which called for his separation, decided that there was nothing improper in permitting it. It seems to me that it is carrying

the rule too far to say that under those circumstances there has been an abuse of discretion or that the presumption should be indulged, until the contrary appears, that the juror was subjected to improper influences. In *Palmore* v. *State*, 29 Ark. 248, it was said that "this court has not favored the setting aside of a verdict for mere separation, unless something more than opportunity for undue influence is shown." I think the decision in this case shows a very different policy. The direction of the circuit judge to the sheriff to allow the juror to separate from his fellows was not in my opinion such a substantive step in the progress of the trial that could not be made in the absence of the defendant. *Mabry* v. *State*, 50 Ark. 492; *Atterberry* v. *State*, 56 Ark. 515.

With proper deference to the opinion of the other judges, it seems to me that the reversal of this case on account of the separation of the juror is entirely technical, the proceedings being otherwise free from error. Doubtless, all will agree that it is unfortunate for the law to be such that a reversal must result under this state of the record. This being true, it is to be hoped that the Legislature will afford relief by changing the law so that in such cases the burden will be on the accused to show that his rights have been prejudiced by an exposure of one of the jurors to improper influences.

COOK v. STATE.

Opinion delivered February 19, 1912.

1. SEDUCTION—CORROBORATION OF PROSECUTRIX.—Before a conviction of seduction can be had, it is necessary for the testimony of the prosecutrix to be corroborated both as to the promise of marriage and as to the sexual intercourse. (Page 365.)

2. SAME—EFFECT OF PROPOSAL TO MARRY.—It is no defense to a prosecution for seduction that after it was begun defendant proposed to marry the prosecutrix. (Page 365.)

3. WITNESSES—EXAMINATION—LEADING QUESTIONS.—It was not error to refuse to permit leading questions to be asked a witness. (Page 365.)

4. SEDUCTION—PRIVILEGE OF WITNESS—REMARKS OF COURT.—It was error, in a seduction case, after a witness has testified that he has had sexual intercourse with the prosecutrix, for the court to approve a statement of the prosecuting attorney that a witness can not be com-

pelled to testify in a seduction case that he has had sexual intercourse with the woman. (Page 366.)

Appeal from Garland Circuit Court; *Calvin T. Cotham*, Judge; reversed.

M. S. Cobb, for appellant.

1. Positive proof of specific acts of illicit intimacy is not required—general reputation is sufficient to show previous unchastity. 59 Kan. 237; 34 *Id.* 63; 77 Neb. 519; 47 N. J. L. 241; 59 *Id.* 1.

2. While previous chastity is presumed, the presumption of defendant's innocence rebuts the former. 71 Ark. 398.

3. The verdict does not conform to Kirby's Digest, § 2943.

4. Appellant was willing to marry the prosecutrix—she refused.

5. Evidence that prosecutrix was an orphan was inadmissible and improper. 115 Ill. App. 1157; 131 Mich. 474; 30 S. W. 369.

6. Doctor Greeson should have been permitted to answer. His testimony corroborated other competent testimony as to the condition of prosecutrix and the probability of an abortion.

7. Stallon's testimony was admissible. 34 Ark. 485; 93 *Id.* 260.

8. A man can be compelled to state whether he has had sexual intercourse with the prosecutrix in a seduction case. *Polk* v. *State*, 40 Ark. 482, is not the law. The expression is dictum and not binding. 14 Cyc. 286; 20 Am. Rep. 451; 1 Ariz. 99; 16 How. (U. S.) 275. Authority of opinions is limited to the points decided. 6 Wheat. (U. S.) 264; 3 Cyc. 494; 57 Ark. 473; 3 Nev. 566; 21 Am. Rep. 192; 11 Cyc. 755. Prosecuting attorney's statement and the judge's remarks were ill-advised. Neither fornication nor adultery are crimes under our statutes unless within the degrees prohibited. 60 Ark. 259.

9. Wheatley's testimony was not privileged. 67 Ark. 163; 78 *Id.* 762; Underhill on Cr. Ev. (2 ed.) 447; 2 Elliott on Ev. § 1005; 47 N. H. 113; 52 W. Va. 132, 296; 36 Mo. 400.

10. The court's statement was an oral charge to the jury and contrary to law. Const. art. 7, § 23; 51 Ark. 184.

Hal. L. Norwood, Attorney General, and *Wm. H. Rector,* Assistant, for appellee.

1. In seduction the character of the seduced is at stake, not her general reputation. Actual personal chastity may be impeached by proof of acts of incontinence before the seduction. 40 Ark. 182; 71 *Id.* 398; 77 *Id.* 23; 84 I*d.* 67.

2. Defendant can not complain of the minimum punishment. Kirby's Digest, § 2043.

3. It was competent to show why Belle Smith lived with her uncle.

4. Where one upon cross examination asks certain immaterial questions he is bound by the answers, and can not contradict them. 99 Ark. 604; 93 Ark. 260.

5. If *Polk* v. *State,* 40 Ark. 482, is the law, neither the remarks of the State's attorney nor the court were error.

HART, J. This is an appeal from a judgment convicting Arthur Cook of the crime of seduction. In such cases, before a conviction can be had, it is necessary for the testimony of the prosecutrix to be corroborated both as to the promise of marriage and the sexual intercourse. *Rucker* v. *State,* 77 Ark. 23; *Lasater* v. *State, Ib.* 468; *Wilhite* v. *State,* 84 Ark. 67; *Cooper* v. *State,* 86 Ark. 30; *Rogers* v. *State,* 101 Ark. 45.

Tested by this rule, a verdict of guilty was warranted by the evidence, and, the sufficiency of the evidence to support the verdict not being questioned, no useful purpose can be served by abstracting the testimony.

The prosecution is this case was first begun before a justice of the peace; after the trial there, and before the prosecutrix went before the grand jury, the defendant expressed his willingness to marry her, and now offers this as a reason why the judgment should be reversed.

The fact that, after a prosecution for seduction was begun, he proposed to marry the female does not constitute a defense to the prosecution. *Carrens* v. *State,* 77 Ark. 16; *Lasater* v. *State,* 77 Ark. 468.

It is next insisted that the court erred in refusing to allow Doctor Greeson, a witness in the case, to answer certain questions asked him. The court sustained the objection of the State to the questions because they were leading and suggested their answers, but told counsel for defendant that if he would frame

his questions in proper form the answers could be stated in evidence. Counsel for defendant declined to do this, and the defendant can not now complain of the action of the court.

Bettus Wheatly, a young man seventeen years of age, testified that for several years prior to the time of the alleged seduction he had been in the habit of having sexual intercourse with the prosecutrix. The prosecuting attorney in his closing argument to the jury, in commenting on this witness' testimony, said: "He don't have to tell it; you can not put a man on the stand and force him to tell it; he can get up there and refuse to tell it; that is the law." The defendant objected to this statement being made to the jury. The prosecuting attorney then said: "I say you can not make a man come in here and testify in a seduction case that he has had sexual intercourse with a woman." The court then said: "Yes, that is the law; that is a correct statement." The defendant excepted to the court's statement. The prosecuting attorney then said: "A man that will go out and have sexual intercourse that many times and then come in here and spit it out, I say he ought not to have communion with honest men."

The Attorney General contends that the statement of law made by the prosecuting attorney and sanctioned by the court is correct, and relies on the case of *Polk* v. *State*, 40 Ark. 482, to sustain his contention. It is true that Judge SMITH, in delivering the opinion in that case, uses language from which it might be inferred that this is the law, but a careful consideration of the whole opinion convinces us that the court did not mean so to decide. In that case the court held that the character of the prosecutrix is involved in a seduction case, and that it may be impeached by particular instances of incontinence occurring before the seduction. In any event, the language attributable to the decision of this question was *obiter dictum* and is not the law. There is no statute in this State making fornication or adultery indictable. *Turney* v. *State*, 60 Ark. 259. Neither are they indictable as a common law offense, except in cases of open lewdness amounting to nuisance. *Krouse* v. *State*, 16 Ark. 566; 19 Cyc. 1435. American Criminal Law (Desty) § § 88a-113a; 1 Bishop, New Criminal Law, § 38.

Under the authorities above cited the previous unchastity

of the prosecutrix may be shown as a matter of defense, and the witness could not refuse to testify on the ground that he would incriminate himself, because, as we have seen, he was guilty of no indictable offense because he had had sexual intercourse with the prosecutrix. It is well settled that a witness is not bound to make answer to a question which will subject him to disgrace or tend to degrade him unless the evidence is material to the issue on trial, or unless it tends to impeach his credibility under principles which it is not necessary here to discuss. From what we have said above, it is apparent that the evidence was material to the issue on trial, and the witness was therefore bound to testify as to the acts of sexual intercourse between himself and the prosecutrix. The action of the court in stating that the witness was not bound to testify as to his acts of intercourse with the prosecutrix had a tendency to affect the credibility of the witness before the jury, and therefore was necessarily prejudicial to the rights of the defendant; for the testimony of the witness was a material issue in the case, and the facts testified to by him were relied on by the defendant as a defense to the prosecution. For this error the judgment must be reversed and the cause remanded for a new trial.

SMITH v. PRICE.

Opinion delivered February 19, 1912.

1. MORTGAGE—SUIT TO REDEEM—PARTIES.—In a suit by the vendor of land to redeem the land from a mortgage sale, his vendee is not a necessary party. (Page 371.)
2. SET-OFF AND COUNTERCLAIM—WHEN NOT ALLOWED.—When a vendor of land seeks to redeem the land from a mortgage sale to a third person, and makes his vendee a party, such vendee is not entitled to counterclaim damages for breach of the contract of sale, as such counterclaim has no connection with the foundation of plaintiff's claim and is not connected with the subject of the action. (Page 372.)

Appeal from Prairie Chancery Court; *John M. Elliott*, Chancellor; affirmed.

STATEMENT BY THE COURT.

On or about the 27th day of February, 1903, A. J. Shipman and wife executed their mortgage conveying a certain tract

of land in Prairie County to Geo. C. Lewis to secure the payment of indebtedness mentioned in the mortgage to Lewis. The mortgage was assigned by Lewis to Mrs. M. B. Carson, and by Mrs. Carson to Ralph J. Smith. On the 8th of May, 1908, Ralph J. Smith sold the land to Addie G. Smith, pursuant to the power contained in the mortgage. A trustee's deed was made on the 8th day of May, 1908, purporting to be based upon the sale of the land under the power contained in the mortgage conveying the same to Addie G. Smith, the defendant in the court below to the present suit.

On the 12th day of January, 1905, Shipman and wife, the mortgagors, conveyed the land to W. M. Price, the plaintiff below, and appellee here. Within one year after the date of the sale on May 8, 1908, appellee tendered to Addie G. Smith the amount necessary to redeem the land from the sale made under the mortgage to Addie G. Smith. She refused to accept same, and appellee instituted this suit to redeem.

In his complaint appellee, after setting up the mortgage and the various assignments thereof, and the sale of the land by the mortgagors to appellee, in consideration that he assume and pay the mortgage debt, set forth the following contract: "Know all men by these presents:

"That I, W. M. Price, of Stuttgart, county of Arkansas, and State of Arkansas, party of the first part, for and in consideration of the sum of nine thousand and five hundred dollars ($9,500), to be paid by Robert B. Smith, of county of Johnson, State of Iowa, party of the second part, having this day bargained and sold to the second party the following described real estate, situated in Prairie County, State of Arkansas, to-wit: The south 240 acres of the east half of section twenty (20), township 1 south, range 5 west, Prairie County, Arkansas, Government survey, 240 acres. The said party of the first part shall make, or cause to be made and delivered, a good and sufficient warranty deed, conveying said land to the said party of the second part, together with abstract, showing good title under the laws of the State of Arkansas, and said title to be passed upon by some reputable attorney.

"Said second party hereby agrees and binds himself to pay for said real estate as follows: Five hundred dollars down; $1,500 when deed and title are accepted by second party;

$2,000 when rice pump and plant of that cost are put on the premises in acceptable manner for the purpose of rice culture thereon, but not prior to January 1, 1907; balance of purchase price payable in five equal payments of $1,100 each on November 10 of each year thereafter, until all are paid, with interest at the rate of 5 per cent. per annum from November 10, 1907, until paid, due and payable as above mentioned, same to be secured by mortgage on the land above described, at the First National Bank at Montezuma, Iowa, deed and abstract to be furnished second party for inspection and examination by November 10, 1906, when all papers are to be then transferred and exchanged if title is good, said deed to be delivered upon the payment of said above named $1,500.

"It is also understood and agreed that, in case there does appear any defect or cloud upon the title to the above-described land, which would require said first party to remove by court or other proceedings necessary to secure or remove the same, the said first party shall be granted a reasonable length of time to have such defect or cloud removed.

"It is understood and agreed as part consideration of this contract that said W. M. Price covenants and agrees to lease said premises as follows: For the term of five years from and after January 1, 1907, at the annual rental of six dollars per acre for all land put under rice culture by said Price, and to give and furnish to said second party in Stuttgart, Arkansas, one-third of the total product grown on the remainder of said premises as rent. It is further agreed by said Price that, as part consideration hereof, he will cultivate and properly put to rice not less that 120 acres of said premises each year during this lease. Said Price agrees to put a $2,000 rice plant on said premises within six months, and furnish vouchers for cost thereof.

"Signed this October 31, 1908.

"W. M. Price (Seal)

"Robert B. Smith (Seal)."

Appellee alleged that he had tendered the amount of the mortgage debt, and offered to pay whatever additional sums that might be found to be due Addie G. Smith, the purchaser of the land under the mortgage sale, and alleged that the sale was void for various reasons, and that the land was subject

to redemption, and prayed that he might be allowed to redeem the same. He also prayed that the trustee's deed purporting to convey the land to Addie G. Smith, the defendant, be cancelled, and for general relief.

R. B. Smith, the appellant here, was made a party the complaint alleging that he denied the right of appellee, plaintiff, to redeem the land from the mortgage and from the sale thereunder, and that he refused to permit such redemption by the payment of any amount whatever by the plaintiff; but no affirmative relief was prayed as to him, but it is alleged that he agreed with appellee that the purchase money to be paid by him under the contract should be used to discharge the mortgage indebtedness.

Appellant, R. B. Smith, filed his answer, and made the same a cross complaint. He admitted the execution of the contract between himself and appellee as set out and exhibited with appellee's complaint. He set up that he had complied with the terms of the contract on his part; that the appellee had breached the contract on his part, and was due the appellant the sum of $3,600 upon the notes evidenced by the contract; that by the terms of the contract appellant had the option, upon default in the payment of either of said notes, to declare all of said notes due and payable; and he alleged that appellee had failed and refused to pay either of said notes, wherefore appellant elected to declare all the notes due and payable.

Various allegations are set up in the answer and cross complaint of the appellant setting forth breaches of the contract entered into between the appellant and appellee. The appellant, after alleging that he was ready to perform the contract on his part in every respect, prayed that the appellee be required to specifically perform his contract, and asked for judgment against the appellee in the sum of $4,000 damages as a difference between the value of the land at the time of making the contract and the value as it would have been if the appellee had complied with the terms of his contract, and that same be declared a lien on the land. He further prayed that whatever might be found to be due him from appellee might be used to discharge the payment of the mortgage debt and the purchase money lien; that he might have execution against the appellee for any sum that might be due, and that if appellee

were allowed to redeem the land he should pay off the mortgage and the purchase money lien and have the title vested in appellant, and that he have such other and further relief as he might be entitled to, though not specifically prayed for.

Appellee moved to strike the cross complaint of appellant, setting up that his suit was for redemption, and that appellant's cross complaint was for specific performance of the contract between appellee and appellant, and was in no wise connected with and did not grow out of plaintiff's complaint, but was a separate and distinct cause of action against the appellee and not enforceable in the present suit. The court sustained the motion, striking the cross complaint of appellant from the files, and rendered judgment in favor of appellee allowing him to redeem the land from the sale under the mortgage upon the payment of the amount thereof with interest and costs. The appellant appealed from the judgment of the court striking his cross complaint from the files.

Manning & Emerson, for appellant.

Notwithstanding appellant's pleading was denominated in the lower court a cross complaint, it was in reality a counterclaim, being a suit by defendant against the plaintiff, and not against some person other than the plaintiff, and that the court erred in striking out the counterclaim is settled by the statute. Kirby's Digest, § 6098, subdiv. 4; *Id.* § 6099; 71 Ark. 408; 93 Ark. 277; 92 Ark. 594.

John L. Ingram, for appellee.

The sole purpose of the suit was to redeem from the mortgage sale. No attempt to resist the redemption is made. The contract declared upon by appellant is not the basis of appellee's cause of action, and is only incidentally mentioned in his complaint. The court properly struck the cross complaint from the files. Kirby's Digest, § § 6099, 6098; Pomeroy, Code Rem., § 747; 66 Ark. 400.

WOOD, J., (after stating the facts). Although appellee, in his complaint, sets out the contract between him and appellant, he asks no affirmative relief as against appellant on this contract. His complaint was for the redemption of the land from the sale under the mortgage. It was really unnecessary for him to have made the appellant a party to the suit, and the

contract which he set up was not germane to the relief of redemption which he sought by his complaint. See *Tombler* v. *Sumpter*, 97 Ark. 480. The court obviously treated it as unnecessary and foreign to the issue on the question of redemption, and therefore dismissed appellant's cross complaint for specific performance and alleged damages growing out of the failure on the part of appellee to perform the contract set forth.

The contract set up in the complaint was neither the foundation of the appellee's claim, nor was it connected with the subject of the action. As we have stated, the subject-matter of the action was the redemption from the mortgage sale. The matters and things set forth in appellant's cross complaint, if true, would not in any manner entitle him to defeat appellee's right of redemption.

This court in *Hays* v. *McLain*, 66 Ark. 400, held (quoting syllabus): "In a suit to enforce specific performance of a contract to convey land, defendant can not, by way of counterclaim, ask foreclosure of a mortgage on the land given by plaintiff to defendant."

The court quotes in its opinion section 745 of Pomeroy's Code Remedies, where the learned author, after reviewing many adjudged cases, said: "These cases must be considered as establishing the doctrine that the defendant's cause of action in order to constitute a valid counterclaim, must to some extent defeat, modify, qualify or interfere with the relief which would otherwise be obtained by the plaintiff." See, also, *Mitchell* v. *Moore*, 87 Ark. 166.

Section 6099 of Kirby's Digest provides that: "The counterclaim mentioned in this chapter must be a cause of action in favor of the defendants, or some of them, against the plaintiffs, or some of them, arising out of the contract or transactions set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action."

Here the counterclaim set up in appellant's cross complaint has no connection whatever with the foundation of plaintiff's claim, and is not in any manner connected with the subject of the action, which, as we have shown, is purely the question of appellee's right to redeem. The court properly treated the other allegations, as to the contract as incidental and unneces-

sary to the relief sought. Its judgment striking appellant's cross complaint from the files of the court was correct, and it is therefore affirmed.

JEFFRIES v. STATE.

Opinion delivered February 19, 1912.

1. LARCENY—UNBRANDED CATTLE RUNNING AT LARGE.—Under Kirby's Digest, section 1898, providing that owners of cattle which run at large in the range or woods shall designate such animals, if over twelve months old, by brands or earmarks, otherwise a person who converts them to his use will not be guilty of larceny, a milch cow over twelve months old and neither branded nor ear marked may be subject of larceny, though she is permitted to feed on the range every day, if she returns each night to the home of her owner. (Page 375.)
2. STATUTES—CONSTRUCTION—LETTER OR SPIRIT.—Where matters within the letter of a statute are not within its spirit, a construction which excludes them is not a substitution of the will of the judge for that of the Legislature. (Page 376.)

Appeal from Monroe Circuit Court; *Eugene Lankford*, Judge; affirmed.

Thomas & Lee, for appellant.

1. It is not larceny to convert or take a cow over one year old and not marked or branded, and running at large in the range, etc. Kirby's Digest, § 1898; 37 Ark. 54; 24 *Id.* 480; 60 *Id.* 59.

2. "At large" and "running at large" have a well-defined meaning. 28 Ia, 491, 497; 15 N. W. 286; 73 Ia, 723; 1 Words & Phrases, 605. "Range" and "cattle range" have been judicially defined. 59 N. W. 227.

Hal L. Norwood, Attorney General, and *Wm. H. Rector*, Assistant, for appellee.

The cow was not running at large in the range or woods. Kirby's Digest, § 1898; 60 Ark. 59.

FRAUENTHAL, J. This is an appeal from a judgment convicting the defendant of the crime of grand larceny based upon an indictment charging him with stealing a cow, the property of one Ella Pool. He seeks to reverse the judgment upon the grounds, (1) that there is not sufficient legal testimony to

sustain the verdict of guilty returned by the jury, and (2) that the court erred in giving certain instructions to the jury. The testimony on behalf of the prosecution tended to prove the following facts: Ella Pool was the owner of the cow alleged to have been stolen, and resided about one-half mile from the city of Clarendon. The cow was a milk cow, and about three years old. She had owned the cow for some time, and milked her each morning and evening. After milking her in the morning, she would turn the cow out, and each evening the cow would return to her home, where she was again milked and remained during the night. The cow had a young calf, which was kept at the home of Ella Pool during the time that the cow was out. In order that the cow should not stray into the city limits, the owner drove her each day about two miles away from the city to a point known as Martin branch, where she roamed and fed. This place was a creek bottom leading to the bottom lands of White River, and was covered with woods. Here the cow ranged and fed during the day, returning each evening along the public highway to Ella Pool's home. On the afternoon of April 4, the defendant and one Will Jordan drove this cow from from a place near Martin branch, where she was feeding, and sold her to a butcher for $15. We are of the opinion that there was sufficient evidence to warrant the jury in finding that the defendant was guilty of stealing this cow if it was a subject of larceny. The uncontroverted evidence shows that the cow was over the age of twelve months, and was unmarked and unbranded. The court, in the instructions which it gave to the jury, defined the crime of larceny and also instructed them that "owners of cattle, hogs and sheep, which run at large in the range or woods, shall designate such animals, if over twelve months old, by brands or earmarks; otherwise, if taken or converted to the use of any other person, such person shall not be deemed guilty of larceny, but the owner may have his action for the value of such unmarked or unbranded animal." The court further said: "This is a good and valid statute, but it was not passed for the purpose of protecting any one in stealing cattle which are not on the range or where one knows the owner of them." Objection being made to this last statement, the court further said: If you believe from the testimony that the cow was running on the range or in the woods as a range cow,

unmarked and over the age of twelve months, then the defendant would not be guilty of larceny; but if you find she was coming up regularly and just going out to get something to eat, and defendant knew the owner of the cow and stole her, he would be guilty. The question is with you as to whether or not the cow was running on the range or in the woods, within the meaning of this law."

By section 1898 of Kirby's Digest it is provided: "Owners of cattle, hogs or sheep which run at large in the range or woods shall designate such animals, if over twelve months old, by brands or earmarks; otherwise, if taken or converted to the use of any other person, such person shall not be deemed guilty of larceny, but the owner may have his action for the value of such unmarked or unbranded animals." This statute was enacted in 1834, and amended in 1868, and has not been repealed by any subsequent legislation. *Thompson* v. *State*, 60 Ark. 59. It has been held that by virtue of this statute the animals therein designated running at large in the range or woods and not branded or marked as therein required are not the subject of larceny. *Matthews* v. *State*, 24 Ark. 484; *Perry* v. *State*, 37 Ark. 54. According to the undisputed testimony, as above stated, this cow was more than twelve months old, and it was neither marked nor branded. The question, therefore, involved in this case for determination is whether or not, under the testimony adduced upon the trial of this case, the cow was running at large in the range or woods within the meaning of the above statute. It is commonly understood that a range is a sparsely populated and uninclosed tract of land over which stock and cattle are permitted to roam and feed without restraint; and likewise the expression "in the woods," as used in this statute, refers to uninclosed and unpopulated woodland. But, before it can be held that the animals mentioned in this statute are not the subject of larceny, it is necessary, not only to show that they were running in the range or in the woods, but it is also essential to prove that they were running at large. Stock running at large are animals which roam and feed at will, and which are not under the control or direction of any one. Where such animals, though left to their free movements, are still subject to the control and restraint of their owner, they are not running at large within the meaning of this statute. This restraint

exercised by the owner over such stock or cattle need not be entirely of a physical nature; that is to say, the animal need not be confined in an inclosure or held by a halter. The restraint may depend upon the habits, training and instincts of the animal in the particular case; and the sufficiency of such restraint will be determined from the effect of such habits, training and domestication of the animal and their controlling and restraining influence over it. *Elliott* v. *Kitchens*, (Ala.) 33 L. R. A. 364; *Keeney* v. *O. R. & N. Co.*, 19 Ore. 291. If the movements of the stock or cattle are controlled by the owner who is present, or, if such owner is absent, then by the habits and training of such animal, so that, although such animal remains for a time in the woods or on the range, yet by reason of such habits and training it returns each day to the home of its owner, then it can not be said that its movements are so urestrained that the animal is running at large within the meaning of this statute. *Bertwhistle* v. *Goodrich*, 53 Mich. 457; *Beeson* v. *Tice*, 17 Ind. App. 78. There are ordinances enacted by cities prohibiting stock and cattle from running at large within the limits of such municipalities; the object of such enactments is to prevent the injury and depredations which may be committed by such animals. Such animals would, therefore, be running at large if roaming at will within the city limits and not under the immediate control or restraint of some one. *McKenzie* v. *Newton*, 89 Ark. 564. But the manifest purpose of the statute in question is to declare those animals only not the subject of larceny which, being uncontrolled or unrestrained, roam at will on the range or in the woods for a long period, that is to say, for weeks or months, so that it would not or could not be known who was the owner thereof; but where the animal is domestic in its nature, like a milch cow, and it is permitted to go from the home of the owner only for a short distance and for a short period of time, as for a day, in order to roam and feed upon the commons or on the range or in the woods, and, by reason of its habits and training as in the case of a milch cow, returns each day to the home of its owner, then such animal does not run at large within the meaning of this statute. Such animal is still the subject of larceny, although over twelve months old and unmarked and unbranded.

As was said in the case of *Holy Trinity Church* v. *United States*,

143 U. S. 457: "It is a familiar rule that a thing may be within the letter of the statute, and yet not within the statute, because not within its spirit nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the Legislature, for frequently words of general meaning are used in a statute—words broad enough to include an act in question, and yet a consideration of the whole legislation or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the Legislature intended to include the particular act."

Under the uncontroverted testimony adduced in this case, we are of the opinion that the cow alleged to have been stolen was not running at large, and was the subject of larceny. Therefore, the court did not err in the above instructions given by it to the jury. There being sufficient evidence to warrant the jury in finding that the defendant was guilty of the larceny of this cow, the judgment is affirmed.

BARR v. JOHNSON.

Opinion delivered February 19, 1912.

1. FRAUDS, STATUTE OF—WHEN APPLICABLE.—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 upon 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 offered to perform the contract. (Page 379.)

2. SAME—EFFECT OF DELIVERY OF DEED IN ESCROW.—The rule that the delivery of a deed in escrow takes a case out of the operation of the statute of frauds applies only in favor of the grantee therein. (Page 380.)

Appeal from Sevier Circuit Court; *Jefferson T. Cowling*, Judge; affirmed.

Collins & Collins, for appellant.

Whatever might have been said by appellant prior to the 13th day of April, 1909, with reference to the purchase of the

land himself, the whole matter was merged into a broker's contract, pure and simple, when on that day appellee executed and delivered the deed in escrow to the First National Bank of De Queen and drew his draft on Hammond for $11,500 and attached it to the deed, etc. Such contracts do not of necessity have to be in writing; and the statute of frauds does not apply to escrow agreements. 18 L. R. A. (N. S.) 337; 90 Ark. 301.

O. T. Wingo, J. S. Lake, J. S. Steel, James D. Head and *John C. Head,* for appellee.

The complaint alleges an oral contract of purchase and a breach of such contract, and prays for damages. No allegation nor proof of a broker's contract appears. The case falls within the statute of frauds. Hammond is a total stranger to the contract between appellant and appellee, and the placing the deed in escrow does not constitute such a memorandum as will satisfy the statute. 51 Ark. 483; 1 Devlin on Deeds (3 ed.) 551; 144 Mass. 465; 80 Ind. 132; 81 Ind. 191; 17 Ia. 485; 48 Ia. 99; 85 Me. 242; 98 Me. 373; 16 Minn. 172; 24 Neb. 83; 97 N. W. 1018; 33 N. J. Eq. 650; 1 Pars. Eq. Cas. (Pa.) 96; 85 Pa. St. 508; 116 Pa. St. 329.

McCULLOCH, C. J. This is an action to recover damages on account of an alleged refusal of defendant to perform his contract for the sale of land. The complaint alleges, in substance, that plaintiff and defendant entered into an oral contract, whereby the defendant agreed to sell to the plaintiff certain tracts of land in Sevier County, Arkansas, for the sum of $8,000; "that it was understood and agreed by and between the parties, at the time of said transaction, that said lands were bought by plaintiff for the purpose of speculation, and defendant agreed at the time to make a deed conveying same to any party to whom plaintiff should sell said land; and that plaintiff should be entitled to all sums for which he should sell same in excess of $8,000;" that plaintiff negotiated a sale of the lands with one Charles Hammond for the sum and price of $11,500; that, pursuant to said contract, the defendant executed a warranty deed conveying said lands to Hammond, which deed, together with a draft for the amount of the purchase price, was delivered to the cashier of a bank in De Queen, to be held by said bank until such time as the abstract of title to said lands might be perfected, that plaintiff was required

to, and did, pay to said bank the sum of $100 as a forfeit in case plaintiff failed to comply with his contract by causing $8,000 to be paid to defendant when the abstract of title was perfected and the deed ready for delivery. It is further alleged that the defendant subsequently sold the land in violation of his contract to another person, and refused to perform his contract with plaintiff. The prayer of the complaint was for the recovery of $3,500, the difference between the price to be paid by Hammond and the price defendant agreed to accept from plaintiff.

The defendant answered, denying all the allegations of the complaint as to the contract, and pleading the statute of frauds.

The testimony in the case tended to establish the allegations of the complaint as to the oral agreement and as to the delivery of the deed to the bank and the posting by plaintiff of the forfeit; but it further shows that Hammond declined to accept the deed on account of alleged defects in the title. Plaintiff testified that he did not refuse to accept a conveyance himself, and that he could have bought it and would have gotten the money to pay for it, notwithstanding Hammond's refusal to accept the deed.

The court gave a peremptory instruction in favor of defendant, and this appeal challenges the correctness of that ruling.

The oral contract between plaintiff and defendant was, of course, within the statute of frauds and void. Counsel for plaintiff insist, however, that the delivery of the Hammond deed to the bank in escrow takes the case out of the operation of the statute. It is said that the trial judge based his ruling on the decision of this court in *Henderson* v. *Beard*, 51 Ark. 485, and we are the opinion that he was correct in holding that that case was conclusive of the present one. It was there held, quoting the syllabus, that "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."

Now, in the present case, as in the one quoted from, there is no writing by which either the contract between plaintiff and defendant or the connection between plaintiff and Hammond is evidenced. The rule seems to be generally settled that the delivery of the deed in escrow takes a case out of the operation of the statute of frauds. Note to *Manning* v. *Foster*, 18 L. R. A. (N. S.) 337. But this would only apply to an enforcement of the contract by Hammond, the grantee in the deed; and, as plaintiff has failed to connect himself with the transaction by any writing, he can derive no aid from the execution of the deed. The rule would be different if plaintiff were suing to recover his commission on a sale made by him for the defendant. A contract of that kind is not within the statute of frauds. *Forrester-Duncan Land Co.* v. *Evatt*, 90 Ark. 301. But this is a suit for breach of a contract for sale of the land to the plaintiff himself, and comes squarely within the operation of the statute. We are of the opinion that the ruling of the circuit court was correct, and the judgment is affirmed.

ADAMS v. PRIMMER.

Opinion delivered February 19, 1912.

1. APPEAL AND ERROR—FINAL ORDER.—Where the trial court sustained a demurrer to a complaint, without entering any further order or judgment, its action was not final, and the order can not be appealed from. (Page 382.)

2. UNLAWFUL DETAINER—SUFFICIENCY OF COMPLAINT.—A complaint in unlawful detainer which alleges that defendant is in possession as tenant and that plaintiff has acquired the landlord's title at a trustee's sale, and that defendant is wrongfully holding over after expiration of the lease and after notice to vacate, states a cause of action. (Page 382.)

3 LANDLORD AND TENANT—ESTOPPEL.—A tenant can not dispute the title of an assignee of the landlord, any more than he could the landlord's title. (Page 383.)

Appeal from Izard Circuit Court; *Jefferson T. Cowling*, Judge, reversed.

STATEMENT BY THE COURT.

Appellant, on March 15, 1911, brought this suit for unlawful detainer against appellees, alleging that he was the owner and entitled to possession of a certain lot situated in the town of Calico Rock, Ark., unlawfully detained by them.

At the March term of the Izard Circuit Court a demurrer was interposed to the complaint, and sustained by the court, exceptions to the court's ruling being saved. At the next September term of the court appellant filed an amended complaint, alleging that he was the owner and entitled to the possession of the same lot of land, as described in the original complaint; that the former owner had executed a deed of trust on the same to secure an indebtedness; that default was made in the payment of such indebtedness and the property sold by the trustee to satisfy it; that the plaintiff became the purchaser thereof at the trustee's sale on September 27, 1910, and that a deed was duly made to him by the trustee, in proper form, conveying same. A copy of the deed was attached to the amended complaint. It was then alleged that prior to the execution of the deed of trust the then owner of the lot had leased it to the defendants; that they are now in possession of same, holding over under said lease long after its expiration, and were holding these lands at the time of the institution of this suit, paying said former owner rent from month to month; that he became entitled to possession of the lot under said trustee's deed, and that appellees were holding over after the expiration of their original lease from the former owner and mortgagor of plaintiff; also that a written notice, as required by law, was given defendants to vacate said premises, and prayer for judgment for the possession.

On the next day, the defendants filed a motion to strike the amended complaint from the files, alleging:

"That the cause of action attempted to be set up herein was fully presented to and passed upon by this court at the last term hereof, and that the same was by the court dismissed in its sustaining of a demurrer to the original complaint herein."

The court rendered judgment, reciting that the amended complaint was filed by leave of the court, and the filing of said motion, and sustained same, and struck from the files of the court said amended complaint, and, the plaintiff declining to

plead further, it dismissed the cause of action and rendered judgment against him for costs.

To this action of the court appellant saved his exceptions, and from the judgment prayed an appeal.

Samuel M. Casey, for appellant.

The courts order sustaining the demurrer to the first complaint was not a final order, and was not appealable. 30 Ark. 665; 27 Ark. 113; 83 Ark. 372. Since the appellee, on the court's sustaining the demurrer, did not ask that the cause be dismissed, and appellant did not stand on his original complaint, and no order was made dismissing the action, appellant had the right under the law to file the amended complaint. The amended complaint goes into sufficient details and specific allegations as to the relation of tenancy existing between the parties, to state a cause of action. Kirby's Digest, § 6095.

J. B. Baker, for appellee.

KIRBY, J., (after stating the facts). If the first complaint filed by appellant was insufficient the court properly sustained a demurrer thereto. Having sustained the demurrer and noted appellant's exceptions to its action in so doing, without any further order made or judgment rendered by the court, its action was not final, and the judgment could not be appealed from. *Moody* v. *Ry. Co.*, 83 Ark. 371.

After the demurrer was sustained, the appellant had the right to amend his complaint, and was properly given leave to do so by the court. Kirby's Digest, § 6095.

The court struck the amended complaint from the files upon said motion, holding that the matter had already been adjudicated by the sustaining of the demurrer at the former term, but erred in doing so. The amended complaint sufficiently alleges a cause of action in unlawful detainer, which is to determine the right to the immediate possession of lands and tenements, and not the title thereto. *Dunlap* v. *Moose*, 98 Ark. 235.

The motion to strike will be treated as a demurrer, and, the complaint being sufficient, the court erred in sustaining it and dismissing plaintiff's cause of action upon his declining to plead further.

It seems from appellee's brief that a writ of possession

was issued upon the filing of the first complaint, and the possession of the premises delivered thereunder to appellant; but appellees did not set up as a defense any disclaimer of possession or claim of right thereto, but only objected to plaintiff's right to proceed.

The complaint alleges that he acquired the title of J. W. Maddox, appellee's lessor, to the lot in question and the right to the possession thereof under the trustee's deed conveying same after a sale under the mortgage to satisfy the indebtedness secured thereby; that appellees were unlawfully detaining and holding the possession thereof, after the expiration of their lease, and paying rent from month to month thereon to said original lessor and refused to surrender possession after written notice given them as required by law.

If these allegations be true, and the demurrer admits that they are, then appellant should have been given judgment for the possession of the lands and damages for the detention until the time they were delivered to him, and costs of the suit in any event.

Appellees would be in no better position to dispute appellant's title, having acquired possession of the premises under their lessor, to whose rights appellant succeeded, by the sale and conveyance under the trust deed, than they would have been to dispute the title of their original lessor and landlord. *Dunlap* v. *Moose, supra.*

For the error of the court indicated, the judgment is reversed, and the cause remanded, with directions to deny and overrule the motion to strike out and for further proceedings.

It is so ordered.

WALKER v. GOODLETT.

Opinion delivered February 19, 1912.

1. APPEAL AND ERROR.—A finding of a chancellor contrary to the decided preponderance of the testimony will be set aside on appeal. (Page 386.)

2. INFANTS—VALIDITY OF CONVEYANCES.—An infant can bind and incumber his estate for the value of necessaries furnished to him, but can not irrevocably alienate his estate, even for that purpose. (Page 386.)

Appeal from Hempstead Chancery Court; *James D. Shaver*, Chancellor; reversed.

J. W. Bishop, for appellant.

Appellant, being under the legal age at the time of signing the deed, had the right to disaffirm it after arriving at full age. 90 Ark. 351; 44 Ark. 153; 21 Ark. 294; 38 Ark. 278; 62 Ark. 316; 85 Ark. 556; 77 Ark. 35; 36 Ill. 376; 74 Ind. 115; 116 Ky. 92; 13 Mass. 371, etc.

An infant has not the legal capacity to irrevocably alienate his property. 34 Ala. 150; 36 Am. St. Rep. 606; 155 N. Y. 535; 82 Am. St. Rep. 103.

He may disaffirm, even against a subsequent *bona fide* purchaser from the grantee or vendee. 76 Am. Dec. 209; 21 Ark. 592; 43 Am. Rep. 629.

L. F. Monroe, for appellee.

The chancellor's finding against appellant's contention as to age will not be disturbed unless clearly contrary to the preponderance of the testimony. 92 Ark. 538; 75 Ark. 9; *Id.* 52; 73 Ark. 489; 72 Ark. 67; 71 Ark. 605; 68 Ark. 139; 68 Ark. 315; 77 Ark. 309; 62 Ark. 615.

McCULLOCH, C. J. The plaintiff, Dan Walker, disaffirmed a deed of conveyance which he alleges was executed by him to the defendant, J. E. Goodlett while he was under twenty-one years of age, and he instituted this action to cancel said conveyance.

The defendant denied in his answer that the plaintiff was under twenty-one years of age when he executed the deed, and this presented the only issue which the chancellor was called on by the pleadings to decide.

The deed was executed on December 28, 1908, and plaintiff alleged that he was born on September 2, 1888, which, if true, made him twenty years and about three and one-half months old at the time he executed the deed. He testified to his age and produced the Bible of his deceased grandfather, in which the date of his birth had been recorded. Tom Walker testified that he had known plaintiff since the latter was a small boy, and that he was about twenty-three years of age at the time the witness testified. Roger Walker testified that plaintiff was born in September, 1888, and produced a Bible in which

the dates of plaintiff's birth and of others were recorded. He stated the place and the particular house where plaintiff was born, and said that he made the record of the birth on the day plaintiff was born. Emma Walker, the widow of plaintiff's grandfather, testified that she knew plaintiff's age, and that he was only twenty years of age when he executed the deed. Bettie Johnson testified that she was an intimate friend of plaintiff's mother, and knew his age, and stated that he was born in September 1888. Sam Walker, plaintiff's putative father, testified that the plaintiff was born in September, 1888, and that, as the plaintiff's mother told him he was the father of the boy, he recorded the date of the birth in his Bible.

Defendant introduced testimony tending to establish the fact that plaintiff was born in September, 1887, which made him a little over twenty-one years of age when he executed the deed. Mrs. Whissen, a lady on whose farm the mother of plaintiff lived, testified that her twin children were born in February, 1888, and other testimony adduced by the defendant tended to show that plaintiff was born in September before the birth of the Whissen twins. Clay Porter testified that he had known plaintiff since the latter's infancy, and that he was on the Whissen place in September before the birth of the twins. He stated that plaintiff was a "good big baby," meaning, as he states, three or four months old, when the twins were born, and that plaintiff's mother waited on Mrs. Whissen at that time. Martha Porter testified that the birth of plaintiff was near the date of the birth of the twins, but she contradicted herself several times as to the date, whether plaintiff or the twins were born first, so that her testimony is of little, if any, value. Iverson Brown testified that he had known plaintiff since infancy, that his (witness') brother, Cornelius, was born on October 8, 1888, and he remembered, when his brother was born, that his mother sent him to Ozan that day, and he went by the Whissen place and saw plaintiff, who was then a "good big baby."

This is the state of the testimony. It is clear that plaintiff was born in September, either in 1887 or 1888. Five witnesses, in addition to plaintiff himself, testified that he was under twenty-one years of age when he executed the deed, and two witnesses (not including Martha Porter) testified that he was a little over twenty-one. Plaintiff's witnesses were mostly

his kindred; the others were mere acquaintances who lived in the neighborhood. In addition to the numerical preponderance of plaintiff's testimony, we are of the opinion that the weight in other respects was on that side. Martha Porter's testimony was, as already stated, so contradictory that it was not entitled to any value. Brown was only about ten years of age when plaintiff was born, and the only reason that he remembered the fact is that his brother was born in October, 1888, and the plaintiff was a good sized baby at that time. It is improbable that, being so young himself at the time, he could accurately remember so long afterwards the age of another child. Clay Porter is the only witness on that side whose testimony is not inherently weak, and it, too, is weakened by the fact that he is not related to plaintiff nor interested in him except as a neighbor and acquaintance, and there is little reason why he should remember plaintiff's age. It is true that there are weak points in some of the testimony adduced by plaintiff, but we are convinced, upon the whole, that there is a decided preponderance of the testimony in his favor, and it becomes our duty, under those circumstances, to set aside the decree.

It appears from the testimony that a part of the consideration for the conveyance was a debt for supplies furnished plaintiff by defendant to enable the former to make and gather a crop. The remainder of the consideration was a debt of Emma Walker, who joined in the conveyance.

An infant can bind and incumber his estate for the value of necessaries furnished to him, (*Cooper* v. *State*, 37 Ark. 421), but can not irrevocably alienate his estate, even for that purpose.

Reversed and remanded with directions to enter decree for plaintiff in accordance with this opinion.

FENTON *v.* DE QUEEN & EASTERN RAILWAY COMPANY.

Opinion delivered February 19, 1912.

1. RAILROADS—KEEPING LOOKOUT FOR STOCK—INSTRUCTIONS.—In an action for killing stock, it was error to refuse to instruct the jury that "you are instructed that the law makes it the duty of persons running trains in this State upon any railroad to keep a constant lookout for stock upon said railroad, and if any stock shall be injured by the negligence of such persons to keep a lookout the company owning and operating such railroad shall be liable to the owner of such stock so injured

for all damages resulting from such neglect, and the burden of proof shall devolve upon the railroad company to establish the fact that this duty has been performed." (Page 391.)

2. SAME—KEEPING LOOKOUT FOR STOCK—INSTRUCTION.—An instruction to the effect that the railroad company was liable for injuries to stock caused by the failure of the trainmen to keep a lookout was properly given though the engineer and fireman of the train supposed to have killed the animal both testified that they were keeping a lookout and failed to see the animal if there were circumstances from which the jury might have inferred that the animal was killed by defendant's train. (Page 391.)

3. SAME—PRESUMPTION.—No presumption arises from the finding of an animal injured near a railroad track that such jury was caused by the running of a train. (Page 391.)

4. SAME—STOCK KILLING—PRESUMPTION OF NEGLIGENCE.—Where the jury finds from the circumstances that an animal was killed by the running of a train, a presumption arises that it was negligently done; but this presumption of negligence may be rebutted by proof that at the time complained of the company did exercise due care. (Page 392.)

5. SAME—NEGLIGENCE—INSTRUCTION.—It was not error in an action for negligently killing stock to refuse to instruct the jury that "if the jury believe from the evidence that the animal in question was injured by defendant's train you will find for the plaintiff," since it permitted a recovery regardless of defendant's negligence. (Page 392.)

6. SAME—NEGLIGENCE—INSTRUCTION.—It was not error, in an action to recover for stock negligently killed, to refuse to give an instruction which would make the statutory presumption of negligence arising from proof that the stock was killed by defendant's train a conclusive, instead of a rebuttable, presumption. (Page 392.)

Appeal from Sevier Circuit Court; *Jefferson T. Cowling*, Judge; reversed.

STATEMENT BY THE COURT.

Appellant brought suit to recover damages for the value of a mare, alleged to have been negligently struck by a train on appellee's road, and so injured as to be entirely worthless. The railroad company denied injuring the mare by the operation of any of its trains.

The testimony tended to show that the line of railroad where the animal was discovered to be injured runs east and west, with a fence on the north side of and parallel to it, which turns a little to the north just before its intersection with the

creek running north and south along the railroad at the Bear Creek trestle or bridge. The mare was found between the borrow pit and this fence, just west of the creek and off the edge of the right-of-way, and when found had a hole in her side just back of the bulge of the ribs, with some deep cuts across the front of her hind legs, near where they joined the body, the flesh seeming to be stripped down, with other slight cuts and bruises upon her. Her value was practically destroyed by the injury, from which she thereafter died, being abandoned by appellant.

Some tracks of horses were discovered coming on to the railroad dump about thirty yards west of opposite where the animal was found injured. The tracks of one being between the rails of the railroad track, and just about opposite the place where this animal was standing, the one that had been running in the center of the track left the railroad coming down the dump into the borrow pit. Some of the witnesses also said there were tracks leading out of the borrow pit towards the place where the injured mare stood. It had rained all the morning of the day upon which appellant heard, late in the afternoon, that his mare had been found injured, and he saw her the next morning. There was no indication, other than the tracks aforesaid and the wounded animal, indicating that she had been struck by a train, there being no blood or hair found upon or near the track, nor upon the engine nor any of the rolling stock. The animal had been in a pasture with two other mares and some horses, partly inclosed with a plank and barbed-wire fence, but there was a gap in the fence next to the railroad not a great distance from where she was found.

The case was tried on the theory that she was stuck by the train leaving De Queen at 9:30 on the morning of the 19th. The engineer of this train testified that they left the station at 9:30 on that morning; that the train did not strike any horse or mare near the Bear Creek bridge that morning; that he could see a point near the bridge from the engine cab down the track for 1,500 feet; that he was sitting on the engineer's side of the cab looking down the track, and that he did not see a horse or mare as he passed; that the fireman was also at his post of duty on the opposite side looking ahead; that he

saw Mr, Kelly, who with his little boy on a speeder, had gone out just ahead of the train, who took it off the track about 300 or 400 feet beyond the Bear Creek bridge; that the speeder was only removed two or three feet from the track and not taken into the borrow pit; that Mr. Kelly started out a few minutes before the train left, and he was looking out for him; that in the afternoon returning no horse or mare crossed the tracks in front of him, and that he didn't see any one along there that afternoon.

The fireman's testimony was about like that of the engineer, both saying they had talked with Mr. Kelly before his leaving the station ahead of the train and were on the lookout for him, the fireman saying that Mr. Kelly took the speeder off the track about fifty feet beyond the Bear Creek bridge; that he knew the train did not strike a horse or mare approaching the bridge that morning, for he was sitting upon his seat looking out all the time and had a clear view for a quarter of a mile; that he distinctly remembers having kept a lookout that morning on approaching the bridge. He learned the next morning of appellant's claim that his mare had been injured. She was found about seventy-five feet from the track. The fireman testified that she was pretty badly cut up on her two hind legs, and that there was a bad place on her side; that the place on the side was in a triangle, cut two ways, and about ten inches long. It was about fifteen wide. "We found where the horse had walked up the track. We found where one foot had slipped. I did not see any other tracks there. There were some along the ends of the ties, that looked dimmer than them, older possibly. A good many horses and cattle ranged along this particular point."

On cross examination, he stated that he wasn't looking for horses that morning, but for Mr. Kelly, who was ahead of them on the track on a speeder.

Mr. Kelly testified that he went out on the track on a speeder that morning, and that the train passed him about 100 feet from the second bridge on the De Queen & Eastern Railroad; that the train passed the point where the mare is claimed to have been hurt about two or three hundred yards behind him; that he did not see the mare when he passed there. Looking west from the point where the train passed him, he could see an

object on the track for a quarter of a mile, and the train did not strike the mare that morning, he knew.

Some witnesses testified that they went up and down the wire fence, and didn't find any blood or hair, indicating that a horse had been hurt upon it. It had rained on the animal since she was crippled. Some of the witnesses also said that she could not have been struck by a train and injured as she was, without some indication of the fact appearing upon the railroad track or the train.

The court instructed the jury, giving instruction one, as requested by appellee, as follows:

"The fact that the mare in controversy was found injured near the tracks of the defendant company raises no presumption that she was injured by the defendant, and the burden of proof is upon the plaintiff to show by a preponderance of the evidence in the case that she was injured by the defendant company and the amount of damages sustained, if any."

Also gave instruction numbered 3, requested by appellant, as follows:

"The court instructs the jury that if you find for the plaintiff you will assess his damages at such sum as you find from the testimony to be the difference between the reasonable market value of the mare just prior to the injury and her reasonable market value immediately after the injury."

And refused, over plaintiff's objections, his requested instructions, numbered 1, 2 and 4, as follows:

"1. You are instructed that the law makes it the duty of persons running trains in this State upon any railroad to keep a constant lookout for stock upon said railroad; and if any stock shall be injured by the negligence of such persons to keep such a lookout, the company operating such railroad shall be liable to the owner of such stock so injured for all damages resulting from such neglect, and the burden of proof shall devolve upon the railroad company to establish the fact that this duty has been performed."

"2. If the jury believe from the evidence that the animal in question was injured by defendant's train, you will find for the plaintiff."

"4. The jury are instructed that it is not necessary, in order for the plaintiff to recover, that he show by direct evi-

dence that the animal was injured by the train, but that the injury of the stock by a train may be proved by circumstantial as well as by direct evidence; and if you believe from a preponderance of the evidence, taking into consideration the place where the injured animal was found, the nature and appearance of the injuries upon the said animal, tracks and other signs upon the track, if any be shown, together with all the other facts and circumstances given in evidence, that the animal was struck and injured by a passing train, while on defendant's tracks, then, under the law, the presumption would arise that the injuries to the animal was due to the defendant's negligence, and you should find for the plaintiff,"

The jury returned a verdict for the defendant, and from the judgment appellant appealed.

Otis T. Wingo, for appellant.

Collins & Collins, for appellee.

KIRBY, J., (after stating the facts). The instruction, numbered 1, as requested, should have been given. *St. Louis, I. M. & S. Ry. Co.* v. *Ewing*, 85 Ark. 53; *St. Louis, I. M. & S. Ry. Co.* v. *Norton*, 71 Ark. 317.

It is insisted by learned counsel for appellee that there was no testimony upon which to base such instruction, and that no prejudice could have resulted from the failure to give it, since the undisputed testimony shows that the employees did keep the lookout required by law, the engineer and fireman both having testified they were keeping a lookout at the time and that the injury was not done by that train.

It is true that no witness testified that the animal was struck by a train, but she was found near the track badly injured, opposite where a horse's tracks left the track of the railroad, after having come down the track for fifty or sixty yards between the rails, the tracks of other horses showing on the sides of the dump and at the ends of the ties, and the jury might have inferred from all the facts in evidence that she was injured by the running of a train on appellee's road, either by the one upon which the employees testified a lookout was kept, or another train.

No presumption arises from the finding of an animal injured near a railroad track that it was done by the running of

trains, as the court properly told the jury in its instruction numbered 1. *Railway Co.* v. *Sagely*, 56 Ark. 549; *Railway Co.* v. *Parks*, 60 Ark. 187; *Midland Valley Rd. Co.* v. *Skinner*, 99 Ark. 370. It is only after proof of facts and circumstances from which the jury can reasonably infer that the animal was injured by the operation of a railroad train that the presumption arises that it was negligently done. "But this presumption of negligence against the railroad company could be rebutted by proof that at the time of the injury complained of the company did exercise due care and diligence and was free from negligence." *Midland Valley Rd. Co.* v. *Skinner, supra.*

When sufficient proof is introduced to convince the jury that the injury to the animal was caused by the operation of the train, then the presumption that the injury was the result of the railroad company's negligence arises and tends to contradict the testimony of the employees that a proper lookout was kept, and it can not be said that the the evidence of such employees was undisputed. This presumption of negligence is rebuttable, however, and, if the jury believed from the evidence that a proper lookout was kept, and the animal was not discovered, it is rebutted, for it might have come upon the track so close to the approaching train that the injury could not have been avoided, without regard to whether a proper lookout was kept or not, although no evidence of this kind was introduced in this case.

Instruction numbered 2, as requested, was properly refused, since it directed a finding against the defendant if the animal in question was injured by one of its trains, without regard to whether it was negligently done or not.

Instruction numbered 4 was subject to like objection, in that it, after properly stating that the injury to the animal could be proved by circumstantial evidence, etc., told the jury that if they believed from a preponderance of the evidence, taking the facts and circumstances into consideration, that the animal was injured by a train, the presumption would arise that it was negligently done, and directed them to find for the plaintiff. The direction was not proper, since it had the effect to declare the presumption of negligence conclusive.

No other instruction, defining the duty of appellee to keep a lookout for stock upon its track, while in the operation

of its trains, being given, for the court's error in refusing to give appellant's instruction numbered 1 the judgment is reversed, and the case is remanded for a new trial.

FOX v. STATE.

Opinion delivered February 19, 1912.

1. ROBBERY—INDICTMENT OF ACCESSORY—VENUE.—An indictment of one for being accessory before the fact to a robbery which aptly alleges that the principal committed the robbery in Washington County in the State on the 26th of August, 1909, and that defendant, not being present aiding, abetting and assisting, in said county and State, on said date, and before said crime of robbery was committed by said principal, unlawfully and feloniously did advise and encourage said principal to commit said crime of robbery, etc., sufficiently alleges that defendant was in the county and State when he aided and encouraged the commission of the crime. (Page 396.)
2. CRIMINAL LAW—RIGHT TO SPEEDY TRIAL.—One accused of crime can not claim the right to a discharge because he was not brought to trial before the end of the second term of the court having jurisdiction of the offense which was held after the finding of the indictment where he was admitted to bail and did not either demand a trial or resist an order for a continuance. (Page 397.)
3. EVIDENCE—TESTIMONY OF DECEASED WITNESS AT FORMER TRIAL.—Where a murder and robbery are alleged to have been committed at the same time and as part of the same transaction, the testimony of a witness since deceased, taken on a former trial of defendant upon the murder charge, is admissible against defendant on a trial upon the robbery charge. (Page 397.)
4. EVIDENCE—COMPETENCY.—In a prosecution of one for being accessory to the crime of robbery, testimony that defendant, indicted as accessory, in another State advised and encouraged the principal to commit the crime was competent where defendant came to the county of the venue with such principal a few days before the commission of the crime. (Page 399.)
5. TRIAL—IMPROPER QUESTION BY ATTORNEY—WHEN HARMLESS.—Where the prosecuting attorney improperly asked a witness whether he knew that defendant was in the penitentiary in Texas, the prejudice was removed where the court refused to permit the question to be asked, and directed the jury not to consider the same. (Page 399.)
6. ROBBERY—INSTRUCTION.—Where the evidence established that a murder and a robbery were a part of the same transaction, and that the robbery was the purpose for which the murder was committed, it was

not error to refuse to instruct the jury to acquit the defendant if the person robbed died before the money was taken from her person. (Page 399.)

7. CRIMINAL LAW—PERMITTING PRIVATE COUNSEL TO ASSIST PROSECUTION. —Where the prosecution of a felony case was in charge of the prosecuting attorney, it was not error to permit a private counsel to assist the prosecution in trying the case. (Page 400.)

8. TRIAL—REFUSAL TO ALLOW TIME TO ARGUE MOTION FOR NEW TRIAL.—Where, in a prosecution of one for being accessory to robbery, the evidence was the same as was given on trial of defendant as accessory to murder, it was not an abuse of discretion for the court to refuse to allow counsel to argue a motion for new trial in the robbery case if the same questions had previously been considered in the murder case. (Page 401.)

Appeal from Washington Circuit Court; *J. S. Maples*, Judge; affirmed.

E. G. McAdams, for appellant.

1. Appellant not having been brought to trial before the end of the second term of the circuit court having jurisdiction of the offense, the cause having been continued without his consent and after he had announced ready for trial, the court should have discharged him upon his motion. The statute is in keeping with the constitutional provision that one accused of crime shall have a speedy, fair and impartial trial, and is mandatory. Kirby's Digest, § 2313; 23 Ark. 270; 65 Ark. 406.

2. The court erred in overruling the demurrer to the indictment. The most that the indictment charges is that at some time, somewhere not in Washington County, appellant advised and encouraged Gus Sartin to commit the crime. Kirby's Digest, § 2227; *Id.* § 2228, second div. Penal statutes must be strictly construed as against the defendant, and liberally in his favor. 38 Ark. 519; 59 Ark. 314; 53 Ark. 344; 40 Ark. 97-9. See also 1 Bishop, Crim. Proc. §§ 79, 81 and authorities cited in note 1, 89, 92, 93.

3. The deposition of a deceased witness, taken in a different case and upon a different issue from the one on trial in which such deposition is offered, is not admissible. 13 Ark. 676; 80 Miss. 351, 31 So. 744; 54 Tex. Crim. Rep. 475; 130 Am. St. Rep. 901; 113 S. W. 533; 121 Cal. 495; 53 Pac. 1098; 25 L. R. A. (N. S.) 868. Izgregg's deposition was further incompetent because the acts testified to by him occurred in another State. 17 Ark. 561.

4. The misconduct of counsel for the State, in stating in the hearing of the jury that appellant had served a term in the penitentiary in Texas, and insisting on proving that fact, when appellant's character had not been put in issue, was reversible error, notwithstanding the trial court's attempt to withdraw the same from the jury's consideration. The prejudicial effect was such that it could not have been removed, even by a scathing rebuke from the court. 77 Ark. 214; *Id.* 19; 71 Ark. 415; 74 Ark. 489; *Id.* 210; 72 Ark. 461; *Id.* 139; 58 Ark. 473.

5. It was error to permit private counsel, not a deputy prosecuting attorney, to conduct the trial of the case on the part of the State, instead of the prosecuting attorney elected for the district.

6. The court should have granted appellant's motion for a peremptory instruction to acquit for want of proof.

The court also erred in refusing to instruct the jury to acquit if they found from the evidence that Carrie Winkleman was dead at the time the money was taken. The burden was on the State to prove beyond a reasonable doubt that Carrie Winkleman was a "person" at the time the money was taken. 6 Words & Phrases, 5322; 25 Fed. Cas. 695-697; 41 S. E. 484-485; 130 N. C. 299; 73 S. E. 250, 251; 87 Ga. 79; 49 Kan. 1; 30 Pac. 108.

7. The court committed reversible error in refusing appellant's request for leave to present his motiou for a new trial and to present authorities in support of same, and in overruling said motion *pro forma.* 13 Kan. 211, 212; 15 Kan. 563; 17 Kan. 145; 32 Kan. 163, 4 Pac. 143; 44 Kan. 394, 24 Pac. 500.

Hal L. Norwood, Attorney General, and *William H. Rector,* Assistant, for appellee; *J. Wythe Walker,* of counsel.

1. There was no error in refusing appellant's motion to be discharged. 13 Ark. 720; 65 Ark. 406.

2. The indictment was sufficient.

3. The testimony of the witness Izgregg, given at a former trial, he having died since giving the testimony, was properly admitted. 1 Enc. of Ev. 904, 910, 914, 915, 916, 918, 919; 3 Dana (Ky.) 36; 28 Tex App. 92, 12 S. W. 493; 1 Greenleaf, Ev., (16 ed.), § § 163, 164; 16 Cyc. 109; 36 N. H. 575.

4. Any prejudice that might have resulted from the al-

leged misconduct of counsel in referring to appellant's having served a term in the Texas penitentiary was entirely removed by the court's admonition. 95 Ark. 321; 84 Ark. 131; 71 Ark. 62; *Id.* 403; 88 Ark. 62; 72 Ark. 461.

HART, J. On the 26th day of August, 1909, Mrs. Carrie Winkleman was killed and robbed in the city of Fayetteville, Washington County, Arkansas. She was accustomed to carry $8,000 or $10,000 in a bustle on her person, and was robbed and killed to secure her money. The evidence tended to show that the crime was committed by Gus Sartin. The defendant was indicted for the crime of accessory before the fact to robbery. He was tried before a jury, found guilty, and his punishment assessed at three years in the State penitentiary.

The indictment (formal parts omitted) is as follows:

"The grand jury of Washington County, in the name and by the authority of the State of Arkansas, accuse N. H., *alias* 'Red,' Fox, of the crime of accessory before the fact to the crime of robbery committed as follows, towit: that one Gus Sartin in the said county of Washington, in the State of Arkansas, on the 26th day of August, 1909, unlawfully, feloniously, and violently did by force and intimidation take from the person of Carrie Winkleman the sum of ten thousand dollars in money, gold, silver and paper money, current money, in the State of Arkansas, of the value of ten thousand dollars, the personal property of the said Carrie Winkleman. And the said N. H., *alias* 'Red,' Fox, not being present aiding, abetting and assisting, in said county of Washington in the State of Arkansas, on said 26th day of August, 1909, and before said crime of robbery was committed by said Gus Sartin, as aforesaid, unlawfully and feloniously did advise, and encourage the said Gus Martin to commit said crime of robbery, as aforesaid, against the peace and dignity of the State of Arkansas."

1. It is insisted by counsel for appellant that the court erred in not sustaining their demurrer to the indictment. They insist that the indictment only alleges that at some time and place not in Washington County, Arkansas, the defendant advised and encouraged Gus Sartin to commit the crime. While the indictment is susceptible of this meaning, it would be a strained construction to place upon it. We think that the indictment in plain terms alleges that the defendant, not being

present aiding, abetting, and assisting, did, in the county of Washington in the State of Arkansas, unlawfully and feloniously advise and encourage the said Gus Sartin, etc. Therefore, the indictment alleges that he was in said county and State, and aided and encouraged the commission of the crime before it was committed.

2. It is urged by counsel for appellant that the court erred in refusing to discharge him upon his motion for the reason that he was not brought to trial before the end of the second term of the court having jurisdiction of the offense, which was held after the finding of the indictment. He bases his contention on section 2313 of Kirby's Digest. If it be conceded that the statute is mandatory, before a defendant would be entitled to his discharge for want of prosecution, he must have placed himself on record in the attitude of demanding a trial, or at least resisting a postponement. *Dillard* v. *State*, 65 Ark. 404; *Stewart* v. *State*, 13 Ark. 720. Here the defendant was admitted to bail, and did not either demand a trial or resist the order for a continuance. The court was correct in refusing to dismiss his case for want of prosecution.

3. The third assignment of error in defendant's motion for a new trial is that the court erred in admitting certain testimony which was alleged to be prejudicial to the rights of the defendant. Under this assignment the defendant complains of the introduction of the testimony of James Izgregg, a witness, who testified at the trial of this defendant in the Washington Circuit Court on the charge of accessory before the fact to the murder of Carrie Winkleman. It was proved at the trial that the witness had since died. The defendant agreed that, in the event the court should hold that the testimony was competent, the testimony taken by the stenographer at the previous trial should be read as his evidence, and agreed that the testimony as transcribed by the stenographer from her shorthand notes was a true and correct statement of his evidence taken upon the former trial.

It is contended by counsel for defendant that the testimony is not competent because it was taken under a different indictment and in a different case. We do not think that the objection is well taken. The record shows that the testimony was taken under an indictment charging the defendant with the

offense of being accessory to the murder of Mrs. Carrie Winkleman, and the present indictment charges him with being accessory to the crime of robbery of Carrie Winkleman. The robbery and the murder were all parts of the same transaction, and were committed by the same persons at the same time for the same purposes. The identity of the issues was complete, and there can be no well founded reason why the testimony taken on the first trial should not be read as evidence on the second trial where it appears that the witness is dead. This precise question has not been passed on by the court, but in the case of *Poe* v. *State*, 95 Ark. 172, where all our earlier cases bearing on this question are cited, the court held: "Where an absent witness in a felony case is dead, beyond the jurisdiction of the court, or upon diligent inquiry can not be found, what such witness had previously testified upon the examining trial of the defendant may be proved at the trial of the case, provided the defendant was present at the examining trial, and had the opportunity of cross examination."

The reason given by the court in so holding was that the defendant was present and had a right and the opportunity to cross examine the witness. The general rule in such cases is that it is not necessary, in order to admit the testimony, that it should have been given on the trial of a case in the exact technical shape for the second action, or that the parties should be identically and nominally the same with those on trial of the first action. The true test in regard to the admissibility of such evidence where the issues are substantially the same is, did the party who is to be affected by it have the power to cross examine the witness and the opportunity to do so? The issues in the two cases were substantially the same, and the parties were the same. As far as the testimony given by Izgregg is concerned, it may be said that it related to the same issue in both cases, and was competent for the same purpose in both cases. The parties in both cases were the same, and the testimony was admitted for the same purpose, and to establish the same issue in both cases. Both indictments arose from the same facts, and the defendant, as we have seen, had the opportunity to cross examine the witness on the first trial. The witness having died since the first trial, we hold that his testimony, taken on the first trial, is competent. *Cox* v. *State*,

28 Tex. App. 92; 1 Greenlead, Ev. (16 ed.) § § 163-4; 16 Cyc. 1095; Ency. of Ev. vol 1, p. 915-18; *Charlesworth* v. *Tinker*, 18 Wis. 663. The testimony tended to show that Gus Sartin committed the murder and robbery. Izgregg testified: "I live in Sulphur, Oklahoma. Before the murder and robbery of Mrs. Carrie Winkleman, I heard Fox and Sartin in conversation. I heard Fox say: 'I know the money is there.' And again: 'I roomed at that place two or three years ago.' I also heard Fox say: 'If you go there, you want to get a room in the small house out from the big one, where you will have a better chance to get the money.' Sartin replied: 'If I go after it, I will be damned sure to get it.' Fox left early in August saying he was going to visit his mother near Van Buren, Arkansas. After his return home, he read carefully all of the papers and was in possession of a considerable sum of money. It was some time in October I heard of Mrs. Winkleman's death."

Other testimony was adduced tending to show that the defendant was in the restaurant where Mrs. Winkleman worked, and came there with Gus Sartin on Thursday before she was killed on Saturday in the month of August following the conversations testified to by Izgregg, and that they knew that she carried a large sum of money in her bustle. Other testimony showed that Mrs. Winkleman had two rooming houses, and that Sartin rented a room in the smaller one, and was rooming there at the time Mrs. Winkleman was murdered and robbed. Mrs. Winkleman carried a large sum on her person in a bustle. When she was found, her bustle and the money contained in it had been taken from her person.

It is also insisted that the testimony of Izgregg which was read in the case was incompetent for the reason that the advice and encouragement given by Fox to Sartin occurred at Sulphur, Oklahoma, and beyond the jurisdiction of the courts of this State. Counsel rely upon the case of the *State* v. *Chapin*, 17 Ark. 561, to sustain their contention. In the Chapin case, the defendant was never in the State of Arkansas at any time prior to the burning of the boat. The facts in this case are distinguishable from those in the Chapin case, The testimony here shows that Fox came to Washington County, Arkansas, in company with Sartin a few days before the commission of

the crime. He was present with him in the restaurant where the murdered and robbed woman worked, and the acts and declarations of Fox and Sartin in Oklahoma are competent as circumstances tending to show for what purpose they were in Washington County, Arkansas.

4. The next assignment of error is in regard to the misconduct of Wythe Walker who assisted the prosecuting attorney in the case. He was examining a witness in regard to the past life and conduct of the defendant and asked the witness to tell what place in Texas the defendant had been in before he came to reside in Sulphur, Oklahoma. Upon objection being made to the question, Mr. Walker said: "If your Honor please, I think it is proper to show whether he knows he had been in Texas; whether he knows he was in the penitentiary." The court said: "It is entirely improper at this time. Everything that relates as to whether the defendant had been in the penitentiary is cut out and withdrawn from the jury and not to be considered in any way." Whatever of prejudice might have been created against the defendant by the remarks of Mr. Walker, we think, was eliminated by what the court said at the time. The court told the jury that the testimony was not competent and directed it not to consider the same. This appears to have been done promptly and with sufficient impressiveness under the circumstances. Therefore we do not think that the judgment should be reversed on that account. *Walker* v. *Fayetteville*, 93 Ark. 443; *Blackshear* v. *State*, 94 Ark. 548; *Kansas City So. Ry.* v. *Murphy*, 74 Ark. 256.

5. It is next urged that the court erred in refusing to instruct the jury to acquit the defendant if it found that Mrs. Winkleman died from the effects of the assault made on her before the money was taken from her person. The court by proper instruction had told the jury what robbery was under our statutes, and in plain and unambiguous language had covered every phase of the question. All the evidence in the case tended to show that the murder and robbery were a part of the same transaction, and that the robbery was the purpose for which the murder was committed. Therefore, we do not think that the court erred in refusing to give the instruction.

6. It is next urged that the court erred in permitting Mr. Walker to assist in the prosecution of the case. The case was in

direct charge of the prosecuting attorney, and there was no error in permitting Mr. Walker to assist him in trying the case.

7. Finally, it is contended by counsel for the defendant that the court erred in not permitting them to argue their motion for a new trial. It will be noted that precisely the same evidence was given in this case as was given on the trial of the defendant as accessory for the murder of Mrs. Winkleman, and it can not be doubted that the court was perfectly familiar with all the testimony and with all the assignments of error which the defendant had made during the progress of the trial. Therefore, it was in the discretion of the court whether or not time should be given for the argument of the motion for a new trial, and we hold that the court did not abuse its discretion in refusing to allow counsel for defendant to argue it before him.

The judgment will be affirmed.

CROW v. SPECIAL SCHOOL DISTRICT NO. 2.

Opinion delivered February 19, 1912.

SCHOOLS—FORMATION OF RURAL SPECIAL SCHOOL DISTRICT.—Territory once organized and established into a rural special school district, under act of May 31, 1909, as amended by act April 7, 1911, can not be cut off and included within another rural special school district.

Appeal from Miller Chancery Court; *James D. Shaver*, Chancellor; affirmed.

STATEMENT BY THE COURT.

School District No. 2 in Miller County was duly organized on October 22, 1910, as a rural special school district under Acts 1909, c. 321, approved May 31, 1909, later amended by act approved April 7, 1911.

The electors of the district at the annual meeting in May, 1911, authorized the school board to borrow twenty-five thousand dollars, or so much of that amount as might be necessary, with which to construct and build necessary school buildings. On July 3, 1911, upon petition, the county judge made an order appointing appellants judges and directed them to hold an election at Rondo for the purpose of creating and establishing

another proposed rural special school district, which included the east half of rural special school district No. 2, and three sections of land south of Rondo. The proposed district contained two-thirds of the railroad mileage of special school district No. 2 and all of the pipe line extending through said district, the principal revenue producing property of it and only seventy-one white children of the district, leaving in the old district 286 white children and that part of same not included in the proposed district.

Appellee school district brought this suit to restrain the appellants as such judges from holding the election under said act of 1909 for the purpose of establishing said school district.

Appellants answered, denying the material allegations of the complaint, except as to the formation of the appellee district and their appointment as such judges to hold an election for the establishment of the proposed rural district, cutting off a part of the territory of said appellee district, and alleged that it was the purpose of the directors of said district to borrow money to build a school house that was not needed and to purchase a site and build a house thereon and move another school from the site it had occupied for fifty years, to the inconvenience, detriment and injury of the patrons of the district, and asked an injunction, prayed a dissolution of the injunction granted against them and for an injunction to prevent such proposed action on the part of the directors of the appellee district.

After the hearing of the testimony in the case, the court perpetually enjoined appellants from holding the election to create the proposed district and dissolved the injunction against appellees, from which decree appellants appealed.

John N. Cook, for appellants.

The only territory exempt from the operation of the act is that in incorporated cities and towns. The term "any given territory" used in the act means any territory designated or set out in the petition provided for by the act. Acts 1909, p. 948 § 2; 95 Ark. 26, 31; 78 Ark. 118. Had the Legislature intended to exempt any part of a rural single school district, it would have employed apt words expressing that intention, and, the Legislature not having made such exception, the

courts can make none. 59 Ark. 237-244. It is not the business of the courts to supervise legislation so as to subserve convenience or to relieve from hardships where the language of an act is plain and unambiguous. 72 Ark. 195; 65 Ark. 565; 69 Ark. 528; 14 S. W. (Tex.) 794-795.

Gustavus G. Pope, for appellee; *W. H. Arnold,* of counsel.

There is nothing in Act No. 321, approved May 31, 1909. or Act No. 169, approved April 7, 1911, amendatory thereof, warranting the conclusion that the Legislature intended that the boundaries of a rural special school district may be changed or the district abolished after it is formed. 48 Ark. 307; 139 S. W. 1112; 58 Ark. 116; 65 Ark. 529; 71 Ark. 556; 76 Ark. 309; 54 Ark. 135.

A school district is a quasi-corporation, a creature of the Legislature, capable of exercising such powers as are expressly conferred upon it by statute or such as arise by necessary implication, and it can not be abolished except by legislative enactment. 33 Ark. 497; 78 Ark. 118; 95 Ark. 28. Had the Legislature intended that a special school district, either urban or rural, could be abolished or its boundaries changed indefinitely, it would have inserted such a provision in the acts authorizing the creation of such districts. 35 Ark. 59; 36 Ark. 330.

It is evident that use of the word "territory" in the act was not intended in its ordinary sense, but rather to a common school district desiring to be created into a special school district. 29 Ark. 356; 94 Ark. 422. See also 91 Ark. 5; 75 N. E. 52; *Id.* 55.

KIRBY, J., (after stating the facts). The question for decision is whether territory already organized and established into a rural special school district, under the provisions of the act of May 31, 1909, as amended by act approved April 7, 1911, may be cut off and included within another rural special school district under its provisions.

Our school system has long comprised two methods of organization of territory into school districts for the purpose of maintaining free public schools for the promotion of education and the general welfare of the State, the one, the single or special school district, including only the territory within the limits of incorporated cities and towns in the State and the territory

annexed thereto for school purposes, and the other including all the other territory within the county organized into common school districts, the county court having the power to form new school districts of such territory and change the boundaries of existing districts and adjust the indebtedness of the districts divided and equitably apportion the surplus fund upon such division.

The Legislature provided for the organization of such districts under different methods and also different laws for the government thereof, the directors within the single or special school districts in the cities and towns and the territory annexed thereto being given greater power for the management and promotion of the school interests than those of the common school districts, whose powers are limited and dependent largely upon the will of the electors as expressed at the annual school meetings.

It soon became apparent that the cause of education flourished and better schools were established and maintained in the single school districts where the directors were given more power in the control and management of the schools, and where they had more means for their maintenance, because of the wealth of the territory, and different communities and localities, desiring to improve their school facilities, sought relief of the Legislature in the enactment of divers special acts creating single or special school districts out of territory that could not be included within such districts under the general law and giving the directors thereof increased powers. To meet this insistent demand and avoid so much troublesome special legislation, the general law was made, authorizing the organization and establishment of rural special school districts. Acts 1909, c. 321, approved May 31, amended by Acts 1911, c. 169, approved April 7, 1911; § § 7591a—7591i, Castle's Supplement to Kirby's Digest.

Section 1 of said act provides: "That when the people of any given territory in any county in this State, other than incorporated cities and towns, desire to avail themselves of the benefits of all the laws of this State for the regulation of public schools in incorporated cities and towns, they may be organized into and established as a single school district in the manner

and with powers therein provided with such modifications of such laws as are herein provided."

It is contended by appellants that since the law provides that any given territory in any county "other than incorporated cities and towns" may be organized into and established as a single school district and the method therefor, any territory not included in such cities and towns may be organized into a proposed rural special school district, without regard to whether such territory may, at the time of its proposed organization, be included within a rural special school district, already organized under the provisions of the law or a special school district made by special act of the Legislature.

We do not agree with this contention. If there were no other law but said section, there would appear to be some ground for it, the exception being made as indicated, but we have the two systems of organization of school districts, with the different laws relating to the management thereof, all of which was in the mind of the Legislature at the time of this enactment.

Nowhere is the county court or the county judge, or any other agency of the State expressly given power by the Legislature to change the boundaries of single or special school districts, except in the annexation of territory adjoining cities and towns for school purposes, and no power is given for the division or dismemberment of any such special school districts unless by the acts under consideration. They provide for the organization of territory outside cities and towns and the government thereof after it is established in rural special school districts. The directors are given certain enlarged power; they may borrow money as provided under the law for the government of single special school districts, and may provide for a building fund, if authorized by the electors at the annual election, and the amount thereof; and if a majority vote is cast for a building fund, "it shall be equivalent to voting a building tax of the amount or rate as determined * * * for each succeeding year, until the money borrowed by the board of directors pursuant to such vote, together with the interest thereon, shall have been fully paid."

When the building fund has been voted, they may borrow money and mortgage the property of the district as security

therefor, giving a certain certificate, the form of which is prescribed, the latter part of which reads, "which amount with interest at the rate of.....per cent. per annum from this date until paid, is to be paid from the funds arising from a tax of.....mills, to be levied annually upon the property in said district."

The certificate must be executed in triplicate, and one copy retained by the board, another delivered to the lender, and the third shall be filed by the board of directors with the clerk of the county court, and "upon the filing of said certificate it shall be the duty of the county clerk to levy each succeeding year a building tax of the amount or rate called for against the property in said district until the amount thus borrowed, with the interest thereon, has been fully paid."

The county treasurer is required to pay the holder of the certificate upon demand any funds to the credit of the building fund of said district, applying the same first to payment of the interest due. It is true, this method of borrowing is not exclusive, but it indicates the legislative intent. The necessity existed for the borrowing of money by the school districts of the State for the improvement and maintenance of its schools, and the Legislature recognized it, and gave the authority to mortgage property of the district and in effect pledge certain revenues thereof for the payment of the loan. If the construction of the statute contended for by appellants is correct, a special school district could borrow a large sum of money and thereafter be so cut up and dismembered by the formation of new rural special school districts, including part of its territory, that there would be little, if any, of the property mortgaged remaining within the old district and little of its revenue-producing property, thus defeating the probability of the success of procuring a loan at all by such district when created and one of the purposes of the Legislature in authorizing the creation thereof.

It is apparent that it had no such intention, and the whole act, construed together, bearing in mind our system of the organization of territory into school districts for the maintenance of schools and the law for the control and management thereof, shows conclusively that it was not intended that any part of the territory, once organized into a rural special school district,

could thereafter be taken and organized into another district of like kind, under the provisions of said act. *Common School District No. 13* v. *Oak Grove Special School District, post* p. 411; *Scott* v. *McCollough,* 75 N. E. 52; *Fulks* v. *Wright,* 75 N. E. 55.

The decree is affirmed.

ZIMMERMAN *v.* HOLT.

Opinion delivered February 19, 1912.

1. FRAUDS, STATUTE OF—PROMISE TO PAY ANOTHER'S DEBT.—Whether a promise to pay for services rendered to a third person was within the statute of frauds or not depends upon whether the debt was the primary undertaking of the promisor or of the person to whom the service were rendered. (Page 409.)
2. SAME—WHEN APPLICABLE.—Where the primary debt for services rendered to a person rests against him, and a promise of a third person to pay it is made subsequent to the time it was incurred, such promise is not an original undertaking and is within the statute of frauds. (Page 409.)
3. SAME—INSTRUCTION.—Where plaintiff sued defendant for medical services rendered to defendant's employees, an instruction that if "plaintiff charged the value of his services to defendant and after such charge was made defendant ratified same, then the defendant's promise to pay need not be in writing" was erroneous, as a subsequent promise by a third person to pay the pre-existing debt of another must be in writing unless founded on a new consideration. (Page 410.)

Appeal from Sebastian Circuit Court; Fort Smith District; *Daniel Hon,* Judge; reversed.

H. C. Mechem, for appellant.

1. The court erred in submitting to the jury the question whether, after Holt rendered the services and charged same to Zimmerman, the latter ratified it. It was erroneous because (a) there was no evidence that Holt charged the services to appellant, and (b) if charged to him, there was no evidence whatever that he ratified it; and because (c) the instruction failed to inform the jury that such ratification must rest upon some consideration then moving to Zimmerman. 45 Ark. 74.

2. If appellant only told Holt to go ahead and treat the men, and he would see that Holt was paid, the court should have charged the jury to find for the defendant (appellant.) 88 Ark. 592.

3. It was erroneous to instruct the jury, in the absence of the defendant, at a time when his presence might readily have been obtained, and without effort to notify him, that they might render a verdict for a sum less than $175. 5 Cal. 148; 8 O. St. 212; 1 Greene 406; 11 Ia. 80; 6 N. J. L. 109; 45 Vt. 308; 108 Ala. 180.

Vincent M. Miles, for appellee.

FRAUENTHAL, J. This is an action instituted by C. S. Holt to recover $175 for services rendered as a physician and surgeon to two employees of the defendant. The defendant denied any original undertaking on his part to pay for said services, and pleaded the statute of frauds. The defendant was a contractor engaged in the construction of a building in the city of Fort Smith. He had two laborers employed on the building who were there injured and then taken to a hospital for treatment. The testimony on the part of the plaintiff tended to prove that he told the defendant, before rendering the services to the injured men, that he desired to know who would pay him for such services, and that defendant directed him to attend on the men, and told him that he would pay him for his services. Thereupon he rendered the services and charged same to the defendant. The defendant on the other hand testified that he told plaintiff that, if he could not collect the amount of his services from the injured men, he would see that he got his money. The testimony on the part of the plaintiff tended further to prove that, some time after the services were rendered and the men had recovered, the defendant agreed to the charge which had been made by the plaintiff against him for these services rendered to his employees. He then requested the plaintiff to make out the account against each of them and turn same over to his (defendant's) attorney so that he might collect them from said employees. The plaintiff testified that he did this, but did not thereby release defendant from his promise to pay the debt. The court gave a number of instructions at the request of the defendant, embodying the principle that a promise to pay the debt of another is not enforceable unless in writing, signed by the party to be charged therewith, and applied it specifically in various forms to the facts of the case. One of the instructions thus requested was refused, and it is claimed by counsel for de-

fendant that he was thereby prejudiced. We do not think it would serve any useful purpose to set this instruction out because it was, in our opinion, fully covered by other instructions which were given. Among others, the court, at the request of the plaintiff, gave the following instruction:

"4. If you believe from the evidence that the plaintiff charged the value of his services to defendant and after such charge was made defendant ratified same, then the defendant's promise to pay need not be in writing."

Counsel for defendant urge that this instruction was erroneous for the reason that in effect it warranted a recovery upon an oral promise made to pay the preexisting debt of another and without any new consideration to support it, whereas such promise is within the statute of frauds. The question as to whether or not the promise of a third person to pay for services rendered to another must be in writing under the provisions of the statute of frauds depends upon whether the promise was original or collateral; that is, whether the debt is the primary undertaking of the promisor or of the person to whom the services were rendered. If the debt was that of another, and the liability to pay it rested with such person, then the promise by a third person to pay it is collateral and must be in writing; but the mere fact that the services were rendered to another does not necessarily determine that the promise made by the third person is collateral. It may be an original undertaking by him; and whether it is or not depends upon the transaction, rather than on the motive of the promisor or the nature of the consideration. If the promise made by the third person placed him under an obligation to pay the debt independently of any contract of guaranty, then it is binding without writing. If the credit at the time services are performed for another is, at the direction of the third person, given solely to him, then the transaction is simply an undertaking to pay the promisor's own debt, and is a primary obligation not within the statute. *Brown* v. *Harrell*, 40 Ark. 429; *Cauthron Lumber Co.* v. *Hall*, 76 Ark. 1; *Long* v. *McDaniel*, 76 Ark. 292; *Leifer Mfg. Co.* v. *Gross*, 93 Ark. 277.

If, however, the primary debt subsists against another, and the promise of the third person to pay it is made subsequent to the time it was incurred, then such promise to pay by

the third person will not be an original undertaking unless the promise is founded on a new consideration moving to and beneficial to him, so that he thereby comes under an independent duty to pay irrespective of the liability of the other person. The rule, as declared by this court in the case of *Hughes* v. *Lawson*, 31 Ark. 613, is thus stated: "A promise by a third person to pay the preexisting debt of another, founded upon an original liability and without any new consideration to support it, is a collateral undertaking and within the statute of frauds." *Kurtz* v. *Adams*, 12 Ark. 174; *Chapline* v. *Atkinson*, 45 Ark. 67; *White* v. *Rentoul*, 108 N. Y. 222. The controlling question in all such cases is whether or not, at the time the services were rendered to another, the credit therefor was given to the third person then promising to pay for them. If it was, then the debt becomes the original undertaking of the promisor and need not be in writing. When the services are rendered to another, the law implies a promise upon his part to pay therefor, and a liability is thus imposed by law upon him to make such payment. If subsequently a third person agrees to pay such debt, then it becomes a promise to pay the debt of another, and, unless based upon a new consideration independent of the original debt, it is only a collateral undertaking and must be in writing to be enforceable.

In the above instruction numbered 4, given on behalf of the plaintiff, the court told the jury that if the value of the services was charged to the defendant, and subsequently the defendant ratified the same, then his promise to pay need not be in writing. According to this instruction, the only direction or promise made by the defendant was subsequent to the time that the services were rendered, and such agreement was therefore a promise to pay a preexisting debt. Inasmuch as the services in the case at bar were rendered to the injured men and the promise referred to in this instruction was made after such services had been rendered, the charge for the services referred to in the instructions was necessarily not the debt of the defendant but of these injured men. There could be no ratification by the defendant of the act of charging this debt to him unless the charge was made by direction of some agent authorized or unauthorized. *McTighe* v. *Herman*, 42 Ark. 285. There was no testimony that any one claiming to represent

the defendant at the time the services were rendered authorized them to be charged to him. Under the facts adduced in evidence in this case, this instruction could only mean that if, after the charge was made, the defendant agreed to it, then such agreement need not be in writing; but such agreement only constituted in fact a promise to pay the debt. As we have seen above, a subsequent promise by a third person to pay the preexisting debt of another must be in writing unless founded on a new consideration. The court erred, therefore, in giving this instruction.

We have examined the other instructions given in the case and those which were refused, and find no error in the rulings made by the lower court thereon. We do not deem it necessary to note or pass upon other alleged errors suggested by counsel for defendant, as it is not likely that the matters complained of will occur upon another trial of this case. For the error indicated above, the judgment is reversed, and this cause is remanded for a new trial.

COMMON SCHOOL DISTRICT NO. 13 *v.* OAK GROVE SPECIAL SCHOOL DISTRICT.

Opinion delivered February 19, 1912.

1. STATUTES—EXTENSION BY REFERENCE TO TITLE.—Const. 1874, art. 5, section 22, provided that "no law shall be revived, amended or the provisions thereof extended or conferred by reference to its title only, but so much as is revived, amended, extended or conferred shall be re-enacted and published at length," is not contravened by Acts 1909, c. 321, authorizing the people outside of cities and towns to form special school districts, and providing that the laws already in force as to special school districts should apply to districts created under that act. (Page 413.)
2. SAME—SUPERVISION BY COURTS.—The courts have nothing to do with the policy or expediency of legislation, so long as it does not violate constitutional limitations. (Page 415.)

Appeal from Greene Circuit Court; *Frank Smith,* Judge; affirmed.

Huddleston & Taylor, for appellants.

1. The act is invalid because it attempts to extend the provisions of all the provisions of the several enactments gov-

erning the organization of single school districts to
of any given territory in any county in this State, other than incorporated cities and towns" * * *, by merely declaring that "they may be organized into and established as a single school district in the manner and with the powers therein provided, with such modifications of said laws as are herein provided." Art. 5 § 22, Const.; 29 Ark. 252; Kirby's Digest, § § 7668 to 7699 inclusive; 49 Ark. 135; 52 Ark. 290, 295; 14 So. 655; 6 So. (Ala.) 119; 23 So. (Ala.) 843; 42 L. R. A. 468; 2 So. (Ala.) 270.

2. If the act is valid, and if the entire body of law relative to single school districts has been legally conferred and granted to rural districts, the section 7695 of Kirby's Digest must be read into the act as a part of its provisions, and when this is done we have, as a part of the act, an express legislative declaration to the effect that it is not the purpose of the Legislature to repeal any of "the provisions of the general school laws of the State." 75 N. E. 52, 55.

Johnson & Burr, for appellee.

1. The act is constitutional. Section 1 of the act confers a new right upon portions of territory, which without the act did not possess such right, and, this being true, the provisions of the sections of the old law, to which reference is made, are not required to be set out at length or reenacted in the new. 49 Ark. 131; 97 Pac. (Okla.) 338; 94 Pac. (Mont.) 634; 121 Fed. 282.

2. The matter of the establishment of school districts, the fixing of boundaries thereof, or the dividing or otherwise altering existing districts, is vested primarily in the Legislature, which may act independently of the inhabitants of the territory affected; and any hardships resulting therefrom is for the Legislature, and not the courts, to remedy. 133 S. W. 329; 35 Cyc. 833; 25 Am. & Eng. Enc. of L. (2 ed.) 34; 139 Ia. 249; 47 Pac. (Okla.) 482.

WOOD, J. 1. Act 321 of the General Assembly, approved May 31, 1909, is as follows:

"An act to create special or single school districts in any county in the State of Arkansas, with same powers as are now

granted to incorporated cities and towns for such purposes, and impowering the county judge to call said election.

"Be It Enacted by the General Assembly of the State of Arkansas:

"Section 1. That when the people of any given territory in any county in this State, other than incorporated cities and towns, desire to avail themselves of the benefits of all laws of this State for the regulation of public schools in incorporated cities and towns, they may be organized into and establish as a single school district in the manner and with powers therein provided, with such modifications of said laws as are herein provided.

"Section 2. That the petitions provided for in section 7669 of Kirby's Digest of the laws of Arkansas shall be accompanied by a map showing the territory asked to be made into the special district and shall be presented to the county judge of the county containing such territory, who shall perform the duties imposed upon the mayor of cities and towns in said original act, and with like force and effect, and said county judge shall designate the time and place for holding the election provided for therein, and shall appoint three qualified electors of the proposed territory to hold said election.

"Section 3. That all school districts created under this act shall have the power to borrow money as any other special or single district, in cities or incorporated towns, when a majority of the legal electors vote for the same, at any annual school meeting.

"Section 4. All laws and parts of laws in conflict with this act are hereby repealed, and this act be in force and effect from and after its passage."

These appeals challenge the validity of the act under section 22, article 5, of the Constitution, which provides: "No law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revived, amended, extended or conferred shall be reenacted and published at length."

In *Watkins* v. *Eureka Springs*, 49 Ark. 131, the court had under consideration a similar question. There the act provided:

"Section 1. That once during the year 1875, and every

succeeding year thereafter, the county court of any county or the municipal authority of any city or incorporated town in this State may call in the outstanding scrip or warrants of said county, or floating evidence of indebtedness of said city or incorporated town, for the purpose of cancelling and reissuing the same.

"Section 2. That the law governing such proceedings in a county shall apply with equal force to cities and incorporated towns. The council, recorder and marshal shall perform the duties laid down for the county court, the clerk and sheriff respectively."

Chief Justice COCKRILL, speaking for the court, said:

"The second section adopts the method of procedure provided for like cases where counties are concerned without reenacting the governing provisions. We are not, however, prepared to assert that when a new right is conferred or cause of action given, the provisions of the Constitution quoted require the whole law governing the remedy to be reenacted in order to enable the court to effect its enforcement. And we see no reason for refusing to apply the same rule to special proceedings like this. To prevent that kind of legislation could not have been the mischief the provision was intended to remedy. It could not have been the intention of the framers of the Constitution to put unreasonable restraints upon the power of legislation, and thus unnecessarily embarrass the Legislature in its work."

In *Scales* v. *State*, 47 Ark. 476, the same learned judge, speaking of this provision of the Constitution, said:

"It is well settled that this provision does not make it necessary when a new statute is passed that all prior laws modified, affected or repealed by implication by it shall be reenacted."

The act in question does not revive or amend any prior law, or extend or confer the provisions of any law in existence to the inhabitants of rural districts in any county in this State. On the contrary, it confers a new right upon the people in such territory—one that they never enjoyed before—of organizing themselves into single school districts in the same manner that such districts are organized in cities and incorporated towns, and confers upon them, when so organized, the same powers as are given these special school districts under existing laws.

The power granted by the Legislature was for the organization and establishment of single school districts of territory that was embraced in common school districts. The Legislature did not have in mind special school districts already in existence, and did not authorize the changing of the boundaries of any special school district that theretofore had been created by special act of the Legislature of territory outside of incorporated cities and towns. The authority given was for the organization of single school districts of territory that had not before been granted such privileges. See *Scott* v. *McCullough,* 75 N. E. 52; *Fulks* v. *Wright,* 75 N. E. (Ohio) 55.

In *Spratt* v. *Helena Power Transm. Co.,* 94 Pac. 631, the Supreme Court of Montana, was passing upon the following section of an act of the legislative assembly:.

"Any corporation organized under the laws of any State of the United States, or laws of the United States, and authorized to engage in business in this State, and engaged in business in this State, may acquire real property as provided in the Code of Civil Procedure, title 7, page 3, to the same extent, for the same purposes and in the same manner as corporations organized under the laws of this State." In that case, after an exhaustive review of the authorities the court held: "If an act is original in form, and by its own language grants some power, confers some right or creates some burden or obligation, it is not in conflict with the Constitution, although it may refer to some other existing statute for the purpose of pointing out the procedure in executing the power, enforcing the right, or discharging the burden."

Section 1 of the act under consideration is an original and distinct grant of power to the people outside of cities and towns to form special school districts, and that portion of the section which makes applicable the provisions of laws then in force refers to single school districts and relates only to the method of procedure in effectuating the grant of power. Such provisions do not contravene the section of the Constitution under consideration. *St. Louis & S. F. Rd. Co.* v. *Southwestern Tel. & Tel. Co.,* 121 Fed. Rep. 282, and cases there cited.

2. Of course, the act under consideration will have the effect, when put in operation in the manner designated in the act, to change the boundaries of common school districts within

the territory organized into single school districts, and thus may work hardships in individual instances where the boundaries of common school districts are disturbed by the changes made; but with the policy or expediency of the legislation this court has naught to do, so long as the act does not violate constitutional limitations.

This court, in the recent case of *Norton* v. *Lakeside School District,* 97 Ark. 71, held that "a school district is a creature of the Legislature, or of some governmental agency of the Legislature. The Legislature is primarily vested with the power to create school districts, and it may create or abolish school districts, or change the boundaries of those established for any reason that may be satisfactory to it. The Legislature may do this without consulting and without obtaining the assent of those persons who reside in the territory affected." See 35 Cyc. 833; *School District of Fairview* v. *Ind. School Dist. of Burlington,* 139 Iowa 249; *School District* v. *Zodiker,* 47 Pac. 482.

The fourth section of the act repeals all laws and parts of laws in conflict. This has the effect of repealing the laws in force at the time with reference to the changing of the boundaries of common school districts affected by the operations of act No. 321, now under consideration, wherever the people of any given territory in any county in the State avail themselves of the provisions of the act in the manner specified therein.

3. There is nothing in this record, either by way of allegation or proof, to show that appellee, Oak Grove Special School District, was not organized and established in the manner required by the statute. In the absence of such showing, the presumption will be that such was the case. The act does not provide for an official canvass of the votes and a declaration of the result thereof by the county court. It does not require that the county court make and enter of record any orders as to such special election or as to the establishment of the special school district. The district is established, under the law, if a majority of the qualified electors within the territory named in the petition before the county judge shall vote for the establishment of such district.

Section 2 of the act provides that the county judge shall appoint three qualified electors in the proposed district to hold

said election. The law thus contemplates that these three designated electors shall ascertain and make known the result of the election.

The judgments of the circuit court, affirming the action of the county judge in carrying out the provisions of the act under consideration and establishing the special school district are affirmed.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* SCOTT.

Opinion delivered February 5, 1912.

1. RAILROADS—NEGLIGENCE—WHEN QUESTION FOR JURY.— Where train men saw three boys walking on the track a quarter of a mile ahead, and gave alarm signals to which the boys paid no attention, it was a question for the jury whether the trainmen were negligent in not stopping the trains before reaching them. (Page 419.)

2. SAME—NEGLIGENCE—INSTRUCTION.—In an action against a railroad company for negligently running down and killing a deaf-mute child, an instruction that defendant was not liable unless the engineer realized that the deceased was unconscious of his peril was properly refused, as it was sufficient to render defendant liable if the engineer saw him and his conduct was sufficient to put the engineer on notice that he was unconscious of his danger. (Page 420.)

3. SAME—NEGLIGENCE—INSTRUCTION.—It was not error to instruct the jury that "where an engineer sees a boy or boys upon the railroad track ahead of the train, and he sounds the whistle to warn them of the approach of the train, he has a right to presume, *until their acts indicated the contrary*, that they will heed said alarm and get off the track in time to prevent being struck by the train. (Page 421.)

4. DEATH—CONSCIOUS SUFFERING—EXCESSIVE DAMAGES.—Where a boy fifteen years old had both legs so mangled that they had to be amputated, and was conscious for several hours, an award of $1,000 for pain and suffering was not excessive. (Page 421.)

5. SAME—DEATH OF CHILD—EXCESSIVE DAMAGES.—An award of $1,000 for the negligent killing of a deaf-mute child fifteen years old, who was in good health and made a good farm hand was not excessive. (Page 422.)

Appeal from Conway Circuit Court; *Hugh Basham*, Judge; affirmed.

W. E. Hemingway, Lovick P. Miles, and *Thomas B. Pryor,* for appellants.

1. A locomotive engineer has a right to presume that a person on the track will leave the track in time for an approaching train to pass. 77 Ark. 405; 90 Ark. 378-286.

2. All persons are presumed to be in possession of their faculties, and the engineer had the right to presume that, when he sounded the danger signals, deceased and his companions would leave the track. The court therefore erred in refusing to give instructions 4 and 12, requested by appellant. 46 Ark. 523; 2 White, Personal Injuries on Railroads, § § 1085, 1890. The modification, "until the acts and conduct of the deceased indicated the contrary," inserted by the court, was erroneous in assuming as true a fact that was in issue. 71 Ark. 38; 76 Ark. 468.

3. The verdict is clearly excessive.

Bratton & Fraser and *Sellers & Sellers,* for appellee.

1. It is for the jury to determine from all the facts and circumstances in proof whether the engineer had good reason to believe that the injured person was insensible of his danger. An engineer can not shield himself behind the presumption that a person seen on the track will leave it in time to escape injury, after his appearance gives the engineer good reason to believe that he is insensible to the danger. 99 Ark. 422.

2. There is no error in the fourth and twelfth instructions as modified. The objection that the modification assumes as true a fact in issue is not well founded; but if it were so, appellant, having made no specific objection thereto in the lower court, will not be permitted to raise the objection here. 76 Ark. 348; *Id.* 468, 471; 66 Ark. 46; 65 Ark. 255.

3. The verdict is not excessive. 59 Ark. 224; 84 Ark. 247.

MCCULLOCH, C. J. Plaintiff's intestate, Homer Scott, was a deaf and dumb boy, fifteen years of age, and was run over and killed by one of defendant's trains while he and two deaf-mute companions, about the same age, were walking the track near McAlmont, a station on the road six or seven miles north of Little Rock. The plaintiff is the father of Homer Scott, and sues as administrator to recover damages to the estate on account of the pain and suffering endured by deceased, and also damages to himself on account of the loss of services of deceased to which he was entitled as parent. A trial resulted

in a verdict for the plaintiff, assessing damages at $1,000 on each branch of the case, and defendant appealed.

The three boys were students at the Deaf-Mute Institute near the city of Little Rock, and on the afternoon of the accident, they crossed the river on the railroad bridge and walked northward on the track until they got nearly to McAlmont, where the accident occurred. The two survivors testified through an interpreter, and gave an account of the way the accident occurred. According to their testimony, they walked along the track, and once or twice got off to avoid approaching trains coming from the north. At the time of the accident they were walking along the track, one of the boys walking on the ends of the ties on the outside of the rail; Homer Scott was walking the right-hand rail, with his hand resting on the shoulder of the other boy; and the third one was walking the ends of the ties on the other side of the track. The testimony tends to show that the boys were conversing by signs as they walked along. A passenger train approached from the south, and the boys were seen both by the fireman and engineer for perhaps something more than a quarter of a mile. The whistle was sounded for the crossing several hundred yards distant, and the fireman continued to ring the bell. Another witness, who was near the track at the time, stated that alarm whistles were commenced about three hundred yards from where the boy was struck. Neither of them gave any indication of having heard the alarm, and when the engine got within a short distance of them, the emergency brake was applied, but too late to prevent striking this boy. The other two, who were walking on the ends of the ties, stepped aside in time to escape injury. The engineer testified that he saw the boys for a considerable distance, but didn't know there was anything the matter with them nor that they were unconscious of the approach of the train, and that he thought they would get off before the engine reached them. He testified that, as soon as he realized that they were not going to get off, he applied the emergency brake and did all he could to stop the engine.

The action is based upon alleged negligence of the engineer in failing to exercise care to avoid striking deceased after discovering his peril. It is insisted that the evidence is not sufficient to warrant the finding that the engineer discovered, in

time to avoid the injury, the fact that the boys were unconscious of the approaching train. The testimony does not free the question from doubt, but we are of the opinion that, under the facts of the case, it was peculiarly within the province of the jury to determine whether the engineer was guilty of negligence in this respect. It is conceded that he saw the boys at least a quarter of a mile, walking along the track, and that alarms, both by bell and whistle, were given about that time. The boys paid no attention to these alarms, and gave no indication whatever that they heard them. It was within the province of the jury to apply their practical knowledge to the facts and draw the legitimate inference that failure of these boys to respond to the signals, by stepping off the track or even looking around, so as to show that they had heard the signals, was sufficient to apprise the engineer of their perilous situation. The engineer stated that it was a common occurrence for boys, or even men, to remain on the track after signal was given, and not step off until the last moment. But still this does not prevent the jury from applying their knowledge of human affairs, to say that the boys would, at least have given some indication of having heard the signals, and that their failure to do so was sufficient to apprise the engineer of the fact that they had not heard them. While the testimony presents a very close question at issue, we are of the opinion that it was sufficient to warrant the jury in drawing an inference of fact which sustains the verdict, and we do not feel at liberty to disturb it.

The recent case of *Memphis, D. & G. Rd. Co.* v. *Buckley*, 99 Ark. 422, is quite in point upon this question.

Error is assigned in the court's refusal to give the following instructions:

"XI. The court instructs you as a matter of law that it is not sufficient to warrant you in returning a verdict against the defendant in this case for you to merely find from the evidence that the engineer might have known that the deceased did not hear the whistles or alarms that were sounded, or might have known that deceased was not going to leave the track. The evidence, under the law, before the plaintiff can recover, must go further and show by a preponderance thereof that the engineer actually realized that the deceased was afflicted; that he could not hear, and that he was not going to leave the track,

and that with this knowledge the engineer failed to exercise ordinary care to prevent striking and injuring the deceased."

This instruction was properly refused, for it is not correct to say that, before negligence can be attributed, under the circumstances of this case, the engineer must have actually realized that the deceased was unconscious of his peril. It was sufficient if the engineer saw him and his conduct or appearance was sufficient to put the engineer on notice that he was unconscious of the danger. The law of the case has been stated in a former opinion of this court as follows:

"If, however, the man seen upon the track is known to be, or from his appearance gives them good reason to believe that he is, insane or badly intoxicated, or otherwise insensible of danger or unable to avoid it, they have no right to presume that he will get out of the way, but should act upon the hypothesis that he might not or would not, and should use a proper degree of care to avoid injuring or killing him. Failing in this, the railroad company would be responsible for damages, if by the use of such care, after becoming aware of his negligence, they could have avoided injuring him." *St. Louis, I. M. & S. Ry. Co.* v. *Wilkerson*, 46 Ark. 523.

The defendant requested the following instruction, which the court modified by inserting the italicised words, which modification is assigned as error:

"XII. The court charges you that where an engineer sees a boy or boys upon the railroad track ahead of the train, and that he sounds the whistle to warn them of the approach of the train, that he has a right to presume, *until their acts indicated the contrary*, that they will heed said alarm and get off the track in time to prevent being struck by the train."

The modification was entirely correct, we think, for the reasons already stated. Nor do we think there is any ground for contention that the modification of this instruction, or another one, which was also modified in the same manner, amounted to an assumption of the truth of the facts recited. Other refused instructions were substantially covered by instructions which the court gave. In fact, we are of the opinion that the law of the case was properly given to the jury, and that there is no error in this respect.

It is finally contended that the verdict is excessive. The

injury occurred about 5 o'clock in the afternoon, and both of the boy's legs were so badly mangled that they had to be amputated, which was done after he was brought back to Little Rock about 9 o'clock that night. There is evidence that the boy was conscious for a considerable portion of that time, first, for awhile after the injury occurred, and, then, when he was aroused at the hospital.

On the other branch of the case, the testimony shows that the deceased was a bright, intelligent boy, and that he had an earning capacity on his father's farm of about a dollar a day at that time. He had been in the Deaf-Mute Institute three years, and worked for his father about four months each year during the summer vacation. He was in good health, and made a good farm hand. The evidence fully warranted the conclusion that the boy would grow in strength and intellect from year to year, and that his earning capacity would be increased. Considering all the facts of the case, we are unable to say that the verdict was excessive on either branch of the case, so the judgment is affirmed.

MILES v. DODSON.

Opinion delivered February 26, 1912.

1. BILLS AND NOTES—WHEN HOLDER PROTECTED.—Where the holder of negotiable paper acquired it after maturity from one who became a *bona fide* holder for value and without notice before maturity, he is then protected upon the strength of his transferrer's title. (Page 425.)

2. SAME—BONA FIDE HOLDER.—One who takes negotiable paper before maturity in payment or as security for an antecedent debt, and without notice of any defect, receives it in due course of business, and is a holder for value free from any equities of the maker or indorser. (Page 426.)

3. SAME—TO WHOM PAYMENT SHOULD BE MADE.—The maker of a promissory note can make a valid payment only to the holder of the note; and if he makes a payment to one not at the time the holder of it, he does so at his own risk. (Page 427.)

4. APPEAL AND ERROR—CONCLUSIVENESS OF MASTER'S FINDINGS.—Findings of fact of a consent master are as conclusive as the findings of a jury. (Page 427.)

Appeal from Union Chancery Court; *James M. Barker*, Chancellor; affirmed.

R. G. Harper, for appellant.

1. Dodson acquired the note after maturity. It was dishonored and put the purchaser on notice of all defenses. 38 Ark. 127; 30 *Id.* 590.

2. Appellee had no legal right, with his father, to negotiate the note to the Ouachita Valley Bank. 179 Ill. 599; 46 L. R. A. 753.

W. E. Patterson, for appellee.

1. Appellee is a *bona fide* holder, in due course of business, without notice, before maturity and for value. 41 Ark. 418; 42 *Id.* 22; 65 *Id.* 204; 94 *Id.* 387; 7 Cyc. 932, 928, 938; 65 Conn. 544; 1 Dan. Neg. Inst. p. 776, 801; 46 L. R. A. 784.

2. Payment to one not the legal holder of the note and without authority to collect avails nothing as a defense. 21 Ark. 393; 89 *Id.* 448; 55 *Id.* 347; 75 *Id.* 170; 1 Dan. Neg. Inst. 758; 46 L. R. A. 769; 86 Ark. 439.

FRAUENTHAL, J. This was an action upon a note originally instituted in the circuit court by C. W. Dodson against F. W. Miles and the other makers thereof. The note is a negotiable instrument for $575.25, dated August 20, 1903, and due January 1, 1905, payable to the order of E. H. Smith. The plaintiff claimed that he was an innocent purchaser of the note. The defendants alleged payment of the note, and that plaintiff had acquired it after its maturity and after notice that it had been paid. They also alleged that the note had been assigned by said E. H. Smith to Dodson & Sons, a partnership, of which the plaintiff was a member, as collateral to secure a principal note executed by said Smith to said partnership; that a great many other notes and shares of stock had at the same time been transferred to said partnership as collateral to secure said principal note, and that the partnership had collected on the other collateral a sufficient amount to pay the principal note. Without objection, the cause was transferred to the chancery court, and, by the consent of all parties, that court appointed a master to make and state an account of all payments which had been made and all sums which had been collected on all said collateral notes and shares of stock which had been transferred by said Smith to Dodson & Son, and also of all payments made by the defendants upon the note

involved in this suit. Testimony of a number of witnesses was taken by the master relative to these matters, and he made a report in which he set out the various notes and shares of stock which had been transferred by said Smith to Dodson & Son to secure his principal note to them, and also the various sums which had been collected thereon. From this he found that there was still due and unpaid on said note executed by Smith to Dodson & Son the sum of $1,781.89. The master further found that in March, 1904, the defendant Miles had paid to said Smith the full amount of the note herein sued on. He thereupon reported that plaintiff was not entitled to recover on said note. The chancellor approved the findings of fact made by the master, but overruled the conclusion of law at which he arrived. He found that the plaintiff was an innocent purchaser of the note before its maturity, and thereupon rendered judgment in his favor for the amount thereof.

It appears that on or about September 1, 1903, said E. H. Smith became or was then, indebted to Dodson & Son in the sum of $7,000, and executed his note therefor to them. In order to secure the payment of that note, he transferred to Dodson & Son on the same day a number of notes of various parties which were payable to him and also some shares of stock in two or more corporations. Amongst the notes thus transferred as collateral to Dodson & Son was the note upon which this suit is instituted. At the time of making said transfers, Smith also executed a written power by which he authorized said Dodson & Son, or their assigns, to sell said collaterals, or any of them, upon default being made in the payment of said principal note executed by him to them. The testimony tended further to prove that shortly afterwards Dodson & Son placed these collateral notes in the hands of a firm of lawyers for collection. These attorneys testified that they used every reasonable effort to collect these notes and succeeded in collecting about $1,000 thereon by August, 1904. On September 1, 1904, Dodson & Son had a settlement with said Smith of the collections which had been made by them upon the various collateral notes, which, being credited upon said principal note, left a balance due thereon of $6,000. In renewal of the balance thus found due upon said note, Smith, on said day, executed to Dodson & Son his note for $6,000,

due January 1, 1905. The note herein sued on, which had been transferred as collateral to secure the payment of the original note for $7,000, was still retainned by Dodson & Son as collateral to secure the payment of the renewal note for $6,000. Some of the other collateral notes were also retained by them, and other notes were transferred to them as collateral for the payment of the renewal note. About that time Dodson & Son borrowed from, or became indebted to, the Ouachita Valley Bank in the sum of $4,346.62, and executed their note to it therefor, and in order to secure same transferred to the bank the said note for $6,000 executed to them by Smith, and also the collateral notes attached thereto, amongst which was the note herein sued on. Later, and in February, 1905, Dodson & Son having made default in the payment of their note to the bank, the collateral notes were sold by the bank under the power granted by Smith to Dodson & Son and their assigns. At this sale the plaintiff became the purchaser of the note herein sued on. The testimony upon the part of the defendant tends to prove that in March, 1904, F. W. Miles paid the amount of the note herein sued on to said Smith for the purpose of satisfying it. The note was not then in the possession of Smith, but was then held by Dodson & Son, who had no knowledge of this payment. In excuse for or explanation of paying the note to Smith without knowing that he was the holder thereof, or for failing to demand the note at the time of its payment, Mr. Miles testified that "it was a slack piece of business, I guess, being the only reason I know."

It is urged by counsel for defendants that the plaintiff purchased the note from the bank in February, 1905, which was after its maturity, and, on that account, was not an innocent purchaser thereof, but took it subject to all defenses that the makers had against the original payee, Smith; and they cite, to sustain this contention, *Nisbett* v. *Brown*, 30 Ark. 590, and *Sorrells* v. *McHenry*, 38 Ark. 127. But under the facts of this case we do not think that the makers can resist the payment of this note by any defense which they might interpose to it in the hands of the original payee, even if it should be held that the plaintiff obtained the note from the bank after its maturity. The note had been transferred by the payee, Smith, to Dodson & Son in August, 1903, long prior to its ma-

turity. If Dodson & Son were at that time holders thereof for value in the due course of business, then any subsequent purchaser thereof from them, even though he obtained it after maturity, would be protected against any defense which the makers might have or be entitled to assert against the original payee. As is said in 1 Daniel on Negotiable Instruments, p. 801: "As soon as the paper comes into the hands of a holder unaffected by any defect, its character as a negotiable security is established; and the power of transferring it to others with the same immunity which attaches in his own hands is incident to his legal right and necessary to sustain the character and value of the instrument and to protect the *bona fide* holder in its enjoyment." And the author further says: "If the holder acquired the paper after maturity from one who became a *bona fide* holder for value and without notice before maturity, he is then protected by the strength of his transferrer's title." 1 Daniel on Negotiable Instruments, p. 776; *Woodmen* v. *Churchill*, 52 Me. 58; *Hogan* v. *Moore*, 48 Ga. 156; See also note to *Y. M. C. A. Gym. Co.* v. *Rockford Nat. Bank*, 46 L. R. A. 784.

At the time the note was transferred to Dodson & Son it was assigned by Smith as collateral security for his debt to them. Dodson & Son were protected as innocent holders of this negotiable note, whether it was transferred to them to secure an indebtedness which was then incurred by Smith to them or a preexisting indebtedness. In the recent case of *Haldiman* v. *Taft*, *ante*, p. 45, cited by this court, the rule is thus stated: "One who takes negotiable paper before maturity in payment or as security for an antecedent debt, and, without notice of any defect, receives it in due course of business, and is a holder for value free from any equities of the maker or indorser." *Brown* v. *Calloway*, 41 Ark. 418; *Winship* v. *Merchants Bank*, 42 Ark. 22; *Tabor* v. *Merchants Nat. Bank*, 48 Ark. 458; *Evans* v. *Speer Hdw. Co.*, 65 Ark. 204; *Exchange Nat. Bank* v. *Coe*, 24 Ark. 387; *White-Wilson-Drew Co.* v. *Egelhoff*, 96 Ark. 105. According to the undisputed evidence, Dodson & Son received the note herein sued on as collateral before its maturity in the due course of business and without any notice of any defense thereto; in fact, at that time there was no defect in or defense to this note.

Thereafter Dodson & Son transferred the note to the bank, which, in February, 1905, transferred it to plaintiff, who was, in fact, a member of the firm of Dodson & Son, and in effect the note was thus returned to the original assignee by the bank. But whether we shall consider the plaintiff as a purchaser of the note from the bank or only as retaking it from the bank after payment of the indebtedness of Dodson & Son, to it and thus obtaining it as collateral to the note for $6,000 given to them by Smith, which he also obtained from the bank, the rights of the plaintiff would be the same, and he would still be protected as an innocent holder of the note herein sued on. The note was constantly, after its assignment by Smith, the payee, in the hands of a holder who had acquired an interest in it, and such holder was alone entitled to the payment of it. After such transfer by the payee, the maker was not authorized to pay same to the payee of the note. He could only make a valid payment to the holder of the note; and if he made a payment to one who at the time was not the holder of it, he did so at his own risk. *Block* v. *Kirtland*, 21 Ark. 393; *Jenkins* v. *Shinn*, 55 Ark. 347; *State Nat. Bank of St. Louis* v. *Hyatt*, 75 Ark. 170; *Bank of Batesville* v. *Maxey*, 76 Ark. 472; *Winer* v. *Bank of Blytheville*, 89 Ark. 448; *Buchanan* v. *Hicks*, 98 Ark. 370.

In March, 1904, the defendants claimed that Miles made payment of the note herein sued on to Smith, the payee. At that time Smith was not the holder or owner of the note. Long prior to that time he had transferred it to Dodson & Son, from whom plaintiff acquired it, and thereby plaintiff acquired all rights and interest which Dodson & Son then had in the note. The payment made by Miles to Smith, therefore, did not result in the payment of the note unless the principal note, which had been executed by Smith to Dodson & Son, has also been paid. This question of fact as to whether or not the principal note for $6,000 executed by Smith to Dodson & Son has been paid, was, by consent of the parties, referred to a master. He took the testimony of all persons who had connection with the transaction, and who had made collections on the collaterals which had been put up to secure that note. He stated an account of these collections, and found that there was still due and unpaid on this principal note the sum of $1,781.89. This finding was approved by the chancellor. The master who

made this finding of fact was appointed by consent of the parties. This court has held that the finding of fact of a consent master is as conclusive as the finding of a jury—that is, if there is any legal evidence to sustain it, the finding must stand. *Greenhaw* v. *Combs*, 74 Ark. 336; *McDonald* v. *Kenney*, 101 Ark. 9. Upon an examination of the evidence relative to this issue, we are of the opinion that there is sufficient legal evidence to warrant this finding of fact made by the master and approved by the chancellor. It follows that the chancellor was right in rendering judgment in favor of plaintiff for the note sued on. The decree is accordingly affirmed.

CHEROKEE CONSTRUCTION COMPANY *v.* PRAIRIE CREEK COAL MINING COMPANY.

Opinion delivered February 26, 1912.

EVIDENCE—PAROL EVIDENCE TO VARY WRITING.—Where parties to a dispute agreed to a complete settlement of all their differences and entered into a written contract to that effect, it was not admissible to prove by parol evidence that only a part of their differences was included therein.

Appeal from Sebastian Circuit Court, Fort Smith District; *Daniel Hon*, Judge; affirmed.

STATEMENT BY THE COURT.

The plaintiff, Cherokee Construction Company, brought this suit against the Prairie Creek Coal Mining Company to recover $781.34, with interest, on account of taxes and insurance alleged to be due to plaintiff by the defendant. There is no controversy between plaintiff and defendant as to the amount of taxes and insurance, but it is the contention of the defendant that it does not owe this to the plaintiff.

On the 19th day of December, 1906, the plaintiff and defendant entered into a contract whereby the defendant leased a coal mine from the plaintiff and agreed to pay certain royalties as rent, and to pay the taxes and insurance on the property. It was the custom of the plaintiff to pay the taxes and insurance and for the defendant to reimburse it. On April 14, 1908,

plaintiff instituted suit in the Federal court to cancel the lease and to have the defendant account to it for unpaid royalties and for certain personal property which plaintiff alleged had been appropriated by the defendant. The grounds upon which the plaintiff sued to cancel the lease was fraud practiced by the defendant in obtaining the lease, and that the defendant had failed to make payments of royalties due, as provided by the lease. Plaintiff prayed that a decree be entered directing the defendant to surrender the lease contract, and for its cancellation, and that an accounting be had of all coal mined by the defendant and for the royalty due.

In June, 1909, the parties met in the city of Philadephia, the home office of the plaintiff company, and there settled their differences. A new lease contract in regard to the coal mined was entered into between the parties, and this contract differed from the first one in the amount of royalty to be paid the plaintiff, and also in certain other minor respects. On the same day the parties also entered into the following agreement:

"This agreement entered into this 26th day of June, A. D. 1909, by and between the Cherokee Construction Company, party of the first part, and the Prairie Creek Coal Mining Company, party of the second part, witnesseth:

"That whereas, the party of the second part has a lease from the party of the first part covering certain coal properties in Sebastian County, Arkansas, dated December 19, 1906.

"And whereas the parties have entered into a new lease covering said property for a period of thirty (30) years from July 1, 1909.

"And whereas the party of the first part has a suit in equity in the United States Circuit Court for the Western District of Arkansas against the party of the second part covering said lease of December 19. 1906.

"And whereas the party of the second part has various claims against the party of the first part for car shortage and other matters.

"And whereas it is desired by the parties hereto to settle all matters and differences between said parties including damages for car shortage, strike allowance and unpaid royalties.

"Now, therefore, in consideration of the premises, the party of the second part agrees, on the execution and delivery of the said new lease, to pay the party of the first part the sum of four thousand three hundred and seventy-five dollars ($4,375) in full settlement for all royalties due by the party of the second part to the party of the first part under said lease of December 19, 1906, and in full settlement of all matters and differences between said parties and upon the payment of said money the party of the first part agrees to dismiss the said suit.

"Witness the hands and corporate seals of the parties hereto in duplicate each and original, the day and year first above written."

After the suit in the Federal court was filed the plaintiff paid the taxes and insurance for which this suit was brought.

Plaintiff introduced testimony to the effect that at the time the suit in the Federal court was compromised, and the matters and differences between the parties adjusted, and the new lease contract executed, nothing was said about the taxes and insurance so paid by the plaintiff, and that it was not intended that they should be embraced in the settlement. The case was submitted to the court sitting as a jury and judgment rendered for the defendant. Plaintiff has appealed.

Ira D. Oglesby, for appellant.

The court erred in its findings and declarations of law, and in refusing to give the findings requested by appellant. There was no final settlement, and did not cover the present cause of action.

Read & McDonough, for appellee.

The instrument was in full settlement of all prior matters and differences. 6 L. R. A. 503; 59 Atl. 77; 9 Cyc. 595; 3 Page on Contracts, § § 1339-40.

HART, J., (after stating the facts). The instrument or lease copied in the statment of facts is general and comprehensive, and expressly purports to be in full settlement of all matters and differences between the parties. It was broad enough to cover the present cause of action. The parties, in order to avoid the evils of litigation, made a compromise and settlement of all matters and differences between them. The

lease or instrument in question was something more than a mere receipt. It was the final embodiment in writing of the agreement between the parties. It is a comprehensive discharge, not only of the differences between the parties, but of all matters between them. The natural meaning of the language used is broad enough to cover everything connected with the first lease. To permit the plaintiff to show by parol proof that it was not so intended would be to contradict or explain away the instrument, which is contrary to the established rule of law as established by the previous decisions of this court. *Cache Valley Lbr. Co.* v. *Culver Lbr. Co.*, 93 Ark. 383; *Cleveland-McLeod Lbr. Co.* v. *McLeod*, 96 Ark. 405; *Kahn* v. *Metz*, 88 Ark. 383.

The judgment will be affirmed.

MIDLAND VALLEY RAILROAD COMPANY *v.* STATE.

Opinion delivered February 26, 1912.

1. RAILROADS—STATUTORY PENALTY—NATURE OF PROCEEDINGS.—A proceeding by the prosecuting attorney under Kirby's Digest, section 6595, to recover the statutory penalty for failure to ring a bell or sound a whistle at a railroad crossing is a civil and not a criminal proceeding. (Page 432.)
2. SAME—RECOVERY OF PENALTY—FEE OF PROSECUTING ATTORNEY.—Where a prosecuting attorney recovers the penalty provided by Kirby's Digest, section 6595, for failure of a railroad company to give either of the required signals at a public crossing, he is entitled to a fee of $5 to be taxed as costs in the case, under section 3488, Kirby's Digest, allowing him a fee of $5 "for each judgment on complaint or information, or otherwise, in the name of the State or of any county." (Page 432.)

Appeal from Sebastian Circuit Court, Greenwood District; *Daniel Hon*, Judge; affirmed with modification.

Ira D. Oglesby, for appellant.

The prosecuting attorney is not entitled to a fee of $10. Kirby's Digest, § § 6595, 3488. If entitled to any fee, it would be $5, under § 3488, Kirby's Digest.

No attorney for appellee.

FRAUENTHAL, J. This is an appeal from a judgment denying appellant's motion to retax the costs in certain suits and to strike therefrom the fee of $10 for the prosecuting attorney which the clerk had taxed against it in each case. Four

suits were instituted against appellant in the name of the State for the benefit of the Greenwood District of Sebastian County, to recover the penalty prescribed by section 6595 of Kirby's Digest for a failure to ring the bell or sound the whistle on its locomotive when approaching road crossings. In each of the cases judgment was rendered against appellant for a recovery of the penalty, and in each case the clerk taxed as part of the costs a fee of $10 for the prosecuting attorney. By section 6595 of Kirby's Digest it is provided: "A bell of at least thirty pounds weight or a steam whistle shall be placed on each locomotive or engine, and shall be rung or whistled at the distance of at least eighty rods from the place where the said road shall cross any other road or street and be kept ringing or whistling until it shall have crossed said road or street, under a penalty of $200 for every neglect, to be paid by the corporation owning the railroad, one-half thereof to go to the informant and the other one-half to the county; and the corporation shall also be liable for all damages which shall be sustained by reason of such neglect." By section 6599 of Kirby's Digest it is provided that all penalties imposed by said statute may be sued for by the prosecuting attorney in the name of the State.

It has been repeatedly held by this court that the violation of the provisions of the above statute is not a criminal offense, and that the proceedings instituted for the recovery of the penalty thereon provided for are civil in their nature and not criminal. A suit for the recovery of this penalty is a civil action, governed by the rules which are applicable to civil procedure. *Railway Company* v. *State*, 55 Ark. 200; *Railway Company* v. *State*, 56 Ark. 166; *Railway Company* v. *State*, 59 Ark. 165; *Kansas City, S. & M. Rd. Co.* v. *State*, 63 Ark. 134. By section 3488 of Kirby's Digest it is provided that the prosecuting attorney shall be allowed a fee of $10, to be taxed as costs, "for each conviction on indictment, presentment or information for misdemeanor or breach of the peace." This necessarily refers to a judgment or conviction had upon a charge for a criminal offense. The judgments rendered in the present suit against appellant were obtained upon complaints in the name of the State, and we are of opinion that the prosecuting attorney is entitled to a fee of $5, to be taxed as costs in each

case, under said section 3488 of Kirby's Digest, which provides that the prosecuting attorney is entitled to a fee of $5 "for each judgment on complaint and information, or otherwise, in the name of the State or of any county." *State* v. *Jackson*, 46 Ark. 137; *Pearce* v. *State*, 55 Ark. 387. The judgment will be modified so as to tax as costs a fee of $5 in behalf of the prosecuting attorney in each of said cases, and, as modified, the judgment is affirmed.

GRIER v. YUTTERMAN.

Opinion delivered February 26, 1912.

1. EJECTMENT—PLEADING—ISSUES.—Where the plaintiff in an ejectment suit to recover a fractional quarter section of land claimed under a deed of certain date, and alleged that at and prior to such conveyance the Arkansas River was the east boundary line of the quarter section, and that since that time the river has receded eastwardly, and thus added to said fractional quarter section a large quantity of permanent land, which is the property of plaintiff by reason of his ownership of said fractional quarter section, and the defendant made no denial concerning the formation of land by accretion, it was unnecessary for plaintiff to prove such allegation. (Page 434.)
2. SAME—PLEADING—GENERAL DENIAL.—A general denial of an allegation in a complaint in ejectment that plaintiff is the owner and entitled to possession of certain lands formed by accretion was not sufficient to put in issue such ownership, as such pleading was a mere conclusion, and not a denial of the facts stated in the complaint. (Page 435.)

Appeal from Sebastian Circuit Court, Fort Smith District; *Daniel Hon*, Judge; reversed.

H. C. Mechem, for appellant.

Where a water line is the boundary of a named track of land, that line remains the boundary, no matter how it shifts. 69 Ark. 34.

A water line does not shift up and down a stream but at right angles to it as it advances or recedes. In no case will an accretion be divided between coterminous owners by lines running up and down a stream. 17 Pick. (Mass.) 41; 13 R. I. 355; 100 N. Y. 437; 92 S. W. (Mo.) 228; 108 N. W. (Ia.) 924; 111 N. W. (Wis.) 570; 127 N. W. (Mich.) 365; 33 Am. Dec. 280, note; 114 Ill. 313; 118 Mo. 403; 53 N. W. (Minn.) 1139;

18 Ia. 549; 127 N. Y. Supp. 949; 1 Black (U. S.) 121. The court adopted the wrong rule. *Malone* v. *Mobbs, post* p. 542.

Winchester & Martin, for appellee.

1. The question of accretion is settled by 73 Ark. 199.

2. Erroneous findings of the court, without evidence to support them will be disregarded in this court—the record in the case is the only guide. 65 Ark. 278; 68 *Id.* 33; 71 *Id.* 427, 436. If the judgment is right, the declarations of the court will not prevent an affirmance. 70 Ark. 507.

McCULLOCH, C. J. Appellant is the owner of a fractional quarter-section of land, according to the original government survey and plat, in Sebastian County, Arkansas, and instituted this action at law against appellee, the owner of an adjoining tract, to recover the posesssion of land alleged to have been formed by gradual accretion since the year 1890 between the boundaries of appellant's original tract on the Arkansas River and the present bank of the river. The case was tried before the court sitting as a jury, and the court found that the land in controversy was formed by accretion, and rendered judgment in favor of appellant, but only to the extent of allowing him sufficient land to fill out the quarter-section as if it had been a full quarter originally, still leaving in the possession of appellee a strip of land between that line and the bank of the river,

The court adopted the wrong rule of allotting accretions (*Malone* v. *Mobbs, post* p. 542), and this is conceded; but it is insisted on behalf of appellee that, upon the whole case, the appellant is not prejudiced by the judgment of the court, for the reason, as alleged, that there was no proof to show that the land was formed by gradual accretion. It is true that appellant introduced no proof to show the manner in which the land was formed, except that some of the witnesses stated "that the river had receded." On examination of the pleadings, however, we find that appellant is correct in his contention that the question of the formation of the land was not made an issue in the case, the answer not having denied the allegations of the complaint on this point. Appellant, setting out the source. of his title, showing among other links in the chain, a deed from Robert S. Gibson to Paul Delorvin, dated November 7, 1890, made the following allegation in his complaint: "That

at and prior to the said conveyance from Robert S. Gibson to Paul Delorvin the Arkansas River was the east boundary line of said fractional northeast quarter, and that since that time said river has gradually receded eastwardly, and thus added to said fractional section a large quantity of permanent land, amounting in all, to more than 100 acres, which is the property of plaintiff by reason of his ownership of said fractional northeast quarter."

This is, we think, a sufficient allegation that the land was formed between the old and the new boundaries by gradual accretion. If not sufficiently definitely and certain, it should have been met by a motion to make it so. Appellee in his answer put in a denial that the Arkasas River was the east boundary line of appellant's land at the time named. There is no denial, or attempt at denial, of the allegation concerning the formation of the lnad by gradual accretion. Therefore it was unnecessary to prove it. There is a general denial of the allegation in the complaint that appellant is the owner and entitled to the immediate possession of the lands alleged to have been formed by accretion, but this was not sufficient to put that question in issue as that was pleading a mere conclusion, and not a denial of the facts stated in the complaint. *Beard* v. *Wilson*, 52 Ark. 290. The denial was not, as contended by counsel for appellee, as broad as the allegation of the complaint. Appellant introduced proof tending to establish the location of the river bank with respect to his original tract of land in the year 1890, which was an issue in the case; but, as before stated, he introduced no proof on the other point, because it was not made an issue. It follows that the judgment of the circuit court was erroneous. The judgment is therefore reversed, and the cause is remanded for a new trial.

MILLSAPS v. NIXON.

Opinion delivered February 26, 1912.

1. FRAUDS, STATUTE OF—GUARANTY.—In determining whether an oral promise is original or collateral, the intention of the parties at the time it was made must be regarded; and in determining such intention the words of the promise, the situation of the parties and all the circumstances attending the transaction should be taken into consideration. (Page 437.)

2. SAME—CONTRACT HELD A GUARANTY WHEN.—Where plaintiff sued appellee and his codefendant on an account for goods which he admits were sold to the latter, claiming that appellee stood good for them, the court properly directed a verdict for appellee. (Page 438.)

3. APPEAL AND ERROR—HARMLESS ERROR.—Where the judgment of the trial court was correct, the cause will be affirmed, though such judgment was based upon an erroneous reason. (Page 439.)

Appeal from Van Buren Circuit Court; *George W. Read*, Judge; affirmed.

STATEMENT BY THE COURT.

The plaintiffs, Millsaps, Hatchett & Co., brought this suit before a justice of the peace against O. P. Nixon and Sam Boone. There were no writtten pleadings in the case. Upon a trial *de novo* in the circuit court, the record shows the following:

"Plaintiffs claimed that defendant Nixon had promised plaintiffs to pay for goods sold and delivered to defendant Boone; that Boone was Nixon's tenant; that Nixon was personally benefited by the sale of the goods to Boone; that the proceeds of Boone's crop passed through the hands of Nixon that the goods were sold to Boone on the faith of the solvency of Nixon; and that Nixon did not deny that he was liable on said account when called upon to pay same.

Defendants deny any promise on Nixon's part to see that said account was paid, and they also relied upon the statute of frauds.

While the opening statement was being made by the attorney for defendant O. P. Nixon, the court on its own motion stopped further proceedings before the jury and directed the stenographer to take down the following statement:

"BY THE COURT: The court finds in this case that the goods sued for by plaintiffs were furnished the defendant, Sam Boone, and charged upon the books of the company to Sam Boone and on the right of the name of Sam Boone, the words 'O. P. Nixon stands;' that this appears as charging the goods to Sam Boone, making him liable for the same, and that the same could not be considered as charging the goods primarily to O. P. Nixon, the defendant O. P. Nixon having denied ever promising to pay for these goods prior to or at the time of the sale, or at any other time, and also pleads the statute of

frauds; that in this case it is immaterial as to whether Nixon promised to pay for the goods or not; that the manner in which the goods were bought was such as to bring the promise of Nixon, if made, within the statute of frauds."

The court then directed a verdict for the defendant Nixon, and the plaintiffs have appealed.

Appellants, pro se.

1. The court erred in holding that the mere charging of plaintiffs' account to defendant, Boone, was conclusive that defendant Nixon's promise to pay was within the statute of frauds. All the facts and circumstances must be taken into account. A mere charge upon the seller's book is not conclusive. 8 Am. & Eng. Law. 679, note 4; 88 Ark. 592; 12 *Id.* 174; 76 *Id.* 293.

2. It is for the jury to say whether the promise is original or collateral. 20 Cyc. 321; 87 Ill. 18; 52 Mo. 180; 83 Ark. 258; 76 *Id.* 292; 88 *Id.* 592; 12 *Id.* 174.

3. It was error to direct a verdict for defendant. 88 Ark. 592; 12 *Id.* 174.

Fraser & Fraser, for appellee Nixon.

1. It is proper to direct a verdict for defendant if, giving the evidence its strongest probative force, plaintiff failed, upon any reasonable view of the evidence, to establish a cause of action. 88 Ark. 510; 71 *Id.* 445; 76 *Id.* 520; 91 *Id.* 337; 93 *Id.* 561; 95 *Id.* 560.

2. Nixon's promise was collateral and within the statute of frauds. 76 Ark. 292; 12 *Id.* 174; 83 *Id.* 258; 20 Cyc. 165, 321; 36 Mich. 61; 39 N. H. 259; 85 Mass. (3 Allen) 540; 127 Ala. 240; 52 Pac. 908; 78 Mo. App. 234; 93 Neb. 943; 54 Atl. 1058; 54 N. Y. S. 221.

HART, J., (after stating the facts). The first claim by counsel for the plaintiffs is that this case is controlled by the principles announced in *Long* v. *McDaniel*, 76 Ark. 292, and *Treakel* v. *Vaughan*, 83 Ark. 258; but we can not agree with their contention. In *Long* v. *McDaniel* there was a promise by the owner of the building to pay for the plumbing and material used in repairing it, if the lessee did not. This was held to be an original promise because of the interest of the owner of the building in the performance of the contract.

In *Treakel* v. *Vaughan, supra,* a promise to an attorney by the purchaser of real estate that he would pay him for preparing the abstracts and statements of title to the property which he contemplated purchasing if the vendor did not, was held to be an original promise, upon which the promisor was liable. This conclusion was also based upon the fact that the vendee had a beneficial interest in the performance of the work by the attorney. Here the primary object of Nixon was not to subserve or promote his own interest. The mere fact that he had an interest in the performance of his tenant's contract can not determine his liabiltiy to be that of an original promisor.

It is the settled law in this State that in determining whether an oral promise is original or collateral, the intention of the parties at the time it was made must be regarded; and in determining such intention the words of the promise, the situation of the parties and all of the circumstances attending the transaction should be taken into consideration. *Kurtz* v. *Adams,* 12 Ark. 174; *Swaboda* v. *Throgmorton-Bruce Co.,* 88 Ark. 592.

Tested by this rule, it is contended by counsel for the plaintiffs that the court erred in directing a verdict for the defendant Nixon; but we can not agree with this contention. All of the facts stated by counsel in their opening statement were considered by the court as proved and were taken as true. The court then found that the promise of Nixon was a collateral agreement to answer for the debt of Boone, and was therefore, within the statute of frauds. The fact stated by counsel and taken by the court as true showed that on the book account of the transaction the charge was made to Boone, and on the right of the name of Sam Boone were the words: "O. P. Nixon stands." It also appears that both Nixon and Boone were sued in this suit.

While, as contended by counsel for plaintiff, these facts are not conclusive against them, because they were susceptible of explanation and might be rebutted by testimony tending to show to whom the credit was originally given, still it will be noted that no explanation was offered by the plaintiff. On the other hand, plaintiffs' counsel stated that the goods were sold to Boone, and that the defendant Nixon had promised to pay for them. This statement, when taken in connection

with the book charge and the fact that the plaintiffs also sued Boone, establishes conclusively that the real substance of the transaction was that the plaintiff did not intend to look solely to Nixon in the first instnace for payment, but rather intended to look to him as surety. It is true the court based its reasons for directing the verdict upon the fact of the book charges, but we are not concerned with the reasoning of the court. A judgment may be correct, although based on mistaken reasons. Upon the facts stated and taken as true, the court was right in directing a verdict, and the judgment must stand, although a wrong reason was given.

Judgment will be affirmed.

CARNEHAN v. PARKER.

Opinion delivered February 26, 1912.

1. BILL OF EXCEPTIONS—WHO SHOULD SIGN.—A bill of exceptions can be signed only by the judge before whom the case was tried and the exceptions made, and one not so signed is a nullity, and can not be noticed. (Page 441.)
2. SAME—OBJECT OF JUDGE'S SIGNATURE.—The object of the statute in requiring the trial judge to sign the bill of exceptions is to furnish a certain test of its accuracy. (Page 441.)
3. SAME—SUFFICIENCY OF SIGNATURE.—Where the special judge who tried a cause refused to sign the bill of exceptions as tendered to him, but wrote a letter offering to do so when certain inaccuracies were corrected, such letter will not be considered a certificate of the accuracy of the bill in other respects nor a signing thereof. (Page 441.)

Appeal from Ashley Circuit Court; *Paul G. Matlock*, Special Judge; affirmed.

STATEMENT BY THE COURT.

Appellee brought suit against appellants upon three promissory notes made by H. O. Scott and indorsed by Carnehan and Chestnutt, appellants, alleging that said Scott was indebted to him and to secure the payment of the indebtedness executed said notes so indorsed for the amount specified; that same are due and unpaid; and attached copies to the complaint.

Appellants answered, admitting that they had indorsed the notes sued on, and alleged that Scott was the cashier of

appellee Parker's Oil & Gin Company, and as such had embezzled the sum of $3,600, and that Parker was threatening and about to prosecute him for embezzlement, and, "in order to compromise said felony, the said Parker agreed with said Scott that if he (the said Scott) would execute the notes in the complaint mentioned, with their indorsement, then said prosecution would be compromised, and said Scott not prosecuted for said felony;" that said notes were executed for that purpose, and that the compounding of the felony and the agreement of Parker not to prosecute Scott was the sole and only consideration for the execution and indorsement of the notes.

Testimony was introduced, and the jury were instructed by the court, and afterwards returned a verdict in favor of appellee for the amount sued for. From this judgment appellants appealed.

Geo. W. Norman, for appellant.

Thomas Compere, for appellee.

There is no bill of exceptions in this case. It was not signed by the presiding judge. 51 Ark. 279; 72 Ark. 320; 37 *Id.* 372; 71 *Id.* 577; 87 *Id.* 543; 42 *Id.* 488; 71 *Id.* 82; 38 *Id.* 217.

KIRBY, J., (after stating the facts). It is contended by appellee that there is no bill of exceptions in the record, and that therefore the judgment must be affirmed. What purports to be a bill of exceptions, with a certificate for the signature of the judge, was included, but the judge who tried the case did not sign said certificate nor the bill of exceptions at all. The purported bill of exceptions recites that it was presented to the Hon. Paul G. Matlock, special judge, who presided in the case, within the time allowed for its preparation for signature, and contains his letter giving his reasons for not signing it, as follows:

"Fordyce, Ark., Sept. 14, 1911.

"Judge G. W. Norman, Hamburg, Ark.

"Dear Judge—Yours containing bill of exceptions to hand. On examination I find myself unable to sign the same because:

"1. Your instructions numbered 1, 2, and 3 were overruled, but no exceptions were saved.

"2. The court gave the instruction quoted as the law in the case, which was accepted as the law in the case by both sides, no exceptions being saved by either side.

"Brother Compere filed an exception or protest of some kind to have your motion for a new trial corrected, but no action was taken; yet I think it should be in the bill of exceptions.

"Amend the transcript to conform, and I will gladly sign it.

"Yours very respectfully,

"Paul G. Matlock."

It is contended by appellant that said letter amounts to an approval of the bill of exceptions, except as to the giving and overruling of instructions and saving of exceptions thereto, and that the affidavits of certain members of the bar who were present at the trial, also included, show the court's rulings and exceptions saved.

It has long been held that a bill of exceptions can only be signed by the judge before whom the case was tried and the exceptions made, and that one not so signed is a nullity and can not be noticed. *Watkins* v. *State*, 37 Ark. 370; *Turner* v. *Collier*, *Ib.* 530; *Cowall* v. *Altchul*, 40 Ark. 172; *Bullock* v. *Neal*, 42 Ark. 278.

The object of the statute in requiring the trial judge to sign the bill of exceptions is to furnish a certain test of its accuracy, and his certificate must be an unqualified statement that the matters and things contained therein are true. *Kansas City, S. & M. Rd. Co.* v. *Oyler*, 51 Ark. 280; *Huff* v. *Citizens Bank*, 99 Ark. 97; *Williams* v. *Griffith*, 101 Ark. 84.

The letter of the special judge who tried the case is not only not a certificate that the matters contained in the bill are true, but a refusal to sign same at all because it did not correctly state the facts relative to the giving and refusing of instructions and saving of exceptions thereto. If appellants did not desire to correct the bill to conform to his view, after being advised by his letter, they should have insisted upon his signing the same in any event. If he had struck out, before signing, any matters that they thought the bill should rightfully contain, he should have so certified, and appellants could then have preserved the excluded matters by affidavits of the bystanders. *Boone* v. *Goodlett*, 71 Ark. 577; *Fordyce* v. *Jackson*, 56 Ark. 601.

Said letter of the trial judge can in no wise be considered a certificate of the accuracy and verity of the bill of exceptions nor a signing thereof. It was not signed by the judge who tried the case, and was a nullity; and if such defect can be cured by the affidavits of bystanders, it was not done in this instance. The bill of exceptions being a nullity, it can not be considered for any purpose by this court, and without such consideration it is not possible to review the case for errors occurring upon the trial, nor as to the sufficiency of the testimony. It follows that the judgment must be affirmed.

RITTER v. THOMPSON.

Opinion delivered February 26, 1912.

1. RAILROADS—CONVEYANCE—"FOR RAILROAD PURPOSES ONLY."—A conveyance of land "for railroad purposes only" entitles the company to the use and possession of the entire tract so long as any part of it is used for such purposes. (Page 445.)
2. FORFEITURE—WHEN WAIVED.—Any conduct on the part of one having the right to declare a forfeiture which is calculated to induce the other party to believe that a forfeiture is not to be insisted upon will be treated as a waiver. Thus, where plaintiff granted a strip of land to a railroad company "for railroad purposes," and thereafter for four or five years acquiesced in the railroad company granting licenses to various persons to use portions of such strip and permitted such licensees to make improvements thereon, and accepted licenses himself for portion of such land, he will be held to have waived any right that he might have had to declare a forfeiture. (Page 446.)

Appeal from Poinsett Chancery Court; *Edward D. Robertson,* Chancellor; affirmed.

STATEMENT BY THE COURT.

Appellant instituted this suit in the Poinsett Chancery Court, and alleged, in substance, that on the 22d day of July, 1898, he was the owner of, and by deed of that date conveyed to the Kansas City, Fort Scott & Memphis Railway Company, a strip of land situated in Marked Tree, Poinsett County, Arkansas, which he described in his complaint. He alleged that the grantee in the deed subsequently conveyed its interest to the St. Louis & San Francisco Railway Company, one of the ap-

pellees; that the deed was without consideration, and was made for the exclusive use by said railway company for railroad purposes; that the appellee Thompson had known at all times the conditions of the deed limiting the grant for railroad purposes only; that, notwithstanding such knowledge, he had secured from his codefendant, the railway company, numerous grants and conveyances under which he claimed to be authorized to construct and occupy upon the railroad right-of-way embraced in the deed certain buildings, a map and plat of which he attached to his complaint. He alleged that Thompson was threatening to erect and occupy other and additional buildings on the right-of-way. He averred that at the time he conveyed the land to appellee railway company he owned and occupied, by tenants, a number of buildings upon the land adjacent to the right-of-way, and that the buildings erected by Thompson and the ones which he was threatening to erect would endanger appellant's buildings and subject them to additional loss and damage by fire. He prayed for a temporary restraining order, and that same, upon final hearing, be made perpetual; that the lease covenants between the appellees be cancelled, and that the appellee railway company be perpetually enjoined from issuing other leases of a similar character.

The appellees answered separately, denying the allegations of the complaint, admitting the execution of the right-of-way deed, but denying the alleged legal effect of the limitation contained therein; admitting the execution of the various licenses by appellee railway company to appellee Thompson and others, but alleging that same were with appellant's approval and consent.

The answers set up estoppel, laches and waiver in that for many years the appellee railway company had granted licenses to many persons, including appellant; that many buildings of great value had been erected under said license, and with the knowledge and encouragement of appellant.

On the 10th of December, 1888, C. W. Frazier and wife by deed of that date, conveyed to the Kansas City, Fort Scott & Memphis Railway Company the land in controversy, and after the conclusion of the description of the land in the deed is the following: "For the use of said company as railroad line purely, excluding all other uses and purposes of said land, and

not to conflict with any sale heretofore made of land included in said limits."

Appellant claims title to the land in controversy from the same source of title, and also from an alleged tax title. After acquiring his deeds he conveyed to the Kansas City, Fort Scott & Memphis Railway Company the land in question, on July 22, 1898. The deed recites that, for and in consideration of the sum of one dollar paid by the railway company, "they (he and his wife) do hereby grant, sell and quitclaim unto said railway company, and unto its successors and assigns forever, the lands (describing them) for railroad purposes only.

Appellee railway company succeeded to whatever rights the Kansas City, Fort Scott & Memphis Railway Company had in the land in controversy, and the appellant succeeded to whatever rights the original grantor, Frazier, had.

Going & Brickerhoff, for appellant.

1. The deeds conveyed an easement only. 10 Atl. Rep. 522; 5 N. W. 484; 53 *Id.* 807; 64 *Id.* 572; 61 *Id.* 342; 14 S. W. 538; 24 *Id.* 234; 1 N. E. 420; 46 N. W. 240; 35 N. W. 862; 74 N. E. 812; 53 So. 22; 111 Pac. 578.

2. The right of re-entry was assignable. Wash. on Easements (4 ed.) 292. It is not limited to the grantor's heirs but extends to his assignees. 38 Pac. 1126. Any interest in real estate may be conveyed. 14 Ark. 489; 3 Metc. 163; 44 Ark. 153; 91 *Id.* 407.

3. Appellant is not estopped; the essentials of an estopped are wanting. Bigelow on Estoppel, 484. A party must be actually deceived or misled to his injury by the conduct of another, and the latter must intend that his conduct should be acted upon. 56 Ark. 217; 54 *Id.* 465; 58 *Id.* 20; 53 *Id.* 545; 51 *Id.* 52; 109 Mass. 53. Something more than mere silence or inactivity is needed. 39 Ark. 131. The mere failure to institute proceedings is not sufficient. 63 Ark. 300.

4. Appellant has not waived his rights. See authorities on estoppel. The case of 77 Ark. 168 is not in point. The facts are too dissimilar.

Lamb & Caraway, for appellees.

1. The words "for railroad purposes" in a fee simple deed do not arise to the dignity of a condition subsequent,

entitling appellant to re-enter for condition broken; they mean nothing more than for the use and benefit of the railway company. 46 N. J. L. 536; 17 Pac. 580; 13 *Id.* 890; 7 Allen (Mass.) 125; 20 Ind. 398; 12 N. E. 607; 98 N. Y. 665; 37 N. E. 650; 23 Pac. 98; 46 N. J. L. 536; 40 N. E. 587; 68 Ky. 330; 28 N. E. 442; 39 Conn. 54; 27 N. E. 162; 34 Mich. 163, 169-70; 77 Ark. 168; 38 Ga. 202; 223 Pac. 98-100; 43 N. E. 1076.

2. Conditions which operate as a forfeiture are not favored in law. The language is most strongly construed against the grantor. 50 Ark. 141; 38 Wis. 165; 23 Pac. 93; 27 N. E. 162; 40 *Id.* 587; 77 Ark. 168.

3. Appellant is barred. 59 Ark. 405; 77 *Id.* 168; 51 *Id.* 491; 135 S. W. 905; 73 N. E. 74; 106 N. W. 456; 114 *Id.* 151; 43 N. E. 1076; 96 Pac. 284; 55 Mo. 392; 99 C. C. A. 286.

WOOD, J., (after stating the facts). 1. The appellant contends that the language used in the deed to appellee railway company, "for railroad purposes only," had the effect of limiting the use of all the lands mentioned in the deed to the purposes of an easement only; that the deeds conveyed an easement in the land, and that when the railway company ceased to use the entire tract conveyed or any part thereof for the purposes of its easement the appellant, being the owner of the land in fee, had the right to re-enter and take possession of the part that was not used as an easement.

In our construction of the deed it becomes unnecessary to determine whether or not its effect was to convey the fee-simple title to the railway company. The deed, in our opinion, conveyed to the railway company the entire strip of land mentioned therein; and, so long as any part of the same was being used for railroad purposes, appellant could not enter and take possession of any part that might not be used for the easement or right-of-way. See *Morrell* v. *Wabash, St. Louis & Pacific Ry. Co.*, 96 Mo. 174. The deed was entire; and, so long as the railway company was using any portion of the strip of land conveyed for its right-of-way or easement, it had the right to the use and possession of all of it.

It will be noted that the clause in the deed is not "for right-of-way," but "*for railroad purposes.*"

The uncontradicted evidence shows that the grants under

which appellee Thompson and others occupied portions of the land in controversy were mere licensees. They were only tenants at will; they had no leases for any definite time. There is nothing in these licenses to show that the appellee railway company had abandoned any portion of its premises for railroad purposes. The witness testified that "under these licenses the parties simply held at our will. The licenses is revocable at sixty days' notice, and that precaution is taken to avoid any contention that they might constitute an abandonment. Persons go on there with the understanding that with sixty days' notice they must move their improvements and get off, and for the further reason that no railroad company can determine its needs at any definite time in the future at any particular point."

Conceding, without deciding, that the clause "for railroad purposes only" is in the nature of a condition subsequent giving the grantor the right to re-enter upon condition broken, we are of the opinion that the testimony does not show such breach of the condition as to entitle appellant to re-enter or to have the relief sought in this case.

2. On the same day that the appellant executed his deed to the Kansas City, Fort Scott & Memphis Railway Company, he entered into an agreement whereby, in consideration of a pass over the company's road, he undertook to sign court bonds for the company and also "to act as agent to watch and warn trespassers from encroaching on its right-of-way at Marked Tree."

In 1903, according to appellant's testimony, the appellee Thompson, erected a hardware and furniture store about fifty feet from the track of the railway company. Appellant personally notified Thompson of his claim; told him he had deeded the land to the railway company for railroad purposes only, and protested that appellee Thompson had no right to build on it. Thompson replied that he had a lease from the company, and was amply protected, and he kept on building on the right-of-way over appellant's protest and objection until appellant had him enjoined. The agent of the appellee company, having its land matters in charge at Marked Tree, as early as the latter part of October, 1905, went to Marked Tree and saw the appellant. The agent on this first visit had consider-

able conversation with the appellant. Appellant called his attention to the provisions in the deed, and out of that conversation grew the special clause that went into appellant's licenses, which is as follows: "It is understood and agreed that in all instances where the title of the railway company is such that the property shall revert to the grantor in case of nonuse for railroad purposes this lease is made subject thereto, and by reason of its acceptance by the licensee he shall forfeit no right nor shall his interest be in any wise prejudiced."

Other licenses were being granted to various parties at that time. The proof shows that on October 18, 1905, licenses were granted to the appellee Thompson for the erection of five buildings, one on the main line and four on the Marked Tree spur. There had been many buildings erected on the land in controversy under licenses from the railway company. Various parties besides the appellee Thompson had erected structures. Some of the parties to whom licenses were granted testified that appellant objected to their building on the land, calling attention to the fact that he had conveyed the property to the railway company for railroad purposes only.

Parties had made known to the land agent of the railway company these objections. When the land agent went to Marked Tree in October, 1905, he spent the entire day going over the ground. Appellant went with him across the street to where he had some property, and where some other party had property that appellant wished to show him. Appellant was interested in the property that he showed him. The land agent talked with appellant generally. The agent stated that, while appellant called his attention to the provisions in the deed, he made no objection whatever at that time to the parties building on the right-of-way. Parties wishing licenses had informed the land agent that appellant was protesting, and the agent had gone to Marked Tree to look over the ground and see about it.

Witnesses on behalf of appellant testified that, while there had been buildings of different kinds and by various parties upon the land in controversy, it had been generally known that appellant had always objected. One of the witnesses stated that "Ritter" (appellant) had always refused permission to

build or construct buildings on the railroad right-of-way, and that the common talk had been that, in order to put up a building on the railroad right-of-way, the parties would have to catch Mr. Ritter out of town." This witness testified that "the bank, the Miller building Dr. Taylor's brick building, Thompson's saloon, hardware store, pressing shop, restaruant, barber shop, and butcher shop were within one hundred feet of the center of the track, on the south side of the Marked Tree spur; that the Grossman brick, and servant's house, and coal house are on the land in controversy; that all of these buildings, except the Miller building, had been erected within the last nine years, the last one being the Thompson & Powell lumber shed, being built about a year ago."

He further testified that the "Fisher & Smith building, Marked Tree Gazette building, the Doctor Mitchum building were within 100 feet of the main line; also the Phoenix Hotel, the coal chute, handle factory, and the Marked Tree Lumber Company offices and fences were within fifty feet of the box factory spur."

The appellant himself testified "that since the deed was executed to the company he had intended to impress every one of his rights and of his intention to enforce them, and of his objection to the erection of buildings on the right-of-way in violation of the provisions of his deed. He said that he believed that he had the right to restrain the execution of the leases all the time. At the time of the institution of the present suit appellee Thompson was threatening to construct a one-story frame building on the right-of-way which would increase appellant's insurance rate, and so he brought the suit." He said that "the reason for his making objections to the erection of buildings by appellee Thompson was that he (Thompson) was simply putting up fire traps which had a number of times canceled his insurance on the brick which appellant had erected, and was making the rate very high."

One of the witnesses for the appellant testified that the buildings erected by Thompson on the right-of-way were of a character to increase the danger of a general conflagration in the town and would increase the insurance rates on appellant's property. But this witness stated that the danger was no greater at the time of the institution of this suit than it was at

the time the buildings were first constructed; and the witness added: "I don't know why he didn't prevent by lawful means, if he had the right to so do, the construction of these buildings at that time."

The attorney for the appellee railway company stated that as early as 1902 appellant, as the agent of the railway company at Marked Tree to look after the matter of encroachments upon its right-of-way, assisted him in getting two parties off of the right-of-way in a certain place and in locating them in another. These parties were setting up some claim adverse to the railway company, and appellant assisted the attorney in disposing of the matter. The attorney testified that from then until November, 1909, when appellant wrote him with reference to Thompson, he had no intimation that anything was being done in connection with the right-of-way at Marked Tree displeasing to appellant. The attorney sent the letter of appellant to their land agent at St. Louis. This agent testified that he didn't recall any protest from appellant from 1902 to 1911, except the Thompson one.

The appellee, Thompson, testified that, with the exception of himself, he had never heard of appellant making any objection to any buildings on the right-of-way other than that of two other parties. He said that the reason that he didn't refrain from erecting other buildings after 1904, when the appellant first objected, was that many other swere building, including appellant himself. His testimony was to the effect that appellant made no objection to the buildings on the right-of-way on the ground of insurance, and that the buildings which appellant himself had erected on the right-of-way had increased the rate of insurance.

The above testimony shows that on the very day appellant conveyed the land in question to the railway company he accepted a position as their agent to "watch and warn trespassers from encroaching on its right-of-way at Marked Tree." Appellant, of course, was aware, at the time he executed the deed containing the clause "for railroad purposes only," of whatever rights that clause gave him. If appellant's contention were correct, that the clause "for railroad purposes only" gave him the right to repossess himself of the land when the appellee railway company granted licenses to other parties to

occupy portions of the land granted, and to restrain the railway company from granting such licenses, then appellant had the right, at least as early as the year 1904, to prevent the railway company from granting to appellee Thompson a license to erect buildings on the land, as well as to prevent Thompson from consummating any such purpose. Notwithstanding this fact, appellant, during all these years, stood by and permitted appellee railway company not only to issue licenses to appellee Thompson but to others; permitted them to erect structures of various kinds on the premises, and not until the bringing of this suit November 16, 1909, did he take any steps towards availing himself of the right which he now contends the clause under consideration gave him. Appellant knew, during all these years, of the construction which the appellees were placing upon the deed which he had executed to the railway company; he knew that the railway company was claiming the right to grant these licenses, and that appellee Thompson was claiming the right to accept them.

Appellant, during all these years, was accepting similar licenses from the railway company, and was exercising the rights which these licenses granted him. We think his conduct, under the circumstances, shows clearly that he acquiesced in the construction which the appellees placed upon his deed, and that he is estopped from setting up the construction for which he now contends.

After appellant had granted the land mentioned in his deed to the railway company "for railroad purposes only," he accepted many licenses from the railway company and erected and occupied buildings under those licenses, thus clearly recognizing the right of the railway company to grant licenses to him for the purpose indicated. But by his present contention he assumes the anomalous and rather inconsistent attitude of saying that, while the appellee railway company had the right under his deed to grant licenses to him, it has no right to grant precisely similar licenses to other persons.

When appellant first had knowledge that the appellee railway company was granting these licenses, and that the grantees were operating under them, necessarily spending considerable sums of money in making their improvements, it was the duty of appellant to have given notice, not only to the

persons holding such grants from the railway company, but also to the railway company, that he intended to assert his rights if the parties so notified ignored such notice and proceeded to assert rights which they claimed to have under the licenses. It was the further duty of appellant, within a reasonable time, to have taken steps to enjoin them. This he did not do.

Appellant's conduct, as disclosed by the facts above set forth, was well calculated to induce the appellees, especially the appellee railway company, to believe that appellant would not insist upon the right to repossess himself of the land or to prevent appellee railway company from using it in the manner indicated. If he ever had any such rights as he now claims under the clause "for railroad purposes only" contained in his deed, the clear preponderance of the evidence shows that by his conduct he has waived any right to assert them.

In *Kampman* v. *Kampman*, 98 Ark. 328, the court, speaking through the Chief Justice, said:

"Conditions which operate as a forfeiture of rights under a deed are not favored in the law, and slight circumstances will often be seized upon to prevent such forfeitures. Any conduct on the part of the party having the right to declare a forfeiture which is calculated to induce the other party to believe that the forfeiture is not to be insisted upon will be treated as a waiver." See also, *Reichardt* v. *St. Louis & S. F. Ry. Co.*, 51 Ark. 491; *Little Rock Granite Co.* v. *Shall*, 59 Ark. 405; *Bain* v. *Parker*, 77 Ark. 168.

The decree is correct, and it is affirmed.

Mr. Justice HART concurs on the ground of estoppel.

FOX v. STATE.

Opinion delivered February 26, 1912.

1. FALSE PRETENSES—SUFFICIENCY OF INDICTMENT.—An indictment for false pretenses is sufficient which alleges that accused, with intent to defraud, falsely represented to the prosecuting witness that a third person was indebted to accused as evidenced by a note and mortgage, that by means of such representation the prosecuting witness was induced to become surety for accused, and that the representation was false and known to accused to be false. (Page 453.)

2. FALSE PRETENSE—WHAT CONSTITUTES.—It is not sufficient to constitute an offense within the meaning of the statute to obtain goods or things of value with the intent to defraud, but it must be accomplished by a false pretense; and, although the pretense used was believed by defendant to be false, he will not be guilty if it turns out not to be false. (Page 458.)

3. BILLS AND NOTES—BONA FIDE HOLDER.—Where a promissory note was indorsed before maturity to one as collateral security for his indorsement of a similar note, he became a *bona fide* holder, and entitled to the protection of an indorsee. (Page 459.)

4. SAME—BONA FIDE HOLDER OF ACCOMMODATION PAPER.—The *bona fide* holder for value of accommodation paper, taken in regular course of business, may enforce it against the maker, although he knew when he received it that it was accomodation paper. (Page 460.)

Appeal from Polk Circuit Court; *Jefferson T. Cowling*, Judge; reversed.

Wright Prickett and *Elmer J. Lundy*, for appellant.

1. The indictment is insufficient, and the demurrer should have been sustained. Kirby's Digest, § § 1689, 2230; 163 Ind. 628; 70 N. E. 600; 58 Ark. 43; 94 *Id.* 242; 70 *Id.* 30; 42 *Id.* 131; 38 *Id.* 523; 118 Ind. 491. The language is not sufficiently definite. Cases *supra;* 95 N. E. 768.

2. The evidence is not sufficient, and there was error in the admission of evidence. The indictment charges two offenses. 70 Ark. 30; 37 *Id.* 443; 80 *Id.* 94; 60 *Id.* 141; 80 *Id.* 285.

3. Intent is the gist of the crime of false pretense. Hughes, Inst. to Juries, § 830; Underhill on Cr. Ev. § § 436-7; 4 El. on Ev. § 2975; 111 Ala. 40; 20 So. 629; 5 Enc. of Ev. 744. There must be an intent to defraud *at the time.* 12 Am. & Eng. Enc. Law (2 ed.), 824-5; 61 Ark. 157; 54 Ark. 481; 141 Mass. 423; 20 Tex. App. 592; 54 Am. Rep. 530.

4. The peremptory instruction for defendant should have been given. The alleged false representations of defendant are entirely unconnected with any act of defendant. 61 Ark. 157-188. See further 54 Ark. 481; 141 Mass. 423; 20 Tex. App. 592; 54 Am. Rep. 530.

Hal L. Norwood, Attorney General, and *Wm. H. Rector,* Assistant for appellee.

1. The indictment is good under § 1689, Kirby's Digest.

2. The evidence supports the verdict—it is ample.

3. The instructions do not ignore the *intent.* The word "fraudulently" conveys the idea that the representations must have been made with intent to cheat and defraud. 95 Ark. 60, and cases cited; 48 Ga. 192; 98 Ind. 335; 7 Fed. 622; 38 N. W. 509; 74 Ia. 602; 66 Ga. 715; 84 Mo. 666; 71 Pac. 860; 66 Kan. 447; 77 Ala. 357; 54 Am. Rep. 60.

KIRBY, J. Appellant was convicted in the Polk Circuit Court upon an indictment, charging him with obtaining the signature of one T. M. Dover by certain false pretenses.

The sufficiency of the indictment was challenged by general demurrer, in which it was also alleged that it was bad for duplicity.

The indictment is long and involved, and is by no means a model of good pleading, but it alleges in apt terms that defendant "unlawfully, falsely, fraudulently, feloniously and designedly, with the intention then and there to cheat and defraud, did falsely represent and pretend to him, the said T. M. Dover, that one H. G. Gray was justly indebted to the said J. M. Fox, etc., and the said J. M. Fox did then and there falsely, fraudulently, feloniously, and designedly, with intention then and there to cheat and defraud, * * * represent and pretend to him, the said T. M. Dover, that the said mortgage and note aforesaid represented and was security for a good and valid and *bona fide* indebtedness, * * * and by means of which said false and fraudulent representations and pretenses as aforesaid the said J. M. Fox then and there induced the said T. M. Dover to become surety for the said J. M. Fox for the sum of one hundred dollars, * * * and the said T. M. Dover, then and there relying upon the representations and pretenses as aforesaid, did then and there become surety for the said J. M. Fox on a certain promissory note for the sum of one hundred dollars, * * * the said representations and pretenses as aforesaid were false and were known to be false by the said J. M. Fox at the time they were made, and by means of which said false and fraudulent representations and pretenses as aforesaid he, the said J. M. Fox, did then and there unlawfully, falsely, fraudulently, feloniously and designedly, with intention then and there to cheat and to defraud, * * * did obtain from him, the said T. M. Dover, his signature and indorsement as surety * * *."

We think it is sufficiently alleged that the pretenses made were false and known to be so by appellant, and were made with the fraudulent intent to deceive the injured party, Dover, and secure his signature and indorsement to the note, upon which the money was procured from the bank, and which said Dover afterwards had to pay, and that he was induced thereby to make such signature and indorsement.

It is true that there are many other allegations in the indictment relative to procuring the money from Dover and the Bank of Hatfield, but we do not think the indictment is open to the charge of duplicity, and any other allegations not necessary to the charge of obtaining the signature of Dover by the false pretenses alleged were properly treated as surplusage by the lower court in overruling the demurrer.

The evidence tends to show that one Bud Gray, desiring to secure the payment of his indebtedness to T. M. Dover, and to secure a certain and further sum of money from him, executed to him the following note:

"$300.00. Hatfield, Ark., June 15, 1910.

"Ninety days after date, I promise to pay to J. M. Fox, or order, at Hatfield, Arkansas, three hundred ($300.00) dollars for value received, negotiable and payable without defalcation or discount, with interest from date at the rate of 10 per cent. per annum; this being the mortgage note from H. G. Gray to J. M. Fox conveying the following described property towit: one bay horse mule ten years old, fifteen hands high, named Pete, one bay mare mule nine years old, fifteen hands high, named Kit, one new three-inch Springfield wagon, on which property a vendor's lien is retained to secure payment of this note. (Signed) "H. G. Gray."

Due 15th September.

No.....P. O. Hatfield.

Indorsed on back:

June 18-10.

"I hereby authorize T. M. Dover as my agent to foreclose the accompanying mortgage to this note at maturity.

(Signed) "J. M. Fox."

—securing same by a mortgage upon certain property described in the note, which was duly executed by the said Gray upon the same date that the said Dover went first to the Bank of Hat-

field, and presented the mortgage and note, and asked if he could procure a loan upon it, telling the cashier at the time about the value of the property. The cashier suggested that he go and see Dover and get his indorsement on the note, and he would lend him the hundred dollars he desired. He then went to Dover to procure his signature to the note, and the transaction was stated by Dover as follows:

"I am acquainted with H. G. Gray, commonly called Bud Gray, and J. M. Fox. About June 15, 1910, I lived in Hatfield, and was engaged in the mercantile business. In June I signed a note as security with J. M. Fox, as principal, to the Bank of Hatfield for $100, as follows:

"'$100.00. Hatfield, Ark. June 18, 1910.

"'Ninety days after date, for value recived, I, we, or either of us, promise to pay to the order of the Bank of Hatfield, Hatfield, Ark., one hundred dollars, negotiable and payable, without defalcation at the Bank of Hatfield, Hatfield, Arkansas, with interest at the rate of ten per cent. per annum from maturity until paid.

"'The drawers and indorsers severally waive presentment for payment, protest and notice of protest and nonpayment of this note.

"'Due 8-18-10 No. 12. J. M. Fox.

"Post Office Hatfield."

Indorsed on back: T. M. Dover.

"10-17-10. Paid by T. M. Dover, $100.85.

"E. R. Bryant, Cashier."

"He came to my place on the 18th of June with the note and mortgage, just he and I together, and he showed me the note and mortgage, and said he wanted to turn them over to me to secure me to go on his note at the Bank of Hatfield for $100. I asked him if Bud Gray owed him $300, and he said he did. He went on and told me what he owed it for, but I don't remember what that was. I first doubted him owing it at the start until he told me what he owed it for, and then I finally decided that it would be good to secure the $100, if that was true what he told me. I told him if he owed him that, and it was correct, that would be enough to secure me to go on his note for one hundred dollars. He turned the note right over there in the warehouse, and wrote on the back of it (referring to the indorse-

ment on the back of the note due him by H. G. Gray, dated Hatfield, Arkansas, June 15, 1910). This is his writing on the back of the note which he wrote on the 18th day of June.

"Q. Now this was done after you told him you would sign the note with him if he would make you his agent and turn over the note to you? A. Yes, sir. This is the mortgage that accompanied the note for three hundred dollars. The purpose of making me his agent and turning over the note to me was so I could foreclose the note at maturity and make my money out of the property in question, in case he didn't pay the note at the bank. He didn't pay the note, and I had to pay it. I notified him the note was due, and I got no answer from him, and in a few days he left the country. After he left, I kept on his trail all through Oklahoma. When I found out that he had left the State, I notified Gray that his mortgage was due, and to come down and make some arrangement, or I would have to foreclose it, and he came down to Hatfield, and asked if it had not been paid, and I told him it had not.

"The mortgage is the usual form of chattel mortgage. It recites the consideration due of three hundred dollars, and for other money, goods, wares, etc., furnished by the party of the second part to the party of the first part, up to the foreclosure of the instrument signed on the 15th day of June, by H. G. Gray and acknowledged by him before W. J. Davis, a justice of the peace.

"I called on Gray for the property, and he refused to give it up, and I replevied it under the mortgage. He took a change of venue to Mena, and I found out that it was not his property and withdrew the suit. I found out it belonged to his wife. I didn't pursue the case any further, but commenced to try to catch Fox in Oklahoma. Fox gave H. G. Gray a check or half the money he realized on the note I indorsed on the same day I signed it. We didn't have a trial on the replevin suit for this property. I found out it was not his property, and withdrew the suit. We took Bud Gray's affidavit, which was filed in the court. I don't remember whether Fox told me that part of what Gray owed him for was for $135 worth of timber or not. He told me $300 worth of stuff that Gray owed him, but I don't remember what he told me the $300 worth of stuff was. I don't know how much Gray owed Fox. All If

know was what Fox told me when he brought that note and mortgage. I thought all the time it was Bud Gray's team, and never heard it called any one else's until the suit came up."

Bud Gray testified as follows: "I remember executing the note and mortgage for $300 to J. M. Fox in June of last year, about the 15th of June, I believe, that I let him have it. This matter was talked over at Hatfield. I was not due Fox $300 when I signed the note and mortgage. I think I was due him about $30. I knew at the time I executed this mortgage and note I was only due him that amount. I don't think the matter was discussed between me and him as to how much I owed him. I sold Fox some timber, and was to get $125. He paid me about all of it in money, groceries and goods. It might have been as much as $177.75 that he paid me. He got part of the timber, and sold the remainder to Spencer. Spencer didn't get this lumber, and there was some that he didn't cut, and I agreed to pay Fox back. We never had any permanent settlement, and I owed him at the time the mortgage was made, about $28 or $30."

The defendant testified: "Gray came to my mill and wanted me to go to Mena and help him raise some money to buy some cattle, was about the first part of the transaction. I told him I was busy, and could not go. He came back two or three days after that, and wanted me to go to Mena with him and help raise some money. He said about fifty or seventy-five dollars would do him, and that he would give me a mortgage on his mules and wagon to secure me for that much. I told him if he would give me a mortgage on his mules and wagon, and make me a note sufficient to cover what he already owed me and the amount he wanted to borrow, I would make an effort to get it for him. We didn't come to Mena. I told him we would go over to Hatfield. We went over to Hatfield, and he executed the note and mortgage before Squire Davis. I went to see Mr. Dover, and told him what I wanted, and asked him if this security would be good for that amount. He said he didn't believe the mules were worth $300, but said the mules and wagon were. I then asked him if he would be willing to go on my note for $100 and take the note and mortgage as security. A note was then executed by me and Dover on the 18th day of June. Bud Gray owed me at the time this note

and mortgage was made $177.75. I bought timber to the amount of $125.00 from him. He also got groceries and other goods at the commissary. The account was $177.75. I sold the timber to Spencer Lumber Company, but Spencer didn't get the timber, and after they didn't I had a conversation with Bud Gray, and asked him why he had stopped Spencer Lumber Company from cutting the timber. He said he was on a deal to sell the place, and they would not buy the place if the timber was cut off, and he believed it would damage the place more than he was getting out of it to have it cut, and he decided, if it was agreeable to me, to pay me back what I had paid on the timber, and I told him if he did that it would be all right. This was about the 10th of June, and the mortgage was executed about ten days later. This was part of the consideration for the note and mortgage, and the balance was that I was to furnish him more commissaries and get the money at the bank, with the understanding that his account would not exceed $300, including the money which I got at the bank for him. I just carried the note and mortgage to Dover and asked him if he thought it was good security for a loan of $100, and after he looked it over he said it was. I have had lots of business dealings with Dover, more than a thousand dollars a year, during the two years previous, and have owed him as much as a thousand dollars at one time. I did not tell Dover Bud Gray owed me $300. I told him Bud Gray owed me for timber and a lot of other goods I had furnished him."

There was other testimony introduced as to the defendants going to Oklahoma; his arrest there for the alleged offense and refusal to return, and his second arrest and return to the State. Also a good deal of testimony in explanation of his actions after the payment of the indorsed note by Dover, which might have tended to show that he had no interest in the collection of the $300 note, beyond the amount for which it was pledged as collateral.

It is insisted that the verdict is not sustained by the evidence, and that the court should have given the peremptory instruction for appellant, and we have concluded the contention is correct.

It has already been held by our court that it is not sufficient to constitute an offense within the meaning of the statute to

obtain goods or things of value with the intent to defraud, but that it must be accomplished by a false pretense; and, although the pretense used was believed by the person to be false, it will not be sufficient to constitute the offense, if it turns out in fact not to be so. *State* v. *Asher*, 50 Ark. 430.

So here, by the terms of said section 1689, Kirby's Digest, with the violation of which appellant is charged, the pretense or writing designedly used to obtain the signature to the instrument must be false. The false pretense charged herein is Fox's representation that the $300 note of Gray, payable to his order, secured by the mortgage upon the personal property, represented a *bona fide* indebtedness. Unless such representation was false, it furnishes no foundation for a prosecution against Fox. The testimony shows that Gray voluntarily executed the note sued on, as presented to Dover for security, and the mortgage accompanying it. That he did not, at any time before payment thereof was demanded of him by Dover, after he had been required to pay the $100 note he indorsed for Fox to the bank upon the faith of the security thereof, contend that it did not represent a valid debt, and after said demand only contended that he did not owe more than $25 or $30 at the time of its execution. Fox stated that Gray was indebted to him at the time the same was executed for $177.75, on account for groceries, and for a balance on a hundred and twenty-five dollar timber claim; and that he agreed to let him have fifty dollars more in order to procure Gray's note and security for the amount already owing him, and the money and supplies thereafter to be furnished, up to the amount of the note taken, $300.

There was no testimony tending to show that Fox knew, at the time he procured the signature and indorsement of Dover to the $100 note negotiated at the bank, that the property mortgaged by Gray to secure the $300 note was not owned by him, if such is the fact, or that he made any representation to Dover that the property included in the mortgage belonged to the mortgagor, nor is he charged with having made such representation.

The note, if it be regarded as accommodation paper merely, was, by its terms, negotiable, and, having been delivered before maturity to Dover, as collateral security for his indorsement

of the $100 note, it was a valid obligation, binding upon the maker, and constituted Dover a *bona fide* holder thereof, and entitled him to the protection of an indorsee. *Brown* v. *Callaway*, 41 Ark. 418; *Winship* v. *Merchants Bank*, 42 Ark. 22.

"The *bona fide* holder for value of accommodation paper, taken in the regular course of business, may enforce it against the maker, although he knew when he received it that it was accommodation paper." *Evans* v. *Speer Hardware Co.*, 65 Ark. 204. See, also, *Exchange National Bank* v. *Coe*, 94 Ark. 387; Daniel on Negotiable Instruments, § 793a, vol. 1.

It follows that, since the $300 note of Gray was and is as binding and valid in the hands of Dover against its maker as if it had in fact represented a *bona fide* indebtedness for that amount, it could not constitute a false pretense within the meaning of the statute, the representation made being in effect true; and no offense was committed by the representation made and securing the signature of Dover to the $100 note on account of it.

Dover got the security he thought he was getting, so far as the representation made by appellant at the time of securing his signature that the $300 note represented a *bona fide* indebtedness was concerned; and, while the evidence indicates that the security has proved worthless on account of Gray not being the owner of the property he mortgaged to secure the $300 note, it was not brought about by any false representations alleged to have been made in the securing of the signature.

The judgment is reversed, and the cause dismissed.

GRAYSONIA-NASHVILLE LUMBER COMPANY *v.* CARROLL.

Opinion delivered February 19. 1912.

1. RAILROADS—DUTY TO TRESPASSER ON TRACK.—The only duty a railroad company owes to a trespasser walking on its track is not to wilfully or negligently injure him after discovering his peril. (Page 465.)
2. TRIAL—PROVINCE OF JURY—CREDIBILITY OF WITNESSES.—The credibility of a witness is for the jury. (Page 468.)
3. SAME—PROVINCE OF JURY.—The jury, in weighing the testimony, have a right to draw all reasonable deductions from it warranted by their common knowledge of and experience with human affairs. (Page 468.)
4. NEGLIGENCE AFTER DISCOVERING PERIL—EVIDENCE—Where there was evidence tending to prove that one of defendant's brakemen

discovered the peril of the decedent in time by the exercise of due care to have avoided injuring her, a finding that defendant was negligent will be upheld. (Page 468.)

5. TRIAL—OFFER OF EVIDENCE—COMPETENCY.—Where two causes of action were united in one action, evidence offered by defendant which was admissible in one cause but not in the other was properly excluded where the defendant did not ask that the testimony be limited to the cause to which it was applicable. (Page 469.)

6. DEATH—DAMAGES—INSTRUCTION.—An instruction in an action for negligently killing plaintiff's interstate, to the effect that the jury should assess the damages at whatever sum they found from the testimony to be a fair and reasonable compensation, and that they should be guided by their judgment and discretion as jurors, is not susceptible of being construed to mean that they were to be guided by their judgment, instead of by the testimony, in assessing the damages. (Page 469.)

7. INSTRUCTIONS—SUFFICIENCY OF OBJECTION.—An objection to the language of an instruction ahould be specific. (Page 469.)

8. HUSBAND AND WIFE—RIGHT OF HUSBAND TO RECOVER FOR WIFE'S DEATH.—Where a husband, by the wrongful killing of his wife, is deprived of her services and companionship, he suffers a legal injury, and is entitled to compensation therefor. (Page 469.)

9. INSTRUCTIONS—REPETITION.—It was not error to refuse instructions already covered by the court's charge. (Page 470.)

Appeal from Howard Circuit Court; *Jefferson T. Cowling*, Judge; affirmed.

STATEMENT BY THE COURT.

This is an action by J. T. Carroll as administrator and J. T. Carroll in his individual capacity against the Graysonia-Nashville Lumber Company for the alleged negligent killing of his wife by one of the railroad trains of said company.

The defendant is a corporation organized under the laws of the State of Arkansas, and owns and operates a lumber plant and several railroad tracks in connection therewith near the town of Graysonia, in Clark County, Arkansas. The defendant owns and operates log trains over a certain track into and through one of its camps about two and a half miles out of said town of Graysonia. The camp and settlement was used by the defendant for the habitation of the employees and their families. There were erected along the side of said railroad track about forty houses up and down the track for a distance of about 150 yards. Mrs. Mollie Carroll and her husband, J. T. Carroll, the plaintiff, occupied one of these houses; her daugh-

ter, Mrs. Jack Rawlins, occupied another. The house of Mrs. Rawlins was fifty-eight feet on a straight line from the railroad track, and on a path along from it to the tracks it was eighty-four feet. Some time in the early part of January, 1911, Mrs. Carroll was at her daughter's house. About 2 or 3 o'clock in the afternoon she left there and started home. She was at the time an able-bodied woman about forty-five years old and in possession of all her faculties. She followed the track above referred to to the railroad, and then walked along the railroad track a distance of 112 feet to a trestle where she was overtaken by one of the defendant's trains and struck by it. She died on the next day, about 11 o'clock, from the effects of the injuries received.

James Shope, a boy between thirteen and fourteen years of age, saw the accident, and testified in regard to it substantially as follows: "I was down there near the scene of the accident and heard the train whistle at the branch over across the hill, and thought I would wait and see the train come in. I could not see it until it came over the hill about a quarter of a mile away. Before the train came in sight, Mrs. Carroll came on to the railroad track, and, without looking backward, walked along down the railroad track towards me. She was walking along at a moderate gait and never did look back until just before the train struck her. The train consisted of a Shay engine and three flat cars and was running backwards, the flat cars being in front of the engine. I saw a brakeman on the first flat car in front of the engine. He looked down the track at Mrs. Carroll and then off from her. He then was looking out towards a house, and I did not see him look back towards her again. Mrs. Carroll never did look back until just about the moment that the train struck her. She had walked about twenty-five yards down the track near to a small trestle before she was struck by the train. The train struck her before she got on the trestle. The train got about fifty or sixty feet beyond her before it stopped. The trainmen never did slack the speed of the train after Mrs. Carroll came on the track, nor did they warn her by blowing the whistle or giving her any other signal that the train was approaching."

James H. Gary testified: "I was unloading coal at the chute about seventy-five yards or eighty yards from where Mrs.

Carroll was struck. Mrs. Carroll was between me and the train. I saw a brakeman sitting on some groceries on a flat car next to the tender. I never paid any attention to what direction the brakeman was looking. When I again looked, the brakeman was walking down the flat car towards its front. Mrs. Carroll was walking along down the track,, and had her back to the train, and the brakeman had his face towards her the way she was going. There was no obstruction between him and her, and I heard no bell nor whistle. I did not see the train when it struck her, and don't know whether it slowed up or not. The next I saw was after the woman was struck by the train when I saw the brakeman running down to where she was."

J. T. Carroll (plaintiff) testified; The deceased and I had been married for twenty-six years, and had seven children. She was a good wife, and our relations were pleasant. She was about forty-five years of age when she was killed. The train could have been stopped within six or eight feet."

J. A. Baker testified: "When the train passed my house on the day of the accident, I was sitting on the front porch facing in the direction in which the train was going. After the train had passed my house, something like 150 or 175 feet, I saw Mrs. Carroll. I was looking out over the cars when I saw her. I judge she was something like six feet from the cars. The next I saw of her was a glimpse of her under the car wheels. The engineer was looking down the track towards Mrs. Carroll at the time I saw her. I do not know whether the train struck her before she got on the trestle or not."

W. A. McClellan, testified: "I was the engineer on the log train that struck Mrs. Carroll. I did not see Mrs. Carroll on the track that day. I could not have seen her because of the tank of coal. The engine was running backwards pushing the tender and three flat cars in front of it. I had no knowledge of her presence on the track until the train had passed over her in the culvert there. The engine was making considerable noise as it propelled the train."

The brakeman was not present and did not testify at the trial, but the defendant introduced testimony tending to show that he had left the employ of the company before the suit was commenced, and that after a diligent search they were not able to ascertain his whereabouts.

The culvert or trestle near or on which the defendant was injured was about ten feet long and averaged two and one-half feet in height. There was one place on it between the ties about eighteen inches wide, and it was in this hole that Mrs. Carroll was found after the accident. The witnesses say she was found on her knees with her head sticking out above the trestle. There was a bruised place on each knee, and one on her hip. The skin was not broken on the hip, and did not bleed any. The skin was broken on her right eye, and bled a great deal. Two of her teeth were nearly knocked out. There were no bruises of any character on the front or back parts of her body, and her left arm was cut in two twice, and three fingers mashed on her right hand. She remained conscious for most of the time after she was injured until her death. Other facts will be referred to in the opinion.

The jury returned a verdict as follows: "We, the jury, find for the plaintiff as administrator in the sum of $1,000, and for the plaintiff individually in the sum of $2,000." From the judgment rendered the defendant has duly prosecuted an appeal.

D. B. Sain and *W. C. Rodgers*, for appellant.

1. The court should have directed a verdict for the defendant, because it entirely fails to show that any of the employees in charge of the train discovered the deceased on the track in time to have avoided the injury. 94 Ark. 529; 86 Ark. 306; 54 Ark. 431; 56 Ark. 457; 61 Ark. 549.

2. Deceased was a trespasser upon the track and grossly negligent. There was nothing to indicate that she was not a woman of mature years, in possession of all her faculties and at liberty to leave the track at any time she so willed. The train was running very slowly, and there was no reason apparent why the ordinary presumption that she would leave the track in time to save herself should not prevail. 113 Ind. 234; 47 Ark. 497, 502; 108 N. C. 616; 105 N. C. 140; 113 N. C. 558; 112 Ind. 59; 113 Ind. 196; 55 Kan. 536; 42 Neb. 905.

3. Deceased, in undertaking to use the railroad track as a footway, is presumed to have done so with full knowledge of its dangers and to have assumed the risk. 45 Kan. 503; 97 Ark. 438; 52 La. Ann. 1894; 114 La. Ann. 825.

4. The court erred in excluding testimony detailing the statement of the deceased made shortly after she was injured. It was competent as showing knowledge on her part of the proximity of the train, and as being a declaration against interest. 8 Ark. 510, 571; 9 Ark. 389; 31 Ark. 252; 37 Ark. 580; 58 Ark. 277; 59 Ark. 503; 60 Ark. 26; 74 Ark. 104; 78 Ark. 381; 54 Ark. 336; 77 Ark. 258; *Id.* 567; *Id.* 599; *Id.* 109; 79 Ark. 225; 84 Ark. 373; 87 Ark. 471; 90 Ark. 104. Her declaration would have been competent evidence against her, had she lived to bring suit. It was equally competent against her administrator suing in behalf of her estate.

G. C. Hardin, W. P. Feazel and *Mehaffy, Reid & Mehaffy,* for appellee.

1. The evidence shows that deceased was unconscious of the near approach of the train and of her peril, and that the train operative saw her in time to have given warning and stopped the train without injuring her. 91 Ark. 18; 89 Ark. 499; 2 Thompson on Negligence, § 1741; 74 Ark. 407.

2. The statement attributed to the deceased was not admissible. It was not competent or relevant because it throws no light upon the question at issue, *i. e.*, whether or not deceased's peril was discovered in time to have avoided the injury by the exercise of ordinary care, and whether or not such care was exercised.

3. There is no error in the instruction on the measure of damages. The amount of damages for pain and suffering must necessarily be left largely to the sound judgment and discretion of the jury. 89 Ark. 541; 48 Ark. 407.

4. Instruction 5 is proper. Kirby's Digest, § § 6288, 6290; 26 Am. Rep. 396.

HART, J., (after stating the facts). It is conceded that Mrs. Carroll was a trespasser, and it is the settled rule in this State that the only duty a railroad company owes a trespasser walking on its track is not to wilfully or negligently injure him after discovering his peril. *St. Louis, I. M. & S. Ry. Co.* v. *Evans,* 74 Ark. 407; *St. Louis S. W. Ry. Co.* v. *Jackson,* 91 Ark. 18; *Adams* v. *St. Louis, I. M. & S. Ry. Co.,* 83 Ark. 300; *Chicago, R. I. & P. Ry. Co.* v. *Bunch,* 82 Ark. 522.

In the application of this rule it is earnestly insisted by

learned counsel for the defendant that the verdict of the jury was not warranted by the evidence. It must be conceded that the case is a very close one, but we are unable to agree with the contention of counsel for the defendant. Under the principles of law announced in the cases cited above when the defendant was charged with the knowledge of the presence of Mrs. Carroll on its track, it immediately owed her the duty of exercising ordinary care and diligence to prevent injury to her. The boy, James Shope, testified that the brakeman on the flat car in front of the engine looked at Mrs. Carroll and then looked away to the side of the track. He says there were no obstructions and nothing to prevent the brakeman from seeing her when he looked at her. Another witness testified that he saw the brakeman walking towards the front of the flat car and looking towards Mrs. Carroll. The boy Shope says that he thinks that Mrs. Carroll walked on the track for a distance of twenty-five yards before she was struck. The railroad company had the distance measured from the trestle to a point on the track opposite Mrs. Rawlins' house, and the distance is 112 feet. They also had the distance measured from the trestle to the top of the hill where the train could first be seen, and this was 547 feet. All the witnesses say there was nothing to obstruct the view of the brakeman. From this testimony the jury was warranted in finding that the brakeman did see Mrs. Carroll walking down the track a short distance ahead of the train with her back toward it. From this time on the defendant owed Mrs. Carroll the duty of exercising ordinary care and diligence to prevent injury to her. It is the theory of the defendant company that Mrs. Carroll knew that the train was approaching her, and believed that she could cross the trestle and step over to the side of the track before the train reached her, and that she slipped and fell in the trestle while crossing it. The testimony shows that the train was making a good deal of noise as it approached, and that all of the other persons heard it coming, and that Mrs. Carroll was an able-bodied woman and in possession of all her faculties. From this testimony, under the instructions given by the court, the jury might have found for the defendant. But the testimony also shows that Mrs. Carroll never looked back from the time she stepped on the railroad track until

just before the train struck her. The boy, Shope, says that she was struck just before she reached the trestle, and was dragged by the train across the trestle into the hole where she was found. The trestle was about ten feet long and averaged about two and a half feet in height. The hole in which she was found was about two feet from the end of the trestle farthest from her, when she was struck. Hence, if the testimony of the boy Shope is true, she was struck by the train just before she reached the trestle, and was dragged nearly across it, a distance of about eight feet. The evidence shows that the train was a rolling down grade about 2½ per cent. and that the steam was shut off. The engineer says that the speed of the train was about four miles per hour. Under these circumstances, the jury were warranted in believing that Mrs. Carroll was walking along the track, and, through inattention, absent-mindedness, or some other mental abstraction, was unaware of the near approacah of the train, and that, had the servants of the defendant blown the whistle when they saw that she did not look back, they might have attracted her attention, and she could have stepped to one side and avoided injury to herself. Again, the testimony shows that the train could have been stopped in the space of six or eight feet; that it could have been stopped either by the engineer or by the brakeman turning off the angle-cock in the front of the engine. Had the brakeman kept a lookout after he discovered her presence on the track, he would have seen that she did not get off when the train was getting nearer to her. He could then have warned her of her danger, or, failing in that, could have stopped the train in time to have avoided injuring her. At least, these are the deductions that the jury were warranted in drawing from all the facts and circumstances adduced in the evidence. The boy, Shope, said that she did not look around until just before she was struck by the train. Another witness said that he saw her standing six or eight feet in front of the train facing it the moment before she was struck. The jury might have inferred from this testimony that she was wholly unaware of the approach of the train until just before it struck her, and that when she heard it she turned around in a startled manner facing it. As we have already seen, the jury was warranted in finding that the brakeman saw Mrs. Carroll a short distance in front of the

train walking along the track with her back to it. From the evidence they were also warranted in believing that, had he looked again, he would have seen that she was unaware of the proximity of the train and the impending danger to her.

The testimony of the boy Shope is criticised because he says that the distance from the top of the hill where the train first came in sight to the scene of the accident was about a quarter of a mile when in fact it was only 547 feet, as shown by actual measurement. This was a mere inaccuracy of the judgment of the boy, and did not tend strongly to show that his testimony as to the thing he saw was not true. In any event his credibility was a question for the jury, and they had the right to believe such parts of his testimony as they believed to be true and reject that which appeared to be untrue.

The jury had a right to weigh the testimony and draw all reasonable deductions from it warranted by their common knowledge and experience with human affairs, and, when all the facts and circumstances adduced in evidence are considered together, we think the jury were warranted in finding that the servants of the defendant, after discovering the peril of Mrs. Carroll, did not use ordinary care and diligence to prevent injury to her.

The following questions and answers were asked a witness in the absence of the jury, and were excluded by the court from the jury:

"Q. Detail all that Mrs. Carroll told you about how this accident happened? A. I asked her how it happened, and she says: 'I was over to my daughter's and started home, and she told me to wait until that train passed, and I told her I thought I could get home before the train got there, and started, and the accident happened.' "

It is insisted by counsel for the defendant that this was error, but this court has decided adversely to this contention in the case of *Murphy* v. *St. Louis, I. M. & S. Ry. Co.*, 92 Ark. p. 159, where it held: "In a suit by an administrator of a deceased person to recover damages on account of his killing for the benefit of his mother or his next of kin, it was error to permit the defendant to offer in evidence a written statement made by deceased during his lifetime to the effect that his

mother was dead, as there was no privity between the next of kin and the deceased."

Hence it will be seen that the excluded testimony was not competent in the individual case of the husband against the defendant. The testimony not being competent in the case of the husband against the defendant, the defendant should have asked that the testimony be limited to the case in which it was admissible, and, not having done so, he is not now in an attitude to complain. *Murphy* v. *St. Louis, I. M. & S. Ry. Co.*, 92 Ark. 159; *St. Louis, I. M. & S. Ry. Co.* v. *Raines*, 90 Ark. 482.

The court gave the following instruction: "If you find for the plaintiff as administrator, you will assess the damages at whatever sum you may find from the testimony to be a fair and reasonable compensation for the pain and suffering, if any, that was endured by plaintiff's intestate on account of the injury complained of. And in this you are to be guided by your sound judgment and discretion as jurors." It is insisted that the court erred in giving this instruction because by it the jury were directed to be guided by their judgment and discretion, instead of the testimony, in assessing the damages. We do not think the instruction is susceptible of this construction. The jury were plainly told that they were to assess the damages at whatever sum they found from the testimony to be a fair and reasonable compensation, and the court meant to tell them that they were to be governed by their judgment in determining from the testimony what the amount of damages ought to be. If counsel for the defendant thought the instruction open to the objection they now make, they should then by a specific request have asked the court to change the language, and, not having done so, they can not now complain.

It is next insisted that the court erred in giving instruction No. 5 as follows: "If you find for the plaintiff in his own individual right, you will in a separate finding assess his damages in whatever sum you may believe from the evidence he has been damaged by reason of the loss of the service and companionship he would have received from her, but for the injury complained of in his action." In support of their contention they rely on the case of *Helena Gas Co.* v. *Rogers*, 98 Ark. 413. That case is not authority for their contention. There the court held that the wife could not recover for her own

mental distress on account of her husband's pain and suffering. The husband is entitled to the society and companionship of his wife; and where he is deprived of her services and society or companionship, he has suffered a legal injury, and is entitled to compensation therefor. This is so by the express terms of our statute. Section 6288, Kirby's Digest.

Counsel for defendant complain that the court erred in not giving certain instructions asked by it on the subject of discovered peril. The court had already in its instructions given at the request of the defendant fully and completely covered this phase of the case, and it was not necessary to repeat the instructions.

The judgment will be affirmed.

JOBE v. URQUHART.

Opinion delivered January 15, 1912.

1. MANDAMUS—CONTROL OVER EXECUTIVE DEPARTMENT.—Under the rule that an officer of the executive branch of the government can not be controlled by the courts in the exercise and performance of his official acts involving his judgment and discretion, the Auditor will not be compelled by mandamus to audit and pay a claim alleged to be due by the State for the purchase of the State farm unless the act of May 31, 1909, providing for its payment, divested the Auditor of any discretion. (Page 476.)
2. COURTS—CONTROL OVER EXECUTIVE DEPARTMENT.—When the courts are called on to review and control the official acts of an officer in a co-ordinate branch of the government, they should proceed with caution, and the right of the courts to exercise such power should be clear. (Page 477.)
3. STATES—LIABILITY FOR INTEREST.—A State can not be held to pay interest on her debts unless bound by an act of the Legislature or by an authorized contract of her executive officers. (Page 478.)
4. SAME—CLAIMS AGAINST—INTEREST.—Under act June 24, 1897, authorizing the Board of Penitentiary Commissioners to purchase or lease a farm upon which to work State convicts and to pay for same out of the labor or product of the convicts, the board was not expressly or impliedly authorized to contract to pay interest on deferred payments of the price of a farm so purchased. (Page 479.)
5. SAME—CLAIMS AGAINST—POWER OF LEGISLATURE.—The Legislature had the power to bind the State to pay interest upon a claim which according to the pre-existing law bore no interest. (Page 479.)

6. EVIDENCE—JUDICIAL NOTICE.—In construing the legality of acts of the Legislature, the courts take judicial knowledge of the recitals and records of the journals of both branches of the Legislature. (Page 481.)
7. STATE—APPROPRIATION TO PRE-EXISTING CLAIM.—Under Const. 1874, art. 5, section 26, providing that no money shall be appropriated or paid on any claim, the subject-matter of which shall not have been provided for by pre-existing laws, unless allowed by bill passed by two-thirds of the members elected to each branch of the General Assembly, an act in effect authorizing the Auditor to calculate the amount of interest due by the State to a claimant, not passed by two-thirds of the members of both branches of the Legislature, is void. (Page 481.)
8. PLEADING—DEMURRER—OPERATION AND EFFECT.—A demurrer to an answer admits the allegations thereof to be true. (Page 482.)
9. STATES—SUIT AGAINST AUDITOR—EFFECT.—A suit will not lie against an Auditor to compel him to allow a claim alleged to be due under a contract for the purchase of a State farm for convicts made with the Board of Penitentiary Commissioners; the suit being really one against the State. (Page 482.)
10. SAME—DUTY OF AUDITOR TO AUDIT CLAIM.—Under Acts 1909, p. 1218, providing that it should be the duty of the Auditor of State to calculate the amount due for the purchase of the State convict farm according to the terms of the contract made by the Board of Penitentiary Commissioners and to draw his warrant for such sum, the courts will not compel the Auditor to draw his warrant for the purchase money of such farm, where the vendor is unable to convey a portion of the lands which he agreed to convey. (Page 483.)
11. SAME—VALIDITY OF CONTRACTS WITH STATE.—Ordinarily, all contracts with the State must rest upon some legislative enactment or be specially provided for by law, and in the absence thereof, no agent or officer of the State has the power to bind the State. (Page 484.)
12. CONSTITUTIONAL LAW—JUDICIAL POWER OVER EXECUTIVE OFFICERS.—Under Kirby's Digest, sections 3401, 3408, making it the duty of the Auditor "to audit, adjust and settle all claims against the State payable out of the treasury," and providing that if any person be dissatisfied with the Auditor's decision the matter may be referred to the General Assembly, *held* that where the Auditor refuses to allow a claim, the claimant should apply for redress to the Legislature, and not to the courts. (Page 484.)
13. STATES—SUIT AGAINST.—In mandamus against the State Auditor to compel him to audit a claim for interest for the purchase of a State farm, the plaintiff will not be heard to contend that if the agreement to pay interest is void the State is not entitled to hold the land without paying the interest, as such contention would, if sustained, make the State in effect a party defendant to the suit. (Page 485.)

Appeal from Pulaski Circuit Court, Second Division; *F. Guy Fulk*, Judge; reversed.

STATEMENT BY THE COURT.

This controversy grows out of the purchase of a convict farm by the Board of Commissioners of the State Penitentiary, who were acting under the authority vested in them by act of the General Assembly approved June 24, 1897.

The Governor, Attorney General, Secretary of State, Auditor, and the Commissioner of Mines, Manufactures and Agriculture, constituted said board.

By the terms of said act the board was given plenary powers to negotiate for the purchase or lease of a farm for the employment of the State convicts, but in case of a purchase of such farm the act limited the powers of said board in the manner of paying for same by providing that payments should be made out of the net profits arising from the operation of said farm.

Acting under this statute, the said board on the 21st day of November, 1902, entered under a contract with Edmond Urquhart, now deceased, for the purchase of two places known as the Cummins place and Maple Grove place, for which the said board agreed on the part of the State to pay $140,000, of which sum $30,000 was paid in cash, and on the unpaid balance the said board agreed to pay 6 per cent. interest per annum.

The record before us is silent as to the developments and progress under this contract until the Legislature passed an act at the session of 1909 appropriating $65,000, or so much thereof as might be necessary, to pay the estate of E. Urquhart for these farms.

Section 1 of said act reads as follows: "That $65,000, or so much thereof as may be necessary, be paid to the estate of E. Urquhart, deceased, for the purchase of convict farm according to the contract price and purchase between E. Urquhart and penitentiary commissioners purchasing farm, same to be paid out of the penitentiary fund."

Section 2 reads as follows: "It shall be the duty of the Auditor of State to calculate the amount owing to the estate of E. Urquhart according to the terms of the contract between the Board of Penitntiary Commissioners and E. Urquhart and to draw his warrant on the State Treasurer for such sum, and it shall be the duty of the State Treasurer to pay the

same out of the amount herein appropriated." (Acts 1909, p. 1218.)

On the 20th day of April, 1911, the appellee filed in the Pulaski Circuit Court, Second Division, her petition for a writ of mandamus to be direstedagainst John R. Jobe, as Auditor of the State of Arkansas, alleging in substance that the Board of Penitentiary Commissioners, acting under the authority vested in said board by the act approved June 4, 1897, had bought the farms of her testator, E. Urquhart. That, for the purpose of paying off the balance of indebtedness owing to said estate for the purchase price of said farm bought of her testator, the Legislature by an act approved May 31, 1909, appropriated the sum of sixty-five thousand ($65,000) dollars, or so much thereof as might be necessary, to be paid to the estate of petitioner's testator for the purchase of said farm according to the contract price and purchase thereof, and the same to be paid out of the penitentiary fund. That by the terms of said act it was made the duty of said defendant as Auditor to make the calculation of the amount of balance due and draw his warrant on the State Treasurer for such sum. That, in compliance with act, said defendant did make said calculation according to the terms of the contract, and found there was due said estate the sum of $10,617.05, and the petitioner demanded that the said Auditor draw his warrant for same, which was refused; with a prayer for a writ of mandamus to be issued against said Auditor commanding him to draw his warrant on the Treasurer of the State for the amount owing to said estate."

On the 11th day of May, 1911, the defendant appeared through the Attorney General of the State, and filed a demurrer to the petition as follows:

"1. Because the facts, matters and things contained in the petition do not, in law, entitle the petitioner to a writ of mandamus or to the relief therein sought."

"2. Because the court has no jurisdiction to try this cause, as it is, in effect, a suit against the State of Arkansas."

On the same day the defendant below filed his answer or response to said petition in which he admitted the allegation of the petition to be true, but based his refusal to issue his warrant as requested, because the act of the General As-

sembly of the State of Arkansas approved June 4, 1897, which authorized the Board of Penitentiary Commissioners to purchse the farm, "did not authorize said board to contract for the payment of interest. That said board entered into a contract for the purchase of the farm at an agreed price of one hundred and forty thousand dollars, of which amount thirty thousand dollars was to be paid in cash, and said board contracted to pay interest at the rate of 6 per cent. per annum upon the balance to be paid. That in so doing the board exceeded its authority, and the provisions of the contract for the payment of interest was illegal and invalid, and did not bind the State to its performance. That the State of Arkansas had already paid to the plaintiff the full sum of $140,000, the contract price of the farm, and $26,888.62 as interest. That the balance claimed to be due is for interest, and that the act approved May 31, 1909, in so far as it appropriated any amount for the payment of interest, is unconstitutional and void."

"As a further defense, the defendant set up a partial failure of consideration of the contract of purchase, in this: The contract called for all of section 17, township 7, range 5, when in fact the plaintiff offered or tendered a deed to only a part of said section 17, which was over 280 acres of land less than the amount called for in the contract of sale.

"As a further defense, the defendant set up the fact that he was acting under the directions of the penitentiary board, and that on May 15, 1911, that body adopted a resolution which in effect directed the defendant not to issue a warrant for any further amount to the plaintiff." A copy of this resolution was made "Exhibit B" to the complaint.

It was manifest from the record before us that there is a clerical or typographical mistake relative to the date of the passage of this resolution. The copy of the resolution found in the transcript bears no date; but the answer filed on the 11th day of May, 1911, states that the resolution was passed on the 15th day of May, 1911, whcih is six days after the answer was filed.

From the history of the litigation, we conclude this reslution was passed by the board before these proceedings were begun; at least, it is safe to assume the resolution was passed before the answer was filed. This resolution reads as follows:

"Whereas, the written contract entered into between the Penitentiary Board and the Urquhart estate in November, 1902, calling for certain sections and fractional sections of land aggregating more than 7,000 acres, for which the penitentiary board agreed to pay the sum of $140,000; and,

"Whereas, the penitentiary board has, up to this time, paid said $140,000, principal, and in addition thereto has paid $26,888.62 in interest; and,

"Whereas, the Urquhart estate now claims a balance of more that $10,000 interest; and

"Whereas, said Urquhart estate does now tender the Penitentiary Board a deed containing more than 280 acres of land less than that which was specifically set out and described in the written contract with the Penitentiary Board of 1902; and,

"Whereas, the penitentiary board did not have authority to pay interest or to contract for the payment of interest in the purchase of the State farm; and, therefore be it

"Resolved, that the penitentiary board does hereby accept the deed heretofore tendered to the State for the said land, provided the Urquhart estate refund to the penitentiary, board the amount of money erroneously paid in interest to the Urquhart estate in excess of the contract price of $140,000, which is $26,888.62."

The plaintiff filed her demurrer to the response or answer of defendant as follows:

"Petitioner demurs to the response of the defendant herein on the ground that the facts therein stated do not constitute a defense to the relief prayed by the petitioner."

The records then as made up were submitted to the court, namely: the petition for the mandamus, the demurrer to same interposed by the defendant, the response or answer of the defendant, and the demurrer interposed by the plaintiff to this answer. Thereupon, the court overruled the defendant's demurrer to the plaintiff's petition, and sustained the plaintiff's demurrer to the defendant's answer.

The defendant saved proper exceptions, and elected to stand on his answer and response, declined to plead further; and thereupon the court entered a judgment in accordance

with the prayer of the plaintiff's petition, from which judgment this appeal is taken and prosecuted.

Hal L. Norwood, Attorney General and *W. H. Rector,* Assistant, for appellant.

Appellant's demurrer to appellee's petition should have been sustained. *Jobe* v. *Urquhart,* 98 Ark. 525. The State is not liable for interest in any case unless by express agreement she makes herself liable. 10 Ark. 61; 136 U. S. 211; 15 Tex. 72; 70 Ark. 578.

Moore, Smith & Moore, for appellee.

The State in all its contracts and dealings with individuals must be adjudged and must abide by the rules which govern in determining the rights of private citizens contracting with each other. 71 N. Y. 527. If the board was not authorized to contract for interest, its action in so doing was ratified by the subsequent action of the Legislature. 112 N. Y. 146; 67 Ark. 236. The Auditor can not question the right of the Legislature to make the appropriation. 23 N. E. 690; 54 Pac. 36; 31 Pac. 614; 91 Cal. 469; 27 Pac. 1089; 92 Cal. 605; 28 Pac. 673; 28 N. E. 358; 118 Ind. 502; 21 N. E. 39; 4 W. Va. 11; 19 Barb. 81; 25 L. R. A. 774; 38 N. J. L. 403; 79 N. Y. 189; 14 Ark. 687.

L. A. BYRNE, Special Judge, (after stating the facts). The records of this case present one main central question, to which all other questions to be considered naturally gravitate.

That question is, whether the act of 1909, by its terms, divested the Auditor of the State of all those official functions, judgments and discretions vested in him by the Constitution and laws ordinarily incident to his official duties, in respect to the subject-matter under consideration, and thereby left this official to perform merely a bare act of ministerial duty? Or did the Legislature by the passage of said act intend that the Auditor should retain his prerogatives and powers as the special chosen arbiter of the State to make the estimate and settlement with the appellee as to the amount legally due the estate of Urquhart, and, if necessary, issue his warrant for payment of same?

After a consideration of the whole of the subject-matter as presented by this record, if it should manifestly appear

that in the passage of the act under consideration it was the legislative intent that this State official should be stripped of all official discretion and judgment relative to the State's rights on all questions which had arisen or might arise in making a settlement under the contract of purchase of the land in question, irrespective of the justice or merits of such demands, then this action is proper, and should be upheld.

If, upon the other hand, by a fair construction of said act, it can be reasonably inferred that the Legislature did not intend to take the whole matter from the Auditor and deprive him of the exercise of the functions of his office in making his estimates of the amount legally due under the contract of purchase, and he might refuse to issue his warrant for a sum demanded by the appellee which he believed was clearly illegal and unfair to the State, then under the law the Auditor would be justified in refusing the warrant demanded by the appellee, and this suit must fail, by reason of the well recognized rule of law, adhered to by both the Federal and State courts, that an officer of the executive branch of the government can not be controlled by the courts in the exercise and performance of his official acts, involving his judgment and discretion. When the courts are called on to review and control the official acts of an officer in a co-ordinate branch of the government, they should proceed with extreme caution and circumspection, and the right of the courts to exercise this power should be manifestly clear and free from doubt and not made to depend upon uncertainties or the doubtful construction of a statute.

Having premised the consideration of this case, we will now pass to a discussion of the questions involved.

It is contended by the defendant, and made a part of his answer, that the Board of Commissioners of the Penitentiary, when they made and entered into the contract of purchase of the land in question, exceeded their authority in obligating the State to pay interest on the deferred payments, and for this reason the contract to pay six per cent. interest on the balance of the purchase money is to that extent void.

The act approved June 4, 1897, authorized said board to purchase or lease a farm or farms upon which to work State convicts, and to pay for the same out of the labor or product of any of the convicts, provided the board shall only apply

such proceeds for the payment of said farm as are not actually needed for the support and maintenance of the State convict farm. The act further provides that said board is impowered to perform any and all acts necessary in the purchase or lease and equipping of said farm.

The contract for the purchase of the land in controversy was not made until November, 1902, whereby, according to the pleadings, the board bound the State to pay $140,000 for the land, $30,000 of which was paid in cash, and $110,000 to be paid at some future date or dates; but as to the maturity of this balance the records before us do not disclose. However, the records show there was a stipulation in the contract for the State to pay six per cent. interest per annum on this balance.

The appellee concedes in her brief that the State is not bound by the unauthorized acts of its agents in agreeing to pay interest, but contends that "this authority may be expressed or implied."

The court can not subscribe to this doctrine to its fullest extent. The General Assembly is the sole and supreme legislative power of the State, and that body has the inherent right to legislate upon all questions affecting the general welfare of her people, except in so far as it is restrained or limited by the Constitution.

The General Assembly has plenary powers to contract for and create interest-bearing indebtedness on the part of the State, except to issue interest-bearing treasury warrants or scrip. But the authority to bind the State to the payment of interest on her indebtedness must be plainly expressed and not implied.

If the State could be bound to pay interest by implication, then, to extend a rule of this kind to its legitimate results, every debt of the State could or should draw interest.

It is well settled both upon principle and authority that a State can not be held to the payment of interest on her debts unless bound by an act of the Legislature or by a lawful contract of her executive officers made within the scope of their duly constituted authority. *State* v. *Thompson*, 10 Ark. 61; *United States* v. *North Carolina*, 136 U. S. 211; *United States* v. *Sherman*, 98 U. S. 565; *Angarica* v. *Bayard*, 127 U. S. 251; *Wes*

tern & Atl. Rd. Co. v. *State,* 14 L. R. A. 438; *Sawyer* v. *Colgan,* 102 Cal. 283; *Molineux* v. *State,* 109 Cal. 378; *Auditorial Board* v. *Arles,* 15 Tex. 72.

The act under discussion is silent on the question of interest. In no part of the act is any mention made of interest or any authority given to the board to contract for the payment of interest.

It is a matter of universal custom with legislatures, which has grown into a common knowledge in the business world, that in the passage of laws authorizing the State, or any subdivision thereof, or any district therein, to make and issue any interest-bearing indebtedness, the act authorizing the same, without exception, fixes the rate, or the maximum rate, of interest the indebtedness should bear.

It therefore follows that, if the Legislature really intended to confer authority on the board in the purchase of the farm to bind the State to pay interest on the unmatured part of the debt, then in the exercise of ordinary wisdom they would have had the forethought to fix the rate, or the maximum rate, the same should bear, and not turn the board loose with unlimited discretion in contracting for interest. Adopting the construction of the act, as the appellee would have us make, the board might have fixed any rate of interest emergency, as it seemed to them, might suggest, and fixed a much higher rate. This circumstance presents to us a very potential reason for believing that the Legislature did not intend that the board should bind the State by contract to pay interest on the deferred payments. It is therefore the opinion of this court that that part of said contract of purchase, in so far as it attempted to bind the State to the payment of interest, is invalid and not binding on the State.

But the appellee insists that, if the board was not authorized to contract for interest, its action in so doing was ratified by the subsequent action of the Legislature in the passage of the act approved May 31, 1909. In answer to this position, it must be conceded in the outset that the Legislature had the power and the right to extend the legal liability of the State in respect to the item of interest and to provide for its payment by appropriation of a fund for that purpose; but this must be done in the manner pointed out by the Constitution.

Prefacing what we may say upon this point, we assume that it has been clearly shown by principle and authority that the State was not bound by the contract to pay interest, and so much of that part of the contract was a nullity.

The parties to the contract will be held to a knowledge of the law in respect to the same, and under this rule of the law the appellee's testator knew he held a contract against the State which was void as to the interest feature. Therefore he had no legal demand against the State for the interest; and, if anything was paid in the shape of interest, it was in excess of what he could rightfully claim under the law.

Considering the question of interest from this viewpoint then, any money paid to him as interest would be a gift or donation, as it would be in excess of his legal demands.

The case of *Molineux* v. *State*, 109 Cal. 378, is a case very similar in principle to the one under consideration.

In 1851 certain Indian war bonds were issued under the authority of a statute. The bonds drew interest, which was evidenced by interest coupons. The plaintiff, Molineux, was the holder of a considerable amount of these interest coupons, which were long past due, having matured prior to September 1, 1856. On the 3d of March, 1894, he presented these coupons to the proper authority for allowance with a claim for legal interest from their maturity. This demand for interest on the coupons was rejected. The plaintiff sued the State, and secured judgment for the coupons and the legal interest. The State appealed.

It appears that in 1893 the Legislature of the State of California passed an act and the fifth section of the act reads as follows: "In case judgment be rendered for the plaintiff in any suit, it shall be for the amount actually due from the State to the plaintiff, with legal interest thereon from the time the obligation accrued." And the plaintiff based his claim for interest on this statute, contending that under and by virtue of same he was entitled to interest on his coupons. But the Supreme Court of the State held, first, "that the State was not liable for interest on its debt, unless its consent to be so bound is manifested by an act of its Legislature, or by some lawful contract of its executive officers."

The court further held that if the plaintiff was not le-

gally entitled to interest on his claim (coupons), either by reason of the nature of the claim or the immunity of the State from an obligation to pay interest, then the latter statute did not authorize its recovery; and as there was no liability on the State, at the time, to pay interest on the coupons, there was no legal interest for which a recovery could be had, irrespective of the provisions of the statute itself. It was contended that the statute was retrospective, and by its terms included the right to recover interest from the maturity of the coupons, but the court met this contention with the proposition that the interest claimed was prior to the passage of the act; there was no obligation on the part of the State to pay, and for the Legislature to attempt to make provision for the payment of such claim would be making a gift or donation to the claimant, and, therefore, under the restrictions of the Constitution, this could not be done."

If by the passage of the act approved May 31, 1909, the Legislature intended to fix the payment of interest on the contract made by the board, then this act must comply with the constitutional requirement.

By reference to section 26, art. 5, of the Constitution, we are confronted with this limitation:

"No extra compensation shall be made to any officers, agents, employee, or contractor after the services shall have been rendered, or the contract made; nor shall any money be appropriated or paid on any claim, the subject-matter of which shall not have been provided for by pre-existing laws, unless such compensation or claim be allowed by bill passed by two-thirds of the members elected to each branch of the General Assembly."

It is a fixed rule of this court, of long duration, and well established, that in construing the legality of acts of the Legislature this court will take judicial knowledge of the recitals and records of the journals of both branches of the General Assembly to aid the court in determining the validity of any act.

Applying this rule to the question under consideration, we have resorted to and examined the journals of the General Assembly, and from these records we gather the facts attending the passage of the act approved May 31, 1909.

The bill for the act originated in the Senate as Senate Bill

No. 237. This bill took its regular course in that body, and passed without a negative vote. Upon reaching the house the bill took its regular course, and was placed on third reading and final passage. The roll of the house being called, 54 members voted in the affirmative—21 members in the negative, and 25 members were absent and not voting. (See House Journal of the session of 1909, page 887.) It necessarily follows that, the bill having failed to receive a two-thirds vote of all the members of the house elected as required by the Constitution, that part of the act attempting to appropriate a sum of money to pay interest for which the State was not legally bound is void.

Regardless of the validity or invalidity of the act under consideration, the records of this case presents another reason fatal to the maintenance of this suit.

The defendant sets up in his answer a partial failure of consideration—alleging that the deed tendered by the appellee contained more than 280 acres of land less than the amount sold and agreed to be conveyed by the terms of said contract, and for that reason he justified himself in refusing a warrant for the entire amount.

For the purpose of reaching a conclusion on the point presented, we must presume that this allegation is true.

Both the appellant and the appellee cite the court to the case of *Jobe* v. *Urquhart,* 98 Ark. 525.

An examination of that case will disclose the fact that this identical point, of the partial failure of consideration, was before the court in that case. In that suit the plaintiff, who is the plaintiff in this suit, filed her complaint in the Pulaski Chancery Court against the Board of Commissioners of the State Penitentiary, asking for reformation of the contract of purchase of the land in controversy, so as to show that the 280 acres of land which was short of the amount agreed to be conveyed was not in fact a part of the land embraced in the contract of purchase. The court held in that case that the suit, while against the Board of Commissioners of the Penitentiary, was in reality and in fact a suit against the State, and, regardless of the merits of the defense interposed, could not be upheld, and the suit was dismissed.

We are unable to draw any discrimination or distinction

in principle between the case referred to and the one under consideration, in so far as the right to prosecute the suits and the jurisdiction of the court are concerned.

The appellee is trying to accomplish in this suit, by other methods and processes adopted, that which the court held could not be done in the former suit.

By referring to the act approved May 31, 1909, it will be seen that the Legislature directed the Auditor "to calculate the amount owing to the estate of E. Urquhart according to the terms of the contract between the Board of Penitentiary Commissioners and E. Urquhart and draw his warrant," etc.

The amount of land agreed to be conveyed under the said contract is as much a part of the *terms of the contract* as the amount of money to be paid by the State; and when a deed was tendered the Auditor with a considerable portion of the land embraced in the contract omitted, he was not in a position to make a settlement with the appellee according to the *terms of the contract* as authorized or directed by the act.

As guardian of the rights of the State, as her auditing agent, in passing on claims and demands, the action of the Auditor in refusing to issue his warrant for the entire balance of the debt claimed by the appellee, with a material shortage of the land in the deed offered, was highly proper and justified under the law.

It was not within the province of the Auditor to pass on the equity or justice of the controversy, nor inquire into the fact whether or not this shortage of land was a result of a mistake made in the contract. It was his duty to pass on the face of the papers, and when he discovered this shortage of land in the deed to refuse his warrant and refer the matter back to the proper tribunal for determination and settlement.

It will be borne in mind that these proceedings are directed against the Auditor alone, while the suit in the case of *Jobe* v. *Urquhart, supra,* was directed against the Board of Commissioners of the Penitentiary, of which the Auditor was a member.

It will be further observed that the Auditor, in so far as this case is concerned, is acting under the directions of the entire board, by virtue of a resolution passed by it, directing the Auditor to pay no further sums of money on the appellee's

debt; assigning, among other reasons for this action, the fact that there was a shortage of land contracted to be conveyed. Thereupon in effect the action of the Auditor in refusing the warrant is only a reflection of the action of the entire board; and, under the rule announced in the case of *Pitcock* v. *State*, 91 Ark. 527, and subsequently adhered to in the case of *Jobe* v. *Urquhart, supra*, this suit can not be maintained.

In the consideration of this case, it has been suggested, and pressed to the point of a contention, that the payment of interest by the State on the unmatured part of the debt was a part of the consideration to be paid for the land, and the State is morally bound to pay the interest, regardless of the legality or binding force of that part of the agreement.

In other words, the State should not be permitted to hold the land and refuse to pay the full consideration for same, and the courts should enforce the obligation.

This position is not tenable for several reasons. In the first place, as against the State, no one can acquire vested rights in a void contract. Ordinarily, all contracts with the State must rest upon some legislative enactment, or be specially provided for by law, and no agent or officer has the power to bind the State by contract independent of a special or general statute authorizing the same. In this respect the law governing the contracts of the State is different and not so general in its application as the law regulating contracts between individuals. A void contract is in legal effect no contract. By it no rights are divested. From it no rights can be obtained. The law treats the contract as a *nudum pactum*, and the courts can not breathe life and vitality into a void contract, forsooth it may point to a moral. If contracts are to be enforced on bare moral obligations, regardless of their illegality under the law, but few contracts would escape enforcement. All contracts void for usury, contracts void as against public policy, and the like, would be subjected to the same enforcement, for like reasons.

In the next place, it does not lie within the province of the courts to speak for the State and determine and enforce her moral obligations. The courts are not the keepers of the conscience of the State. The honor and integrity of the State or sovereignty are lodged in the people—her citizens and the

subjects—and in turn the honor and integrity of her people are reflected through the Legislature of the State. The people or sovereignty speak by legislative enactment, and on all questions involving the moral obligation of the State, the Legislature is the sole and exclusive tribunal to determine and adjust such matters. Should any officers or agents in the executive branch of the government, by their acts, while in the exercise of their official discretion and duty, deny to any one their just and legal rights, an appeal can be taken for review by the legislative branch of the government to correct and redress the wrong.

In this case, if the State Auditor denied to the appellee any right which was hers to demand, the law has provided an appeal to the Legislature for review and redress.

Subdivision 1, of section 3401 of Kirby's Digest defines the duties of the Auditor, and reads as follows:

"To audit, adjust and settle all claims against the State payable out of the treasury," etc.

Section 3408 provides: "That if any person interested shall be dissatisfied with the decision of the Auditor in any claim, account or credit, it shall be the duty of the Auditor at the request of such person to refer the same with the reasons of his decision to the General Assembly."

The necessity that called for the above statute was doubtless predicated on the theory that the Auditor of the State is immune from interference in the performance of his official duties by the courts of the State, and the suitor is by virtue of this statute remitted to the Legislature for redress.

Furthermore, it is a sufficient answer to this contention to call attention to the fact that the question of the State holding the land without a complete compliance with the contract made with the board of commissioners is not before this court for a decision on that point. The appellee is not seeking a cancellation of the contract on that ground. This question is not raised by the pleadings. She is attempting to enforce a provision in a contract with the State which the law declares invalid.

Should this court entertain this contention and throw itself into the breach for the purpose of deciding this question, it would be changing the whole purpose of the suit, and would

be engaged in deciding a controversy between an individual and the State, in which controversy the State would be placed in the position of a defendant; and this could not be done without doing violence to that provision of the Constitution, which say: "The State shall never be made defendant in any of her courts."

The moment this court turns to consider questions in this case, other than the mere bare right to a writ of mandamus as asked, that moment we would be crossing well-defined lines and venturing upon forbidden grounds; so it will be seen that, instead of paving the way for this court to take jurisdiction on these grounds, and determine these questions, it only emphasizes the position taken by the court that these questions properly belong to another tribunal for determination.

We have been induced to go thoroughly into the history of this litigation, and review all the questions involved, under the apprehension that the Legislature would again be called in to pass on and adjust the rights of the State and the appellee under the contract in question; and, should the Legislature again pass on this controversy, it is to be hoped that it will do so in such plain and unmistakable terms as to leave no room for doubt.

For the reasons above assigned, it is the judgment of this court that the Pulaski Circuit Court erred in overruling the defendant's demurrer to the plaintiff's petition and in sustaining the plaintiff's demurrer to the defendant's response and answer. The judgment of the lower court is therefore reversed, and plaintiff's petition is dismissed.

McCULLOCH, C. J., (dissenting). It is conceded in the opinion of the majority that there is no limitation upon the power of the Legislature to authorize the creation of interest-bearing indebtedness of the State, except not to issue interest-bearing warrants or scrip. In this I think they are correct. But it is contended that the Legislature did not authorize the penitentiary board to contract for the payment of interest on the price of the State farm which the board was impowered to purchase. I dissent from that conclusion. That portion of the statute which impowered the board to purchase the farm reads as follows: "Said board is hereby impowered to purchase or lease and equip a farm or farms upon which to work State

convicts, and to pay for the same out of the labor or products of the labor of any of the convicts. Said board is hereby impowered to perform any and all acts necessary in the purchase or lease and equipping of said farm or farms: provided, the board only apply such proceeds for the payment of said farms as are not actually needed for the support or maintenance of the State convict farm."

It is seen from the wording of the statute that the board was authorized to purchase a farm, pay for same out of the proceeds of convict labor, and "to perform any and all acts necessary in the purchase," etc., the only limitation placed on the power being that "the board only apply such proceeds for the payment of said farms as are not actually needed for the support or maintenance of the State convict farm. The statute clearly contemplated that the purchase should be on a credit, for no means were provided for a cash purchase. Is it conceivable that the lawmakers intended to so limit the power of the board as to necessitate a delay in the purchase of the farm until sufficient funds for that purpose could be accumulated from year to year out of the net profits of convict labor, or that they meant to require the board to find a landowner who would be willing to sell his farm to the State for a cash price and to await, without interest, the slow process of payment out of the net profits of the convict labor? Surely not, for to place that construction on the statute is to attribute to the lawmakers an intention to require the board to do an improvident thing, on the one hand, or to attempt an impossible task on the other. The presumption should be indulged that the framers of the statute meant, no words appearing which manifested a contrary intention, to meet the situation and deal with it in a practical, business-like manner, and to authorize the purchase of a farm in the only way which was practicable, not to say possible, under the existing circumstances. The power to contract for the payment of interest on what was necessarily intended to be a purchase on a credit must be implied, for the State authorized the board to "perform any and all acts necessary in the purchase." Let us concede the full propriety and force of the rule that the vesting of power in a public board or other functionary by implication is not favored, unless the implication necessarily results from

the nature of the enactment. Yet we think that the wording of this statute meets the requirements of that rule. We perceive no reason why the ordinary rules of construction in interpreting statutes should not be applied to this as to any other statute. "Statutes are seldom framed," says Mr. Black in his work on Interpretation of Laws (§ 33), "with such minute particularity as to give directions for every detail which may be involved in practical application. Herein they are aided by the doctrine of inplications. This doctrine does not impower the courts to go to the length of supplying things which were intentionally omitted from the act, but it authorizes them to draw inferences from the general meaning and purpose of the Legislature and from the necessity of making the act operative and effectual as to those minor or more specific things which are included in the more broad or general terms of the law or as to those consequences of the enactment which the Legislature must be understood to have foreseen and intended. This is not the making of law by the judges. It is deducing the will of the Legislature by the logical process of inference. It is a rule of construction that that which is implied in a statute is as much a part of it as what is expressed."

Pursuing the subject further, the same learned author says: "Whenever powers, privileges or property are granted by a statute, everything indispensable to their enjoyment or exercise is impliedly granted also, as it would be in a grant between private persons. * * * Whenever a statute grants power to do an act, with an unrestricted discretion as to the manner of executing the power, all reasonable and necessary incidents in the manner of executing the power are also incidents in the manner of executing the power are also granted."

In another text book we find the statement in substance of the same rule, as follows: "Statutes are not, and can not be, framed to express in words their entire meaning. They are framed like other compositions to be interpreted by the common learning of those to whom they are addressed; especially by the common law, in which it becomes at once enveloped, and which interprets its implications and defines its incidental consequences. That which is implied in a statute is as much a part of it as what is expressed. * * * Wherever a provision of a statute is general, everything which

is necessary to make such provision effectual is supplied by the common law and by implication." 2 Lewis, Sutherland, Statutory Construction, § § 500, 504.

Another statement of the same rule, which is peculiarly applicable to this case, is as follows: "The rule respecting such powers is that, in addition to the powers expressly given by the statute to the officer or board of officers, he or it has by implication such additional powers as are necessary for the due and efficient exercise of the powers expressly granted or as may be fairly implied from the statute granting the express powers." Throop on Public Officers, § 542.

This principle is clearly announced by this court in the recent case of *A. H. Andrews Co.* v. *Delight Special School District*, 95 Ark. 26, in which case it was held that, while there was no authority in the statute for school directors to contract for the payment of interest on purchases, yet, if the interest was computed as a part of the purchase price and the district accepted the goods, it would be legally bound to pay the whole price, including the interest. We think that principle is applicable here, and is controlling in the present case. The same principle is recognized as to the power of a levee board to contract for the payment of interest. *Altheimer* v. *Board of Directors of Plum Bayou Levee District*, 79 Ark. 229. In that case we held, after announcing the principle as to implied powers, that from the authority conferred by the statute to build a levee there was necessarily implied power to build on credit and to agree to pay the legal rate of interest for deferred payments.

It seems to me, therefore, that the majority of the judges have, in reaching their conclusion, departed from well settled principles of law which are not only established by the decided weight of authority elsewhere, but have been clearly recognized in several decision of this court.

But, even if it be held that the board was not authorized to contract for the payment of interest, the result should be the same so far as this case is concerned. The contract for the sale and purchase of the farm is executory, and the State is bound either to ratify the action of the board and perform the contract or to repudiate it as a whole. It can not take the property under the contract of purchase without paying

the full amount stipulated in the contract. In other words, it could not lawfully take the property without paying the interest which the board agreed to pay. This salutary rule applies to the State in its dealings with individuals as well as to individuals themselves.

"The State, in all its contracts and dealings with individuals, must be adjudged and abide by the rules which govern in determining the rights of private citizens contracting and dealing with each other. There is not one law for the sovereign and another for the subject; but when the sovereign engages in business and the conduct of business enterprises, and contracts with individuals, although an action may not lie against the sovereign for a breach of the contract, whenever the contract, in any form, comes before the courts, the rights and obligations of the contracting parties must be adjusted upon the same principles as if both contracting parties were private persons." *People* v. *Stephens*, 71 N. Y. 527.

The constitutional provision quoted in the opinion of the majority has, we think, no application to the statute making the appropriation to pay the balance due under the contract. It applies only to appropriations for extra compensation or gratuities and to claims which have not been authorized or provided for by pre-existing law. It does not mean that the Legislature can not, by a majority vote of each house, pass a bill for the purchase of property for governmental purposes and at the same time appropriate the necessary amount of money to pay for same without a preexisting law authorizing it. The Legislature could, and did, pass a bill, by a majority vote, authorizing the construction of the new State Capitol and appropriating funds to pay for same. *State* v. *Sloan*, 66 Ark. 575. It could, and did, by a majority vote, pass a bill appropriating a sum of money for the maintenance of the State militia without any pre-existing law authorizing the expenditure. *State* v. *Moore*, 76 Ark. 197. The ratification by the Legislature of the executory contract for the purchase of the farm was the same as a new purchase, and this could be done by a majority vote.

There is nothing in the California case, cited in the majority opinion, which militates against this view. In that case it is merely held that a statute authorizing interest on judg-

ments against the State was not retroactive in its effect, so as to authorize a judgment for interest on a claim which arose prior to the passage of the act.

This is not a suit against the State, but it is one against the Auditor to compel him to perform a ministerial act in making a simple calculation of the amount specified in the contract and drawing his warrant for it on the treasurer.

The law is well enough settled by this court to exclude further controversy as to when the Auditor may or may not be compelled by mandamus to issue his warrant for debts of the State. "Where the Auditor, in the discharge of his appropriate duties, has a discretion in allowing or rejecting a claim against the State, and exercises it, his decision can not be controlled or reviewed by mandamus. * * * But there is a marked distinction everywhere recognized between the exercise of discretion and a ministerial act, the performance of which is a plain and positive duty enjoined by law; and when essential to the enjoyment or completion of some public or private right, and no other adequate specific remedy is provided, the authorities concur in holding that a mandamus will lie, affording a prompt and efficient remedy, at the instance of any person interested, to compel its performance." *Danley* v. *Whiteley*, 14 Ark. 687; *Jobe* v. *Caldwell*, 93 Ark. 503.

The Legislature, acting through appropriate committees, at the session of 1903, investigated the purchase of the farm, and approved it. At the session of 1909 it passed the act in question, appropriating sufficient funds to pay "for purchase of the convict farm, according to the contract price and purchase between E. Urquhart and the Penitentiary Commission" and directing the Auditor "to calculate the amount owing to the estate of E. Urquhart, according to the terms of the contract, * * * and to draw his warrant on the State Treasurer for such sum." This took the matter out of the hands of the board so far as concerned the payment of the stipulated price, and peremptorily directed the Auditor to draw his warrant after calculating the amount. That officer was not authorized to make a settlement of the claim according to his notion of the justice of the case, nor was he permitted to follow the directions of the board, but he was directed to perform the purely ministerial act of calculating the amount shown from

the face of the written contract and the payments already made and of drawing his warrant.

The question of shortage in the number of acres was not left to him nor to the board to decide. The Legislature left that out of consideration altogether in passing the statute directing the payment of the amount specified in the contract. If the Legislature failed to provide for adjusting that matter, it was of no concern to the Auditor, for he must obey the mandate of the lawmakers, the authority to which we must all yield obedience when acting within its constitutional limitations. We must, however, indulge the presumption that the Legislature fully investigated and considered that matter, and either left it for future adjustment or determined that a mistake had been made in describing the lands, and that the State's vendor had delivered possession of all lands which were intended to be embraced in the contract.

My opinion is that the judgment of the circuit court should be affirmed.

Mr. Justice WOOD concurs herein.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* MEMPHIS, DALLAS & GULF RAILROAD COMPANY.

Opinion delivered January 22, 1912.

1. EMINENT DOMAIN—CONDEMNATION BY RAILROAD OF PROPERTY OF ANOTHER RAILROAD.—A railroad company is not entitled to condemn for depot purposes land which another railroad company had acquired in good faith for the same purposes, although the latter had not filed its map and profile of its route. (Page 496.)
2. SAME—JURISDICTION OF EQUITY.—An unlawful attempt by one railroad company to condemn property acquired by another railroad company for railroad purposes may be enjoined in equity. (Page 499.)

Appeal from Clark Chancery Court; *James D. Shaver*, Chancellor; affirmed.

STATEMENT BY THE COURT.

The St. Louis, Iron Mountain & Southern Railway Company instituted in the circuit court a proceeding under the statute to condemn for railroad purposes a certain block of ground in the city of Arkadelphia in Clark County, Arkansas,

the property of the Memphis, Dallas & Gulf Railroad Company, and in its petition for condemnation made the usual statutory allegations. The defendant demurred to the petition which was overruled. The defendant then filed an answer, and a motion to transfer the cause to the chancery court. The answer denied the allegations of the petition or complaint. In addition, it set up that the defendant was a railroad corporation engaged in constructing a railroad from Dallas, Texas, through Arkansas and Clark County to Memphis, Tennessee; that a part of its line was already constructed and in operation; that its road was in actual operation from Daleville, a point across the river and one mile distant from Arkadelphia, eastward through Clark County to Dalark, a distance of seventeen miles; that it was the intention of defendant to construct its road into the city of Arkadelphia, and that it purchased the block of ground in question for depot purposes before the condemnation proceeding was instituted by the plaintiff. The plaintiff demurred to the answer, and the demurrer was overruled. The court then transferred the cause, over the objections of the plaintiff, to the chancery court.

The evidence on the part of the plaintiff shows that it has owned and operated its main line of railroad on its present location through the city of Arkadelphia since about the year 1873. It had a freight depot near the block of ground in question, and for many years used the block of ground in question, with the consent of its owner, in receiving and discharging freight from its warehouse. It finally erected a new depot, and, wishing to use this block of ground in connection therewith, began negotiations with its then owner for the purchase thereof. Pending the negotiations, the defendant purchased the ground. The evidence on the part of the plaintiff tends to show that the block of ground in question is necessary for its use for depot purposes. After the defendant purchased the block of ground, the plaintiff instituted a proceeding to condemn it.

The evidence on the part of the defendant shows that a charter was granted to it to construct a railroad from Dallas, Texas, through the State of Arkansas and Clark County to Memphis, Tennessee; that it had already built forty-two miles of railroad, and bought twenty-eight miles all leading in the

direction of Memphis from Ashdown, in Little River County, Arkansas; that it has forty-two miles in operation from Ashdown to Murfreesboro in Pike County, west of Arkadelphia, and has six and one-half miles in operation east of Arkadelphia between Daleville and Dalark in Clark County; that Daleville is just across the river from Arkadelphia and about a mile east of it; that a distance of twenty-five miles would connect these two parts of its road. That it has already secured the right-of-way as far east as Helena, and has secured bonuses from Arkadelphia, Pine Bluff, DeWitt and Helena; that at Arkadelphia its proposed road will connect with the old Ultima Thule, Arkadelphia & Mississippi Railroad, now owned by the defendant, and which extends twenty-two miles in the direction of Pine Bluff; that the defendant intends to erect a depot in Arkadelphia within the next two years, and the block of ground in question was purchased for that purpose; that, if this piece of ground is taken away from it, it will destroy the use for which it was designed by the defendant; that the company intends to construct a bridge over the river between Arkadelphia and Daleville. After the river is crossed, the location of this piece of ground is described by defendant's witnesses as follows:

"There is a hollow which we follow for some distance, and this piece of ground lies in a triangular shape right at the mouth of this hollow. It will be necessary for us to follow further down the valley with the main line, and the valley will be used for yards, sidetracks, etc., and this particular piece of land would be about where our station would be placed. There is a bluff on each side, which would make it impracticable to undertake to cut down and put in shape for station location. There is no other piece of ground, close to the city of Arkadelphia as this place which it would be practicable from a topographical standpoint for our company to use or secure for the purpose of erecting a station. The location of a station on this piece of ground was the most desirable that able engineers were able to find."

The testimony on the part of the defendant also showed that, at the time the petition to condemn was filed by the plaintiff, no map of definite location had been filed by the defendant of its road through Clark County, as required by the

statute. The witnesses do say, however, that the defendant's engineers had been over the ground, and that no other route was as practicable as that described above; that since the institution of this suit the engineers of the defendant have located its line along this route, and a map and profile thereof has been prepared, properly signed and filed in the county clerk's office as required by statute.

Other evidence will be stated or referred to in the opinion.

The chancellor found that the defendant had a railroad in actual operation, and intends to construct its line of road into and through Arkadelphia in the near future and to establish its station on the land in controversy; that it has entered into a contract with the citizens of Arkadelphia by which it is required to construct its lines into that city by December 14, 1911, and that the land in question was purchased for a passenger station, and that all of it will be required for that purpose. A decree was accordingly entered enjoining the plaintiff from condemning said land, and from interfering with the defendant's use and possession of said block of ground.

The plaintiff has duly prosecuted an appeal to this court.

W. E. Hemingway, E. B. Kinsworthy, W. V. Tompkins, T. T. Dickinson and *James H. Stevenson,* for appellant.

1. The purchase of the lot of ground in controversy by appellee at a private sale and the recording of its deeds therefor transferred the title and gave notice of private ownership; but neither this nor the horseback survey, nor any private unrecorded and unadopted maps or profiles of the company or its engineers nor the intent of its vice president and general manager or other officers or agents to use it for railroad purposes impressed upon it a public use or a public character so as to reserve the same for its own use and thus pre-empt and protect the property from being taken from it by appellant in the exercise of its power of eminent domain. 168 Ind. 360; 13 L. R. A. (N. S.) 197; 110 N. Y. 128; 12 L. R. A. 220; 4 L. R. A. 785; 110 Fed. 879; 6. N. J. Eq. 635; 105 Pa. 13; 30 S. E. 86; art. 2, § § 22, 23, art. 12, § 9, and art. 17, § 9, Const. Ark.; Kirby's Digest, § § 2900, 2901, 2902, 6547; *Id.* § § 6545, 6546, as amended by acts 1907, p. 195; *Id.* § § 6548, 6574, 6569, 6570, 6571, 6572, 2947, 2955-6, 2903-5, 2958; *Id.* § § 6581, 6575;

43 Ark. 111; 59 Ark. 171; 76 Ark. 239; 78 Ark. 83; 91 Ark. 231; 137 S. W. 815; 68 Ark. 134; 57 Ark. 363.

Callaway & Huie, for appellee.

1. It is true, as contended by appellant, that, at law, the statutory right of a railroad company to condemn land for its use being special, no question could enter into the prceedings for such condemnation except the compensation to be paid the owner, but certainly, upon interposing an equitable defense, the defendant has the right to invoke the aid of a court of chancery. 76 Ark. 239.

2. Appellee had the right to purchase the property and appropriate it to public use without first filing a map and profile of definite location. Kirby's Digest, § 6574. There is no statute which prescribes at what time, with reference to filing map and profile in the county, it is necessary for a railroad company to purchase property for public use. The question, then, in this case, resolves itself into the proposition whether or not appellee intended to use the property for public purposes, and, if so, when?

The chancellor's finding that appellee acquired the lot in controversy for the purpose of erecting a depot thereon, and that appellee intends to construct a railroad through the city of Arkadelphia and said lot *in the near future,* is amply supported by the evidence.

Railroad property already set apart or devoted to use as such can not be devoted to another public use which would nullify the purpose for which it was acquired. 69 Pac. 568; 60 L. R. A. 383. The policy in this State is to encourage the construction of new railroads. 43 Ark. 111, 127.

HART, J., (after stating the facts). It is insisted by counsel for the plaintiff that the mere fact that lands are owned by a railroad corporation does not impress them with a public use; and that a railroad company can not simply, by running a preliminary line, or by a horseback survey, and purchasing lands over which such survey has been extended, so impress such lands with a public use as to pre-empt them as against another railroad company which subsequently institutes condemnation proceedings against such lands.

This is true as an abstract principle of law, but we do not

consider that it is applicable to the facts of this case. Section 6569 of Kirby's Digest provides that every such company (railroad companies), before proceeding to construct a part of their road through any county named in their certificate of association, shall make a map and profile of the route intended to be adopted by such company which shall be certified by a majority of the directors and filed in the office of the clerk of the county court of such county for the inspection and examination of all parties interested therein.

Section 2947 provides, in substance, that a railroad company, after having surveyed and located its line of railroad, shall, in all cases where such company fails to obtain by agreement with the owner of the property through which said line of road may be located, the right-of-way over the same, have the right to institute condemnation proceedings.

Thus it will be seen that the map and profile is only required to be filed before actual construction of the road in the county is begun, and is not required to precede condemnation. This is the plain letter of the statute. Condemnation proceedings may be instituted after the line is located, and before the map and profile is required to be filed. The map and profile may be filed after the condemnation proceedings are instituted. The object of locating the line before condemnation is to fix in some public and definite manner the exact route of the proposed road so that the damages to property owners may be properly assessed.

It is obvious that, if the line was not definitely located, there could be no guide by which to determine the measure of damages to property owners. So it may be said that, under our statutes, a railroad company can not institute proceedings to condemn property before it has located its lines of road; but it by no means follows that as to property owned by a railroad company a rival company may institute condemnation proceedings in every instance before the company owning the property has caused its lines to be surveyed and its location fixed by stakes or other monuments placed in the ground. Cases of this kind must be determined according to the particular facts of each case.

In the case of *Fayetteville Street Railway* v. *Aberdeen & Rockfish Railroad Company*, 142 N. C. 423, 9 A. & E. Ann.

Cas. 683, the Supreme Court of North Carolina held (quoting from syllabus):

"Ordinarily, one of the requisites of a valid location of a railroad, as to third persons and rival corporations, is a preliminary survey by engineers and surveyors who run and mark the lines and report them to the company claiming the prior location; but where the lines are clearly defined, as by the existence of an old roadbed which is entered on and staked out by the agent of the locating company, and the route so marked is approved by the directors as the permanent location of their railroad, a survey by engineers is not of the substance, and should not be considered as being essential."

Under section 6574 of Kirby's Digest, railroad companies have the right to locate and erect all necessary and convenient stations, and to obtain and hold the lands necessary therefor.

Here the defendant had a line of road in actual operation practically to the city of Arkadelphia. Its terminus was across the river, only a mile away from the proposed station site. It contemplated connecting two parts of its road already in operation and of extending them both east and west. It had contracted with the citizens of Arkadelphia to construct its road into the city by a designated date. It had selected the most available bridge site, and on the Arkadelphia side of the river there was but one practical route from the bridge site selected, and that led up a valley to the ground in question. Bluffs were on either side, so that no other route was practicable. This was evident to the engineers of the company without making a survey with instruments. Hence, to all intents and purposes, it was as good and sufficient survey as if made by instruments. The engineers reported that the ground in question was the only available site for a station. The defendant then purchased the ground for that purpose. It afterwards filed its map and profile as required by the statute preparatory to commencing the work of construction. As above stated, the defendant's line of road was in actual operation practically to the city of Arkadelphia, and, under the facts and circumstances before us, we are of the opinion that the defendant made an inchoate appropriation of the block of ground in question before the plaintiff filed its petition to condemn. We do not regard the cases cited by counsel for

the plaintiff as being applicable to the facts before us. For instance, in the case of *Southern Indiana R. Co.* v. *Indianapolis & L. R. Co.* (Ind.) reported in 13 L. R. A. (N. S.) 197, the facts were that a railroad company in process of construction acquired by purchase certain lands through which its proposed road was located, but its map and profile, intended to show the route it had adopted, did not show that all of the proposed right-of-way purchased was necessary for the use of the road, and gave no idea of the width of the right-of-way; and the court held that, under such circumstances, there was no appropriation for right-of-way purposes. Here the proof shows that the ground purchased was for a station, and that all of it was necessary for that purpose.

We do not think the case of *White River Ry. Co.* v. *B. & W. Tel Co.*, 81 Ark. 195, has any application to the facts of this case. That case only decided that the railroad had no right to commence the construction of its road until it filed the map and profile required by the statute, and that it had no exclusive right to its right-of-way prior to the time it acquired it.

It is next contended that the circuit court had the power to determine whether or not the lands were subject to condemnation; and that the court erred in transferring the cause to the chancery court. This question has already been decided adversely to the contention of counsel by this court. *Mountain Park Terminal Ry. Co.* v. *Field*, 76 Ark. 239; *Gilbert* v. *Shaver*, 91 Ark. 231, and later cases.

It follows that the decree will be affirmed.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* WATSON.

Opinion delivered February 26, 1912.

1. CARRIERS—DUTY TOWARD PASSENGERS.—It is the duty of a railroad company to keep in safe condition its station platform where passengers and those who have purchased tickets will ordinarily go, and to keep same free from obstructions and dangerous instrumentalities especially at the time when passengers are expected to go to and from its cars. (Page 502.)
2. SAME—DUTY AS TO STATION PLATFORMS.—A railroad company which uses a station platform jointly with another railroad company is liable to one of its passengers for an injury received by him in consequence of

the unsafe condition of the station platform or of the negligent manner in which employees of either railroad company handled the trucks, baggage or other instrumentalities upon such platform. (Page 503.)

3. SAME—DUTY TO PERSON ON STATION PLATFORM.—A railroad company owes to a person rightfully on its platform, though not a passenger, the duty to exercise ordinary care not to injure him, and will be liable to him for injuries received by him in consequence of the negligence of its employees. (Page 504.)

4. SAME—CONTRIBUTORY NEGLIGENCE FOR JURY WHEN.—The mere fact that a passenger went from the waiting room to the station platform and there remained for a few moments talking to a friend on his way to his train where he was injured did not constitute contributory negligence as a matter of law. (Page 505.)

5. SAME—CONTRIBUTORY NEGLIGENCE IN EMERGENCY.—Where, by defendant's negligence, plaintiff was exposed to danger apparently impending, and there was more than one way to escape from such danger, the mere fact that plaintiff in the emergency chose the way that was less safe did not constitute negligence as a matter of law. (Page 505.)

6. DAMAGES—EXCESSIVENESS.—Where plaintiff, by negligence of defendants, had his leg cut to the bone, which caused him severe pain and lamed him for ten days and gave him a great deal of pain for several weeks, a judgment for $150 will not be set aside as excessive. (Page 506.)

Appeal from Little River Circuit Court; *Jefferson T. Cowling*, Judge; affirmed.

Read & McDonough, for appellant, Kansas City Southern Railway Company.

1. In its instructions the court erred in its definition of a passenger. 10 Fed. Cas. 464; 55 Ala. 387. The use of the word *"protection"* was error. 55 Ala. 387; 176 Pa. St. 341; 114 U. S. 587; 6 Words & Phr. pp. 5741-2.

2. Plaintiff was *not* a passenger on the K. C. So. Ry. Co. and instruction 2 was reversible error. The K. C. owed no duty to plaintiff as a carrier. 90 Ark. 378; 94 *Id.* 15.

3. The verdict is excessive.

Sain & Sain, for appellant, Memphis, Dallas & Gulf Railroad Company.

1. The peremptory instruction for this appellant should have been given. This appellant owed no duty except to use ordinary care not to injure appellee. There is no proof that any act nor conduct of any employee of this company had any connection with the injury. 90 Ark. 378; 94 *Id.* 15. A carrier

is only bound to the exercise of ordinary care for the protection of persons while in and about its stations, and is bound to no higher degree of care for the protection of persons who may be lawfully there on its premises, other than in the capacity of passengers. 96 Ark. 311; 100 Ark. 433.

2. The verdict is excessive. Appellee lost no time, paid out no money, and was very slightly injured.

J. S. Lake, J. C. Head, J. S. Steel, and *James D. Head,* for appellee.

1. If the use of the word "protection" was error, the court's attention should have been called to it. 81 Ark. 187; 83 *Id.* 61.

2. Where connecting carriers jointly employ a common agent in prosecution of a joint enterprise as carriers, they are jointly liable for his defaults. 76 Ark. 589; 58 S. E. 913; 2 White, Personal Injuries on Railroads, § 627; 2 Hutch. Car., § 917, 938; 3 Thompson, Negl., § 2697, 2711; 140 S. W. 708; 94 Ark. 15; 88 Fed. 197.

3. A railroad company owes no greater duty than to protect its passengers while in and about its stations, as to whom, ordinary care is sufficient. 140 S. W. 708; 94 Ark. 15; 88 Fed. 197.

4. There was no error in the instructions. 52 Ark. 248; 57 *Id.* 306; 84 *Id.* 241.

FRAUENTHAL, J. This is an action instituted by D. M. Watson against the Kansas City Southern Railway Company and the Memphis, Dallas & Gulf Railroad Company to recover damages for an injury which the plaintiff alleged he sustained by reason of the negligence of both defendants. The alleged injury occurred upon the station platform at Ashdown. At this place there was only one depot, which was owned by the Kansas City Southern Railway Company but which was used by both defendants. At this depot the trains of both defendants stopped and took on and discharged passengers, and agents of both companies sold tickets there for their respective trains. On the day the injury was received, plaintiff purchased a ticket at this depot from the agent of the Memphis, Dallas & Gulf Railroad Company. It was about the time for the departure of his train, and plaintiff went from the waiting

room to the station platform in order to go to said train, which was located on the second track. At this time a local freight train of the Kansas City Southern Railway Company was standing on the first track, and freight was being unloaded therefrom. As plaintiff passed over the station platform, he stopped a few moments to talk to a friend, and, while thus engaged, a railroad employee pulled a baggage truck along the platform and suddenly dropped its tongue. The truck was going with such rapidity that it struck the plaintiff on his leg, just above the ankle, and painfully injured him. The testimony tended to prove that when plaintiff saw the truck thus turned loose, he sprang aside, upon another truck which was standing nearby on the platform, in order to escape from the impending injury, and was there struck by the truck. The testimony on the part of the defendants tended to prove that the employee who was in charge of this truck was in the service of the Kansas City Southern Railway Company. A verdict of $150 was returned in favor of plaintiff and against both defendants, and both of them have appealed from the judgment rendered thereon.

1. It is urged by counsel for the Memphis, Dallas & Gulf Railroad Company that the injury complained of was not caused by one of its employees, but by a servant who was solely in the employ of the other railroad company, and on this account it was not liable for the injury. The plaintiff had purchased a ticket from this defendant in order to immediately take passage upon one of its trains. In going to his train, he was passing over the station platform, and was there injured. The depot and station platform were used jointly by both defendants. At this time the plaintiff was a passenger of the Memphis, Dallas & Gulf Railroad Company, and it owed to him the duty to exercise ordinary care to protect him from injury while on and passing over the station platform which it furnished for plaintiff to proceed upon to his train. *St. Louis, I. M. & S. Ry. Co.* v. *Woods*, 96 Ark. 311; Hutchinson on Carriers, § 935; 3 Thompson on Negligence, § 274. It is well settled that it is the duty of a railroad company to keep in safe condition its station platform where passengers and those who have purchased tickets with a view to take passage on its trains will ordinarily go, and for failure to exercise ordi-

nary care in that regard the company is liable for any consequent injury to one of its passenger. *Texas & St. L. Ry. Co.* v. *Orr*, 46 Ark. 182; *Arkansas Midland Rd. Co.* v. *Robinson*, 96 Ark. 32. This duty not only requires the railroad company as a carrier of passengers to exercise ordinary care to see that the station platform itself is in safe condition and free from any defect from which a consequent injury might be reasonably expected to result, but also to keep such station platform free from obstructions and dangerous instrumentalities, especially at the time when passengers are expected to go to and from its cars. In the case of *Warren* v. *Fitchburg Railroad*, 90 Mass, 227, this duty is thus well expressed: "It is the duty of a railroad company to afford to the passengers whom they undertake to carry in their cars a reasonable and safe opportunity to pass from the room or building in which they receive passengers for transportation to the cars. * * * They should provide a safe and convenient way and manner of access to the cars, and in preventing the interposition of any obstacle or obstruction which would reasonably impede him or expose him to injury while proceeding to his car to take his seat." In 2 White on Personal Injuries on Railroads, § 627, it is said: "The care exacted by the law on the part of the carrier to avoid injury to its passengers include the duty to exercise reasonable care to avoid striking passengers with baggage trucks or similar vehicles used on station platforms where passengers are allowed or invited to congregate to take cars or to alight from trains." A passenger, while passing over a station platform, which is provided by the carrier for the purpose of going to his train, has a right, while in the exercise of ordinary care for his own safety, to require the servants of the carrier, or those persons who are in service thereon by permission of such carrier, to exercise ordinary care not to injure him while handling trucks and baggage upon such platform. In the case at bar, the station platform was used by both defendants for the purpose of enabling passengers of each railroad company to go to their respective trains. It became the duty of both of them to keep the station platform in safe condition and free from obstructions or dangerous instrumentalities. Neither was absolved from this duty to its passengers, and the Memphis, Dallas & Gulf Railroad Com-

pany, which occupied the relation of carrier to the plaintiff, was liable to him for an injury received by him in consequence of the unsafe condition of the station platform or of the negligent manner in which employees of either railroad company handled the trucks, baggage or other instrumentalities upon such platform. 3 Thompson on Negligence, § § 2696, 2699; 2 Hutchinson on Carriers, § 938; *Cleveland, C. C. & St. L. Ry. Co.* v. *Reese,* 93 Ill. App. 657; *Atchison, T. & S. F. Rd. Co.* v. *Johns,* 36 Kan. 769; *Pineus* v. *Railroad,* 140 N. C. 450; *Mangum* v. *North Carolina Rd. Co.,* (N. C.) 58 S. E. 913. It follows, therefore, that the Memphis, Dallas & Gulf Railroad Company was liable to the plaintiff for any injury which he received while on the station platform which was due to the negligent act of an employee of the Kansas City Southern Railway Company in handling trucks or other vehicles thereon, if the plaintiff was himself in the exercise of due care.

2. The Kansas City Southern Railway Company resists recovery herein against it on the ground that plaintiff was a passenger of the other railroad company, and, according to the undisputed testimony, not its passenger. In this connection counsel for this defendant urges that the court erred in instructing the jury that plaintiff was a passenger, in any event in so far as his relation to it was concerned. The court in substance instructed the jury that if the plaintiff purchased a ticket from the Memphis, Dallas & Gulf Railroad Company for the purpose of taking immediate passage upon its train, then he was a passenger rightfully upon the station platform and entitled to protection as such passenger, as defined in a subsequent instruction. In the subsequent instruction the court told the jury in effect that the defendants were required to exercise ordinary care to avoid injuring the plaintiff while upon the station platform, and did not require of either of the defendants the exercise of any greater degree of care. The injury which was received by the plaintiff was caused by an employee of the Kansas City Southern Railway Company. If the plaintiff was a passenger of the other railroad company, he had a right to be upon the station platform, and the Kansas City Southern Railway Company then owed to him the duty to exercise ordinary care not to injure him, whether he was its passenger or not. As is said in 3 Thompson on Negligence,

§ 2697: "The obligation of a railway company to see that its platform is reasonably safe is not confined to passengers or to intending passengers; but it extends to all persons who may be lawfully there. *Ark. & La. R. Co.* v. *Sain*, 90 Ark. 278; *St. Louis, I. M. & S. Ry. Co.* v. *Jackson*, 96 Ark. 469; *Denver & R. G. R. Co.* v. *Spencer*, (Col.) 51 L. R. A. 121. The Kansas City Southern Railway Company was therefore not prejudiced by any instruction given by the court in regard to its relation to the plaintiff because the court in no instruction given required of it to exercise any higher degree of care for the protection of plaintiff than that of ordinary care. Its liability for damages for the injury received by plaintiff was based, not upon the fact that plaintiff was or was not a passenger, but upon the fact that it failed to exercise ordinary care in protecting him while rightfully upon its station platform. If it failed to exercise that degree of care, then it was guilty of negligence. The injury was received by plaintiff by reason of the act of its employee, and, that employee having failed to exercise ordinary care, the act was one of negligence, making the Kansas City Southern Railway Company liable.

It is urged by both defendants that plaintiff was guilty of negligence contributing to his injury, and for that reason was not entitled to recover. The court instructed the jury that plaintiff could recover only in event he exercised due care for his own safety, and under the facts of this case we think it was a question peculiarly for the jury to decide as to whether or not he was guilty of contributory negligence. The mere fact that the plaintiff went from the waiting room on to the station platform and there remained for a few moments talking to a friend on his way to his train did not constitute negligence as a matter of law upon his part. *Chicago & A. Rd. Co.* v. *Wooldridge*, 32 Ill. App. 237. Nor did the act of plaintiff in jumping on to the truck nearby to escape the danger which appeared impending constitute negligence as a matter of law upon his part. The mere fact that there was more than one way to escape from the apparently impending peril, and that plaintiff in the emergency chose the one which was less safe, would not characterize his act as one of negligence as a matter of law. *Railway Co.* v. *Murray*, 55 Ark. 248; *Railway Co.* v. *Maddry*, 57 Ark. 306; *St. Louis, I. M. & S. Ry. Co.* v. *Stamps*, 84 Ark. 241.

Under the facts and circumstances adduced in evidence upon the trial of this case, we are of the opinion that the question as to whether or not the plaintiff was guilty of any negligence which contributed to his injury was one for the jury to determine.

It is urged that the amount of the verdict returned by the jury is excessive. The plaintiff was injured on his leg just above the ankle. He was struck by the truck, which cut a gash to the bone. It caused the plaintiff severe pain, and, while he was able to continue his work, it lamed him for at least ten days, and gave him a great deal of pain for several weeks. Three weeks after the injury was received, a physician examined the wound, and found that the outer bone had a knot on it, and that this portion of his leg was swollen and discolored, and that he still suffered pain therefrom. For the pain and suffering thus endured by him and the lameness which was thus caused by the injury, we can not say that the amount of the verdict returned by the jury was excessive.

Upon an examination of the whole record, we find no prejudicial error which was committed in the trial of the case. The judgment is accordingly affirmed.

PLESS v. STATE.

Opinion delivered February 26, 1912.

1. TRIAL—RECALLING JURY FOR FURTHER INSTRUCTIONS.—It is within the province of the presiding judge to recall the jury and give them further instructions when in the exercise of a proper discretion he regards it necessary to do so in furtherance of justice; and it is not always necessary that he should repeat the whole charge. (Page 510.)

2. HOMICIDE—DRUNKENNESS AS EXCUSE—INSTRUCTION.—The court instructed the jury as follows: "Before drunkenness will excuse or lessen the degree of homicide, it must not be voluntarily produced for the purpose of nerving the defendant to carry out a preconceived design to take life, and it must be so complete and to the extent that reason is dethroned and the defendant rendered incapable of having a specific intent to take life. Partial intoxication, which merely arouses the passions and influences the mind of defendant, will neither mitigate nor lessen the degree of guilt if he still knew right from wrong, the probable consequences and results of his acts, and was capable of a specific intent to take the life of the deceased." *Held*, no error. (Page 510.)

3. SAME—DRUNKENNESS—INSTRUCTION.—It is error to instruct the jury to the effect that if the defendant, prior to the killing, formed the specific intent to take the life of the deceased, and afterwards voluntarily became so drunk that he did not know what he was doing at the time of the killing, he would still be guilty of murder in the first degree if he was but carrying out his predetermined purpose to kill the deceased at the time the act was committed. (Page 511.)

Appeal from Pope Circuit Court; *Hugh Basham*, Judge; reversed.

STATEMENT BY THE COURT.

The appellant was indicted and convicted of murder in the first degree for killing one Lillie Gardner. The testimony shows that she, with her sister, Lucy Kelly, had started home, and were driving along the street in a buggy in the city of Russellville. Lucy Kelly, relating the occurrence, stated that she was the married sister of the deceased girl; that when they got near Mr. Brashear's gate, Cecil Pless ran out and grabbed the lines and said, "Lillie, I want you to tell me the truth." She said: "What is it?" He said: "Are you going to marry me?" She said: "No." He then told her to take off his ring. "While she was taking it off, he pulled his gun, and I jumped out over her, and grabbed him. He slung me down, and shot the horse. He hit me over the head with a gun, while I tried to hold him and told her to run. He then began to shoot at her. She could not run very fast. She ran down the block by Mr. Berry's fence and fell down. I caught him again after she had run to the porch of the house, and tried to hold him. We fell off the porch, and she ran for the gate. She ran and jumped over the fence, and he knocked me down, and ran after her, and jumped over the fence, and when I got there he shot her two times in the breast, it seemed like. She told him not to kill her, and she would go to the courthouse and marry him right then. She said this as she ran. She was shot about sundown, and died that night. I don't know how many times he shot her. He stood over her and loaded his gun after he had emptied it. She told him more than once that she would go to the courthouse and marry him. She said it while he was standing over her loading his gun. He shot the last time as he jumped the fence after her."

Several other witnesses saw the killing, and some testified

that appellant fired two shots at the woman after she had jumped over the fence the last time.

The defendant testified that he did not remember what he did on the day of the killing. He was drunk, and had been for three weeks, on blind tiger liquor; told where he procured his whisky, and how much he had been drinking; said the last he remembered was drinking some liquor down by the railroad tracks that afternoon and giving the corkscrew and keys to a man out in front of the hotel. "I do not remember meeting Lillie that day; do not remember shooting her. The last time I remember seeing her was Monday before that. The first I knew of the killing was the next morning after some one came in and said: 'The girl is dead.' I asked, 'What girl?' Sam Edwards said: 'You know you killed Lillie.' And I fell back on the bed. I don't remember being put in jail."

There was other testimony as to the condition of the defendant at the time the shooting occurred, the man who arrested him saying he looked queer and appeared to be under the influence of some drug. Many of the witnesses testified that he was sober, while others testified that he was very drunk, some in the jail saying that, after vomiting a great deal within a few minutes after being put in jail, he went to sleep and slept soundly until next morning. The physician thought this indicated a state of drunkenness that rendered him irresponsible, not capable of appreciating the result of his acts.

The court instructed the jury, and refused to give appellant's requested instruction No. 1, as follows:

"If you find and believe from the evidence that the defendant was intoxicated, to the extent that he was not conscious of what he was doing, being drunk to the extent that he could have no specific intent to kill, under the law he would not be guilty of murder in the first degree."

Gave instruction numbered 14 on its own motion, defining the extent of drunkenness necessary to reduce the degree of homicide:

"14. You are further instructed that, before drunkenness would excuse or lessen the degree of homicide, it must not be voluntarily produced for the purpose of nerving the defendant to carry out a preconceived design to take life, and it must be so complete, and to that extent that reason is dethroned and

the defendant rendered incapable of having a specific intent to take life. Partial intoxication, which merely arouses the passions and influences the mind of the defendant will neither mitigate nor lessen the degree of guilt, if he still knew right from wrong, the probable consequences and results of his acts, and was capable of a specific intent to take the life of the deceased."

The jury then retired, and after some time returned into court and reported that they had not agreed, and asked the court to instruct them again on the point as to when drunkenness would affect the decree of homicide or excuse the slayer. The defendant asked that the court reread all the instructions to the jury, which was done. They retired again, and did not ask for any further instructions. The attorneys for the State then asked that the jury be recalled, and be given a further instruction. The jury was recalled, and in the presence of defendant and his counsel the court gave, over their objection, instruction numbered 18, as follows:

"18. If you find from the evidence that the defendant, at any time prior to the killing, formed the specific intent to take the life of the deceased, and afterwards voluntarily became so drunk that he did not know what he was doing at the time of the killing, still, if he was carrying out his predetermined purpose to kill the deceased, then such intoxicated condition of the defendant would not lower the degree of the homicide."

The jury returned a verdict of guilty of murder in the first degree, and from the judgment the appeal comes.

R. B. Wilson, for appellant.

Instruction 14, given by the court, was negative merely, and should have been followed by the positive instruction, numbered 1, requested by the appellant, charging the jury that if they found and believed from the evidence that the defendant was intoxicated to the extent that he was not conscious of what he was doing, being drunk to the extent that he could have no specific intent to kill, under the law, he would not be guilty of murder in the first degree. But the court erred especially in giving instruction numbered 18 on request of the State, without request from the jury for further instruction, without reading the other instructions in connection therewith or reminding them even that it should be considered only

in connection with the other instructions. By this instruction the court singled out and placed emphasis upon the testimony of one witness. Hughes on Instructions to Juries, § 115; 1 Heiskell (Tenn.) 202; 88 Ark. 458; 81 Ark. 16; 73 Ark. 148.

Hal L. Norwood, Attorney General, and *William H. Rector,* Assistant, for appellee.

There is no error in the court's instructions. As to the instruction 18, it should be borne in mind that when the jury first returned into court they specifically requested an instruction upon the point covered by this instruction, that is, that the court give them the law as to the effect of drunkenness in reducing the degree of the homicide or excusing the slayer, 88 Ark. 458; 73 Ark. 148; 81 Ark. 16; 47 Ark. 407-8; 40 Ark. 511; 54 Ark. 284; 91 Ark. 503; 34 Ark. 341.

KIRBY, J., (after stating the facts). It is contended that the court erred in giving said instruction numbered 18 at the time and in the manner it did, without calling attention to the other instructions as part of the law of the case, and that the instruction itself is not the law.

It was within the province of the presiding judge to recall the jury and give them further instructions when, in the exercise of a proper discretion, he regarded it necessary to do so in the furtherance of justice, and it is not always necessary in such cases that he should repeat the whole charge, but this instruction was given to the jury after they had returned once and asked to be instructed again as to the extent of drunkenness that would affect the degree of the crime and all the instructions of the case had been reread to them, and without any request upon their part for further instruction, and also without any caution or admonition from the judge that they should regard it with all the other instructions given as the law of the case. Such practice is not to be commended, although in this instance it may be that the cause would not have been reversed because of it if the instruction complained of had been a correct declaration of law. *Lee* v. *State,* 73 Ark. 148.

The law relating to the extent of drunkenness or the effect necessary to be produced by it upon the mind of the defendant, to reduce the grade of the offense, was properly declared in instruction No. 14 given by the court. *Casat* v. *State,* 40 Ar.k

511; *Chrisman* v. *State*, 54 Ark. 284; *Chowning* v. *State*, 91 Ark. 503; *Wood* v. *State*, 34 Ark. 341.

Defendant's requested instruction No. 1 applied the law as stated in No. 14 to the case as made, and in connection with it was a correct statement of the law, and should have been given. The cause would not have been reversed, however, for the court's failure to give it, since such failure could not have been prejudicial because of instruction No. 14 given. Instruction No. 18 given at the State's solicitation and without request from the jury, after it had retired the second time for the consideration of its verdict, was not the law. It tells the jury that if the defendant, prior to the killing, formed the specific intent to take life of the deceased, and afterwards voluntarily became so drunk that he did not know what he was doing at the time of the killing, he would still be guilty of murder in the first degree, if he was but carrying out his predetermined purpose to kill the deceased at the time the act was committed; and is contradictory of the law as heretofore laid down in the decisions of the court and as properly declared in instruction No. 14. *Henslee* v. *State*, 97 Ark. 105.

For this error, the judgment is reversed, and the cause remanded for a new trial.

BILLINGSLEY *v.* ADAMS.

Opinion delivered March 4, 1912.

1. APPEAL AND ERROR—PRESUMPTION WHERE EVIDENCE IS NOT ABSTRACTED.—Where the evidence heard by the trial court is not abstracted, it will be presumed that the court's finding was sustained by sufficient evidence. (Page 512.)
2. JUSTICE OF THE PEACE—APPEAL—NECESSITY OF AFFIDAVIT.—The filing of an affidavit for appeal is prescribed by the statutes as a prerequisite to an appeal from a justice of the peace, and unless waived is ground for dismissal. (Page 513.)
3. SAME—MOTION TO DISMISS APPEAL—EFFECT OF DELAY.—Mere delay from one term to another before moving to dismiss an appeal from a justice of the peace for want of an affidavit for appeal, where the rights of the party appealing were not prejudiced by the delay, did not constitute a waiver of the omission to file the affidavit. (Page 513.)
4. SAME—EFFECT OF DISMISSING APPEAL.—Where an appeal from a justice of the peace is dismissed for want of an affidavit, it was error to render judgment on the appeal bond. (Page 513.)

Appeal from Izard Circuit Court; *J. W. Meeks*, Judge; reversed in part.

J. B. Baker, for appellant.

1. The affidavit for appeal and the payment of the fee for transcript is all that is requisite for an appeal. Kirby's Digest, § 4666; 19 Ark. 647; 96 *Id.* 332. If there was no appeal, the circuit court had no jurisdiction, and the court erred in affirming the judgment. 19 Ark. 647; Kirby's Digest, § 4664.

2. It was error to render judgment against the bondsmen. Kirby's Digest, § 4666; 19 Ark. 647.

3. The taking of an appeal consists of filing an affidavit with the justice. Kirby's Digest, § 4666, subd. 1, and § § 4667, 4670-2-6-7; 67 Ark. 493; 70 *Id.* 102; 12 *Id.* 80. The oath was made and filed with the justice—that was all that was requisite. Kirby's Digest, § 4666; 35 Ark. 212; 96 *Id.* 332.

Chas. F. Cole, for appellee.

1. No affidavit for appeal was filed. Kirby's Digest, § 4666; 19 Ark. 647.

2. It is the duty of appellant to see that the appeal, is perfected in time. 48 Ark. 73; 31 *Id.* 268; 32 *Id.* 292; 31 *Id.* 558.

3. The statutory requirements for an appeal can not be dispensed with. 2 Enc. Pl. & Pr. 234; 24 Ark. 282; 7 Ark. 514; 10 *Id.* 308.

4. The dismissal of the appeal necessarily gave judgment on the bond according to its terms.

McCULLOCH, C. J. Appellee sued appellant on a promissory note before a justice of the peace, and recovered a judgment, from which an appeal was taken to the circuit court. At the first term of the circuit court there were no proceedings in the cause, except that on application of appellant the cause was continued to the next term; and at the next term appellee moved for dismissal of the appeal on the ground that no affidavit for appeal had been filed. Appellant offered to file a substituted affidavit, but the court denied the request on the ground that no affidavit had been filed with the justice of the peace, and dismissed the appeal. From that judgment an appeal to this court has been prosecuted.

The evidence heard by the court is not abstracted. There-

fore, we must indulge the presumption that the court's finding that no affidavit for appeal had ever been filed with the justice is sustained by sufficient evidence. The filing of an affidavit is prescribed by statute as a prerequisite to an appeal, and unless waived is ground for dismissal. *Merrill* v. *Manees*, 19 Ark. 647.

Appellee did not take any substantive steps in the case before moving for the dismissal of the appeal; and mere delay from one term to another, where appellant's rights were not prejudiced by the delay, did not constitute a waiver of the omission to file the affidavit. When the appeal was dismissed for want of an affidavit, it was error to render judgment on the appeal bond. The judgment of the court in dismissing the appeal is affirmed, but the judgment on the bond is reversed and quashed.

MORRIS v. STATE.

Opinion delivered March 4, 1912

1. BANKS AND BANKING—RECEIVING DEPOSITS AFTER INSOLVENCY.—An indictment of the president of an incorporated bank for receiving deposits when he knew that the bank was insolvent was sufficient where it alleged that he knowingly and feloniously did accept and receive on deposit in said bank, a corporation doing a banking business, from a certain person a sum named, the bank being then and there insolvent and the said defendant being president thereof, well knowing at the time he accepted and received the money that said bank was insolvent. (Page 515.)
2. SAME—SUFFICIENCY OF INDICTMENT.—An indictment of a bank president for receiving deposits after he knew that the bank was insolvent, which designates him as president of the bank, is sufficient to show that he was an officer of the bank. (Page 515.)
3. SAME—RECEIVING DEPOSITS AFTER INSOLVENCY.—Under Kirby's Digest, section 1814, forbidding any officer of the bank to receive or accept deposits after the bank is insolvent, the words "receive" and "accept" are synonymous, and intended to describe but one offense. (Page 515.)
4. CONTINUANCE—DISCRETION OF COURT.—Where, in a felony trial, a continuance was asked on the ground that, in the opinion of his physicians, defendant's physical condition was such that the excitement of a trial might result fatally, but the court refused the continuance, and it does not appear that any prejudice resulted to the defendant, no abuse of the court's discretion is shown. (Page 516.)

5. BANKS AND BANKING—RECEIVING MONEY AFTER INSOLVENCY—VARIANCE.—Where indictment of a bank officer for receiving money after insolvency of the bank alleged the receipt of "one hundred dollars in gold, silver and paper money, current money in the State of Arkansas," proof that defendant received eleven dollars of the amount charged in currency and the residue in checks is not a variance, as proof of receiving any amount in currency was sufficient. (Page 517.)

Appeal from Washington Circuit Court; *J. S. Maples*. Judge; affirmed.

R. F. Forrest, for appellant.

1. In view of the mental and physical condition of appellant as set up in the motion for a continuance and supported by the testimony of medical experts, the court abused its discretion in overruling the motion. 23 Ark. 34.

2. The statute under which the indictment is drawn is a criminal statute and must be strictly construed. No case can be brought within its provisions unless it is within both the letter and spirit of the law. The demurrer to the indictment should have been sustained. 91 Ark. 1; Lewis, Sutherland, Stat. Con. 456-9; 415-25; 38 Ark. 519; 53 Ark. 334; 29 Ark. 68; 43 Ark. 93; 154 Ind. 443.

The indictment is bad for duplicity. The statute is disjunctive, creating and for the punishment of two offenses, (1) receiving and (2) accepting the deposit. The two offenses should be charged in separate counts. 134 Mo. 238-243; Kirby's Digest, § 2230; 48 Ark. 94; 45 Ark. 62.

Hal L. Norwood, Attorney General, and *William H. Rector*, Assistant, for appellee.

1. An examination of the testimony supporting the motion for continuance shows that there was no abuse of discretion in overruling the motion; and this fact is made clearer by an examination of appellant's testimony given at the trial, from which it appears that he was fully competent, mentally, to cope with the situation.

2. The indictment is sufficient. It is identical in form with that in *Davey* v. *State*, 99 Ark. 547.

WOOD, J. Appellant was convicted under section 1814 of Kirby's Digest of the crime of accepting and receiving on deposit money at the Bank of Siloam, of which he was presi-

dent, after the said bank had become insolvent, and he appeals to this court.

The indictment charges, in substance, that he "knowingly and feloniously did accept and receive on deposit in said Bank of Siloam, a corporation doing a banking business, from M. E. Gaither the sum of one hundred dollars in gold, silver and paper money, current money, the bank being then and there insolvent and the said R. S. Morris being the president of said bank, well knowing at the time he accepted and received the money on deposit that the Bank of Siloam was insolvent."

Excepting the name of the defendant and the amount alleged to have been received, the indictment was precisely the same in form as that approved by this court in *Davey* v. *State*, 99 Ark. 547.

A corporation can only act through its agents. The allegations of the indictment were sufficient to charge that the bank had received and accepted the deposit while insolvent, and that the appellant, who was president of the bank, and who acted for it in receiving and accepting the money on deposit, knew at the time the bank was insolvent, and therefore violated the provisions of the statute in thus accepting the money on deposit.

It was unnecessary for the indictment to charge in specific terms that appellant was an officer of the bank. He was designated in the indictment as president of the bank, which was sufficient to show that he was an officer of the bank. The allegations of the indictment were amply sufficient to show that the bank, through its duly constituted agent, accepted and received the deposit, being at the time insolvent, and that the appellant, being at the time president, and therefore an officer of the bank, and knowing of its insolvency, accepted and received the deposit. Everything necessary to constitute the offense charged was stated.

The appellant was indicted as principal offender, and not as an accessory, under the terms of the statute.

The terms "accept" and "receive" as used in the statute are synonymous, and are intended to describe but one offense. The indictment shows that it was returned by the grand jury of Benton County, and that it was filed in open court. The indictment was in the form prescribed by section 2244 of

Kirby's Digest, and was both in form and substance a valid indictment, as held in *Davey* v. *State, supra.*

The appellant filed a motion for continuance in due form, setting up, in substance, that he was in no condition, either mentally or physically, to undergo a trial. He showed that he was seventy-four years of age, and that, about eighteen months prior to August 6, 1910, he had suffered a stroke of paralysis which had incapacitated him for the transaction of business, and that about the first of November, 1910, he suffered a stroke of apoplexy; that by reason of these afflictions he was under the treatment of physicians who advised that a trial at that time, with "its necessary attendant mental and physical strain upon a charge of felony, would tend to end fatally." He supports his motion with the affidavits of several physicians, to the effect that on account of the mental and physical condition of the appellant, brought about by the afflictions indicated, "the excitement of a trial might bring about a recurrence of the ailment, which might end in immediate death," and that in the opinion of these physicians "he was unable to attend court or to testify as a witness."

The motion was also supported by the affidavit of appellant's counsel, in which he sets up, among other things, that from November 1, 1910, to about February 15, 1911, he, as appellant's counsel was warned by the physicians not to talk or communicate with appellant "as his physical and mental condition would not permit such consultation as was necessary for the preparation of his defense in the case of a felony;" that, by reason of appellant's infirmities and the restriction placed upon him and his counsel by his advising and consulting physicians, "appellant had not had reason enough to appreciate his peril or act advisedly with counsel in suggesting such facts as "would break the force of the prosecuting evidence," and had not been able "to adduce such exculpatory proof as his case would warrant."

Motions for continuance are addressed to the sound discretion of the court, and such discretion will not be controlled unless it appears that it was abused. The appellant was a witness in his own behalf at the trial, and his testimony, as set out in the abstract of the Attorney General, does not disclose any inherent weakness or indicate that the appellant was in

any manner incapacitated as a witness by reason of his age or the physical infirmities described by his counsel and physicians. His evidence does not, upon its face, give any indication that appellant was laboring under any physical or mental disability.

Counsel, in his affidavit, did not set forth any material evidence of which he was deprived by reason of the mental and physical infirmity of his client, nor show specifically wherein his client was unable to give him specific information that would be useful in the preparation for and in the conduct of his defense.

The affidavits of the physicians, after setting forth the nature of his ailments, simply expressed the opinion that the appellant was unable, on account of his infirmities, to testify as a witness, and that to do so would endanger his life. But appellant did testify as a witness, and went through the ordeal of a trial, and it does not appear that his life was endangered thereby, thus showing that the apprehension of the physicians was erroneous.

While it occurs to us that the trial court might very appropriately, under the circumstances, have granted the continuance, yet we can not say that his refusal to do so resulted in any prejudice to the appellant, and therefore it was not an abuse of the court's discretion, and was not such an error as should reverse the judgment.

The indictment alleged that "the sum of one hundred dollars in gold, silver and paper money, current money in the State of Arkansas, of the value of one hundred dollars," etc., was accepted and received. The testimony shows that eleven dollars of the amount charged was in currency and the residue was in checks. The amount received was evidenced by the deposit slip, showing the sum of eleven dollars in currency and the balance in checks. The appellant objected to the introduction of the deposit slip and to the testimony tending to show that the deposit consisted of checks instead of currency, and he now contends that there was a fatal variance on this account between the allegtions of the indictment and the proof. The contention is not sound. The proof was sufficient to show that eleven dollars in currency were accepted and received, and checks representing the balance of the amount alleged were received. The offense, under the statute, was

complete if the appellant knowingly received any amount of money, and it was proved by evidence tending to show that he received the sum of eleven dollars in currency. It was wholly unnecessary to show that he received the full amount charged in order to sustain a conviction; proof of any amount was sufficient.

We deem it unnecessary to set out the evidence. After careful consideration, we are of the opinion that it is amply sufficient to sustain the verdict. No objection is urged here to the instructions of the court. We assume, therefore, that they were correct.

Finding no reversible error, the judgment is affirmed.

REEDER v. CARGILL.

Opinion delivered March 4, 1912.

LIMITATION OF ACTIONS—SUSPENSION OF STATUTE BY DEBTOR'S IMPROPER ACT.—Under Kirby's Digest, section 5088, providing for a suspension of the statute of limitations during the time when the defendant "by absconding, concealing himself or any other improper act of his own," prevents the commencement of an action against him, *held* that where a debt was to become due upon the expiration of the debtor's term in the penitentiary and he escaped therefrom and was subsequently pardoned, his escape was an "improper act," and the statute of limitation did not run in his favor until the pardon was granted.

Appeal from Independence Circuit Court; *R. E. Jeffery*, Judge; reversed.

STATEMENT BY THE COURT.

This suit was instituted by appellant, Reeder, the surviving partner of the firm of Wright & Reeder. to recover the sum of $81 with interest, alleged to be due for services rendered by them as attorneys in defending the appellee, who was convicted in the Independence Circuit Court of the crime of grand larceny. He appealed, and the judgment of conviction was affirmed. The firm of which Wright was then a member, and of which Reeder afterwards became a member, represented him in both courts, and the testimony tends to prove that the fee for such services, including expenses, was $212, of which appellee had paid the sum of $131, leaving as a balance due the amount sued for.

The appellee denied that he owed the debt, and set up the statute of limitations.

The testimony on behalf of the appellants was sufficient to have sustained a finding in their favor; and the testimony on behalf of the appellee was sufficient to uphold a verdict in his favor. So the only question is as to whether or not the court properly instructed the jury.

Appellee was sentenced to the penitentiary, and was received by the keeper of the penitentiary on February 8, 1906, and the testimony tends to show that he escaped from the penitentiary on April 16, 1906. The keeper of the penitentiary testified that a reward of $25 was offered for the capture of appellee after he made his escape, which was sent out over the State to all sheriffs and other officers; that he had written, he supposed, two dozen letters to officers in the part of the State where appellee formerly resided, trying to effect his capture.

The sheriffs of Independence County at the time appellee was sent to the penitentiary and at the time of his escape testified that they received a letter from the keeper of the penitentiary inclosing a description of appellee, with the offer of the reward for his capture; that they made inquiries immediately upon receipt of the letter from the keeper of the State penitentiary, and got word in response that he was in Izard County. One of the sheriffs testified that "he had a fellow up there watching for him," and the other sheriff testified that he talked with the sheriff of Izard County and to another party who lived at Mudtown, a place near where appellee claims to have lived after he escaped from the penitentiary.

The appellee lived in Independence County when he was convicted and sent to the penitentiary. The sheriffs say that they made diligent inquiry for him; that they were making an effort to find him all the time after his escape. The proof shows that appellee was pardoned while at large on May 24, 1909.

Appellant testified that, after he received information of appellee's escape from the penitentiary, both he and his partner, Wright, who had since died, made repeated efforts to learn where appellee was and wrote several letters. They heard occasional rumors of his whereabouts. The letters addressed to him at such places would be returned, and further information would reveal that he was not there and had left

the country; that he was never able to get service on him until summons was served in this case.

Appellant further testified that his firm agreed with appellee, when he was about to be carried to the penitentiary, to let the balance that was due the firm run until appellee returned from the penitentiary; that the understanding was that when appellee came back from serving his sentence he was to pay the balance of the fee. Appellant testified that he thought the amount became due when appellee was pardoned; that he had been out of the penitentiary some time before that, but appellant Reeder was ignorant of his whereabouts; that he had made inquiries but could not find out from any source where the appellee was.

I. J. Matheny, who was a law partner of W. S. Wright in 1903 and 1904, testified "that there still remained due and unpaid on the fee $81; that he knew this because he saw Wright and Cargill settle just before Cargill left for the penitentiary, and he admitted owing that amount, which was shown by the books to be due. The amount was to become due when Cargill was out of the penitentiary. He claimed that "he was hard up, and that his wife would need all he had, and Wright agreed to wait until he was out of the penitentiary."

Quite a number of witnesses testified on behalf of appellee to facts tending to show that, after appellee returned from the penitentiary, he lived openly and publicly at his old home place in Izard County, Arkansas; that he lived continuously there from April 16, 1906, the date of his escape, until the trial of the present case; that he was a stock man and farmer, frequently went to the postoffice, burials, church and other public places; that he made no effort to conceal himself, and that his presence in the community was generally known.

The court among others gave the following instructions:

"No. 5. If you find from the evidence that the defendant, after his leaving the penitentiary, lived openly and publicly in the neighborhood of his residence, then that would not be such a concealment required by law as would prevent the statute of limitations from running, and your verdict should be for the defendant, unless you further find that by some

other improper act of his own he prevented the commencement of this action.

"No. 6. Under the law of this State, service of summons in a civil action may be had by leaving a copy thereof at the usual place of abode of the defendant, with some person who is a member of his family over the age of fifteen years; and, before you can find for the plaintiffs, you must find that the plaintiffs were prevented from so beginning their cause of action by such service prior to three years before the institution of this suit, but the time the defendant was actually in the penitentiary would not be computed in that time.

"No. 8. If the plaintiffs, by the exercise of reasonable diligence, could have discovered the whereabouts of defendant, then they can not plead the suspension of the statute of limitations; and it is incumbent upon plaintiffs to show such diligence, unless you find that the debt was not to become due until defendant returned from the penitentiary."

The appellant requested the court to grant, among others, the following prayers for instructions, which the court refused.

"No. 4. You are instructed that the three years' statute of limitations on an open account does not begin to run until the accrual of the cause of action; and if you believe from the evidence in this case that the account of plaintiffs now sued on was not to be payable until the defendant should serve his time, or sentence, in the penitentiary, then under the evidence in this case the statute would not begin to run until the date he secured a pardon from said sentence, and the plaintiff would have three years from the date of said pardon to bring this action.

"No. 5. The only way a convict sentenced to the penitentiary can be served is by serving a summons and copy of the complaint upon the keeper of the penitentiary, which must be delivered to the convict served; and if you find that the defendant was a convict and escaped from the penitentiary, thereby preventing a copy of summons and complaint being delivered to him by said keeper, then this would be such an improper act of his own as would prevent the statute running while he was at large and unpardoned.

"No. 6. If you believe from a preponderance of the evidence that the contract between Wright and defendant was

that the debt sued on was not to become due until the defendant was returned from the penitentiary, and if you further find that defendant escaped and was not released, but was subsequently pardoned, then the statute would not begin to run until said pardon was granted."

Samuel M. Casey and *McCaleb & Reeder*, for appellant.

Oldfield & Cole, for appellee.

WOOD, J., (after stating the facts). The testimony of appellant Reeder and of witness Matheny tends to prove that the alleged claim for which this suit was brought would not be due until the appellee had returned from the penitentiary after serving the term of his imprisonment. According to this testimony, appellee and Wright had in contemplation that appellee would serve his term in the penitentiary, and that the balance of the fee claimed by Wright would not be due until the year for which he was sentenced had expired, or at least until the time that he should legally serve under the sentence had expired. Reeder testified that they did not contract with reference to appellee making his escape.

We are of the opinion that, according to this testimony, the amount claimed was due at the expiration of the period for which appellee was sentenced to the penitentiary. But for the fact that appellee had made his escape from the penitentiary, this action could have been commenced against him at that time, and the statute of limitations, had he not made his escape, would have commenced to run at that time also.

But section 5088 of Kirby's Digest provides as follows:

"If any person, by leaving the county, absconding or concealing himself, or any other improper act of his own, prevent the commencement of any action in this act specified, such action may be commenced within the times respectively limited after the commencement of such action shall cease to be so prevented."

The escape of appellee from the penitentiary was an unlawful and improper act on his part, which, under the above statute, suspended the running of the statute of limitations from the time when the alleged debt was due until appellee was pardoned. The law in regard to service of summons upon convicts makes provision only for service upon convicts who

are imprisoned in the penitentiary. Kirby's Digest, § 6051. Therefore, one who occupied the status of an escaped convict, although he may have been living openly and publicly at the place where he resided before his sentence, can not set up that the statute of limitations was running during the time he was an escaped convict, nor can he complain of a lack of diligence in not serving him with summons in a civil action during such time. In contemplation of law, a convict who has escaped from the penitentiary during the period of such escape and before pardon has no usual place of abode where he may be served with process under the provisions of section 6042, subdivision 3, Kirby's Digest.

It will be observed from what we have said that the cause was tried upon a misconception of the law.

The instructions of the court were based upon this misconception of the law, and were therefore erroneous and prejudicial. Prayers for instructions 4, 5 and 6 on behalf of appellant, in the view we have expressed, were correct, and the court erred in not granting the same.

For the errors indicated the judgment is reversed and the cause remanded for a new trial.

McCULLOCH, C. J., (dissenting). The majority hold, as I understand from the opinion, that an escaped convict can not plead the statute of limitations for the reason that there is no statutory provision for service of process on him. I take issue on that proposition.

Section 6051 of Kirby's Digest reads as follows: "Where the defendant is a prisoner in the penitentiary a copy of the complaint must accompany the summons, and the service must be upon the keeper of the penitentiary, who shall deliver the copies of the complaint and summons to the defendant. And a copy of the summons must also be delivered to the wife of the prisoner, or, if he has no wife, left at the place where he resided or claimed to reside, prior to his confinement, with some person of the age of sixteen years."

Another provision of the statute is that service may be had "by leaving a copy of such summons at the usual place of abode of the defendant, with some person who is a member of his family over the age of sixteen years." Third subdivision of section 6042, Kirby's Digest.

Now, it is plain that the provisions of section 6051 are solely for the benefit of a convict while confined in the State penitentiary, and the statute requires, for his protection, that while he is confined in the penitentiary a copy of the complaint and summons must be served on the keeper for his use, and also that a copy must be delivered to his wife or other person over sixteen years of age at his former residence. If he is not confined in the penitentiary, but has voluntarily left it, the provisions of section 6051 do not apply, and other methods of service are sufficient, by delivering a copy to him in person or to a member of his family over sixteen years of age at his usual place of abode. It seems to me to be a peculiar state of the law that a convict is immune from process because he wrongfully leaves the place where the statute provides a method of service on him. If that method of service was exclusive, he could not, of course, be otherwise served, but I can not believe, from the language of the statute that it was so intended. As before stated, that method of service is provided for his protection, and he forfeits it by voluntarily leaving the place, and may be served by any other statutory method provided for other persons. Section 5088 only makes an exception to the operation of the statute of limitations against a person who by his wrongful act prevents the commencement of an action against him. It is not every wrongful act that operates to prevent the commencement of an action. Merely because a convict escapes from the penitentiary does not prevent the commencement of an action against him; and unless he absconds or conceals himself so that process can not be served in some of the statutory modes, the statute of limitations is not suspended. If he has a place of abode known to his creditor, and is to be found there, the statute of limitations continues to run in his favor. I fail to see how appellee's confinement in the penitentiary and his alleged escape therefrom has anything to do with the case except as bearing on the question of evasion of the service of process; and if he was living openly at his usual place of abode, and appellant knew it, or by the exercise of reasonable diligence could have known it, the statute of limitations was not suspended.

The question as to the alleged agreement for postponement of the maturity of the debt was properly submitted to the jury.

I fail to discover any reversible error in the record, and the judgment should therefore be affirmed.

Mr. Justice KIRBY concurs in this opinion.

REED v. STATE.

Opinion delivered March 4, 1912.

1. HOMICIDE—INSTRUCTIONS—WHEN HARMLESS.—The error of instructing the jury, in a murder case, that premeditation and deliberation are necessary in both degrees of murder was harmless where the jury were told that if the defendant at the time he fired the shot did not have the intention to take life he would be guilty of murder in the second degree, but that if he had the specific intent to kill, and the killing was done after premeditation and deliberation, he would be guilty of murder in the second degree. (Page 527.)
2. SAME—SANITY—EVIDENCE.—Where, in a prosecution for murder, the defense was that defendant was insane at the time the homicide was committed, a statement, made by him while he was incarcerated in jail after the killing, that he was going to play crazy and try to get bond was competent as tending to throw light upon his mental condition at the time the killing occurred. (Page 529.)
3. EVIDENCE—DECLARATIONS BY ACCUSED.—Statements or declarations by the accused not amounting to a confession, but from which, in connection with other evidence, an inference of guilt might be drawn, are admissible against the accused as admissions. (Page 530.)
4. NEW TRIAL—REMARK IN JUROR'S PRESENCE.—It was not an abuse of discretion to refuse a new trial on account of an improper remark made in the presence of a juror where there was evidence sufficient to justify a finding that the remark did not influence the juror. (Page 530.)

Appeal from St. Francis Circuit Court; *Hance N. Hutton*, Judge; affirmed.

STATEMENT BY THE COURT.

Andrew Reed was indicted, tried and convicted before a jury, of the crime of murder in the first degree, charged to have been committed, by shooting his wife, Mollie Reed. The defendant killed his wife on Monday the 12th day of June, 1911. The defendant and his wife were separated, and had been living apart for some time. On Saturday preceding the killing, the defendant went to where his wife was staying and

asked her to return to him. She refused to come, saying that he had treated her so badly she could not live with him any more. On the succeeding Monday she went to defendant's house and asked him if she might have a set of furniture, and he told her that she might have anything in the house she wanted. When she started to go, he told her to sit down, that he had something he wanted to talk over with her. A witness who heard this conversation said that he then left to go and get a bucket of water, and that the killing occurred while he was getting the water. The deceased was standing in the back part of the house with her hands on her hips at the time the defendant shot her. He shot her in the side with a shotgun; she fell head over heels down the steps into the yard. She struggled around trying to get up, and said, "Lord, have mercy!" The defendant walked back through the house with the gun in his hand, and went out on the back gallery, and, putting his foot on the step, shot her twice more. After he shot her the last time, one of the witnesses says he came back through the house, and his wife's mother asked if her child was dead, and the defendant said: "Yes, you ought to have been here and got your part." The deceased only lived about thirty minutes after she was shot. The homicide occurred in Madison, St. Francis County, Arkansas.

The defendant adduced testimony tending to show that he had a running sore in his head which had been caused by a lick which he had received several years before, and that it pained him considerably, especially in hot weather; that when he drank whisky it caused a loss of memory, and that he did not know or understand what he was doing. He also adduced testimony tending to show that he had been drinking heavily for several days prior to the killing, and that he was so drunk at the time he killed his wife that he did not know what he was doing.

In rebuttal, the State introduced witnesses who testified that they talked with the defendant a short time before and after the killing, that he appeared to be sober and understand what he was doing. Another witness went to see him after he was confined in jail and asked the defendant for some money that he owed him. The defendant told him that he was going to get out on bond, and the witness told him that was foolish-

ness to talk that way, that he could not get out on bond. The defendant then said that he was going to play crazy and get out that way.

From the judgement of conviction the defendant has duly prosecuted an appeal.

S. H. Mann, for appellant.

1. The testimony of Taylor Swift as to what defendant said about going to "play crazy" was incompetent and prejudicial.

2. The court erred in its charge as to the degrees of murder. 21 Cyc. 727, 730, 1044; 7 L. R. A. 1071 (N. S.); 17 *Id.* 705; 11 Ark. 460; 9 A. & E. Enc. L. 567; 29 Ark. 264.

3. A new trial should be granted for improper remarks made in the hearing of a juror. 73 Ark. 501; 75 *Id.* 67; 84 *Id.* 569; 40 *Id.* 454; 3 Wharton, Cr. Law, pr. 3172; 57 Ark. 1; 44 *Id.* 115; 34 *Id.* 341; 12 Cyc. 674 (4).

Hal L. Norwood, Attorney General, and *Wm. H. Rector,* Assistant, for appellee.

1. Swift's evidence was not prejudicial.

2. The court's charge, as a whole, properly states the law, and could not have misled the jury. 34 Ark. 275; 49 *Id.* 156; 54 *Id.* 283; 91 *Id.* 503.

3. The integrity of the verdict was not impeached. No improper influence was shown by, nor did any prejudice result from, the remark heard by the juror. 84 Ark. 569; 73 *Id.* 581; 75 *Id.* 1.

HART, J., (after stating the facts). The defense relied on by the defendant for an acquittal was his alleged insanity at the time of the killing, and this question was submitted to the jury under proper instructions given by the court. The jury by its verdict found against the defendant on that issue. If the defendant was capable of distinguishing between right and wrong when he killed his wife, there can be no doubt but that it was a wilful, deliberate and premeditated killing, and that he was guilty of murder in the first degree.

After the jury had deliberated for some time, they returned into court and asked for further instructions as to the distinction between murder in the first and second degrees. The court them gave them the following instructions:

"I have stated to you that the distinction between murder in the first and second degree is a very dim line. In order to convict the defendant of murder in the second degree, it must be clear to the jury from all the facts and circumstances in the case that at the time the fatal shot was fired there was an intent on the part of the defendant to take the life of the deceased. This premeditation and deliberation is necessary in both grades of murder, but in murder in the first degree it is not necessary to exist for any length of time, but it is sufficient if it was the intention of the party to take life. In murder in the second degree the distinguishing line would be if the party at the time he fired the shot did not have the intention to take life—that would be murder in the second degree, and if the intent was there a moment before the killing or the shot was fired, he would be guilty of murder in the first degree."

It is contended by counsel for defendant that this instruction does not properly state the law, and that the defendant was prejudiced by the court giving it. They insist that the instruction told the jury that there was practically no difference between murder in the first degree and murder in the second degree. The instruction is loosely drawn, and the court should have not told the jury that the distinction between murder in the first and second degrees is a very dim line; but we do not think the court's action was prejudicial to the rights of the defendant. All the instructions in the case are to be considered together. Under our statute, one of the main distinctions between murder in the first degree and murder in the second degree, is that to make out the crime of murder in the first degree a specific intent to take life must be shown. *Petty* v. *State*, 76 Ark. 515; *Byrd* v. *State*, *Ib.* 286. So that it will be seen that the leading characteristics of murder in the second degree are the presence of malice, distinguishing if from manslaughter, and the absence of premeditation or deliberation. In other instructions, the court told the jury what was necessary to constitute murder in the first degree, and instructed them fully as to the distinction between murder in the first degree and murder in the second degree. The law does not undertake to set any limit to the time which must elapse between the formation of an intent to kill and the consummation in the homicide. In the case of *Bivens* v. *State*, 11 Ark.

455, the court, in discussing what is necessary to constitute murder in the first degree, said:

"It is indispensable then in such cases that the evidence should show that the killing with malice was preceded by a clearly formed design to kill—a clear intent to take life. It is not, however, indispensable that this premeditated design to kill should have existed in the mind of the slayer for any particular length of time before the killing. Premeditation has no definite legal limits, and therefore if the design to kill was but the conception of a moment, but was the result of deliberation and premeditation, reason being upon its throne, that is altogether sufficient, and it is only necessary that the premeditated intention to kill should have actually existed as a cause determinedly fixed on before the act of killing was done, and was not brought about by provocation received at the time of the act, or so recently before as not to afford time for reflection."

From the principles above announced, it will be seen that the court erred in telling the jury that premeditation and deliberation are necessary in both degrees of murder, but this error was not prejudicial to the rights of the defendant. It will be noted that the court told the jury that the distinguishing line between the two degrees would be that, if the defendant at the time he fired the shot did not have the intention to take life, he would be guilty of murder in the second degree, but that if he had the specific intention to take life at the time he killed the deceased, and if the killing was done after premeditation and deliberation, he would be guilty of murder in the first degree. The jury found the defendant guilty of murder in the first degree, and necessarily found that the killing was done after premeditation and deliberation, and, so finding, the instruction was not prejudicial to the rights of the defendant. *Beene* v. *State*, 79 Ark. 460.

It is next insisted that the court erred in admitting the statement of the defendant, made while he was incarcerated in jail after the killing, that he was going to play crazy and try to get bond. The defense of the defendant was that he was insane at the time the homicide was committed. The question of his sanity or insanity at the time of the killing was one of fact for the jury to determine, and the statement was competent for whatever the jury might consider it to be worth,

as tending to shed light upon his mental condition at the time the killing occurred.

Statements or declarations by the accused before and after the commission of a crime, although not amounting to a confession, but from which, in connection with other evidence of surrounding circumstances, an inference of guilt might be drawn, are admissible against the defendant as admissions. 12 Cyc. 418.

Finally, it is contended by counsel for defendant that the court erred in refusing him a new trial because one of the jurors had been subjected to improper influences. On this question, the court heard the following evidence:

T. C. Merwin, testified: "I remember J. G. Taylor being in the office during the progress of the Andrew Reed trial. I asked something about what had been done in the case, what the jury was hung up about, and I don't remember right now, but something was said about the trouble being the instructions of the judge, and about that time Mr. Taylor got up and went out. I can't remember whether this was before the jury reported or not. I might have said something before Mr. Taylor went out about hanging the negro, but he was only there a few minutes the first time, and he went right out. After that I commenced talking about it."

J. G. Taylor: "I heard something said about hanging the defendant and why the jury were so long in returning a verdict as I was going in the vault for a drink of water, but I don't remember just what was said. The statement had no influence on me in my finding. I have not been influenced by anybody in any manner or way.

CROSS EXAMINATION.

"I did hear Mr. Merwin say something about Andrew Reed, but I got right up and went out. I stopped and told him that I was on the jury. (To the question, 'You understood he was condemning Andrew Reed, did you not?' objections sustained. Defendant expected). He said something to me effect that Reed ought to be hung. It was not long before I got away. I was going for some water any way."

John Wydick: "I was in Mr. Merwin's office at the time Mr. Taylor passed through there when the matter of

Andrew Reed was being discussed. To the best of my memory Mr. Taylor had passed into the vault when Mr. Merwin expressed himself about this case. I don't know how many times Mr. Taylor was in there; that the was only time that he said anything."

We have abstracted all of the testimony that was introduced on this question, and it will be seen that the court was fully advised concerning all the matters alleged as improper influences to which the jurror was subjected, and that it was made to appear to the satisfaction of the court that the juror was not influenced by what he heard Merwin say. The juror himself testified positively that the remarks made by Mr. Merwin in his presence did not have any influence upon him in arriving at a verdict. The witnesses on this point were examined in the presence of the court, and, the court having satisfied itself that the remarks made in the presence of the juror did not have any influence upon the mind of the juror in arriving at a verdict in the case, we do not think there was an abuse of discretion in denying the defendant's motion for a new trial in this account.

Judgment will be affirmed.

BROWN v. SIMSBORO CASH STORE.

Opinion delivered March 4, 1912.

SALES OF CHATTELS—SUFFICIENCY OF DELIVERY.—If the property be present, and the vendor for an agreed consideration makes an unconditional sale of the property to the vendee, who accepts it, although the actual possession of the property is retained by the vendor as bailee for the vendee, the sale is complete.

Appeal from Lafayette Circuit Court; *Jacob M. Carter*, Judge; affirmed.

D. L. King, for appellant.

No brief for appellee.

FRAUENTHAL, J. This is an action of replevin for the recovery of a yoke of oxen. It was instituted by the appellee, and the trial resulted in a verdict in its favor. The appellant has made no abstract of the instructions given by the trial court,

nor of any that it refused. According to the repeated rulings of this court, we will therefore indulge the presumption that no error was committed by the trial court in its rulings upon the instructions.

The sole question which is presented by the record for our determination is whether there is sufficient legal evidence to sustain the verdict which was returned.

The appellee claimed title to the property by virtue of an alleged purchase from appellant. The appellee is a corporation engaged in the mercantile business at Simsboro, Louisiana, and it appears from the testimony introduced upon its behalf that appellant purchased goods from it for several months prior to April, 1911, and upon a credit. In April, 1911, it insisted that appellant should pay or reduce this indebtedness. In consideration of $70, which was credited by the appellee upon his account, the appellant then sold to it the property involved in this suit. The oxen were at that time in the town of Simsboro, and appellant brought them to appellee's store, and turned them over for the above consideration. It was then agreed between the parties that appellant might retain possession of the property until June following, for the purpose of hauling some ties. This the appellant did; but, instead of returning the property to appellee, he left Simsboro with it in June, and there was some testimony tending to prove that he left in the night time, driving the cattle, and under suspicious circumstances indicating that he was endeavoring to leave with the property without appellee's knowledge.

In determining whether or not there was a completed sale of the property to appellee under the facts of this case, the controlling question is, was there a delivery of it at the time of the alleged sale? As between vendor and vendee of personal property, the passing of the title is ordinarily determined by a consideration of what was the actual intention of the parties. As between purchaser and seller, it is not necessary that there should be an actual change of the possession of the thing sold in order to invest the buyer with the title, if such is the actual intention of the parties. *Priest* v. *Hodges*, 90 Ark. 131; *Guion Mercantile Co.* v. *Campbell*, 91 Ark. 240.

If the property is present, and the vendor for an agreed consideration then makes an unconditional sale of the property

to the vendee, who for an agreed price accepts it, and at the time it is understood by both parties that the title to the property shall pass, then, although the actual possession of the property is still retained by the vendor as bailee for the vendee, the sale will still be complete. Under such circumstances, the contract of sale is absolute and binding, and the vendee's title will be protected, even as against attaching creditors or subsequent purchasers, if no element of fraud is connected with such contract of sale. *Shaul* v. *Harrington*, 54 Ark. 305; *Hight* v. *Harris*, 56 Ark. 98.

We are of the opinion that there was sufficient evidence adduced upon the trial of this case showing that the property was purchased unconditionally by appellee at the price of $70, which was credited by appellee upon appellant's account to it, and that legal delivery of the property was made at the time, and actual possession thereof was only retained by appellant as bailee of the appellee. Under these circumstances, the sale was complete, and the title to the property passed to appellee.

The appellant also urges that errors were committed by the trial court in its rulings relative to the introduction of certain testimony. Some of the exceptions which were made to these rulings have not been incorporated in the motion for new trial, and on this account have not been sufficiently preserved to be considered upon an appeal to this court. We have examined those rulings made by the trial court relative to the introduction of testimony to which exceptions have been properly made and preserved, and we do not find that any error was committed in any of these rulings; nor do we think that they are of sufficient importance to here discuss them.

The controlling question which was involved in this case is one of fact, which has been settled by the verdict of the jury. The judgment is accordingly affirmed.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* LINDAHL.

Opinion delivered March 4, 1912.

1. CARRIERS—CONTRIBUTORY NEGLIGENCE—RIDING ON PLATFORM OF COACH.—A passenger was not guilty of contributory negligence as

matter of law in riding upon the platform of a coach which was so crowded that he could not find a seat inside. (Page 537.)

2. INSTRUCTIONS—APPLICABILITY TO ISSUES.—Instructions which fairly submitted to the jury the issues of the case will not be ground for reversal though the language used in the instructions was not aptly chosen and might in some respects be open to criticism. (Page 538.)

3. CARRIERS—CONTRIBUTORY NEGLIGENCE—ARGUMENT.—In an action by a passenger of sixteen years to recover for personal injuries where the defense was contributory negligence, it was not error for plaintiff's counsel to argue that the jury had a right to consider the age of the plaintiff in determining whether he was negligent. (Page 538.)

Appeal from Hot Spring Circuit Court; *W. H. Evans*, Judge; affirmed.

STATEMENT OF FACTS.

George Lindahl, a boy between sixteen and seventeen years of age, while riding on a platform of an overcrowded train of the Chicago, Rock Island & Pacific Railway Company, fell therefrom and was injured. This suit is brought against the railroad company to recover damages therefor. The company defended on the ground that there was no negligence on its part, and that George Lindahl was guilty of contributory negligence.

George Lindahl resided in Malvern, Hot Spring County, and in October, 1910, went to the State fair at Hot Springs, over the defendant's line of railroad. He had a round-trip ticket, and left Hot Springs for home about 5:30 o'clock, P. M. on Friday, the next to the last day of the fair. When he boarded the train, he walked into one coach and looked around, but could not find a seat. He then walked to the door of the other coach, and did not see a vacant seat in that coach; he then stepped out on the platform of the car, and the people kept crowding out on the platform going from one car to the other, so that he stepped over to one side and took a position on the top step of the platform and stood there facing the engine, holding on to the hand rail. When the train got out about a mile from Hot Springs, it stopped for water, and Lindahl stepped off on the ground. When the train was about to start again, he stepped back on the platform, and resumed his position on the top step, and stood facing the engine with his hand around the top rail. There were six or eight people on the platform,

and the persons in the car kept going from one car to the other so that the plaintiff could not get in there without shoving some of the persons on the platform aside. The conductor came along and took up his ticket, but said nothing to him about going inside of the car. When the train had gone about a mile from the water tank, while rounding a curve, it lurched, and the plaintiff was thrown from the train to the ground and received severe injuries. This is the version of the accident as testified to by the plaintiff himself. Other witnesses corroborated his statement and testified that there were about a dozen persons riding on the platform.

The railroad company adduced testimony tending to show that there were a few vacant seats in the car—perhaps one or two—and that the plaintiff could have obtained a seat, had he gone into the car, but that he went out on the platform with a companion to smoke. The plaintiff, however, denies this. Other evidence adduced by the defendant tended to show that the plaintiff was standing on the middle step of the car, and that one foot was hanging out, and that he would kick the weeds along the side of the track, and this was denied by the planitiff.

The testimony, however, does show that there was room for the plaintiff to stand on the inside of the car.

The jury returned a verdict for the plaintiff, and from the judgment rendered the defendant has appealed.

Thomas S. Buzbee and *George B. Pugh*, for appellant.

1. The evidence shows that there was ample room within the coach where appellee might have stood with safety, and he should have stood there, rather than expose himself to danger by riding upon the platform. The injury was therefore the result of his own negligence. Huthcinson on Carriers, 1410; 70 L. R. A. 709; 146 Ind. 147; 34 L. R. A. 141; 84 Me. 203.

2. At the time of the injury appellee was over sixteen, nearer seventeen, years of age. When appellant requested an instruction to the jury directing them that they could not consider the boy's age in arriving at their verdict as to his right to recover, which the court refused to give, it was error for the court to permit counsel for plaintiff, in discussing the refusal of the court to give that instruction, to state to the jury that he would insist on the converse of the instruction as one

of the grounds upon which he would ask a verdict, and to argue that a boy sixteen years of age will not be held to the same degree of care for himself that a man of mature years would be, etc. 32 Am. Rep. 413; 26 N. E. 916; 39 N. W. 402; 57 L. R. A. 639; 57 Ark. 461; 92 Ark. 437.

J. C. Ross and *H. C. Means,* for appellee.

1. Appellant was negligent in failing to furnish proper accommodations for its passengers in failing to furnish appellee a seat. 3 Thompson on Neg., § § 2572, 2858; 34 N. Y. 670; 69 Miss. 421; 50 S. W. 732; 43 L. R. A. 300; 98 N. Y. 650; 97 Fed 891; 45 Ark. 368. Appellant's contention that where it furnishes standing room inside the coach it has performed its duty is without merit. If the carrier fails to furnish the passenger a seat, and he, in the exercise of ordinary care, is riding on the platform or steps by reason of any necessity, real or apparent, and without any reasonable excuse for being there, then, in case of injury to the passenger, the failure to furnish the seat may be held to be the proximate cause of the injury. 50 S. W. 732; 34 N. Y. 670; 67 Mo. App. 105.

2. The evidence established the *prima facie* presumption that there was negligence in the operation of the train. 3 Thompson on Neg., § 2830; 93 Ark. 242.

3. Appellee was not guilty of contributory negligence. 146 Ind. 147; 84 Me. 203; 54 Vt. 107; 99 Pa. 492; 39 W. Va. 366; 72 Ala. 112; 16 Col. 103; 85. Ga. 653; 47. La. Ann. 1671; 91 N. Y. 420; 162 Mass. 546; 88 Wis. 421; 139 Pa. 195; 43 N. E. 649; 33 Md. 588; 42 N. E. 656; 58 N. Y. 248; 64 Mich. 196.

4. It is not negligence *per se* for a passenger to ride upon the platform. Beach on Contributory Negligence, (3 ed.), § 149; 3 Thompson on Neg., § § 2949, 2952; 20 Wash. 466; 43 L. R. A. 300; 98 N. Y. 650; 94 Ala. 299; 24 S. W. 854; 3 Hutchinson on Carr., § 1198 p. 1409; 10 Am. & Eng. Ann. Cases, 816, note; 103 Cal. 7; 141 Ill. 614; 212 Ill. 332; 100 Ky. 221; 27 Ind. 59; 76 Ill. App. 613; 67 Mo. App. 105; 50 Neb. 906; 34 N. Y. 670; 149 N. Y. 336; 56 S. W. 214; 66 S. W. 879; 67 S. W. 1085; 97 Fed. 891; 126 Fed. 157.

5. There was no impropriety in counsel's reference in argument to the boy's age at the time of the injury, his age

being a proper element to consider to determine the question to contributory negligence. 97 Ga. 381; 84 Ark. 74; 90 Ark. 407; *St. L. I. M. & S. Ry. Co.* v. *Aiken,* 100 Ark. 437.

HART, J., (after stating the facts). It is first contended by counsel for the defendant that the plaintiff is precluded from a recovery in this case by the principles announced in the case of *Memphis & Little Rock Ry.* v. *Salinger,* 46 Ark. 528; but we do not think so. There Salinger had a seat in the car, and went out on the platform to smoke, and was warned by the conductor that it was dangerous to ride there, but replied that he would go inside as soon as he finished his cigar. The court said: "It is contributory negligence for a passenger to remain on the platform of a car propelled by steam when there is no reasonable excuse for his so doing and after he has been specifically warned of his danger; and if an injury happens to him under such circumstances through the negligence of the company, yet, if it also appears that the injury would not have fallen on him but for his being in that particular position, the company may successfully defend an action for such injuries."

Here the facts are essentially different, and were not such that it would be said as a matter of law that plaintiff had no reasonable excuse for riding on the platform.

It is next contended by counsel for defendant that the fact that there are no vacant seats in railroad cars does not justify a passenger in riding on a platform while the train is in motion, and that he is guilty of contributory negligence in standing upon the platform when he can obtain standing room inside, though the train is crowded and ther are no vacant seats. On this question, the authorities are divided, one line holding with the contention of defendant and the other holding that, as the question of contributory negilgence of plaintiff depends upon circumstances, it should be left for the determination of the jury. Many authorities on both sides have been cited by counsel in their respective briefs, and they may also be found in the case note of *Norvell* v. *Kanawha & Mich. Ry. Co.* (W. Va.) 29 L. R. A. (N. S.) 325, and *Rolette* v. *G. N. Ry. Co.,* 91 Minn. 16 (1 Am. & Eng. Ann. Cases 313).

The railway company had notice in advance that an unusual number of people would ride on its cars to and from Hot Springs during the State fair, and it was its duty to have used

reasonable efforts to prepare for them. It does not appear that the crowd was so unexpected and unusual that provision reasonably could not have been made to afford seats to passengers and to prevent overcrowding the car. The passengers who had tickets to entitle them to go by that train were entitled to seats. Plaintiff held such a ticket—the return coupon of a round trip ticket. These facts are undisputed.

In addition to this, it appears from the testimony of the plaintiff that he walked into one car, and could not find a seat there; he then walked out on the platform of the car, and looked through the door of the other car, and saw he could not obtain a seat there. He then remained on the platform, and was jostled to one side by the crowd going from one car to the other. He said that when he got back on the car after alighting at the water tank the plaftorm was so crowded that he could not have re-entered the car without jostling and shoving the other passengers around. It is true that his testimony in this respect is contradicted by the evidence adduced on behalf of the defendant; but, when the surrounding facts and circumstances are considered, we are of the opinion that the negligence of the defendant and the contributory negligence of the plaintiff were questions for the jury.

The instructions on this question were somewhat loosely drawn, but instructions are always given with reference to the particular facts of the case; and, when so considered, we think the instructions fairly submitted to the jury the contributory negligence to the plaintiff and also the negligence of the defendant, and that the judgment should not be reversed because the language used in the instructions was not aptly chosen and might in some respects be open to criticism. 6 Cyc. 654; *Trumbull* v. *Erickson,* 38 C. C. A. 536; *Werle* v. *Long Island Rd. Co.,* 98 N. Y. 650; *Bonner* v. *Glenn,* 79 Tex. 531; Hutchinson on Carriers, (3 ed.), § 1198; *Graham* v. *McNeill,* 20 Wash. 466, 72 Am. St. Rep. 121.

It is next urged by counsel for defendant that the court erred in permitting counsel for the plaintiff to argue to the jury that in determining the question of plaintiff's contributory negligence they might take into consideration the boy's age. There was no error in this. Even if it be conceded that it was not proper to instruct the jury that it might take into con-

sideration the plaintiff's age and inexperience in determining the question of his contributory negligence in the absence of proof that he was less able than an ordinary person to look out for his safety, still, in determining the question of contributory negligence, the jury had a right to consider the age of the plaintiff in connection with all the other surrounding facts and circumstances, and it was not error for plaintiff's counsel to argue that fact to them, for it was the duty of the jury to consider all fatcs and circumstances adduced in evidence.

Judgment will be affirmed.

ROYAL THEATER COMPANY *v.* COLLINS.

Opinion delivered January 29, 1912.

1. MECHANICS' LIEN—RIGHT TO ENFORCE.—As a mechanics' lien exists only by statute, and the power is given by the statute, no one can obtain a lien unless he comes within the provisions of the statute. (Page 541.)
2. SAME—LIEN—BURDEN OF PROOF.—Under Kirby's Digest, section 4970, providing, in substance, that every mechanic, builder, artisan, workman, laborer or other person who shall do or perform any work or labor upon or furnish any material for any building, including contractors, subcontractors, material furnishers, upon complying with the act, shall have a lien for work or labor done or material furnished, *held* that a contractor, to be entitled to a lien, must show that the amount claimed is due for a debt due him for services performed by him or for materials furnished by him. (Page 541.)

Appeal from Pulaski Chancery Court; *Judge E. Martineau*, Chancellor; reversed.

J. A. Comer, for appellant.

A contractor is not entitled to a lien for a bonus agreed to be paid for expediting the work. Such sum is not for material nor labor furnished. 59 Ark. 81; 43 Ark. 168; 54 Ark. 522; 65 Ark. 183; 71 Ark. 84. But, even if he were entitled to a lien, it could not extend further than the leasehold interest. 71 Ala. 55; 21 L. R. A. 489; 62 *Id.* 396. There was no privity of contact between the owner of the fee and the contractor. 59 Ark. 81.

J. W. Blackwood and *J. W. Newman*, for appellee.

If, when a demurrer is filed, it is not insisted on at the

hearing, it is abandoned. 95 Ark. 408. Appellee was entitled to a lien for the bonus agreed to be paid to him. 138 W. 974. He was entitled to a lien against the interest of the owner of the fee. 90 Ark. 472.

HART, J. Appellee filed a complaint in the chancery court, in which he alleges that he is a contractor engaged in the construction of buildings in the city of Little Rock, and as such he contracted with the appellant, Royal Theater Company, to construct for it a certain building on a lot owned by M. B. Sanders and leased to the theater company; that, in pursuance of his contract, he furnished the material and labor, and erected said building; that on the 21st day of December, 1910, he filed a mechanic's lien on said lot. He prays judgment for the amount sued on against both appellants, and asks that a lien therefor be declared on said lot.

Appellant, Royal Theater Company, filed an answer, denying the allegations on the complaint. M. B. Sanders did not file an answer.

The contract for the construction of the building was introduced in evidence, and it provided that the sum to be paid to the contractor for the work and materials should be $12,000. The contract also contained this further provision: "All work to be completed within ninety working days, no allowance made for inclement weather. For each day required to complete the building after this time, the contractor will pay the owner twenty dollars ($20) as liquidated damages, and for each day the work is completed before this time, the owner will pay the contractor a bonus of the same amount."

The case was submitted to the chancellor upon the pleadings, and the following agreed statement of facts:

"It is hereby agreed that this cause may be submitted to the court upon the pleadings and upon the contract and the certificate of the architect making the settlement, and also upon the agreement that since the bringing of this suit the following sum has been paid upon the account sued upon, amounting to $300; that in making the final settlement the architect included in the amount fourteen days' bonus at twenty dollars per day, making $280.

The plaintiff filed his mechanics' lien against said property set out in the complaint within the time allowed by law.

The chancellor found for appellee in the sum of $278.25, and decreed that a mechanics' lien existed on said lot for said amount. The case is here on appeal.

A mechanics' lien exists only by statute, and, the power to obtain a lien being given by the statute, no one can obtain a lien unless he comes within the provisions of the statute.

Section 4970 of Kirby's Digest provides, in substance, that every mechanic, builder, artisan, workman, laborer or other person, who shall do or perform any work or labor upon or furnish any materials for any building, including contractors, subcontractors, material furnishers, mechanics and laborers, under or by virtue of any contract with the owner or proprietor thereof, upon complying with the provisions of this act, shall have a lien for his work or labor done or materials furnished. It will be observed that the statute only gives the contractor a lien for work done by him or materials furnished by him. The proof in the case shows that a certain sum of money is due appellee as contractor, but it does not show that this is a debt due him for services performed by him or for materials furnished by him. In other words, so far as the record discloses, the amount due appellee may represent all or a part of the profits made by him in erecting the building, and has no reference to materials furnished by him or labor or services performed by him. If so, appellee has no lien under the statute. The right to maintain the lien is found in the statute, and no one can obtain a lien unless he brings himself within the provision of the statute. Rockel on Mechanics' Liens, § 48.

The allegations of the complaint were denied in the answer filed by the Royal Theater Company and the burden was on appellee to show that his claim came within the provisions of the statutes before he can assert a lien on the lot. Not having done so, it follows that the chancellor erred in decreeing a lien on the lot.

The case of *Pratt* v. *Nakdimen*, 99 Ark. 263, is not authority for the contention of appellee. There the contractor had abandoned his contract, and material men were asserting liens under the statute, and in adjusting their equities and in determining what amount should be prorated among the lienors it became necessary to ascertain the contract price of the building, but the case does not hold that liens can be asserted except

for materials furnished or services performed as provided by the statute.

It is next insisted by counsel for appellant that the $280 allowed appellee by the architect was a bonus or gratuity for speeding the work of construction, and that it was not a part of the contract price under the terms of the contract. The views we have already expressed render it unnecessary to decide this contention because, as we have already seen, appellee has failed to establish that the amount sued for is such a claim as would entitle him to a lien, even if it be held to be a part of the contract price. For the same reason it is not necessary to decide whether appellee, if entitled to a lien, could assert it on the reversionary interest of Sanders in the lot, or merely on the leasehold estate of the Royal Theater Company.

Therefore, the chancellor erred in holding that a lien on the lot described in the complaint existed in favor of the appellee, and his decree in that respect is reversed, and the cause remanded with directions to deny the right of appellee to a lien on said lot.

The chancellor rendered a judgment *in personam* against the Royal Theater Company. No contention is made that the judgment is erroneous, and it is affirmed. An appeal bond was filed, and a supersedeas was issued. The bond is in the form provided by section 1218 of Kirby's Digest, and by its terms includes the judgment *in personam* against the Royal Theater Company.

If appellants desired to stay proceedings on only a part of the judgment or decree, the terms of the bond should have been varied to that effect. Kirby's Digest, § 1222.

The appellee is entitled to his judgment here under the statute on the supersedeas bond, and it is so ordered.

MALONE v. MOBBS.

Opinion delivered February 12, 1912.

1. WATERS—APPORTIONMENT OF ALLUVION.—The rule for apportioning alluvion among riparian proprietors is (1) to measure the whole extent of the ancient bank or line of the river, and compute how many rods, yards or feet each riparian proprietor owned on the river line: (2), supposing the former line to amount to 200 rods, to divide

the newly formed line into 200 equal parts, and appropriate to each proprietor as many portions of this new river line as he owned rods on the old; then, to complete the division, lines are to be drawn from the points at which the proprietors respectively bounded on the old to the points thus determined as the points of division of the newly formed shore. (Page 544.)

2. APPEAL AND ERROR—REVERSAL—REOPENING CASE.—Where an equitable cause was tried upon an erroneous theory, the decree will be reversed with directions to take additional testimony if desired. (Page 545.)

3. BOUNDARIES—PAROL AGREEMENT—EFFECT.—Where there is a doubt, dispute or uncertainty as to the true location of a boundary line, the parties may by parol fix a line which will, at least when followed by possession with reference to the boundary so fixed, be conclusive upon them, although the possession is not for the full statutory period. (Page 546.)

Appeal from Perry Chancery Court; *Jeremiah G. Wallace*, Chancellor; reversed.

W. L. Moose and *Sellers & Sellers*, for appellants.

1. Agreed boundaries are favored, where accretions are divided amicably, by the courts, and such divisions are held valid and binding, although not following the rules of law. 13 R. I. 76; 10 Gray 521; 18 N. J. Eq. 391; 10 N. Y. 412; 131 S. W. 463; 130 Ia. 618. The proof of agreement here is stronger than in 131 S. W. 463.

2. The suit is barred.

P. H. Prince and *R. W. Robins*, for appellee.

1. Accretions are held by the owners of the land upon which they formed as a compensation for possible loss from the same source. 1 Am. & E. Enc. Law. (2 ed.) 476; 2 Black. Com. 262; 2 W. A. L. 57; 25 Ark. 120; 3 Current Law, 1746.

2. The weight of authority sustains the division of accretions by a line running at right angles from the point on the old river bank, where it was intersected by the dividing line between the original tracts. 19 Ohio C. C. 709; L. R. 6 Ch. 551; 4 Current Law, 1315.

3. There is no proof of agreed boundaries. Nor can appellants claim possession of any land outside of the inclosed portions of the disputed triangle. 83 Ark. 377. The adverse possession was not proved. 84 Ark. 587.

HART, J. Appellants and appellee are the owners of adjoining tracts of land on the Arkansas River in Perry County.

Arkansas. This suit was instituted by appellee against appellants in the chancery court for the purpose of settling the boundary between them to the accretions formed in front of their lands, and no question has been raised as to the jurisdiction of the court.

The chancellor seems to have held that the boundary between appellants and appellee as to the accretions was to be determined by extending a line at right angles from the boundary between them on the old river bank to the present bank of the river. A decree was rendered accordingly, and the case is here on appeal.

The difficulty of establishing an absolute rule for the apportionment of accretions between coterminous proprietors under all circumstances has been generally recognized by the courts, and the principle observed is to make such a division as will give to the proprietors of the new shore line such portion thereof as they possessed of the old shore line before the formation of the alluvion. In *Deerfield* v. *Arms*, 17 Pick. (Mass.) 41, 28 Am. Dec. 277, this rule is laid down for the division of alluvion between the contiguous riparian proprietors—First: to measure the whole extent of the ancient bank or line of the river, and compute how many rods, yards or feet each riparian proprietor owned on the river line: Second: supposing the former line for instance to amount to 200 rods, to divide the newly formed bank or river line into 200 equal parts, and appropriate to each proprietor as many portions of this new river line, as he owned rods on the old; then, to complete the division, lines are to be drawn from the points at which the proprietors respectively bounded on the old to the points thus determined as the points of division of the newly formed shore.

Commenting on this method of apportionment the court said: "This mode of distribution secures to each riparian proprietor the benefit of continuing to hold to the river shore whatever changes may take place in the condition of the river by accretion, and the rule is obviously founded in that principle of equity upon which the distribution ought to be made." See also *Northern Pine Land Co.* v. *Bigelow*, (Wis.) 21 L. R. A. 776, and cases cited; *Hathaway* v. *Milwaukee*, (Wis.) 9 L. R. A. (N. S.) 778; 122 Am. St. Rep. 975; *Johnson*

v. *Jones*, 1 Black (U. S.) 209; *Bachelder* v. *Keniston*, 51 N. H. 496; 12 Am. Rep. 493; 5 Cyc. 888, and cases cited; 29 Cyc. 353.

Hence it will be seen that this rule has been generally recognized as the proper one to follow unless there are such irregularities in the shore lines as to make it inequitable, and we adopt it as the general rule in this State. This rule of apportionment has been modified under pecular circumstances, as where the shore line happens to be elongated by deep indentations or sharp projections. *Hopkins Academy* v. *Dickinson*, 9 Cush. 552, and cases cited. 1 Am. & Eng. Enc. Law & Prac. p. 808, note 14 (a).

In this case, however, there are no special circumstances that call for a departure from or modification of the general rule. It follows that the chancellor proceeded on an erroneous theory in the division of the accretions. The measurement made by the two surveyors of the appellee were not made with reference to the rule above announced by the court, and appellee challenges the correctness of the survey and estimates made by the surveyor of the appellants. In the application of the rule in *Long* v. *Abeles*, 77 Ark. 156, the decree will be reversed and the cause remanded and reopened so that the parties, if so advised, may take additional proof on the measurement of the accretions under the rule adopted by the court. It is so ordered.

ON REHEARING.

Opinion delivered March 18, 1912.

HART, J. In our original opinion it was held that the rule of apportioning to each abutting proprietor such proportion of the new shore line as his ownership to the original shore line bears to the whole line on which the accretion abuts and dividing the area to be proportioned by connecting the points on the new shore line is well recognized as a proper one to follow unless it results in such irregularities as to make it inequitable.

It is insisted by counsel for appellee that the rule adopted by the court is erroneous. But, after a careful consideration of the authorities bearing on the question, we adhere to our original opinion, and deem it well sustained both upon principle and the adjudicated cases.

In the original opinion we did not refer to or discuss the testimony relating to an agreed boundary line of the accretions. A majority of the court was then of the opinion that the testimony was not sufficient to establish an agreement as to the boundary line between the accretions; and for that reason it was not necessary to discuss it because we decided for appellants, who were insisting that the testimony was sufficient. A re-examination of the testimony leads us to the conclusion that the contention of appellants was correct on this point.

H. W. Burrows was the former owner of the Mobbs land, and Levin Hill was the former owner of the Malone lands. Burrows was dead at the time of the trial of this case in the lower court. Levin Hill testified in behalf of Malone, as follows:

"When I sold the timber on the accretions to this land. I went to see Mr. Burrows about establishing the boundary line between the accretions of our respective lands. Mr. Burrows and myself agreed that the extension of the north and south line as it existed on the original tracts of land should be the boundary line of our accretions. Mr. Burrows went ahead and pointed out the line, and I followed and blazed the trees. The line so established was agreed by us to be the boundary line between our accretions, and was thereafter recognized by us as the true line. Burrows afterwards deadened the timber on his land up to this line, and I cut the timber off of mine and cleared it up to the line. This line was established and blazed out to the sandbar, and was afterwards recognized by Burrows and myself as the true line between up, up to the time I sold to the appellant." E. A. Wolverton, testified: "Mr. Burrows in his lifetime told me that he and Mr. Levin Hill had agreed that the section line between them should be extended north over the accretions, and that the line so extended should be the boundary line between them as to the accretions." Hence it will be seen that there was a definite settlement between them as to the boundary line of the accretions and the testimony is practically undisputed.

In the case of *Payne* v. *McBride*, 96 Ark. 168, we held: "Where there is doubt, dispute or uncertainty as to the true location of the boundary line the parties may by parol fix a line which will, at least when followed by possession with reference to the boundary so fixed, be conclusive upon them

although the possession is not for the full statutory period." To the same effect is *O'Neal* v. *Ross,* 100 Ark. 555; *Butler* v. *Hines,* 101 Ark. 409.

It follows that the line agreed upon by Burrows and Hill is the true line between the parties as to the accretions.

The judgment heretofore rendered is modified to this extent, and the chancellor is directed to enter a decree fixing the boundaries between appellants and appellees as to the accretions on the agreed line.

SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY *v.* DANAHER.

Opinion delivered February, 12, 1912.

1. TELEPHONE COMPANIES—AUTHORITY TO MAKE REGULATIONS.—A telephone company has the right to make and enforce reasonable rules and regulations for the guidance of its subscribers, and, in case a subscriber refuses to obey such regulations, may refuse to furnish telephone service, without being guilty of discrimination. (Page 550.)
2. SAME—REASONABLENESS OF RULE.—It is not a reasonable regulation for a telephone company to refuse to furnish telephone connection to one until he pays a debt contracted for services rendered in the past which he claims he does not owe. (Page 551.)
3. APPEAL AND ERROR—FORMER DECISION.—A decision on a former appeal is the law of the case. (Page 551.)
4. TELEPHONE COMPANIES—REASONABLENESS OF RULE.—A telephone company can not make a regulation whereby it would charge a subscriber who is in arrears to it for past services a greater sum for telephone services than it charges those who have kept their bills paid. (Page 552.)
5. SAME—DUTY TO THE PUBLIC.—Telephone companies, by the necessities of commerce and by public use, have become common carriers of communications, and as such must supply all alike who are similarly situated. (Page 552.)

Appeal from Pulaski Circuit Court; Second Division; *F. Guy Fulk,* Judge; affirmed.

STATEMENT BY THE COURT.

This action was here on a former appeal and is reported under the style of *Danaher* v. *Southwestern Telegraph & Telephone Company,* 94 Ark. 533. The action is for a recovery of the statutory penalties, under section 7948 of Kirby's Digest,

for an alleged discrimination against the plaintiff in refusing her telephone service.

The controversy arose because the defendant company refused plaintiff telephone service until she should pay a claim for past due services, which the defendant contends she owed, and which the plaintiff insists she did not owe. Reference is made to the former decision for a more extended statement of the issues. After the case was remanded for a new trial, substantially the following testimony was introduced:

For several years prior to March 30, 1908, the plaintiff had a telephone in her residence in the city of Little Rock; on the date mentioned it was disconnected from the exchange and remained disconnected until the 8th day of May. During this time plaintiff tried to get the central office every day but got no response. The reason for doing this was because the telephone company refused her further service until she should pay a claim it had against her for past due services, which she contended she did not owe. She paid $2 to the defendant company at its office in Little Rock on March 13, 1909, and said that she paid this for services for the month of March. Commencing with the month of April, service for telephone in residences was raised to $2.75 per month, but subscribers were given a rebate of fifty cents when they paid before the 15th of the current month. The plaintiff tendered $2.25 at the office of the company before the 15th of April, but the defendant told her that she was not entitled to the discount unless she paid the back bill, and on the 29th day of April, she paid $2.75 to the company. On the 2d day of May she went to the office of the company and told them that she wanted to pay for that month. She first offered to pay $2.25, but they told her that she was not entitled to the 50 cents discount unless she paid its claim for past services. She then paid the company $2.75 and told them that it was for the month of May.

The following agreed statement of facts was also introduced:

"It is agreed that during the months of April and May, 1908, the defendant had in operation in Little Rock, Arkansas, more than five thousand telephones, a majority of which were in private residences; that under the rules of the defendant during these months all residence telephone subscribers were

charged $2.75 per month, from which a deduction of fifty cents a month was made in all cases where the rentals were paid by the subscriber on or before the 15th day of said month.

"It is agreed as a fact in the case that the defendant telephone company cut off plaintiff's telephone on the 30th of March, 1908, and refused to give plaintiff further telephone service thereafter for the reason that the defendant claimed that the plaintiff owed it for telephone service theretofore rendered, which claim on the part of the telephone company was disputed by the plaintiff, she claiming that she did not owe the telephone company for any service rental in the past."

The jury returned the following verdict:

"We, the jury, find a verdict in favor of the plaintiff, as follows: "From March 30 to May 8, 1908, inclusive, making forty days at $100 (one hundred dollars) per day, for nonservice, making $4,000 (four thousand dollars), and, from May 9 to May 31, 1908, inclusive, twenty-three days at $100 (one hundred dollars) per day, making $2,300 (twenty-three hundred dollars) for discrimination. Making a total verdict of $6,300 (sixty-three hundred dollars) in favor of plaintiff."

From the judgment rendered the defendant has duly prosecuted an appeal to this court.

Walter J. Terry, A. P. Wozencraft and *Coleman & Lewis,* for appellant.

1. The issues determined on the former appeal (94 Ark. 533) were wholly different and distinct from those raised in the present record. This is a suit for a statutory penalty (Kirby's Digest, § 7948), for discrimination against plaintiff.

2. As to the common law rule of liability of *quasi*-public corporations, see 160 Fed. 316; 66 Md. 399; 105 Ind. 250; 106 *Id.* 1; 61 S. C. 83; 71 S. W. 435. There was also a remedy by mandamus. Jones on Tel. & Tel. Companies, § 495; 61 S. C. 83; 17 Neb. 126; 45 Barb. 136. Also by injunction. 117 Fed. 726; Jones Tel. & Tel. § 496.

3. For decisions on statutes like ours see 160 Fed. 316; 72 Ark. 478; 81 Ark. 486. No rule can be laid down by which the credit to which each person is entitled can be determined.

4. The regulations of the company were reasonable; they applied to *all* delinquents; and there was no discrimination

against plaintiff. 160 Fed. 332; 117 N. W. 780; 40 Ark. 97; 45 *Id.* 158; 63 S. W. 785; 25 App. Cas. (D. C.) 443; 148 Cal. 490.

Dan. W. Jones, W. S., M. and *Palmer Danaher*, for appellee.

1. 94 Ark. 533, settles all questions and issues raised here.

2. It is a discrimination to refuse service on the ground of a failure to pay for past service. 94 Ark. 533; 140 S. W. 720. The case of 160 Fed. 316, is not in point, as the court only held that conduct which would not amount to an illegal discrimination at common law would not be an illegal discrimination under the statute.

3. Where the law fails to fix a reasonable rate, the courts must decide. 41 Am. St. Rep. 283; 94 U. S. 155; 125 *Id.* 680; 55 Ark. 65; 21 L. R. A. 787. Such statutes are constitutional. 129 U. S. 26; 17 L. R. A. 286; 207 U. S. 73; 24 L. R. A. 504; 86 Ark. 115.

4. Plaintiff was entitled to the same treatment as all others. 5 A. & E. Enc. (2 ed.) 166; 57 Am. St. 546.

HART, J., (after stating the facts). The telephone company has the right to make and enforce reasonable rules and regulations for the guidance of its subscribers, and, in case the subscriber refuses to obey such regulation, may refuse to furnish telephone service, without being guilty of discrimination, and such right was recognized by the court on the former appeal of this case. We held in addition, on the former appeal, that where a subscriber refuses to pay charges for past services but properly asked the telephone company to reinstate his telephone in his residence, his demand for reinstatement is not barred by his refusal to pay for past service which he claims he does not owe. Mr. Justice BATTLE, speaking for the court, said:

"A telephone company, being a public servant, can not refuse to serve any one of the public in that capacity in which it has undertaken to serve the public when such one offers to pay its rates and comply with its reasonable rules and regulations. It can not refuse to serve him until he pays a debt contracted for services rendered in the past. For the present services, it has a right to demand no more than the rate of

charge fixed for such services. It transcended its duty to the public when it demanded more. (Citing authorities.)

"A tender or payment to the telephone company of its rate or charge for service or rent of telephone for any particular time and offer to comply with its reasonable rules and regulations would entitle the applicant to such service or rent. Should the telephone company incur a penalty by refusing to rent or render such service, it could prevent the increase thereof by rendering or offering to render the applicant such service." *Danaher* v. *Southwestern Tel. & Tel. Co.*, 94 Ark. 533.

The decision on the former appeal is the law of the case. Therefore, under the undisputed evidence as disclosed by the record, and as stated above, we think the present appeal is controlled by the decision on the former appeal.

Counsel for the defendant with great earnestness and with much force have undertaken to escape this conclusion. The effect of their argument, as we understand it, is that there is no discrimination under the statute where the defendant enforces an unreasonable rule against all who refuse to obey it, but that discrimination arises where the company enforces an unreasonable rule against some and not all, of its subscribers who refuse to obey it. The fallacy of their argument is that by such a course the defendant, by enforcing an unreasonable rule against all of its subscribers who refuse to obey it, could entirely abrogate the statute, release the defendant from the penalties expressly prescribed by the statute, and remit subscribers who refuse to obey its unreasonable rules to their remedy by mandamus or such other remedy as might be available under the common law. They contend that telephone companies under the common law are prohibited from making discrimination in the performance of the service required of them, and that section 7948 of Kirby's Digest is merely declaratory of the common law. This may be true, but it is equally true that the object and purpose of the statute is to compel telephone companies to perform the duties required of them, both in supplying telephone service and in preventing discrimination to its subscribers. Having held on the former appeal that a telephone company can not refuse to furnish telephone connection to one until he pays a debt contracted for services rendered in the past, it seems to us that it neces-

sarily follows that the plaintiff is entitled to recover for the forty days during which her telephone was disconnected and telephone service was refused her. She was ready, willing and able to pay and did pay for the service, and was in the same situation as all other persons who had telephones installed in their residences.

In regard to the twenty-three days subsequent to the 8th of May, the defendant did render her services, but charged her fifty cents more than it did to other subscribers for residence telephones. They say they did this for two reasons: First, because she refused to pay their claim for past services, and second, because under their rules they allowed no discount to subscribers who were in arrears for past services. It follows from the ruling in the former appeal that the defendant could not make a rule or regulation whereby they would charge a subscriber who was in arrears to them for past services a greater sum for telephone services than it did for those who had paid their bill. The evidence shows that all persons having telephones in their residences received a discount of fifty cents if they paid for the service before the 15th of the month. The plaintiff belonged to this class of persons, and it was a discrimination against her to charge her more than it did other persons who had telephones in their residences. See, also, *Southwestern Tel. & Tel. Co.* v. *Murphy*, 100 Ark. 540.

Telephone companies, by the necessities of commerce and by public use, have become common carriers of communications, and as such must supply all alike who are alike situated, and can not discriminate in favor of or against any one. The plaintiff, as above stated, was a resident of the city, and, as above stated, was ready and willing and able to pay for the reinstallation of telephone service in her residence and did pay for the same. Therefore, she was in a similar situation to all other persons who were receiving telephone service in their residences, and, as stated in our former opinion, the telephone company could have obviated the payment of a penalty in this case by rendering to the plaintiff the telephone service.

The judgment will be affirmed.

ROAD IMPROVEMENT DISTRICT NO. 2, PULASKI COUNTY, *v.* WINKLER.

Opinion delivered March 4, 1912.

1. HIGHWAYS—JURISDICTION OF COUNTY COURT—COLLATERAL ATTACK.—Unless it appears from the record of the county court itself, or from evidence *aliunde*, that the facts essential to the jurisdiction of such court did not exist, a collateral attack upon a judgment rendered by it establishing a public road will not prevail. (Page 558.)
2. SAME—CONCLUSIVENESS OF ORDER ESTABLISHING.—The record of an order of the county court purporting to establish a public road is at least *prima facie* evidence, upon collateral attack, that it was legally established. (Page 558.)
3. SAME—ESTABLISHMENT—NOTICE.—The necessity for giving the notice of the presentation or of the pendency of a proceeding for the establishment of a public road arises only in cases involving the right of the land owner across whose land the road is opened to attack the proceeding upon the ground that his land is taken or injured by the public road. (Page 559.)
4. SAME—ESTABLISHMENT BY PRESCRIPTION.—A right to use land for a public highway is acquired by prescription where the public holds the open, exclusive and hostile possession thereof for more than seven years. (Page 559.)
5. SAME—AUTHORITY OF COUNTY COURT.—Where a public road has been established by dedication, by prescription and by an express order of the county court, that court has authority, under Acts 1907, p. 568, and Acts 1909, p. 1151, to form such road into an improvement district. (Page 559.)
6. SAME—WHEN NOT A CITY STREET.—Where a highway lies outside of the limits of a city, though it adjoins such city, and the adjacent land is platted and built up with residences, it is a county road, and the county court is authorized to create an improvement district for its improvement. (Page 560.)
7. SAME—FORMATION OF IMPROVEMENT DISTRICT.—The provision of Acts 1909, p. 1151, section 13, that the land embraced in a road improvement district shall be entered upon the assessor's books in convenient subdivisions as surveyed by the United States Government did not intend to exclude from a district lands that had been platted into lots and blocks. (Page 560.)
8. SAME—POWER TO CREATE IMPROVEMENT DISTRICT.—The mere fact that lands lying outside the improvement district may also be benefited does not deprive the county court of the power to create an improvement district in which shall be included lands which are benefited. (Page 561.)

Appeal from Pulaski Circuit Court, First Division; *Robert J. Lea*, Judge; reversed.

Bradshaw, Rhoton & Helm, for appellant.

1. This district was held to have been legally formed under a constitutional act. 92 Ark. 93.

2. Under our laws there are two systems for the formation of improvement districts: (1) applying to land lying wholly within the boundaries of municipalities, and (2) to lands lying wholly outside of said boundaries. The extension of High Street has been used as a public road for more than seven years, and it has been declared a public highway by the county court, the only court having jurisdiction. The court erred in holding that the act relied upon does not apply except to rural roads.

Mehaffy, Reid & Mehaffy, for appellee.

1. The statute does not apply to a *street* in addition to the city of Little Rock. The dedication was as a street, and there is no showing that it was ever accepted as a county road by any act of the county court. 59 Ark. 39; 89 *Id.* 517.

2. In opening and laying out a public highway the county court must proceed according to the statute. 66 Ark. 293; 83 *Id.* 239.

3. The record fails to show due notice of the petition for a county road. Kirby's Digest, § § 2995-6-8-9, 3000, 3001. It appears upon the face of the record that the petition was presented and the whole proceedings were had on the same day. 10 Ark. 241; 66 Ark. 293. The statute must be followed or the order is subject to collateral attack. 83 Ark. 238.

4. It does not appear that this is a district of the character contemplated by law. The act only applies to such sections of public roads as are already in existence at the time of the organization of the district. 92 Ark. 93.

5. The act is inapplicable to the improvement of streets and alleys of a city. Act June 1, 1909, § 28, p. 1168; 89 Ark. 517; 92 *Id.* 93. "Street" is a general term, including all urban ways. 7 Words & Phrases, p. 6685. See 49 L. R. A. 757; 90 N. E. 892; 4 S. W. 327, 330; 62 Ark. 141, 143.

Bradshaw, Rhoton & Helm, in reply.

1. This was a county road by prescription. 50 Ark. 53, 60; 47 *Id.* 431.

2. The question of notice can not be inquired into on collateral attack. 66 Ark. 292; 83 *Id.* 236, 238.

FRAUENTHAL, J. A number of persons owning real estate in Pulaski County presented to the county court of that county a petition asking for the formation of a road improvement district under the provisions of an act of the Legislature approved May 2, 1907, entitled, "An act to provide for the creation of road improvement districts, or building, constructing, maintaining and repairing of public roads in the State of Arkansas," as amended by the act approved June 1, 1909 (Acts 1907, p. 568; Acts 1909, p. 1151). A remonstrance was filed to the petition by a number of owners of real estate in the proposed district. Upon a hearing of the matter in the county court, that court found that the petitioners had complied with the provisions of the above acts, and thereupon adjudged that the territory described in the petition be formed into a road improvement district and known as Road Improvement District No. 2 of Pulaski County, Arkansas. The remonstrants prayed and obtained an appeal from said order to the circuit court. In the circuit court the matter was tried upon an agreed statement of facts. From this it appears that the petition was signed by a majority in value of the owners of land to be affected in the district. All of the district lies outside of the corporate limits of the city of Little Rock, but is adjacent thereto, and is built up thickly with residences, and most of it is improved in the same manner as other residence portions of said city. The district is situated in what is known as Braddock's Boulevard Addition to the city of Little Rock, which was laid out and platted into lots and blocks, and the plat thereof was filed in the office of the recorder of said county on November 9, 1891, and thereon a public highway noted as a street, and known as High Street, was dedicated to the public. This highway is a continuation of what is known as High Street in the city of Little Rock, and by this proceeding it is sought to improve the highway which is outside the corporate limits of said city. Although said addition was laid out and platted, and the highway thereon was dedicated as a street to the public, the street has never been accepted by the city of Little Rock, and that city has no authority to exercise any jurisdiction over the same or any part of the territory included within the proposed district. The property lying to the west, north and east of the district and adjacent

thereto is built up and used as residence property, and the improvement contemplated is for the purpose of improving the one highway running north and south, and the cost of the construction thereof will be assessed to the property on each side thereof for 300 feet. While the improvement district is sought to be formed for the purpose of benefiting the property in the district, one of its effects will be to benefit what is known as Braddock's Park, all of which is acreage property, unplatted, and only about three acres of which is included in the district. This park lies just south of and adjacent to the proposed improvement district. For more than fifteen years before the filing of the petition, all that part of the highway or street which is sought to be improved by this district was used by the public as a public highway. After the above named addition had been platted, all property thereafter sold was sold with reference to this and other highways in said addition, and the lots and blocks as represented on such plat. This highway begins at the southern limits of the city of Little Rock and extends through said Braddock's Boulevard Addition to what is known as Thirty-sixth Street in said addition, where Braddock's Park abuts it on the south.

It appears also from this agreed statement that the chief petitioner owned said Braddock's Park, and, prior to the filing of this petition, had entered into an agreement with a contractor to grade, curb and pave this highway. It was also provided in said agreement that, in event an improvement district should be established in said territory, the contractor would enter into an agreement with said improvement district to grade, curb and pave said highway or street and release said petitioner therefrom.

The circuit court found that it was sought by this petition to form a district for the purpose of improving a highway which, while not in the corporate limits of the city, was still a street in the city of Little Rock, and that the highway had never become a public road legally. It further found that some of the property included in the district would receive a less benefit than other property which was without the district and which would not be assessed for the improvement. The court further found that the provisions of said acts of the Legislature under which this proposed improvement district

was sought to be created were applicable only to rural roads, and not to those highways which were in effect streets within towns and cities. It thereupon ordered and adjudged that the petition seeking the formation of said improvement district should be dismissed, and ordered that the organization of the district be declared invalid. From this judgment of the circuit court the petitioners have appealed to this court.

It is urged by counsel for the remonstrants that the order of the county court creating this improvement district is invalid; (1) Because the highway which is sought to be improved is not one of the public roads of said county; and (2) because the acts of the Legislature under which the proceeding is had are applicable only to rural public roads, and not to streets in a municipality, and it is contended that this highway which is sought to be improved is in effect such a street.

It appears from the agreed statement of facts that on February 4, 1910, the county court of Pulaski County made an order declaring and establishing that part of High Street between the south boundary of the city of Little Rock and the south boundary of Thirty-sixth Street in said Braddock's Boulevard Addition a public road or highway. In that order it was recited that a petition seeking the establishment of said public road had been duly filed, signed by the requisite number of resident property owners, as prescribed by law, and that upon hearing thereof the court found that the above part of High Street outside of the limits of the city of Little Rock had been for more than ten years openly, continuously and notoriously used as a public highway, and that in December, 1891, by a bill of assurance the owners of the land over which that portion of High Street runs had dedicated same to the public for use as a highway, and that it was to the best interests of the people of the county that the same should be a public highway. Thereupon said court did order and adjudge that said portion of High Street extending through said Braddock's Boulevard Addition to the limits of the city of Little Rock should be established and opened as a public highway, and did thereby declare the same a public road of said county.

It is contended that this order establishing said public road is null and void, for the reason that it does not appear that proper notice was given of the filing of such petition seeking

the establishment of said road or of the appointment of viewers, or of their report thereon. By virtue of section 28 of art. 7 of the Constitution of 1874, the county court is given exclusive jurisdiction over all matters relating to roads, and thereby it obtained jurisdiction of the subject-matter to which this petition applied. The county court, in the matter of laying out and establishing public roads of the county, is a court of superior jurisdiction. This is a collateral attack made upon a judgment of that court. The judgment of a court of superior jurisdiction, like that of a court of general jurisdiction, is presumed to be valid. Having jurisdiction over the subject-matter, which by the Constitution is granted to it, it will be presumed that the county court has exercised the powers thus confided to it in a legal and valid manner. To give it full and complete jurisdiction, it was only necessary that notice should be given, as prescribed by the statute, of the presentation of this petition, in order that all persons might be bound thereby. Unless it appears from the record itself, or from evidence *aliunde*, that the facts essential to the jurisdiction of such court did not exist, a collateral attack upon a judgment rendered by it establishing a public road will not prevail. *Brumley* v. *State*, 83 Ark. 236. Such order or judgment may be attacked collaterally where it is affirmatively shown that there was a want of jurisdiction in such court, either of the subject-matter or by failure to give said notice required by law. No proof was introduced to rebut the presumption that said notice was given as required by the statute, and it does not appear from the record itself that such notice was not given. The county court had the power to determine whether notice had been given as required by law for the institution of the proceeding for the establishment of this public road and the sufficiency of the proof thereof. It was not required to spread upon the record the evidence by which it ascertained that notice had been given. The record of the county court purporting to establish a public road is at least *prima facie* evidence that it has been legally established, and this is especially true upon collateral attack. 15 A. & E. Enc. L. 387; *Lingo* v. *Burford*, 112 Mo. 149; *Willis* v. *Sproule*, 13 Kan. 257; *Anderson* v. *Com'r of Hamilton County*, 12 Ohio St. 635. The county court having jurisdiction over the subject-matter of a petition seeking

to establish a public road, and notice in the first instance having been given as required by statute, the jurisdiction of the county court to proceed therein became complete. Thereafter the failure to take the various further steps prescribed by statute were but irregularities in the exercise of the county court's jurisdiction, which could be corrected upon appeal, but which would not make its order establishing the road null and void. *Lonoke County* v. *CarlLee,* 98 Ark. 345.

In addition to this, however, the necessity for giving the notice of the presentation of the petition or the pendency of the proceeding for the establishment of a public road and the various steps thereafter to be taken arises only in cases involving the right of the land owner across whose land the road is opened to attack the proceeding upon the ground that his land is taken or injured by the public road; and if it should be held that the absence of such notice as to such landowner would render the judgment establishing such road void, because it would be taking his land without due process of law, it would not have that effect where such rights of the land owner were not involved. 15 A. & E. Enc. L. 365.

It appears from the agreed statement of facts in this case that the owner of the land upon which this highway is laid actually dedicated the same to the public, and now recognizes their right thereto. Thereafter, the public claimed and continuously exercised the right of using it for a public highway for more than seven years prior to the time the county court assumed jurisdiction over it as a public road by virtue of this order. In the case of *Patton* v. *State,* 50 Ark. 53, it was held that the public may obtain and acquire the right to use the land upon which a public highway is opened by adverse possession and that such right is acquired when the public holds the open, exclusive and hostile possession thereof for more than seven years. See also *Howard* v. *State,* 47 Ark. 431.

The county court, in making its order establishing this road, found that the public had obtained the same by dedication, use and adverse possession thereof, so that, in any event, the road was a public road, and no person other than the owner of the land upon which it runs could attack collaterally the order of the county court assuming jurisdiction thereof. By virtue of this order the county court assumed the juris-

diction of this road as one of the public roads of the county. This was all which, under the law, was necessary to give to the county court the authority under the above acts to form it into an improvement district.

It is contended that the above acts of the Legislature providing for the formation of a road improvement district are applicable only to rural public roads, and it is urged that the road involved in this proceeding is not such a road, but rather a street in a municipality. This contention is based upon the ground that it lies next to the city of Little Rock, that upon each side thereof are lots and blocks with residences, and that the land lying adjacent thereto is platted and built up thickly with residences in the same manner as portions of the city of Little Rock. But we are of the opinion that this road, although called a street, is in fact one of the public roads of the county. It lies entirely outside of the limits of the city of Little Rock and that municipality therefore has no jurisdiction of it. The county court is the only public authority that could have jurisdiction over it as a highway.

It is provided by our statutes and Constitution that the common councils of cities and towns shall have the power and right to form improvement districts within the limits of the municipalities. By the above acts of the Legislature it is provided that road improvement districts may be formed outside of the limits of municipalities, and we are of the opinion that the provisions of said acts are applicable to all roads lying outside of the limits of municipalities, whether they are adjacent thereto or not, and without reference to the character of the improvements that are near it or the fact that the lands abutting such road are laid out into lots and blocks, or remain acreage property. In the construction of these acts, it was held by this court in the case of *Park View Land Co.* v. *Road Imp. Dist. No. 1*, 92 Ark. 93, that they authorize the formation of part of the county into road improvement districts for the repairing, maintaining and improving of roads then in existence, and that the county court has the power to create improvement districts for the improvement of portions of its public roads. The highway involved in this case was a public road of Pulaski County over which the county court assumed jurisdiction prior to the presentation of the

petition seeking to improve it by the creation of a road improvement district. It lay entirely outside of the limits of any municipality, and was, in fact and in law, a public road of Pulaski County. Its character as a public road was not altered by the fact that it lay next to the city of Little Rock, or that the lands abutting it were platted into lots and blocks and improved with residences. This might occur in any portion of the county far removed from any municipality. These lands, though laid out in lots and blocks, can be entered and described upon the assessor's books equally as well as acreage land, and assessments made against them for the benefits received. We do not think that the provisions of section 13 of said last act, prescribing that the land shall be entered upon the assessor's books in convenient subdivisions as surveyed by the United States Government, is intended to exclude any character of lands that may lie in the improvement district, whether it consist of a few acres or of a few feet; nor do we think that it was the intention of the Legislature that the act should only apply to acreage lands by reason of the provisions of this section prescribing the manner in which acreage lands shall be entered upon the assessor's book.

The mere fact that land lying outside of the improvement district may also be benefited does not deprive the county court of the jurisdiction and power to create an improvement district in which shall be included lands which are benefited. Having the power to create improvement districts, the county court has the discretion to determine what lands should be included therein and what should be excluded. Other lands in the county, although not immediately adjacent to the improvement district, may be benefited, and usually are, by the creation of a road improvement district. But that fact can have no effect upon the power and authority of the county court to establish an improvement district of those lands which it finds are benefited by the formation thereof. Whether or not it has abused its discretion in the matter of the territory which it has included therein, or excluded therefrom, is a different question.

We are of the opinion, therefore, that the highway or street involved in this proceeding is, and was, one of the public roads of Pulaski County; that, inasmuch as the territory

comprised within this improvement district and the highway which it is sought thereby to improve lie entirely without the limits of any municipality, the highway is a public road which the county court has the power to improve, and the lands benefited thereby are such territory which the county court has the authority to create into an improvement district for that purpose; and that it was within the discretion of the county court, subject to review for an abuse of such discretion, to determine whether or not the improvement district should be created out of the territory and lands included in the proposed district.

It follows that the circuit court erred in adjudging that the county court did not have the jurisdiction to create said improvement district and in dismissing the petition therefor. The judgment of the circuit court is reversed, and this case is remanded for further proceedings not inconsistent with this opinion.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* SMITH.

Opinion delivered March 4, 1912.

1. MASTER AND SERVANT—ASSUMED RISK.—A servant assumes all the ordinary and usual risks and hazards that are incident to the service in which he is engaged, but he does not assume the risk of any injury which arises from the master's negligence; and, when such master is a railroad corporation, he does not assume the risk of any danger arising from the negligence of a fellow-servant. (Page 565.)
2. SAME—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.—A verdict against a railway company for personal injuries received by a servant will be sustained by evidence tending to prove that such injuries were received on account of the negligence of a fellow-servant. (Page 566.)
3. SAME—PERSONAL INJURIES—PREDISPOSITION TO DISEASE.—A servant is not precluded from recovering for injuries resulting in inguinal hernia, due to the negligence of a fellow-servant for which the master was liable, though plaintiff was predisposed to that disease. (Page 566.)

Appeal from Lonoke Circuit Court; *Eugene Lankford*, Judge; affirmed.

S. H. West and *Bridges & Wooldridge*, for appellant.

1. The injury complained of was one of the risks assumed by appellee when he undertook the employment in which he

was engaged. It was his duty to inform himself of the ordinary risks incident to the employment; and, if he negligently failed to do so, he will still be held to have assumed them. 77 Ark. 367. And, since a man is the best judge of his own lifting capacity, and it is incumbent on him not to overtax it, he will especially be held to have assumed the risk in employment of the kind in which appellee was engaged. 106 Tenn. 263, 61 S. W. 53; 108 Minn. 199; 99 Ga. 283; 25 S. E. 646; 53 Kan. 1; 35 Pac. 825; 149 Mich. 473, 112 N. W. 1125; 172 Mo. 106, 72 S. W. 515; 92 N. W. 326. Even under the fellow-servant act of 1907, the master is not an insurer of the safety of the servant. 90 Ark. 543. See also 100 Ark. 462; 97 Ark. 486, and cases cited.

2. The verdict of the jury is not sustained by the evidence and is contrary to the physical facts. The burden was on plaintiff to show negligence by a fair preponderance of the evidence. It will not be presumed from the mere happening of the accident. 100 Ark. 462. If Meadows made "an awkward step," as he states, that does not indicate negligence. As to the physical facts, the timber was rigid, and being supported by four other men—two at each end—and it was not affected by Meadow's act of stepping down. There was no way by which he could have jerked appellee, and the latter's statement to that effect is without probative force and it is not possible that the load could have been shifted, under the circumstances, so as to cause the appellee to bear more or less than one-sixth of the whole. 169 Fed. 55, 94 C. C. A. 423; 137 Mo. App. 47, 119 S. W. 328; 37 Ore. 74, 60 Pac. 907; 121 Mo. App. 92, 96 S. W. 1045; 85 Ia. 167, 52 N. W. 119; 131 Mo. 241, 33 S. W. 428; 98 Wis. 559, 74 N. W. 360; 108 Wis. 530, 84 N. W. 882; 79 Ark. 608, 625-6.

3. The fifth instruction was erroneous. The facts in the case of *Railway* v. *Lewis*, 91 Ark. 343, in which this instruction was approved were materially different from the facts in this case.

G. W. Hendricks, for appellee.

FRAUENTHAL, J. This is an action instituted by the appellee to recover damages for an injury which he alleged he received by reason of appellant's negligence. The appellee

was employed by appellant as a carpenter, and was engaged in the construction of a roundhouse in the city of Argenta. On the day of the injury, he and five other workmen in appellant's employ were directed to carry certain heavy timbers to the roundhouse. At the time of the injury, they were carrying a large timber twenty-five to thirty feet long, and weighing about 425 to 450 pounds. The workmen were divided into pairs, and each pair had a lug-hook, which caught beneath the timber and supported it, while the workmen held the ends of the bars or handles. This arrangement caused three men to be on each side of the timber, one being at each end and one in the center.

The appellee and a fellow-servant named Meadow occupied the center position. In taking a timber from a pile, it was necessary for Meadow to get upon the pile and go down after the timber had been lifted. According to the usual manner in which this was done, he would walk along the timber on the pile to its end, where it sloped nearer to the ground, before stepping off. On this occasion, Meadow had mounted on the pile, which was from eighteen to twenty inches high, and the workmen picked up the timber and started to walk away with it. The appellee was holding on to the handle of the lug-hook upon his side of the timber, and Meadow was holding to the other handle upon the opposite side. The lug-hook was so constructed that as Meadow raised his end of the handle while standing upon the pile it lowered the end of the handle which was held by appellee. Instead of walking down to the end of the timber upon which he was standing, Meadow suddenly and without notice to the appellee stepped off the timber, from the elevation of eighteen to twenty inches, on to the ground. The effect of making this step was to cause the handle of the lug-hook in appellee's hand to go up, and when Meadow reached the ground he gave the hook a severe pull, which jerked the handle in appellee's hands suddenly downward. The testimony on the part of appellee tended to prove that the effect of this was to make a greater lift or strain upon him, and cause a sudden strain upon his abdominal muscles, resulting in an injury known as inguinal hernia. The appellee testified that at the time he received the injury he felt a severe pain in the groin, and immediately sat down and quit work. His foreman gave him a certificate for admission to the ap-

pellant's hospital, but appellee returned to his home and there secured the services of a physician. Since the injury he has suffered much pain, and has been compelled to wear a truss. He has been unable to perform the work of a carpenter since the injury was received.

The witness Meadow testified that in carrying all other timber he had walked to the end of the pile where it was nearer to the ground before stepping off. That upon this occasion he did not do this, but was about eighteen or twenty inches above the ground and stepped off the timber upon which he was standing, in an awkward and unusual way. Upon the trial of the case, a verdict was returned in favor of appellee.

The chief reasons urged by counsel for appellant why the judgment rendered on this verdict should be reversed are, (1) that the injury was due to a risk which appellee assumed when he undertook the employment in which he was engaged; and (2) that there is not sufficient evidence to warrant the jury in finding that the alleged injury was caused by any act of the appellant or its servants.

It is urged that appellee's employment was of a very simple character, unconnected with any complex machinery or appliances wherein there might lurk unsuspected and unknown dangers, and that the injury was but the result of one of the ordinary risks incident to the work in which appellee was engaged. It is contended that the appellee is precluded from a recovery because he assumed such risk.

It has been repeatedly held by this court that a servant assumes all the ordinary and usual risks and hazards that are incident to the service in which he is engaged. When he knows the methods that are adopted, the place which is furnished and the appliances with which the work is done, he assumes the ordinary risks of injury which may result from such known methods and appliances. But it has been also repeatedly held that a servant does not assume the risk of any injury which arises from the master's negligence; and when such master is a railroad corporation, as in this case, he does not assume the risk of any danger or peril arising from the negligence of a fellow-servant. *St. Louis, I. M. & S. Ry. Co.* v. *Ledford,* 90 Ark. 543; *St. Louis S. W. Ry. Co.* v. *Burdg,* 93 Ark. 88.

From the testimony which was given by the appellee and his fellow-servant upon the trial of this case, we are of the opinion that the jury were warranted in finding that the injury was caused by an act of said fellow-servant, and that such act was one of negligence. According to this testimony, appellee was in the exercise of due care at the time, and he had a right to presume that his fellow-servant would also exercise due and ordinary care in the performance of his part of the work in which both were engaged. He was justified in believing, and in acting upon the belief, that this fellow-servant would do his part of the work in the ordinary and usual manner in which it had been done—that is, that, after lifting the timber which was being carried, his fellow-servant would walk down the timber upon which he was standing to its end, where it was nearer the ground, before stepping off. The jury, we think, were warranted in finding that in the exercise of due care he should have done this, or that he should have warned appellee before stepping off the timber at a point where he was at a great height from the ground. In stepping from the timber at this point to the ground, contrary to the usual way in which the work was done, and without giving any warning to appellee of his unexpected action, we are of the opinion that the jury was justified in finding that he was guilty of an act of negligence. If this act of negligence resulted in the injury of appellee while he was in the exercise of due care for his own safety, then appellant is liable for the damages which he sustained thereby. *Missouri & North Ark. Ry. Co.* v. *Van Zant*, 97 Ark. 486.

It is insisted that, according to the undisputed testimony, the injury which appellee complains of was not caused by the act of his fellow-servant, or by the work in which he was then engaged. It is urged that the trouble from which he suffers was the result of his former weakened physical condition, making him subject to hernia; but we do not think that this contention is borne out by the evidence. The testimony of the physicians tended to prove that inguinal hernia, from which appellee now suffers, might be caused by a sudden jerk, strain or fall. One of these physicians had treated appellee a few months prior to the time that he claims to have received this injury, and at that time appellee did not complain of any sore-

ness or injury in the inguinal canal. Immediately after undergoing the strain caused by the jerk or jar, the appellee felt a severe pain in the groin, and on that account had to sit down and quit the work. The witness Meadow testified that he made an awkward and unusual step in going from the pile of timber on to the ground; and the jury were warranted in finding that this caused the handle of the lug-hook in appellee's hand to be suddenly jerked down, so as to throw on him a greater lift or strain, which might have resulted in this injury.

We are therefore of the opinion that there was some evidence adduced upon the trial of this case from which the jury were warranted in finding that the injury which appellee received was caused by the negligent act of his fellow-servant.

In this connection, the appellant complains of the following instruction which was given: "If you find that the defendant company in this case is liable under the instructions given by the court, and that the plaintiff received injuries complained of in the manner alleged, and that at the time of such injury he was predisposed to hernia, but otherwise in good health, and that said injury was solely excited or caused by the sudden jerk of the handle of the lug-hook in plaintiff's hand, and without his fault, and that his injury, whatever you find that to be, has directly resulted therefrom, then you are instructed that the plaintiff is entitled to recover to the fullest extent of whatever you find his injuries so received to warrant, notwithstanding such predisposition or weakness in regard to hernia."

A similar instruction was approved by this court in the case of *St. Louis S. W. Ry. Co.* v. *Lewis*, 91 Ark. 343. The facts in the case at bar as to the cause of the injury are in many respects similar to those in that case; at least, they are not so different as to make the above instruction inapplicable to the facts of this case.

Upon an examination of the entire record, we do not find that there was any prejudicial error committed in the trial of this case. The judgment is accordingly affirmed.

ENSIGN v. COFFELT.

Opinion delivered February 19, 1912.

1. CONTRACTS—VALIDITY.—Where a contract is entire, and a part of the consideration thereof is illegal, and the illegal portion is not separable from the whole consideration, the contract is unenforceable. (Page 572.)
2. BILLS AND NOTES—PATENT AS CONSIDERATION—VALIDITY.—Under Kirby's Digest, section 513, providing in effect that a negotiable instrument, the consideration of which is the sale of any patented machine, implement, substance or instrument of any kind or character, shall be void unless executed on a printed form showing "upon its face that it was executed in consideration of a patented machine, implement, substance or instrument," a note not executed in compliance with the statute is void where a material part of its consideration was the sale of a certain patented article. (Page 572.)
3. EVIDENCE—CERTIFIED COPY OF LETTERS PATENT.—Letters patent issued by the United States Government are proved by the production of the original or by copies of the record under the seal of the patent office and certified by the Commissioner of Patents or his chief assistant. (Page 571.)
4. MERCHANT OR DEALER—DEFINITION.—The manufacturer of a patented article who makes sales thereof through agents who go through the county and from place to place, soliciting orders therefor and selling only to fill orders, is not a merchant or dealer selling in the usual course of business, within the exception to Kirby's Digest, section 513, though he keeps a warehouse in which the article is stored. (Page 573.)

Appeal from Benton Circuit Court; *J. S. Maples*, Judge; affirmed.

E. P. Watson, for appellant.

1. Where a note is void under section 513, Kirby's Digest, the value of the patented article may be recovered on the contract of sale. 70 Ark. 200.

If one of two considerations for a contract is void for insufficiency merely, and not illegality, the other, if sufficient, will support the contract. 117 Am. St. Rep. 495; 63 O. St. 363; 57 Miss. 418, and note 3. This principle will hold good in cases based upon the above statute.

If the gas generator purchased was a patented machine or some parts of it were patented, and the rest of the consideration received was not, the note was not given in violation of any statute, for the consideration was not illegal, and it is not void. 15 Am. & Eng. Enc. of L. (2 ed.), 933; 54 Ark. 471.

2. Phelps, the payee in the note, was a merchant and dealer in the articles for which the note was given, selling same in the usual course of business, and as such was exempt from the above statute. Kirby's Digest, § 516; 217 U. S. 251; 98 Mo. 590; 73 S. W. 302.

3. Appellee is estopped by his contract from questioning the validity of the note sued on. Joyce, Defenses to Commercial Paper, § 668; 31 Kan. 447; 2 Pac. 570.

Rice & Dickson, for appellee.

1. The vendor of the machine in question was not a merchant in the ordinary course of business, but was acting through agents going from place to place, selling by samples, etc. He was not permanently located, nor keeping a stock on hand like ordinary merchants. The stock kept on hand was insignificant, the building where it was kept, was closed when he went away, and the agents were offering to sell and selling territory. If the vendor was a manufacturer, only the note is void, manufacturers not being excepted from the statute. 207 U. S. 251.

2. The note is void if the generator is patented, whether in whole or in part, even if part of the consideration is other than a patented article. 9 Cyc. 566, 567; 55 Am. Rep. 240; 48 Am. Rep. 157; 13 Am. St. Rep. 355; 61 *Id.* 341; 6 Am. & Eng. Enc. of L. (2 ed.) 757.

FRAUENTHAL, J. This is an action instituted on a note which was executed by the defendant, R. L. Coffelt, on March 8, 1908, for $225, payable to the order of A. S. Phelps, Jr., 18 months after its date, with interest. The note is a negotiable instrument, and the plaintiff alleged that he was a *bona fide* purchaser thereof before maturity and for a valuable consideration. The defendant admitted the execution of the note, but resisted its enforcement on various grounds, amongst which are the following: (1) he denied that the plaintiff was an innocent purchaser of the note, and alleged that he was induced to execute it upon representations made by the payee which were false, whereby the consideration therefor had failed; and (2) that the note was executed in consideration of a patented machine or article, and that it was not executed on a printed form, as provided by section 513 of Kirby's Digest; and also

that the payee therein was not a merchant or dealer selling patented things in the usual course of business. A demurrer was interposed to these various defenses except that which denied that the plaintiff was an innocent purchaser of the note, and the demurrer was overruled. Upon the trial of the case, a verdict was returned in favor of the defendant, and from the judgment rendered thereon the plaintiff has appealed to this court.

It appears from the uncontroverted testimony, we think, that the plaintiff purchased the note sued on before its maturity for a valuable consideration and without any notice of any imperfection in or defense to it. This is virtually conceded by counsel for the defendant, and the sole defense now urged by him against a recovery on the note is that the consideration therefor was a patented thing, and that it was not executed in compliance with the provisions of the above statute.

It appears from the testimony that the payee of the note, A. S. Phelps, Jr., was, at the time of its execution, engaged in the business of manufacturing, selling and installing acetyline gas lighting systems or plants. His manufactory was located at that time at Elkhart, Indiana, and later moved to Geneva, Illinois. He had warehouses or distributing places located at different towns and cities, one of which was at Bentonville, Arkansas. At that city he had rented a warehouse, and kept on hand a number of lots or jobs covering several gas lighting systems, complete, and he employed laborers or gas fitters at such place for the purpose of installing the systems. He also had employed one E. P. Roberts as an agent, who went from place to place in the county in which Bentonville is situated, and there sold these gas lighting systems to individuals. This agent, in making such sales, would take with him a sample of the gas generator or the system. The lighting system consisted of a gas generator and some fixtures. On February 15, 1908, the defendant entered into a written contract with said Phelps through the agency of said Roberts for the purchase and installation of the gas lighting system in his residence. By the terms of this contract, he ordered a "50-light Phelps carbide feed gas generator," at the price of $150, and directed the piping of his residence and the furnishing of fixtures, for which he agreed to pay the additional sum of $75, and also to

board the men doing the work of installing the plant. Later the system was installed, and the defendant executed said note for the said sums aggregating $225. The defendant introduced in evidence a certified copy of letters patent issued by the United States Goverment on February 28, 1905, granting to said A. S. Phelps, Jr., the right to make, use and vend an improvement upon acetyline gas generators. This copy of said letters patent was certified to by the commissioner of patents. The testimony adduced on behalf of the defendant tended to prove that the generator sold to him was the identical machine covered by these letters patent, and that the said Roberts, who was the agent of the said Phelps in selling same, had stated that the generator was covered by letters patent issued to said Phelps. From these letters patent and the facts and circumstances adduced in evidence, we are of the opinion that there was sufficient testimony adduced on the trial to warrant the jury in finding that the generator sold to defendant was a patented article. In his testimony, the vendor, Phelps, stated that these letters patent had expired, but admitted that there was a patent held on a part of the system known as the feed and cut-out portion of the gas bell; but the letters patent on the generator continued for seventeen years from February 28, 1905, and the evidence therefore tended to prove that the letters patent covered this generator and had not expired. It is urged by counsel for plaintiff that the court erred in admitting the certified copy of said letters patent. We are, however, of the opinion that this action of the court was right. The letters patent issued by the United States Government are proved by the production of the original itself or by copies of the record thereof under the seal of the patent office and certified to by the commissioner of patents or his chief assistant. 2 Greenleaf on Ev., § 488; 9 Enc. of Ev. 655; U. S. Comp. Stat. 1901, p. 673.

It is provided by section 513 of Kirby's Digest that "any vendor of any patented machine, implement, substance or instrument of any kind or character whatsoever, when the said vendor of the same effects the sale of the same to any citizen of this State on a credit, and takes any character of negotiable instrument in payment of the same, the said negotiable instrument shall be executed on a printed form and show upon its

face that it was executed in consideration of a patented machine, implement, substance or instrument, as the case may be, and no person shall be considered an innocent holder of the same, though he may have given value for the same before maturity, and the maker thereof may make defense to the collection of the same in the hands of any holder of said negotiable instrument, and all such notes not showing on their face for what they were given shall be absolutely void." It is further provided by section 516 of Kirby's Digest that "this act shall not apply to merchants and dealers who sell patented things in the usual course of business."

It is urged by counsel for plaintiff that the consideration of the note was not only said gas generator but also the fixtures and the installation of the plant; that, even if said generator was patented, the other part of the consideration therefor was not patented; he contends that the plaintiff is entitled to recover unless the note was executed solely for the purchase price of a patented machine or article, and asked an instruction to that effect. The court, however, refused to give that instruction, but instructed the jury that it devolved upon the defendant to prove that the note sued on was executed for the purchase price of a patented machine or article. It is well settled, we think, that, if a contract is based upon several considerations, some of which are merely insufficient and not illegal, it is not void but may be upheld by the consideration which is sufficient; but if one of several considerations of an entire contract, as a note, is illegal, the whole contract is void. In other words, where the contract is entire, and a part of the consideration thereof is illegal, and the illegal portion is not separable from the whole consideration, then the whole contract is unenforceable. 1 Parsons on Contracts, § 455; 1 Daniel on Negotiable Instruments, § 204; *Edwards* v. *Randall*, 63 Ark. 318; *Hanauer* v. *Gray*, 25 Ark. 350; *Tucker* v. *West*, 29 Ark. 386; *Kizer* v. *Texarkana & F. S. Ry. Co.*, 66 Ark. 348.

By the above statute the note is declared void where it is given in payment of a patented article, and is not executed on a printed form and in the manner therein prescribed. In other words, it makes illegal such note in the sense that it is given in contravention of a statutory requirement, and for that reason its character as a negotiable instrument is destroyed, and

it can not be used as the evidence of the indebtedness. If part of the consideration of the note is illegal in this sense, then the note itself is tainted with illegality, and is void. The contract of sale itself of a patented article or of any other article in connection therewith is not void, no matter what may be the form of the note given for the articles, because the statute does not declare the contract void. But the note given in pursuance of such sale is void if a material part of the consideration thereof is a patented article, and it is not executed in form and manner required by said statute. The consideration of the note sued on was the gas generator and certain fixtures and the installation thereof. The chief portion of the consideration was the gas generator. Under the testimony, the character of this plant or gas lighting system was identified and fixed by this gas generator, which was patented. It may be that in cases where there is some small patented attachment to the machine or article sold which is not the inducing cause of the sale but only an incident thereto, then the machine or article so sold would not fall within the purview of the above statute. But where the machine or thing sold is patented, and is the principal or material part of the consideration inducing the sale thereof, then the note falls within the provisions of the above statute, although there may be some portion of the consideration thereof which is not covered by patent. The above statute avoiding negotiable instruments executed for patent rights or patented things when such notes are not on printed forms as prescribed by said statute has been uniformly upheld by this court and the Supreme Court of the United States. *Wyatt* v. *Wallace,* 67 Ark. 575; *Woods* v. *Carl,* 75 Ark. 328; *Columbia County Bank* v. *Emerson,* 86 Ark. 155; *Mullins* v. *Columbia County Bank,* 87 Ark. 554; *Woods* v. *Carl,* 203 U. S. 358; *Ozan Lumber Co.* v. *Union County National Bank,* 207 U. S. 251. We are of the opinion, therefore, that there was sufficient evidence to sustain the verdict of the jury finding that the note sued on was executed for a patented machine. It is conceded that the note was not executed in the manner prescribed by the above statute. It follows, therefore, that the note was unenforceable, even in the hands of an innocent purchaser.

It is urged that the payee of said note was a merchant or dealer and sold said machine in the usual course of business,

and for this reason, under the provisions of section 516 of Kirby's Digest, was exempted from said statute. The court instructed the jury that it devolved upon the defendant to prove by a preponderance of the evidence that said A. L. Phelps, Jr., the payee of the note, was not a merchant and dealer in the articles for which the note sued on was given, and was not selling same in the usual course of business. It appears that said Phelps was a manufacturer of the gas generator sold, and that he made sales thereof by agents who went throughout the counties and from place to place soliciting from individuals purchases of the lighting plant or system by sample. It is true that he had a warehouse in which a number of the systems were stored, but we think that these were only placed at such warehouse for convenience, instead of shipping same direct from his factory after the orders had been taken. These gas systems were not kept in a store for sale in the ordinary course of business, nor were they sold in the ordinary course of business. They were sold through agents soliciting orders therefor by said Phelps, who was the manufacturer thereof. According to the common understanding, the words 'merchant' and 'dealer' are employed to designate persons who are engaged in the business of buying and selling merchandise or other personal property in the usual course of trade. They are usually understood as being something different from a manufacturer. While it is true that a manufacturer may have a store or business house in which he may buy and sell and deal in the very articles which he manufactures and thus become a merchant or dealer therein, yet if he manufactures the articles sold upon orders and only sells same on such orders, then he is not a merchant or dealer within the purview of the exemption from this statute. *Union County National Bank* v. *Ozan Lumber Co.*, 179 Fed. 710. We think that there was sufficient evidence adduced upon the trial of this case to warrant the jury in finding that said Phelps was not a merchant or dealer selling said patented generator or the gas lighting system in the usual course of business.

The court gave a number of instructions, and refused several which were asked by the plaintiff; but we are of the opinion that in its various rulings on these instructions it conformed to the principles which we have herein announced.

By the instructions which were given, we think that the law applicable to the facts of this case was fully and fairly presented to the jury, and the court committed no error in any of its rulings upon any of the instructions. We are also of the opinion that there was sufficient evidence to warrant the verdict which the jury returned.

The judgment is accordingly affirmed.

ZEARING v. CRAWFORD, MCGREGOR & CAMBY COMPANY.

Opinion delivered February 26, 1912.

1. EVIDENCE—VARYING WRITING BY PAROL.—All antecedent proposals and negotiations become merged in a written contract, which can not be varied by parol testimony. (Page 579.)
2. VENDOR AND PURCHASER—OPTION.—Where the owner of land agreed to sell certain growing timber upon certain conditions, the transaction is not a contract of sale but an option to purchase. (Page 579.)
3. SAME—OPTION—TIME.—Under a contract which is merely an option to buy land, the time specified for performance is of its essence; and, before the purchaser can claim the right to perform it, he must show performance on his part, or an offer to perform, within the time specified. (Page 580.)

Appeal from White Chancery Court; *John E. Martineau*, Chancellor; reversed.

1. The court's finding with reference to the estimate amounts in effect to making a new contract between the parties, one which was never in contemplation by them. Courts have no such power, but are limited to construing, reforming, enforcing or cancelling a contract—never to making a contract. 2 Parsons on Contracts, (9 ed.) 651, 655.

2. The evidence is not sufficient to justify a decree for specific performance.

3. The extension of the option was without consideration and conferred no rights. 10 Mont. 5.

Manning & Emerson, for appellee.

1. It is conceded that courts can not make contracts for people, but that is not what the court did in this case. It sought to ascertain the intention of the parties, and to enforce it accordingly. With reference to the estimate, the court found that that part of the contract was solely for the benefit

and option of appellee; that appellant was satisfied that there was one and a half million feet of the timber and willing to sell it on that basis as to amount, at $3.00 per thousand. Appellee could and did waive its right to have the timber estimated.

The evidence is clear that appellee was given the option to take the timber at any time during the life of the option at a million and a half feet at the above price.

2. It is not necessary, in order to justify a decree for specific performance, that the evidence be so clear and convincing as to make it practically conclusive, although it is so in this case, but it is sufficient if the contract be "proved with a reasonable degree of certainty." 63 Ark. 100, 105.

This contract, having been prepared by appellant's counsel, with the aid of its vice president and general manager, should be construed, where there is any ambiguity, most strongly against appellant. 74 Ark. 41-5; 73 Ark. 338-42; 80 Ark. 209-12. See also 110 Pac. (Wash.) 9.

3. The original consideration of $100 was a sufficient basis for the extension—but no consideration was necessary. The extension of the option was a mere proposition which, when accepted, and when appellee tendered compliance with its terms, became a valid and binding contract. 12 S. E. 464; 10 Mont. 5, 24 Pac. 695.

MCCULLOCH, C. J. The Stoneman-Zearing Lumber Company (a corporation) owned a tract of timber land in White County, Arkansas, containing about 15,000 acres, and on September 20, 1906, entered into a written contract with appellee whereby it gave the latter an option to purchase the persimmon timber on said land. This is a suit instituted by appellee to compel specific performance of the contract, and after its institution appellant, Fannie M. Zearing, was appointed as receiver of the Stoneman-Zearing Lumber Company, and substituted as defendant. The contract (omitting caption) reads as follows:

"That the Stoneman-Zearing Lumber Company, a corporation created as aforesaid, and doing business as aforesaid, in consideration of one hundred dollars to it paid, * * * do hereby sell, give and grant to the said Clarendon Last Block Works, H. S. Matthewman, general manager, an option on all of the persimmon timber upon the following described lands,

lying and being situate in White County, Arkansas, towit: (here follows description) for a period of thirty days from date hereof, with the privilege of an extension for thirty days longer, in case of overflow or sickness.

"It being expressly agreed and understood that the said Stoneman-Zearing Lumber Company is to furnish at its expense a man to assist in estimating said persimmon timber on said land, and the said H. S. Matthewman, general manager of the Clarendon Last Block Works is to furnish at its expense a man to represent it in the estimation of said timber, and that the expenses for boats, provisions, additional help, etc., while estimating and in estimating said timber, is to be borne equally by each of said corporations, and that, as soon as said estimate is made and agreed upon by the parties representing each of said corporations, the said H. S. Matthewman, general manager of the Clarendon Last Block Works, or the Clarendon Last Block Works, are to pay to the Stoneman-Zearing Lumber Company three dollars per thousand feet for said persimmon timber, according to the estimate agreed upon.

"It being expressly agreed and understood that said estimate must be completed and agreed upon in thirty days from the date of this option, except as aforesaid, in case of high water or sickness, in which said event the time is to be extended thirty days longer, and in no event shall said option be extended longer than sixty days, and, in case of high water or sickness as aforesaid, said timber must be paid for within sixty days.

"It is expressly agreed and understood that, after said timber has been estimated and agreed upon and same paid for at the price aforesaid, ($3.00 per thousand), the said Stoneman-Zearing Lumber Company is to execute and deliver to the said H. S. Matthewman, general manager of the Clarendon Last Block Works, a timber deed to all of the persimmon timber standing upon the above described lands, and is to give him the right, authority and license for ten years from date of said deed to go upon, over and across any of said lands with wagons and teams in the getting of said timber out.

"It is further expressly agreed and understood that should the said Stoneman-Zearing Lumber Company and H. S. Matthewman, as general manager, etc., as aforesaid, fail to agree upon an estimate of said timber, or, after agreeing to same,

should the said H. S. Matthewman, as general manager as aforesaid, or any one for him or said Clarendon Last Block Works, fail to pay for said persimmon timber at the price of $3 per thousand feet on said estimate, then the said $100 paid as aforesaid shall forfeit to the said Stoneman-Zearing Lumber Company, and belong to and become theirs, but should the said H. S. Matthewman, as general manager as aforesaid, pay for said timber as herein provided, the $100 as aforesaid is to be and become a part of the purchase money therefor."

Appellee was operating in that territory under the name of Clarendon Last Block Works, having a mill at Clarendon, Arkansas, for the manufacture of shoe lasts, golf heads and shuttle blocks. On October 17, 1906, appellee, by letter, asked for an extension of the option until January 1, 1907, and this was granted. Appellee's manager, Mr. Matthewman, in making the request for extension, pleaded bad weather and high water as having prevented making an estimate of the timber. Nothing further was done under the contract—no estimate of the timber was made by either party—and on December 31, 1906, appellee's manager tendered to the Stoneman-Zearing Lumber Company the sum of $4,400 to cover the price of the timber (after deducting the sum of $100 paid at the time of executing the contract), according to an estimate of 1,500,000 feet of timber said to have been made by an agent of Stoneman-Zearing Lumber Company prior to the time that the option contract was entered into. The agent's name is Nimmo, and the evidence tends to show that he made an estimate of the timber for his employer, the Stoneman-Zearing Lumber Company, in July or August, 1906, when the land was purchased by the latter, that he negotiated the sale of the timber to appellee and represented to appellee, during the negotiations, that there were 1,500,000 feet of persimmon timber on the land, and offered to let appellee take the timber on that estimate. That was on the day the option contract was entered into. Appellee declined to purchase the timber on that estimate, and the parties thereupon entered into the written contract hereinbefore set forth.

There is a sharp and irreconcilable conflict in the testimony as to whether Nimmo ever made an estimate of the timber, or whether he had any authority to offer the timber for sale on that

basis; but the conclusion which we reach makes it unnecessary to settle the conflict and determine where the preponderance of the testimony lies. We conclude that appellee has failed to establish any right to have the contract carried out, even if we accept as correct its own version of the facts. It is not claimed that appellee, at any time during the life of the contract, performed, or offered to perform, it by having the estimate of the timber made, or that it was prevented by the Stoneman-Zearing Lumber Company from taking steps to estimate the timber. It is not claimed that the terms of the written contract were changed in any way after its execution, or that Nimmo, or any other agent of the Stoneman-Zearing Lumber Company, agreed, after the execution of the contract, that appellee might take the timber upon the estimate previously made. Appellee, on the contrary, bases its claim entirely on the ground that Nimmo represented to its manager, in the negotiations leading up to the execution of the written contract, that he had estimated the timber at a millon and a half feet and offered to let appellee have it on that estimate, then or any other time within the life of the contract. The writing itself must be accepted as the sole evidence of the agreement between the parties. No effort is made to reform it; and, if that be attempted, the testimony is wholly insufficient to accomplish such end. The parties reduced their agreement to writing, and by that alone are their rights to be tested. It is an inflexible rule of evidence that all antecedent proposals and negotiations become merged in a written contract, which can not be varied by parol testimony. This is elemental. Appellee declined to accept the alleged offer of sale of the timber on the basis of a million and a half feet, and elected to enter into a written contract for an option to purchase on an estimate thereafter to be made in a certain way. The effect of the written contract was to withdraw the alleged offer of sale on the basis named and to substitute therefor an offer to sell on the basis of another estimate, and appellee acquired by the contract merely the right to accept the offer within the time specified, as it was not a contract of sale but only an option to purchase. *Bonanza Mining & Smelter Co.* v. *Ware*, 78 Ark. 306. If appellee intended to preserve its right to accept the estimate of Nimmo, it should have caused that to be inserted in the written instrument which became the

sole evidence of the agreement. After having failed to do so, it is barred by well-settled rules of evidence from seeking now to engraft the provision upon the written contract. It is a mistake to assume that the provision in the contract for an estimate of the timber to be made in a certain way was exclusively for the benefit of appellee. To thus construe would be to read something into it which is not found there. When appellee rejected the alleged offer of Nimmo to let the timber go at his estimate of a million and a half feet, then the Stoneman-Zearing Lumber Company elected to prescribe other terms in the written contract upon which it was willing to sell the timber. Those terms were prescribed for the benefit of both parties to the contract, and it is easy to see why each party wanted a thorough and careful estimate made of the timber, so that its true value according to the price named in the contract could be ascertained. The timber estimate made by Nimmo at the time of the purchase of the land, was, confessedly, only a rough and inexact one. The owner may have been willing, when the offer of sale of the timber was first made, to sell on the Nimmo estimate; but, as that offer was not accepted, it is reasonable to suppose that a more careful estimate was desired. At any rate, the written contract so provides, and we are not at liberty to disregard the plain terms of the contract, for to do so would be to make a contract between the parties which they did not make for themselves. If, after the execution of the contract, the Stoneman-Zearing Lumber Company had offered to let the timber go under the contract at the original Nimmo estimate, and there had been a timely acceptance of that offer, it would have operated as a new contract, superseding the old one, and the making of another estimate in accordance with the terms of the contract would have been waived. But such is not the case. It is not claimed that any such offer was made after the execution of the contract, and there is not a scintilla of evidence that Nimmo had any authority to change the contract, even if he had attempted to do so, after its execution, by offering to let appellee have the timber upon the old estimate. The contract being one merely for an option to buy, the specified time for performance was of its essence; and, before appellee can claim the right to enforce it, it must show performance on its part, or an offer to perform the contract within the time

specified; otherwise its rights therein ceased. *Indiana & Arkansas Lumber Co.* v. *Pharr*, 82 Ark. 573.

As the conclusion which we have thus reached is decisive of the right to enforce the contract, other phases of the case need not be discussed. The decree is therefore reversed, and the cause is remanded with directions to dismiss the complaint for want of equity.

JONESBORO, LAKE CITY & EASTERN RAILROAD COMPANY *v.* MINSON.

Opinion delivered February 26, 1912.

MASTER AND SERVANT—NEGLIGENCE—EVIDENCE.—Where the only evidence tending to prove negligence on defendant's part causing the death of plaintiff's intestate was the evidence that the defendant negligently permitted a certain trestle to fall into disrepair, and there was no evidence tending to prove that his death was due to the manner in which the trestle was constructed, evidence tending to prove that the trestle was improperly constructed was misleading and prejudicial.

Appeal from Craighead Circuit Court, Jonesboro District; *Frank Smith*, Judge; reversed.

STATEMENT BY THE COURT.

On the night of the 14th day of September, 1910, Walter Minson, employed by the appellant as a brakeman and acting as hind brakeman on one of its freight trains, was run over by the train, his left leg being crushed and cut off in two places, which resulted in his death a few hours later. Appellee is the widow, and she sues as administratrix of the estate of Walter Minson, alleging that Minson was new and inexperienced in such employment; that he was wholly ignorant of the condition of appellant's roadbed and train equipment; that appellant, knowing these facts, negligently failed to instruct him in regard thereto; that between 10 and 11 o'clock at night, after deceased had been working for more than sixteen consecutive hours in the capacity of brakeman, he was killed through the negligence of the appellant in the following manner: That appellant negligently ordered Minson to make a certain coupling on a switch in the town of Dell, Arkansas; that it was not obviously

dangerous to make the coupling, and Minson proceeded to obey the order. Among other grounds of negligence alleged in the complaint, the appellee charged that appellant was negligent "in the unsafe condition of the unballasted switch track, with a certain trestle work overgrown with weeds, and having a certain tie that was rotten and dangerous for use;" and that it was on account of this condition of the switch track that appellant, while discharging his duty as brakeman, was run over and killed. Appellee asked judgment in the sum of $17,000.

The answer denied the material allegations of the complaint. It alleged that Minson had been employed for several months as fireman and engineer, and was familiar with the roadbed and equipment. Appellant denied specifically that the switch track was in an unsafe condition, that a certain trestle was overgrown with weeds, and that a certain tie on the sidetrack was rotten or dangerous. Appellant did not set up in its answer either of the defenses of assumed risk or contributory negligence.

The facts as stated in the brief of the appellee are substantially correct, and are as follows:

Minson had been a railroad man for a number of years, and had always worked in the capacity of fireman or engineer, almost exclusively the latter. In the spring of 1910, he worked a short while for appellant, first in the capacity of engineer and then as fireman. He laid off in the summer. On the 13th of September, 1910, he was reengaged by the appellant, and on the 14th left Jonesboro as a brakeman upon its freight train. This was the first time he had served as brakeman. The crew of the train at the time it left Jonesboro consisted of the conductor, engineer, fireman and one brakeman, Minson. At Nettleton, the first station out of Jonesboro, the crew picked up a second brakeman, by the name of Flowers. This was also the first time that Flowers had served as brakeman, or had ever worked upon a running train. The train arrived at Dell between 9 and 10:30 that night. The train at that time consisted of thirteen cars. Dell is the junction point of the two lines of the appellant railroad, and at Dell there is a switch about four hundred yards in length which curves around the depot. It became necessary at Dell to detach several cars from the freight train and place them on the switch track, and also

to take several cars from the switch track and attach them to the train. The conductor gave orders to make the necessary couplings to do this, and he himself walked to the west end of the switch. The engineer was on the south side of the cab, and the fireman on the north side. The engine, with eight or ten cars, went east on the main track until the last car of the train was beyond the east end of the switch track. At this time the other brakeman was on top of the train several cars from the rear end. Minson then gave the signal for the train to back up on the switch track to make the first coupling, at that time being on the north side of the track. The train backed slowly, and made the first coupling. The evidence tends to show that the first coupling was made east of the station. The station is located between the main track and the switch track, near the east switch. It is impossible for one on the switch track on the east side of the station to see one on the switch track on the west side of the station, and *vice versa.* The first cars on the switch track were close up to the station. The west end of the cars was on the west side of the station. The conductor saw Minson on the west side of the station and on the north side of the track signalling. He left the north side, and went out of the conductor's sight.

The other brakeman testified that he could see Minson make the first coupling, and that after he had made it he walked to the end of the cars that had just been coupled on, evidently for the purpose of seeing that all was right before giving the signal to back up. At that time he was one or two car lengths from the cars to which the second coupling was to be made, showing that he was on the west side of the station.

The testimony tended to show that, after Minson had signalled from the north side, he crossed over to the south side, evidently because his signals from the north side were not seen by the men on the engine because the station obstructed their view. After Minson had crossed from the north to the south side and had given the signal to the engineer to back, he went out of sight of both the brakeman and the engineer, either down the track or crossed again to the north side.

The car on the end of the train was equipped with an automatic coupler, known as the Tower coupler. The lever as the car came back west on the track was on the north side

of the car. In order to make the coupling, it was necessary for Minson to pass from the south side of the track to the north side. But whether Minson crossed directly to the north side of the track and walked along the side of the track to the place where he was injured, or whether he walked down the center of the track to that point, the positive testimony does not disclose.

After making the first coupling, and after Minson had given the signal to back, the train moved slowly back at the rate of a mile and a half an hour. As the train neared the cars which were to be coupled, Minson was heard to scream. He was found lying several feet away from the track, on the north side thereof, with his head to the northeast. He was lying right at the end of the trestle work. His left leg had been run over in two places. The first wound began at the ankle on the front side of the leg, and ran diagonally upward across the calf, terminating on the back side of the calf several inches below the knee. The second wound began at the back side of the thigh, and extended across it at right angles. There were no other injuries on the body.

The trestle work just opposite where Minson was lying consisted of two hickory logs twelve inches in diameter, laid flat on the ground, parallel one to the other and to the rails. Upon these logs cross-ties had been placed, and on these ties the rails had been laid. There was no ballast on the trestle work, no earth filling, either on the outside or inside of the rails, between the ties and the ground. The distance from the top of the ties to the ground was about eighteen or twenty inches. The length of the trestle work was about eighteen feet. The balance of the switch was ballasted and surfaced up, and it afforded good walking both between the rails and outside of the rails up to the trestle work.

The trestle and the switch track at the time of the injury were covered with weeds, which, on the outside of the rails, averaged from knee to waist high, and completely obscured from view the nature of the trestle work construction. The weeds had remained there all summer. The trestle had been built five years before, and no work had been done upon it since that time.

The conductor, who had been working for the appellant

in the capacity of brakeman and conductor off and on since 1900, had noticed that that was a bad place at the trestle, but had paid no particular attention as to how the track was until the night that Minson was killed. He had not warned Minson of it because, according to his evidence, Minson knew more about it than he did. The trestle work was over a low place, and the water came in between the main and switch tracks, and the trestle was built obviously for the purpose of keeping the track out of the water. On the east end of this trestle work the ties were all rotten. Witnesses testified that the spaces between the ties were unfilled both on the outside and inside of the rails. The first tie on the east end was rotten, and blood on the rail began at that tie. The first blood on any of the ties was on this tie, and there was also a little piece of bone found on this tie. The uppermost corner of the north end of this first tie on the east side had been broken off diagonally downward from the end of the tie back nearly to the rail. This break, when discovered by the witness early the next morning, indicated that it was a fresh one. The north end of the piece of tie that was broken off was imbedded in the earth, and the south end stuck up. Minson was lying just opposite this tie. The ground, when first examined by the witness on the morning after the injury, was damp and soft. There were no foot prints whatever on the inside of the track, and no weeds in there had been trampled or crushed down.

Several days before he went on this trip Minson had half-soled his own shoes, using nails. There were on the front of the tie scratches that looked as though they might have been made by the tacks or nails in the heels of a man's shoes. Witness testified that Minson, while he was lying on the ground, just after his injury, said that he hung his foot and fell, and that it was nobody's fault but his own.

Upon cross examination one of these witnesses testified that Minson, when asked how he got hurt, said: "I stepped through a trestle," and, when asked where, he said: "Over there," pointing to the trestle. When asked whose fault it was, he said: "It was nobody's fault but my own."

There was testimony on behalf of the appellant tending to show that the automatic coupler on the car that ran over Minson was in good condition, but there was testimony on

behalf of the appellee from which the jury might have found that the automatic coupler was not in good condition. One witness testified that he was requested by the station agent of appellant at Nettleton to examine a car that he pointed out, and that he examined the coupler as the agent requested; that the conductor who was on the train at the time of Minson's injury came up after witness had made the examination. He examined the coupling of a Missouri Pacific car at the request of the agent. The conductor took the names of the parties who were present at the time the examination was made, and witness was afterwards subpoenaed as a witness, he presumed by the railroad company. He examined the coupling at one end. "The pin over the coupling was raised by the lever from the outside of the car, but the knuckle of the coupling would have to be opened by hand; the knuckle would not fly open when you pulled the lever up."

The conductor testified that the lever on the Tower coupler would not raise if it was not in working order; that there was a little boot there that threw the knuckle out, and that when the lever was raised the knuckle would fly out.

Several witnesses testified, over the objection of the appellant, that it was not the custom of railroads in this part of the country to build culverts or trestles of the sort described in the evidence upon switch tracks at stations. A sample of the questions asked the witness is as follows:

"Q. Are you familiar with the track construction in this part of the county? A. Yes, sir. Q. State whether or not it is the custom of railroads on their switch tracks to build them by laying two logs lengthwise parallel to the rails and putting the ties across them and the rails on top of them, without any earth filling. A. No, sir." Counsel for the appellant objected to this testimony, stating, "He can not prove negligence by a statement of that kind." The objection was overruled, and the appellant saved his exceptions. At the conclusion of the testimony appellant moved to have the testimony of all the witnesses as to the custom of other railroads throughout the country excluded, for the reason, among others, that the testimony was incompetent because the witnesses were not expert, and because the appellee did not lay sufficient foundation for asking the questions or having them answered. The

court overruled the motion, to which the appellant excepted, and duly preserved its exceptions in the motion for a new trial.

A verdict was rendered in favor of the appellee for the sum of $5,500; judgment was entered for that sum, and appellant has duly prosecuted its appeal.

E. F. Brown, for appellant.

J. R. Turney, for appellees.

WOOD, J., (after stating the facts). 1. The appellant requested the court to direct the jury to return a verdict in its favor, which the court refused. The appellant duly excepted to the ruling of the court, and urges here that the court erred in not granting its prayer, contending that the undisputed evidence shows that there was no negligence on the part of the appellant which was the proximate cause of the injury to Minson, and also that the undisputed evidence shows that Minson's own negligence was the cause of his injury; and also that the undisputed evidence shows that Minson assumed the risk.

It could serve no useful purpose to discuss in detail the evidence upon which appellant bases its contention. We have set forth somewhat at length in the statement the facts which the testimony tends to prove, and our conclusion is that the questions both of negligence and contributory negligence, under the evidence, were for the jury; also the question as to whether or not Minson had assumed the risk. These questions were all submitted to the jury upon instructions to which no objections have been urged here, and, while the defenses of assumed risk and contributory negligence were not set up in the answer, they were, without objection on the part of the appellee, developed in the progress of the trial, and were treated by the court in its instructions as issues in the cause. It is therefore proper to consider them here, which we have done.

2. In our opinion, the only testimony which would warrant a finding of negligence on the part of the appellant is that tending to prove that appellant had failed to keep its trestle in a safe condition. That testimony which tended to show that appellant had permitted its ties to become rotten so that the same would give way and cause a brakeman, while passing over or stepping upon it in the discharge of his duty, to fall

and thus to receive the injury for which damages are sought, is the only testimony upon which the liability of appellant could be predicated.

The manner in which appellant constructed this trestle originally had nothing whatever to do with the injury to Minson. The manner of construction was in no sense the proximate cause of the injury to the brakeman. The negligence, if any, consisted, not in an improper construction of the trestle in the first place, but in the manner in which it was maintained, and in the unsafe condition in which the evidence tended to show appellant had negligently permitted it to become by failing to keep it in proper repair.

If appellant was liable at all, it was because, through its negligence, it had failed to replace the rotten ties with sound ones before it became necessary for Minson to pass over the same in the work of coupling the cars. Therefore, the testimony as to the custom of other roads in the manner of building such trestles as the one under consideration was wholly irrelevant and incompetent. It introduced an issue of negligence that was foreign to any allegation of negligence that was made in the appellee's complaint. The testimony was highly prejudicial, because it was calculated to cause the jury to conclude that if appellant had not constructed its trestle in the first place in the customary manner of other railroad companies it was negligent and should be held liable for that reason, whereas it is not shown that the original construction of the trestle was in any manner the cause of the injury to Minson.

In this view of the case it is wholly unnecessary for us to determine whether or not the testimony would be admissible in any event, and we pretermit that question.

For the error indicated the judgment is reversed, and the cause is remanded for a new trial.

ROY v. STATE.

Opinion delivered March 4, 1912.

TRIAL—REFUSAL TO INSTRUCT—NECESSITY OF REQUEST.—Although it is the duty of the court, when requested to instruct the jury to consider impeaching testimony only for the purpose of impeachment, the court's

failure so to instruct the jury will not be error where no request for such an instruction was made.

Appeal from Lee Circuit Court; *Hance N. Hutton*, Judge; affirmed.

H. F. Roleson, for appellant.

In the absence of a statute authorizing it, a party is not allowed to contradict his own witness; and even where there is a statute such as ours authorizing it, it is only permissible to do so where the witness has testified to some substantive fact prejudicial to the party calling him. Jones on Evidence, § 855; 40 N. W. 70; 93 Ind. 133; 78 S. W. 519; 29 S. W. 471; 20 S. W. 549; 37 S. W. 761, 763; 10 Enc. Pl. & Pr. 320; 72 Ark. 582.

Hal L. Norwood, Attorney General, and *William H. Rector*, Assistant, for appellee.

It was permissible under the statute for the State to contradict its witness. Kirby's Digest, § 3137; 42 Ark. 542. While it is true that such contradicting testimony could be considered only for that purpose, and not as evidence against the defendant, yet appellant can not complain that the court failed to so caution the jury, without having requested the court to do so. 65 Ark. 371; 53 Ark. 381.

McCULLOCH, C. J. Defendant, Eli Roy, was indicted by the grand jury of Lee County for the crime of grand larceny, and was convicted. The accusation is that he stole a cow, the property of one Mary Overton. The stolen animal was identified by the ear-marks, general appearance, and color, and the evidence tended to show that defendant, after stealing the cow, drove her to Marianna and sold her to a butcher. The defendant lived about two miles distant from Mary Overton, and the evidence establishes the fact that he knew that the cow belonged to her. The cow was running out, but was accustomed to coming home about every two weeks to be salted. Witnesses testified that they saw defendant driving the cow to Marianna, and the butcher testified that defendant sold her to him.

We are of the opinion that the evidence was sufficient to warrant the belief that the cow which defendant sold to the butcher was the property of Mary Overton, and that it was

stolen by defendant. The evidence was sufficient, therefore, to sustain the verdict.

The State introduced as a witness one Lonnie Burnsides, and undertook to prove by him that, on or about September 16, the day which the evidence shows defendant sold the cow to the butcher in Marianna, he (witness) passed defendant's house late one evening and saw this cow in defendant's lot. The witness stated that he didn't see the cow in the lot, but saw her on the outside and near the side of the road with a drove of cattle. Witness then proceeded to testify that he had frequently seen this cow since then, even as late as about three weeks before the trial, and that he notified Mary Overton's son of the fact that he had seen the cow. He further testified that Mary Overton's son was with him on one occasion, and saw the cow, which was long after defendant is alleged to have stolen her and sold her to the butcher.

The prosecuting attorney then asked this witness, for the purpose of impeaching him, if he had not stated, at a certain place and on a certain occasion, in the presence of witnesses that he saw the cow in defendant's lot, and the witness denied that he had made any such statement. Later the prosecuting attorney was permitted to prove, over defendant's objection, that the witness, Lonnie Burnsides, had made the statement, on the occasion named, about seeing the cow in defendant's lot.

Our statute provides that the party producing a witness "may contradict him with other evidence, and by showing that he has made statements different from his present testimony." Kirby's Digest, § 3137.

Counsel for defendant invokes the rule, which seems to be sustained by authority, that it is error to permit a party to thus impeach his own witness except where the witness testifies to some matter prejudicial to the party introducing him. Conceding that this is the correct rule, it has no application to the present case for the reason that the testimony of the witness, Burnsides, was highly damaging to the State's case. The testimony, if true, established the fact that he had seen the cow long after the time when, according to the State's contention tion, she had been stolen by defendant, sold to the butcher and killed. In fact, the testimony of that witness, if true, established the fact that the cow was alive, in the range, after the

defendant was indicted by the grand jury. The State therefore had the right to break down the testimony of the witness by introducing contradictory statements concerning a material fact.

It is also insisted that, as the proof of the contradictory statements was only for the purpose of impeaching the witness, it was error for the court to admit the testimony without cautioning the jury to consider it for no other purpose. It is true that when such testimony as that which was introduced is competent for one purpose, it is the duty of the court, when requested, to explain to the jury the purpose for which it is admitted and to admonish the jury not to consider it for any other purpose. The party objecting can not, however, complain or object unless he has requested the court to give such admonition. Where the testimony is competent for one purpose, if the other party conceives that it is likely to be considered by the jury for another purpose, and thus become prejudicial to his rights, it is his duty to call the matter to the attention of the court and ask an instruction limiting its consideration. We have held to this rule in a good many cases. Counsel rely upon language used by Judge RIDDICK in his opinion in *Thomas* v. *State*, 72 Ark. 582; but when the whole opinion is considered, it is evident that Judge RIDDICK was not attempting to lay down any rule contrary to our present views. That case was reversed on account of the insufficiency of the evidence, and he was merely stating what appeared to be reasons for the unsupported verdict, and, among other things, said the jury were probably misled by impeaching testimony. However, we are convinced that it would be laying down an incorrect rule to say that a party would be entitled to a reversal on account of the court's failing to do something which he did not request the court to do.

This is the only error complained of, and we are of the opinion that no grounds exist for the reversal of this case. The judgment is therefore affirmed.

ELMORE v. SNOW.

Opinion delivered March 4, 1912.

CONTRACT—CONSIDERATION.—Where plaintiff, purchaser of the stock of goods of a firm, agreed to pay $1,000 therefor, an agreement by the attorney of certain of the creditors to pay to plaintiff a fee of ten per cent. for defending a suit attacking such sale as fraudulent was without consideration and not binding, as plaintiff was bound to defend against such suit in any event.

Appeal from Sharp Circuit Court; Southern District; *J. W. Meeks*, Judge; reversed.

David L. King, for appellant.

There was no consideration for the alleged promise to pay. Kirby's Digest, § 3654; 12 Ark. 174; 31 *Id.* 613; 52 *Id.* 174; 45 *Id.* 67; 32 S. W. 27; 50 *Id.* 926; 51 Mo. App. 637; 99 Va. 620; 32 Ky. Law. 521; 3 Ark. 31; 32 S. W. 195; 4 Ark. 271; 26 *Id.* 160; 30 *Id.* 194; 68 *Id.* 276; 66 *Id.* 550; 83 *Id.* 149.

Sam H. Davidson, for appellee.

There was a consideration as defined in 24 Ark. 197; 21 *Id.* 249; 25 *Id.* 196; 72 *Id.* 354; 96 *Id.* 545; 94 *Id.* 7.

KIRBY, J. Appellee brought suit against the appellant in a justice's court in Sharp County on a claim for $40.77, 10 per cent. commission on $409.77, paid to him as representative of creditors of the Southworth Brothers at Hardy, Arkansas, against whom appellant held many claims for his clients for collection. Appellee bought out the firm, agreeing to pay for the stock of merchandise $1,000, and was notified by appellant as attorney of his clients holding the aforesaid claims, not to pay out the $1,000 purchase money until the claims held by him were satisfied; that, if the thousand dollars purchase money were paid to the creditors of the firm, he would consent for the sale to stand, otherwise he would take steps to place the concern in bankruptcy. The creditors all agreed to the arrangement except Mrs. Powell, who claimed she was a preferred creditor, and, the payment of her demand being refused, she brought suit against appellee and the Southworth firm. Appellee defended this suit, and defeated her claim, and the court ordered him to distribute the thousand dollars he agreed to pay for the stock among the creditors of the firm, after payment of the costs.

Appellant held claims aggregating $818.62, upon which he received payment from appellee of a dividend of 50 per cent., amounting to $409.77. Appellant asked the chancery court to allow appellee a fee to be taxed as cost in the case in the distribution of the money, which was denied, and after the trial said to appellee: "I would agree to allow you to retain out of the claims I represented 10 per cent. for the trouble and charge it up to cost."

Appellee paid the whole 50 per cent. dividend to appellant, at the same time writing: "I send you the full amount in check. You can send me check for 10 per cent—$40.90. The reason I did not take out the 10 per cent., as you told me to do, is, I wanted to show that it is all drawn out. Send check to W. S. Snow, Evening Shade."

Appellant acknowledged receipt of the check on October 22, 1910, but said nothing about returning any money as commission to appellee.

On June 11, 1911, replying to a demand from appellee therefor, he wrote: "I think you should have been allowed a fee, and I asked the court to do it. I would not have objected if you had retained your fee out of the check forwarded, but you sent the full amount, of which my clients had notice, and they then refused to allow me anything;" and that if he paid the claim it would have to be done out of his own pocket. He did not think it was right to do it.

Appellee replied, insisting that he should be paid the 10 per cent., without regard to by whom it was paid, and brought this suit. He recovered judgment in the justice's court, and also on appeal to the circuit court, and from this judgment appellant appealed.

It is insisted by appellant that the judgment was not sustained by evidence and is contrary to law; that there was no consideration for his promise to pay appellee 10 per cent. commission if it was made. Appellee was only protecting his own interest and his purchase of the stock of goods of the Southworth Brothers by heeding the notice of appellant, representative of creditors of Southworth Brothers, in having the purchase price of the stock distributed among the creditors of the concern. He was doing likewise in defending against the alleged claim of the preferred creditor and defeating it; and, while this re-

sulted in the payment of a larger dividend on the claims of the creditors of Southworth Brothers, the fact that he defeated it shows conclusively that if he had paid it without resisting the claim he might still have been liable to the payment of the other creditors in the same amount as was finally paid. The chancery court did not regard him entitled to a fee upon his claim of having done something that resulted to the benefit of the creditors, when he was but protecting himself in the matter, and refused to allow him a fee or commission therefor. Any promise made by appellant to pay him a commission thereafter was without consideration and not enforceable, since he was was bound to do as he did do in any event, and to pay the purchase money as directed by the order of the court upon the valid claims against the Southworth Brothers, whose stock of merchandise he had bought.

The judgment is reversed, and the cause dismissed.

RAY v. STATE.

Opinion delivered March 11, 1912.

1. INDICTMENT—ACCESSORY BEFORE THE FACT.—In an indictment for the crime of being accessory before the fact to a felony, it is necessary that the indictment should allege the facts constituting the felony with the same degree of certainty and particularity as though the person alone who committed it were indicted. (Page 596.)
2. HOMICIDE—SUFFICIENCY OF INDICTMENT FOR MURDER.—An indictment of one for being accessory before the fact to murder in the first degree which alleges that the principal committed the murder "with a certain gun then and there loaded with powder and leaden balls and shot" is insufficient in failing to show the manner of the killing. (Page 596.)

Appeal from Miller Circuit Court; *Jacob M. Carter*, Judge; reversed.

John N. Cook and *Joe E. Cook*, for appellant.

The indictment is fatally defective in that it does not allege the manner of the killing—whether the gun was used as a club or a firearm—and the demurrer should have been sustained. 27 Ark. 493; 34 Ark. 263; 54 Ark. 549; *Id.* 587; 51 Ark. 138; 26 Ark. 323; 29 Ark. 168.

Hal L. Norwood, Attorney General, and *William H. Rector* Assistant, for appellee.

The demurrer was properly overruled. The indictment is good under the code, and it was not necessary to allege the manner in which Hunter, the principal, used the gun. 118 Mass. 1; 162 Mass. 90; 1 Russell on Crimes, (3 ed.) 558; Stark's Crim. Proc., (2 ed.) 92; Archbole, Crim Proc., (10 ed.), 407; Kerr on Homicide, § 257; Wharton on Homicide, § § 556-564 *et seq.*; 5 Mont. 242; 67 Mo. 13; 104 Ind. 347; 99 N. W. 1114; 21 Cyc. 845-846; 58 Ark. 390; 61 Ark. 88; Kirby's Digest, § § 2228, 2229, 2243; 84 Ark. 487; 88 Ark. 311.

FRAUENTHAL, J. The defendant, John Ray, was tried and convicted under an indictment charging him with the crime of accessory before the fact to murder in the first degree. The indictment is as follows:

"The grand jury of Miller County, in the name and by the authority of the State of Arkansas, accuse John Ray of the crime of accessory before the fact to murder in the first degree committed as follows, towit: that Will Hunter, in the county and State aforesaid on the 18th day of May, 1911, unlawfully, wilfully, feloniously with malice aforethought, with deliberation and premeditation, did kill and murder one William W. Hunter with a certain gun then and there loaded with powder and leaden balls and shot, and that the said John Ray in the county and State aforesaid on the 17th day of May, 1911, before the said murder was committed in form aforesaid, unlawfully, wilfully and feloniously did advise and encourage the said Will Hunter to do and commit the murder in manner and form aforesaid, against the peace and dignity of the State of Arkansas."

To this indictment the defendant interposed a demurrer, and asked that it be quashed upon the following grounds, amongst others:

1. Because the same is indefinite and uncertain in this, that it does not show the manner, method or means of the killing or how the gun was used—whether as a club, firearm or otherwise.

2. Because said indictment as a whole is so indefinite and

uncertain that it does not apprise the defendant of the offense he is charged with or called upon to defend.

3. Because said indictment does not state facts sufficient to constitute a public offense.

In an indictment for the crime of accessory before the fact, it is necessary that the indictment should allege the facts constituting the felony with the same degree of certainty and particularity as though the person who committed it were alone indicted. It is necessary to allege in such an indictment that the felony was committed by the principal. The accessory can not be guilty if the principal is not guilty; and he can be guilty of no other or higher grade of crime than that of which the principal is also guilty. The accessory before the fact to the crime is indicted as an accessory, but he is punished as a principal. He is in law a participant in the crime of the principal, though absent at the time of its commission. Kirby's Digest, § 1561; *Smith* v. *State,* 37 Ark. 274; *Williams* v. *State,* 41 Ark. 173; *Corley* v. *State,* 50 Ark. 313. The guilt of the accessory before the fact is based and dependent upon the guilt of the principal; and if the principal has committed no crime, then the accessory is free from guilt. To charge an offense against the accessory, it is necessary to also charge an offense against the principal. The facts constituting the crime committed by the principal must, therefore, be set out with the same degree of certainty as though the principal were alone indicted. 1 Bishop, New Criminal Procedure, § 8; 1 Wharton's Criminal Law, (10 ed.) § 238; *Freel* v. *State,* 21 Ark. 212; *People* v. *Thrall,* 50 Cal. 415; *State* v. *King,* 88 Minn. 175; *Ulmer* v. *State,* 14 Ind. 52.

By our Criminal Code it is provided that "the indictment must be direct and certain as regards, first, the party charged; second, the offense charged; third, the county in which the offense was committed; and, fourth, the particular circumstances of the offense charged, where they are necessary to constitute a complete offense." It is also provided that "the indictment must contain a statement of the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." Kirby's Digest, § § 2227 and 2243. In an in-

dictment for murder, the crime must be charged, and the manner of its commission must also be charged.

In the case of *Thompson* v. *State*, 26 Ark. 323, the court said: "It is a well established rule in criminal law that an indictment must contain such a description of the facts and circumstances as constitute the offense charged; that the person accused may be informed of the specific charge which he is called upon to answer, and the court and the jury the issue they are to try." In that case the indictment charged defendant with the crime of murder, and in stating the manner in which the offense was committed the indictment charged that the defendant did kill and murder the deceased "with a double-barreled shotgun, loaded with gunpowder and leaden bullets." In passing upon the sufficiency of that indictment, the court held that it was fatally defective in failing to allege whether the killing was done by shooting or beating the deceased with the gun. After exhaustively discussing the necessity for alleging in such an indictment the manner of the killing with certainty, the court said: "In the indictment before us, there is nothing but the general and indefinite charge that the defendant killed and murdered deceased with a double-barreled shot gun, loaded with gunpowder and leaden bullets. The particular facts and circumstances of the killing, by which it might judicially appear that the same offense had been committed, and the accused be sufficiently informed of the true nature of the charge against him, so that he might be able to prepare for his defense, are not attempted to be set out."

This case was followed and approved by this court in the case of *Edwards* v. *State*, 27 Ark. 493. In that case the court said: "In an indictment for murder, the gravamen consists in the killing, which may be distinctly stated, but the manner in which it was done omitted. The omission to do so may tend to prejudice the substantial rights of the accused on the merits, and so affect the judgment of conviction as to justify the court in reversing it on that ground alone."

In the case of *Dixon* v. *State*, 29 Ark. 165, the decision in *Thompson* v. *State*, *supra*, was again approved, and in that case the court said, in referring to the case of *Thompson* v. *State*: "In that case the manner of killing was not shown; the indictment only alleged it to have been done 'with a double-

barreled shotgun, loaded with gunpowder and leaden bullets,' leaving it uncertain whether by shooting or beating—two modes so different that evidence of one would not be proof of the other."

In the case of *Haney* v. *State*, 34 Ark. 263, a similar indictment was discussed and held fatally defective; and the decision in *Thompson* v. *State* was again approved by this court, through Mr. Justice EAKIN, who rendered the opinion.

Since the above decision made in the case of *Thompson* v. *State*, this court has never departed from the principle therein announced, and has steadily approved and adhered to it whenever the question was presented to it for determination. It has steadily declared that in an indictment for murder the facts and circumstances showing the manner of the killing must be alleged with certainty, and that an indictment is fatally defective in failing to indicate the manner of the killing when it only alleges that the killing was done with a gun, but fails to allege that it was done by shooting or by beating the deceased with the gun, or in failing to state the manner in which the killing was done if it was done in a manner other than by shooting or beating.

It is urged that, according to the ordinary acceptation of the language used, when it is alleged that the killing was done with a gun loaded with powder and shot, it necessarily means that it was done by shooting with the gun. But this is not the ordinary or necessary meaning of such language. As was said by this court in the case of *Dixon* v. *State, supra,* such language in the indictment leaves it uncertain whether the killing was done by shooting or beating—two modes so materially different that evidence of one would not be proof of the other.

Whatever may be the views of the present members of the court relative to the question of the sufficiency of such an indictment, if it was now one of first impression; that question has been definitely determined by this court in the decisions referred to. The opinion declaring that such an indictment is fatally defective has been followed so often, and approved by this court in so many subsequent cases, that we do not think that any useful purpose would be subserved, or that the due and proper administration of the criminal laws of the State would be promoted, by now overruling the former decisions on this question.

It follows that the indictment in this case was fatally defective in failing to allege with certainty the manner of the killing. The case is remanded with directions to quash the indictment, and to hold the defendant for such action as the grand jury may take.

KIRBY, J., dissents.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY v. YOUNG.

Opinion delivered March 11, 1912.

1. CARRIER—OVERCHARGE—MISTAKE.—A carrier is not liable for the penalty provided by Kirby's Digest, section 6620, for making an overcharge for a passenger's fare which was due to an error or mistake on the part of the carrier's agent. (Page 601.)
2. SAME—EFFECT OF OVERCHARGE.—Where a husband applied for two tickets, for himself and his wife, and the agent wrongfully charged him a dollar too much, and there is no evidence that the agent intended to make an overcharge on both tickets, it will be inferred that the intention was to make the overcharge only on the husband's ticket. (Page 602.)

Appeal from Saline Circuit Court; *W. H. Evans*, Judge; reversed in part.

STATEMENT BY THE COURT.

On the 11th day of November, 1910, I. H. Young applied to the ticket agent of the Chicago, Rock Island and Pacific Railway Company at its station at Little Rock, Arkansas, for two tickets to Benton, Arkansas, and tendered in payment therefor $2.50. The agent delivered him the two tickets, and handed him back twelve cents in change. The regular fare from Little Rock to Benton was sixty-nine cents. When the husband returned the change to the wife, she discovered that the agent had kept more money than was necessary to buy the tickets, and called her husband's attention to that fact.

She insisted that they go back at once, and see the agent about it. It was about time for their train to depart, and the husband insisted that they should wait until their return about seeing him. On the next day they returned to Little Rock, and told the agent that he had made a mistake of one dollar Mr. Young presented the coupons to the agent to show that he

had bought tickets to Benton. The agent insisted that he had not made a mistake and refused to return them the dollar.

Mr. and Mrs. Young brought separate suits against the railway company to recover the penalty provided by section 6620 of Kirby's Digest for charging a greater compensation for transportation of passengers than is allowed by the terms of the act. The cases were consolidated and tried together. The facts above recited were proved by the plaintiffs.

It was conceded by the attorney for the defendant that the fare from Little Rock to Benton was sixty-nine cents, and that three cents per mile was charged unless the destination of the passenger was a competitive point.

The ticket agent of the defendant testified that he did not overcharge Mr. Young a dollar, and that if he did not return him the correct change it was through mistake. He stated that he had made a mistake, and if his attention had been called to it at the time he would have corrected it. He further stated that he did not remember Mr. Young coming back afterwards and asking for the dollar back. He repeated that if he received too much money for the tickets he did it unintentionally. On cross examination, he stated that the fare from Little Rock to Benton is sixty-nine cents, and that it was based on a rate of three cents per mile. On re-direct examination, the agent said that the Iron Mountain has the short-line mileage from Little Rock to Benton, and that, it being a competitive point, the Iron Mountain fixes the fare between the two points.

The jury returned a verdict in favor of each plaintiff for $50, and from the judgment rendered the defendant has appealed.

Thos. S. Buzbee and *Geo. B. Pugh,* for appellant.

1. Where the fare received by a railway company is in excess of the lawful rate, and such excess is taken through mere oversight or error, the company is not liable for the statutory penalty. 58 Ark. 490.

2. Where a railway company publishes a rate or regularly charges a rate less than that permitted by the statute, it will not become liable for the penalty prescribed by that statute if in some particular instance it charges a rate higher than the

published rate, provided such higher rate is not in excess of the rate allowed by the statute. Kirby's Digest, § 6620.

3. In any event there was in this case but one transaction. There could have been but one overcharge, and only one recovery for penalty can properly stand.

Manning & Emerson and *I. S. Humbert*, for appellees.

1. The court properly instructed the jury on the theory of honest mistake or oversight, and on that point the verdict of the jury is conclusive that the overcharge was intentional. Besides, the agent's intent will be presumed. 93 Ark. 42-44 58 Ark. 490.

2. Notwithstanding appellee's, I. H. Young's, testimony as to the distance was improperly excluded, there was sufficient proof of the distance, and that the amount charged was excessive from other testimony.

3. Appellant is liable for the penalty in each case. 95 Ark. 218; *Id.* 281, 284.

HART, J. If the taking of the dollar in excess of the correct fare was a mere error or mistake on the part of the agent, the defendant was not liable for a penalty. *Railway Company* v. *Clark*, 58 Ark. 490; *St. Louis, I. M. & S. Ry. Co.* v. *Waldrop*, 93 Ark. 42.

Under proper instructions, the court submitted to the jury the question of whether in making the change the agent made an honest mistake without the intention of taking an amount greater than was allowed by the statute, and the verdict of the jury is conclusive on appeal.

It is next contended by counsel for defendant that the statute upon which this suit is based permits the railway company to charge three cents per mile, and that there is no testimony tending to show that it charged a greater rate than that. They insist that, while the agent testified on cross examination that the fare as published was sixty-nine cents, and was based on a rate of three cents per mile, his testimony on this point was explained on re-examination by his statement that the fare was so fixed to meet the competition of the Iron Mountain Railroad. which had a shorter line from Little Rock to Benton; but we think his testimony on re-examination was rather contradictory than explanatory of his testimony on cross examination, and

the verdict of the jury shows that it believed the testimony given by him on cross examination on this point, and did not believe that given by him on re-examination.

Finally, it is claimed by counsel for defendant that in any event there was but one transaction, and that there can not be more than one overcharge nor more than one penalty. On the other hand, it is insisted by counsel for the plaintiffs that the judgments in both cases should be affirmed under the authority of *St. Louis, I. M. & S. Ry. Co.* v. *Freeman,* 95 Ark. 218, and *St. Louis, I. M. & S. Ry. Co.* v. *Frisby,* 95 Ark. 281. In those cases we held that the party aggrieved who may recover the penalty against a railroad company for charging excessive fare as provided by section 6620, Kirby's Digest, is the person intending to become a passenger. But we do not regard the construction placed upon the act in those cases as controlling the present appeal under the facts disclosed by the record. If the facts in the record showed that the agent had intended to charge seventy cents or any greater amount than sixty-nine cents for each ticket, then, under the authority of the Freeman and Frisby cases, both I. H. Young and his wife, N. A. Young, would be entitled to recover.

But the testimony, as it appears from the record, shows that the real substance of the transaction was that I. H. Young purchased two tickets for Benton; that the agent knew that the fare was sixty-nine cents, and either intentionally or by mistake kept one dollar of the amount tendered in payment of the tickets. The jury by its verdict found that the dollar was intentionally kept by the agent, but there is nothing in the record from which it can reasonably be inferred that he intended to apportion his wrongful act between the two tickets. He knew the fare was only sixty-nine cents, and says that he only intended to charge that amount for a ticket. His act in keeping the dollar then is referable only to his transaction with I. H. Young, and can not be extended to the purchase of the ticket for Mrs. Young without some testimony tending to show that he intended to make an excessive charge for her ticket. Counsel for plaintiff urge that, in as much as both tickets were purchased at the same time, and as there is nothing to show whether he intended to make an overcharge on one or both of the tickets, the presumption is that he intended to charge an

excessive rate on both tickets. On the other hand, we think that, in the absence of any proof upon which it could be reasonably inferred that the agent intended to make an overcharge on both tickets, the inference is that he intended the overcharge for the ticket of the person with whom the transaction was conducted. This is so because the party suing for the penalty under the statute must by proof bring himself within the terms of the statute before he can be allowed to recover the penalty.

It follows that the judgment in favor of I. H. Young will be affirmed; and the judgment in favor of N. A. Young will be reversed, and her cause of action dismissed.

CHICAGO CRAYON COMPANY v. CHOATE.

Opinion delivered March 11, 1912.

1. TRIAL—DIRECTING VERDICT—FAILURE TO OBJECT.—The effect of directing a verdict for the defendant, with no objection made or exception saved thereto, is the same as if the court had given correct instructions on every phase of the case and thereupon the jury had returned a verdict in favor of the party for whom it was directed. (Page 605)
2. SAME—RIGHT TO MOVE TO SET ASIDE VERDICT.—Though defendant failed to object to an order directing a verdict for plaintiff, he may move for a new trial upon the ground that the verdict is not sustained by any legal evidence. (Page 606.)
3. ACCOUNT—PRESUMPTION IN FAVOR OF.—An account, duly sworn to by the plaintiff and not denied by the defendant under oath, either by affidavit by verification of his answer, nor denied by the testimony of any witness, is conclusively presumed to be correct. (Page 606.)

Appeal from Pulaski Circuit Court, Second Division; *F. Guy Fulk*, Judge; reversed.

J. P. Kerby and *W. C. Adamson*, for appellant.

The court erred in giving a peremptory instruction to the jury to find for the defendants. Where there is any evidence tending to establish an issue, it is error to take the case from the jury. 63 Ark. 94; 77 Ark. 556.

Carmichael, Brooks & Powers, for appellees.

The appeal should be dismissed because no exceptions were saved in the trial court to errors complained of. 41 Ark. 535;

44 Ark. 103; 50 Ark. 348; 51 Ark. 324; *Id.* 140; 52 Ark. 180; 55 Ark. 547; 59 Ark. 115; 61 Ark. 515; 62 Ark. 262; *Id.* 543; 70 Ark. 197.

FRAUENTHAL, J. This is an action brought by the Chicago Crayon Company to recover a balance alleged to be due upon an account. The plaintiff is a corporation, domiciled in the State of Illinois, and is engaged in the business of enlarging portraits and selling frames. The defendant, J. J. Choate, was employed by it to deliver the portraits and frames to purchasers, and to collect for the same. The suit was commenced before a justice of the peace by filing a complaint in which it was alleged that said defendant had entered into a written contract with plaintiff, under the terms of which he agreed to deliver said portraits and frames and collect for same, and to receive as his compensation therefor the difference between the invoice prices of the frames and the amount for which they were sold, and to make remittances to the company for collections so made, and account for all portraits and frames received; that the defendant had also executed to plaintiff a bond, with the defendant J. L. Choate as surety thereon, whereby they obligated themselves to pay all moneys not remitted and for all goods not accounted for at said invoice prices. It was further alleged that the defendant had become indebted to the plaintiff in the sum of $185.31 upon an account for goods sold and delivered to him in pursuance of said contract. An itemized statement of this account was attached to the complaint and filed with the suit. The complaint was duly verified, and the affidavit of the plaintiff was attached to the account, stating that it was just and correct.

The defendants filed separate answers, in which they denied that they were indebted to the plaintiff in any sum, but alleged that plaintiff had employed said defendant to work for it, and was indebted to him in the sum of $283.30, for which they asked judgment. Neither of these answers was verified, nor was there any affidavit or oath made by either of the defendants denying the correctness of the account of plaintiff, either in whole or in part.

The case was taken by appeal to the circuit court. Upon the trial in that court, the plaintiff offered in evidence the testimony of three witnesses, taken by deposition. Upon

motion of defendants, one of these depositions was suppressed, and it does not appear that any objection was made or exception saved to this ruling of the court. The other depositions were of the plaintiff's bookkeeper and auditor, and they were admitted in evidence. They testified to the correctness of the account, which was attached to the complaint, as shown by plaintiff's books, and this verified account was presented in evidence; but they also stated that they knew nothing of their own personal knowledge as to whether or not the items of the account had been shipped to the defendant, or as to the payments made by him thereon. Other testimony was adduced by plaintiff proving the execution of the written contract and bond referred to in the complaint.

This was in substance the case which was presented by the plaintiff; and when the introduction of this testimony was concluded, the court, upon motion of defendants, directed the jury to return a verdict in their favor, which was done. It does not appear that any objection was made or exception saved to this ruling of the court directing the verdict in defendant's favor.

It is urged by counsel for defendants that no alleged error committed in the trial of this case is subject to review upon appeal, because no objection was made, and no exception saved, to any ruling made by the trial court. But plaintiff, in its motion for a new trial, has assigned as one of the grounds why the judgment should be reversed that the verdict was contrary to the evidence adduced upon the trial.

The action of the court in directing the verdict was in effect to take the case from the jury and declare that under the law the plaintiff had not adduced sufficient evidence to sustain its cause of action; in other words, that, under the instructions which it would give to the jury, the defendants were entitled to a verdict. Inasmuch as the plaintiff did not make any objection or save any exception to this ruling, we must indulge the presumption that any instruction which the court would have given and the declaration of law which it did make were correct. Therefore, if there was any testimony adduced upon the trial of this case which would support the verdict rendered, under any view of the law as applicable to this case, then the verdict must be sustained. The effect of giving a directed ver-

dict, with no objection made or exception saved thereto, is the same as if the court has given proper and correct instructions on every phase of the case, and thereupon the jury has returned a verdict in favor of the party for whom it is directed. If there is any evidence to sustain the verdict under any view of the law applicable to the case, then it should not be disturbed. If, however, the verdict thus returned is not sustained by any legal evidence, or is contrary to the uncontroverted evidence, then the plaintiff has still the right to ask that it be set aside for that reason; and in the case at bar this has been done in the motion for a new trial.

This suit is founded upon an account. It is true that the plaintiff alleged that the defendant and it had entered into a written contract under the terms of which the items of the account were furnished to the defendant. But, under whatever kind of contract, whether in parol or writing, the items of the account are claimed to have been furnished, the suit brought is for the recovery of this account. The action is therefore one based upon an account. If the account is properly controverted, then the burden rests with the plaintiff to prove by evidence the correctness of each item of the account.

By section 3151 of Kirby's Digest, it is provided: "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." The effect of this statute is to make such verified account, when undenied, *prima facie* proof of its correctness. In event the defendant does not under oath deny the correctness of the verified account which is made the basis of the suit, then it is not incumbent upon the plaintiff to introduce other evidence of its correctness; and such an account, thus verified, is proof itself of its correctness. Such verified account, however, is only *prima facie* evidence of its correctness. It may be denied by defendant by an affidavit filed in the case, or by a verified answer. Its correctness may also be denied by the defendant under oath, when he testifies as a witness in the case. When such denial of the correctness of the account is made by

the defendant under oath in either of these ways, then the burden rests with the plaintiff to prove by other evidence the correctness of the account thus denied. *Boone* v. *Goodlett*, 71 Ark. 577; *St. Louis, I. M. & S. Ry. Co.* v. *Smith*, 82 Ark. 105. But the verified account upon which the action is founded constitutes evidence of the correctness thereof, and continues as such evidence thereof until denied under oath; and if it is not denied under oath in any of the ways above mentioned, then it becomes conclusive proof of its correctness.

This suit is based upon an account which was duly verified by the affidavit of the plaintiff. Defendant did not deny the correctness of this account under oath, either by affidavit or by verification of his answer. He did not himself testify, nor did he introduce any witness in the case. The correctness of the account was not denied under oath, either by the defendant or any other person. We have examined the testimony of the witnesses who were introduced by the plaintiff, and we find nothing therein impeaching the correctness of this verified account. The account of the plaintiff, duly verified by it by affidavit, was, by virtue of the above statute, evidence of its correctness, and it did not devolve upon plaintiff to introduce any other evidence until it was denied under oath by the defendant or by the testimony of some witness. When that was not done, it became conclusive evidence of its correctness. The verdict which was rendered was therefore, under any view of the law applicable to this case, contrary to the uncontroverted evidence which was adduced upon the trial thereof.

The judgment is accordingly reversed, and the cause remanded for new trial.

LAVELLE v. WESTERN UNION TELEGRAPH COMPANY.

Opinion delivered March 11, 1912.

1. TELEGRAPH COMPANIES—RECOVERY OF MENTAL ANGUISH—PARTIES.—Damage for mental anguish, caused by nondelivery of a message, may be recovered by the person suffering it, whether he is the person to whom the message was addressed or the person by whom it was sent. (Page 610.)
2. SAME—NOTICE OF CLAIM—REASONABLENESS OF RULE.—A stipulation for notice of a claim for damages within sixty days from the transmission

of a message is reasonable, and the company can require messages to be sent subject to it. (Page 611.)

3. SAME—MESSAGE WRITTEN BY OPERATOR BINDING WHEN.—Where plaintiff's husband, having authority to write a message on her behalf, requested the telegraphic operator to write the message, she was bound by the message so written to the same extent as if her husband had written and signed the message upon the blank upon which it was written. (Page 611.)

Appeal from Mississippi Circuit Court, Osceola District; *Frank Smith,* Judge; affirmed.

STATEMENT BY THE COURT.

This was a suit for damages for mental anguish alleged to have been occasioned by the failure to deliver the following telegram:

"Ulie McGuan, Osceola: John Lavelle's wife wants you to come at once; dangerously ill.

(Signed) "John Lavelle."

The testimony shows that on July 26, 1910, appellant was sick with congestion at her home in Tyronzo, and her physicians thought and advised her that she would not get well. She directed that Ulie McGuan, her youngest brother, for whom she had great affection, should be telegraphed to come at once that she might see him before she died. Her husband, John Lavelle, went to the telegraph office and dictated the above message to a boy who worked in the depot and was an assistant to the operator. The next morning, no reply having been received, the husband went to the office again and dictated another message to the operator, which was addressed Will McGuan, Osceola." Both of these messages reached Osceola in due time, and there was some effort made to deliver each. The messages received were addressed to Will McGiun or Willie McGann.

The sendee of the messages was an overseer on a plantation three miles from Osceola, and stated that he was in that town every two or three days, that he could have gone to his sister's bedside on either of two trains daily, and would have gone immediately had he received the message. The evidence does not disclose whether he was there between the 26th and 28th of July or on either of these dates.

Appellant thought she was going to die, and desired greatly

to see her brother, and his failure to come made her "feel a great deal worse," and suffer great mental anguish, but she recovered from her illness, and about a month afterwards either visited or was visited by her brother, who then first learned of the messages having been sent. He then called at the office at Osceola, and both of the telegrams were delivered to him. The assistant wrote the first message as dictated by the husband upon the usual telegraph blank, and the agent wrote the second likewise at his dictation on the usual blank, with the printed conditions on the back thereof, and in each instance the message was read to the husband as written and approved by him as correct, on the back of the message was printed this stipulation:

"The company will not be liable for damages or statutory penalties in any case where the claim is not presented within sixty days after the message is filed with the company for transmission."

None of the conditions were read to him at the time, and he and appellant each testified that they were not familiar with but were ignorant of the conditions printed upon telegraph blanks. No claim for damages for failure to deliver the message was presented to the company within sixty days after its transmission, nor was the suit brought until more than sixty days thereafter.

The court directed a verdict for the telegraph company, and from the judgment thereon plaintiff appealed.

J. T. Coston, for appellant.

1. Appellant is not bound by the printed stipulation limiting the time for bringing suit because neither she nor her husband, who was acting as her agent, assented to it. 3 Sutherland, § 975; 2 Thompson, § § 2430, 2420; 26 S. E. 830; 60 Ill. 440; 74 Ill. 171.

2. It is not material whether the operator, who wrote out the message for appellant's husband, acted as agent for the company or for appellant. When he undertook to read the message to Lavelle, it was his duty, both in law and morals, to read also the stipulation in question, and his failure to do so was a fraud upon appellant, and she is not bound by the stipulation. 42 Ind. 458; 67 Ill. 88; 34 Mich. 122; 132 S. W. 221; 26 S. W. 736.

George H. Fearons, E. H. Mathes and *Rose, Hemingway, Cantrell & Loughborough,* for appellee.

1. Appellant's so-called mental anguish was groundless, purely imaginary, and forms no basis for recovery. 83 Ark. 476; 90 Ark. 268; 92 Ark. 69; 96 Ark. 218; 73 S. W. 1043; 101 Ark. 487.

2. Under the circumstances shown, the sender made the operator and the assistant his agents for the purpose of writing the two messages, and he was chargeable with any mistake made in the address and also with notice of the conditions expressed on the message blank. 24 S. W. 86; 64 Tex. 220; 63 Tex. 676; 43 So. 106; 48 So. 712; 50 So. 316.

KIRBY, J., (after stating the facts). It is insisted that appellant was not bound by the printed condition upon the back of the message, requiring that the claim for damages should be presented within sixty days from its transmission, since she had no knowledge of, and did not consent to, it. It is no longer questioned that damages for mental anguish may be recovered by the one suffering it, either the person to whom the message was addressed or by whom it was caused to be sent. 3 Sutherland, Damages, § 975.

John Lavelle, the husband, was appellant's agent, with authority to send or have the message sent to her brother, and he dictated it as desired to the assistant operator, who at his request wrote it out on the usual telegraph blank containing the condition and then read it over to him for his approval.

The second message was sent likewise. If the husband had written the message himself, he would doubtless have used the customary telegraph blank, and without doubt he had the authority to do so, and the operator in writing the message at his request was the agent of the sender, and not of the company.

It is not contended that there was any fraud or concealment practiced upon the husband at the time the message was sent, but only that the actual message, as dictated by and written for him, was read over without the printed conditions upon the back of the blank upon which it was written being called to his attention.

Appellant's husband, in thus sending the message, authorized the writing of it upon the blank as it was written, and the fact that his attention was not called to the printed condi-

tions on the back thereof, and they were not read over to him at the time the dictated message was read for his approval, does not show any fraud or concealment upon the part of the operator by which he was in any way misled.

It has often been held that the stipulation for notice of a claim for damages within sixty days from the transmission of the message is reasonable, and the company can require messages sent subject to it and refuse to send them otherwise, and the husband, plaintiff's agent, having authority to write the message himself and preferring to do it by the hand of the operator under his direction, bound her thereby to the same extent as if he had himself written and signed the message upon the blank upon which it was written. *Western Union Tel. Co.* v. *Dougherty*, 54 Ark. 221; *Western Union Tel. Co.* v. *Moxley*, 80 Ark. 554; *Western Union Tel. Co.* v. *Prevatt*, 149 Ala. 617, 43 So. 106; *Western Union Tel. Co.* v. *Benson*, (Ala.) 48 So. 712; *Gulf, C. & S. F. Ry. Co.* v. *Geer*, 24 S. W. (Tex.) 86.

The sendee of the messages received both of them more than thirty days before the expiration of the sixty-day limit, and there was plenty of time after their delivery to comply with this reasonable stipulation.

There being no dispute as to facts, the verdict was properly directed. The judgment is affirmed.

PARSONS v. SHARPE.

Opinion delivered March 11, 1912.

1. ADVERSE POSSESSION—EFFECT OF CONVEYANCE BY COTENANT.—A conveyance by a cotenant of the entire estate to a stranger gives color of title; and if possession is taken, and the grantee claims title to the whole, it amounts to an ouster of the cotenant, and the possession of the grantee is adverse to them. (Page 615.)

2. SAME—EFFECT OF CONVEYANCE BY COTENANT.—Where a conveyance is executed to a stranger by certain tenants in common, purporting to convey only their undivided interest, such grantee becomes a tenant in common with another cotenant; and, in order to constitute an ouster, the latter must either have actual notice of the adverse holding of such grantee, or the hostile character of his possession must be so openly manifest that notice on the cotenant's part will be presumed. (Page 615.)

3. SAME—INTENT OF COTENANT.—In order for the possession of a tenant in common to be adverse to an absent cotenant, there must have been

an intention, manifested by overt acts or conduct, on the part of the occupying tenant to claim adversely and in hostility to the rights of such cotenant, and such intention may be proved by direct evidence or by circumstances. (Page 616.)

Appeal from Jackson Circuit Court; *R. E. Jeffery*, Judge; reversed.

Gustave Jones and *John W. & Joseph M. Stayton*, for appellant.

1. Actual notice of an adverse holding need not, under the proof in this case, have been brought home to the plaintiff, but he should have been held to have had notice thereof from the notoriety and quality of the acts of ownership which had been exercised over the property by the defendants, and the court erred in not so holding. 137 S. W. 553; 24 L. R. A. 261.

2. If it were true that defendants were without color of title, which is not conceded, their claim is good because they have had actual adverse possession for the statutory period. 33 Ark. 151; 30 Ark. 640. But the deed from Coffin, taking into consideration all the surrounding facts and circumstances of the trade between Parsons and Coffin, constitutes sufficient color of title. 45 Ala. 482; 5 Pac. 661; 11 Atl. 60; 45 Pa. St. 140; 23 Pa. St. 503; 8 Pa St. 503; 4 Watts & S. (Pa.) 32; 3 Watts (Pa.) 69; 1 Serg. & R. (Pa.) 111; 2 Hill (S. C.) 496; 117 N. C. 393; 73 Mo. 538; 60 Mo. 420; 60 Mo. 105; 52 Mo. 108.

Stuckey & Stuckey, for appellee.

1. None of the deeds purports to carry the entire interest in the property, but only the undivided interest of the particular grantor conveying, and all the deeds were recorded. Parsons was bound to take notice of R. W. Sharpe's title, and the latter had the right to rely on the constructive notice of his title given by the record. 89 Ark. 23; 50 Ark. 327. The entry and possession of one tenant in common is regarded in law as the entry and possession of all cotenants, and will inure to the benefit of all. 17 Am. & Eng. Enc. of L. (2 ed.) 669, 661-2; 42 Ark. 289; 55 Ark. 104; 61 Ark. 527; 88 Ark. 612; 77 Am. Dec. 614; 138 S. W. 958; 21 Am. & Eng. Enc. of L. 1149; 3 How. 690; Tiedeman, Real Prop., 251.

2. There can be no adverse possession against a cotenant until there has been an actual ouster or some act deemed in

law equivalent thereto. 1 Am. & Eng. Enc. of L. (2 ed.) 802-803; 42 Ark. 289.

In order for an adverse holding to amount to an ouster, there must be actual notice thereof, or the possession must be of such hostile character, so open and manifest, that notice will be presumed. 1 Am. & Eng. Enc. of L. (2 ed.) 805; 132 S. W. 1002; 138 S. W. 958; 77 Am. Dec. 614; 55 Ark. 104; 88 Ark. 612.

3. The question of adverse possession being one of fact for a jury or a court sitting as a jury, the court's finding in this case will not be disturbed. 23 Ark. 24; 31 Ark. 476; 40 Ark. 144; 60 Ark. 250; 38 Ark. 139; 45 Ark. 41; 50 Ark. 305; 68 Ark. 83; 70 Ark. 512.

4. Since all of the deeds convey only undivided interests of the grantors therein, and none purports to convey the interest of appellee, there is no color of title in appellants as against him. 47 Ark. 528; 67 Ark. 188; 45 Ark. 419; 72 Ark. 610.

McCULLOCH, C. J. In the year 1889 one Brewer sold and conveyed two lots in the town of Swifton, Jackson County, Arkansas, to appellee, R. W. Sharpe, and his mother, Sarah Sharpe, and brother, George M. Sharpe, as tenants in common. Sarah Sharpe died intestate on January 19, 1891, leaving surviving as heirs at law her children, the appellee, and George M. Sharpe, James B. Sharpe, C. L. Sharpe, and Lulu E. Coffin. Some time during the year 1892 appellee disappeared from his home at Wynne, Arkansas, and was not heard from by any of his friends or kindred until the year 1909, when his brother, C. L. Sharpe, received a letter from him written in California, where he resides. In the meantime James B. Sharpe, on June 11, 1897, conveyed his undivided interest in the lots, by quitclaim deed, to M. E. Coffin; on March 23, 1901, C. L. Sharpe, George M. Sharpe and Lula E. Coffin conveyed their undivided interests in said lots to said M. E. Coffin; and on December 9, 1899, M. E. Coffin conveyed all of her interest in said lots to F. M. Parsons, one of the appellants, who, on April 26, 1905, conveyed one of the lots to his co-appellant W. T. Altman. Appellant Parsons took possession of the lot at the date of his said purchase, and with his grantee, Altman, occupied the same continuously up to the present time. At the time of the said purchase by appellant Parsons there was

a small dwelling-house on lot No. 6, the other lot being fenced and used as a garden. During the period of his occupancy, he expended the sum of $432.29 in enlarging and repairing the house, and appellant Altman, after the conveyance of lot No. 5 to him, built a dwelling house thereon at a cost of $800. They also paid taxes on the lots each year. Appellee wrote to his brother, C. L. Sharpe, from California in the year 1909, and subsequently employed an attorney, who instituted for him separate actions in the circuit court of Jackson County against appellants, Parsons and Altman, on December 17, 1909, to recover possession of said lots. Appellants each pleaded the seven-years statute of limitations, and by consent of all parties the cases were consolidated and tried together before the court sitting as a jury.

The evidence tends to establish the fact that appellee was sick and very feeble when he left Wynne in 1892, and that his relatives, after failing to hear from him, supposed that he was dead. None of them ever heard from him until his brother, C. L. Sharpe, received the letter from him in 1909, as before stated. J. B. Coffin, who is the husband of M. E. Coffin, and negotiated the purchase of the property from the Sharpes, testified that when he negotiated the purchase they all took it for granted that appellee was dead, and that his (witness') wife, M. E. Coffin, was getting title to the whole property, having previously purchased the interest of James B. Sharpe, one of the heirs. C. L. Sharpe, who represented the other grantors in the negotiations, testified that nothing was said about his brother (R. W. Sharpe) being dead, but admitted that they had not heard from him since he left in 1892, and all supposed he was dead. Appellant Parsons testified that he purchased the lots and paid the full value therefor on the basis that he was getting title to the whole—that appellee had not been heard from since he left and was supposed to be dead—that his grantor represented to him that all the heirs were satisfied appellee was dead. This is not contradicted. He testified further that he occupied the property, claiming it as his own, and improved it.

The testimony further shows that, aside from the improvements placed upon the lots, they became greatly enhanced in value after the conveyance to appellants.

It is not explained by any one why M. E. Coffin conveyed the property to Parsons before the date of her deed from the Sharpes, but it seems to be conceded that she intended to convey all of the title that she received from them, and it is fair to assume, from the circumstances, that when she conveyed to Parsons she had already negotiated the purchase from the Sharpes, though the deed to her was not executed by them until later.

The court found that at the time of the said conveyance to the Sharpes appellee's "whereabouts were unknown, and he was supposed to be dead by the parties to said conveyance," that appellants had the sole use and occupancy of said property since their purchase, and that they had made improvements on the lots to the amount stated above, but declared that appellants and appellee were tenants in common, and that, "there being no notice to the plaintiff that the claims of the defendants, Parsons and Altman, were adverse to his, their possession can not in law amount to an adverse holding thereof as against said plaintiff."

The rule sustained by the overwhelming weight of authority with reference to conveyances by one or more cotenants to a stranger, and the character of possession taken thereunder, is correctly stated as follows:

"The conveyance by one cotenant of the entire estate gives color of title; and if possession is taken, and the grantee claims title to the whole, it amounts to an ouster of the cotenants, and the possession of the grantee is adverse to them." 1 Am. & Eng. Enc. of Law (2 ed.) p. 806, and numerous authorities there cited.

That rule was recognized by this court in *Brown* v. *Bocquin*, 57 Ark. 97.

On the other hand, the principle is well settled that where a conveyance is executed to a stranger by one tenant in common, purporting to convey only his undivided interest, he becomes a tenant in common with the other tenant (17 Am. & Eng. Enc. of Law (2 ed.) p. 661); and, in order to constitute an ouster, "the tenant out of possession must have actual notice of the adverse holding or the hostile character of the possession must be so openly manifest, that notice on his part will be presumed." 1 Am. & Eng. Enc. of Law (2 ed.) p. 805.

The conveyance to appellant Parsons, being a conveyance only of the undivided interests of some of the tenants in common, falls within the latter rule, and is controlled by the case of *Singer* v. *Naron*, 99 Ark. 446, where we declared the law to be that, "in order for the possession of one tenant in common to be adverse to that of his cotenants, knowledge of his adverse claim must be brought home to them directly or by such notorious acts of an unequivocal character that notice may be presumed."

The case of *Singer* v. *Naron* is strikingly like the present one in that one of the tenants in common disappeared and had been absent for a long time, and returned to claim his interest after his cotenants, supposing him to be dead, had openly occupied the property, claiming it as their own, and conveyed away portions of it. We held that the facts of that case presented a question for the jury to determine whether or not there had been an actual ouster by the cotenants and an adverse holding for the statutory period.

Another essential is that there must have been an intention, manifested by overt acts or conduct, on the part of the occupying tenant to claim adversely and in hostility to the rights of the absent cotenant, which may be proved by direct evidence or by circumstances. *Bayles* v. *Daugherty*, 77 Ark. 201; *Goodwin* v. *Garibaldi*, 83 Ark. 74.

The special findings of the circuit judge convince us that he meant to declare the law that the possession of appellees could not amount to an adverse holding because appellant had no actual notice thereof. This was error. The case should have been determined on the question we have herein indicated, and not solely on the question of actual notice.

For the error indicated, the judgment is reversed, and the cause remanded for a new trial.

FRANCIS v. ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY.

Opinion delivered March 11, 1912.

RELEASE—WHEN BINDING.—A release of liability for personal injuries, executed to a master by a servant for a valuable consideration and without fraud or misrepresentation, will be upheld.

Appeal from Miller Circuit Court; *Jacob M. Carter*, Judge; affirmed.

Hart, Mahaffey & Thomas and *L. A. Byrne*, for appellant.

1. The record does not disclose upon what grounds the court took the case away from the jury. If it did so on the grounds that appellant assumed the risk, then its action was in the face of the statute. "Safety Appliance Act," §§ 2, 8; 86 Ark. 244.

2. It could not legally take the case away from the jury on the grounds of contributory negligence because that is a question solely for the jury unless the undisputed facts are such as constitute contributory negligence. 82 Ark. 11; 87 Ark. 443; 90 Ark. 453; 91 Ark. 388; 93 Ark. 15; See also 220 U. S. 580; 92 Ark. 554; 205 U. S. 1; 129 Fed. 522; 165 Fed. 869; 174 Fed. 399; 135 Fed. 122; 170 Fed. 1014; 53 Atl. 90.

3. On the question of the release, this case is controlled by *Railway* v. *Hambright*, 87 Ark. 614.

H. S. Powell, E. B. Kinsworthy and *W. E. Hemingway*, for appellee.

1. If there was any failure to maintain the couplers so as to make automatic couplings, such failure was not the cause of the injury. It resulted from an unnecessary attempt to make a coupling by use of the foot, a thing which appellee had no reason to expect, and the resultant injury was not a direct or proximate consequence of the condition of the coupler. 90 Ark. 210.

2. It is conceded that, if the case comes within the Safety Appliance Act, the rule of assumed risk does not apply; but there is no proof that the car was being used in interstate commerce at the time of the injury, and the case is not controlled by that act. Hence the rule of assumed risk does apply.

3. The Safety Appliance Act does not refer to contributory negligence, and has no effect upon the plea of contributory negligence as a defense. 96 Fed. 298; 129 Fed. 347, 348; 220 U. S. 590, 596, 597.

Plaintiff having himself testified that it would have been less dangerous to have used his hand instead of his foot in attempting to make the coupling, and, it appearing that other

methods of making the coupling without danger could have been employed, the defense of contributory negligence was clearly made out in this case. 108 Fed. 474; 128 Fed. 529; 144 Fed. 668; 161 Fed. 719.

4. Appellant's settlement and release of his claim, if he had any, precludes recovery in this action. There are so many points of difference between the facts in the Hambright case, 87 Ark. 614, and in this, that that case can not be held as controlling here.

McCULLOCH, C. J. Appellant sued the railroad company to recover damages on account of injuries received while in the latter's service, and he appealed from an adverse judgment, the trial court having given a peremptory instruction to the jury to return a verdict in favor of the company.

Appellant was working in the railroad yards at Texarkana as switchman, and was injured while attempting to couple a car to the switch engine. The engine was equipped with an automatic coupler, which was found to be out of repair; and when appellant called his foreman's attention to this condition, he was directed to remove the knuckles from the coupler of a box car, and place same in the engine coupler. The engine was taken over to a sidetrack, where the box car was, and appellant, assisted by the foreman, took the knuckles out of the coupler on the box car and placed them in the coupler of the engine. The foreman then said: "All right; go ahead." He was directed to couple certain cars, and when he attempted to do so the knuckles were still found to be out of order, so that the coupling could not be made automatically by the impact of the cars coming together. The first and second attempt failed, and in the third attempt appellant tried, with his left foot, to push the drawhead over so that the coupler would connect, but the drawhead on the engine and the car had too much play, and by reason thereof caught his foot and crushed it. The first joint of his big toe was crushed so that it had to be amputated, and all the other toes on that foot were mashed off. He was given attention that night by the local surgeon, and the next day sent to St. Louis and placed in the hospital operated for the benefit of employees of the company. This was on July 4, 1907, and he remained in the hospital until November 2 of the same year. On that day he applied to

Doctor Vasterling, the surgeon in charge, for a discharge or "clearance," assigning as a reason that his wife was about to be confined, and that he could secure proper attention at home with his family. Doctor Vasterling objected to his discharge, but finally acceded to appellant's wishes, and gave him a letter of introduction to the claim agent of the company at St. Louis, and also gave him the following letter (omitting address), addressed to the claim agent, as his discharge:

"J. E. Francis, switchman, the bearer hereof, has this day been discharged from the St. Louis Hospital upon request, where he has been under treatment since July 4 for injuries inflicted at Texarkana on July 2, as follows: Loss of all toes left foot amputation through first phalanx great toe and at metatarso phalangeal articulations other toes, extensive loss of skin structure, dorsal and planter surface of same foot, which we consider permanent. As he is now convalescent, we send him to you for such consideration as his case seems to merit. Judging from his present condition, it will probably be.....before he is able to resume his old employment. Since he has been under our care, his conduct has been O. K. Please furnish him with transportation from St. Louis to Texarkana.

"Remarks: Francis states that his wife will be confined this month and wants to be with her now. A large granular area still remains unhealed which will probably require two to four months' treatment; says his sister is a professional nurse at a sanitarium at Texarkana, who will undertake to dress his foot at regular intervals under advice of his physician. Francis assumes all risks in going before wound is healed; also assumes all bills for expenses for medicine, dressing and treatment. He has read this clearance."

This letter was read to appellant by Doctor Vasterling, and and delivered to him to be handed to the claim agent, Mr. Jones, which was done. The claim agent offered appellant $600 in settlement, or, as appellant stated, to pay for his loss of time, and this he at first declined, but on the next day accepted it and executed to the company a written release reciting that he accepted the sum of $600 in full release of all claims against the company by reason of his injury.

He returned to his home in Texarkana, and was there

treated by other surgeons, and it was afterwards found necessary to amputate the foot, which was done and he was unable, on the account of the loss of his foot, to secure satisfactory employment.

Appellee denied the allegations of negligence with respect to the coupling of the engine, and also pleaded contributory negligence and assumption of risk on the part of appellant, and pleaded said release in bar of appellant's right to recover any more damages.

Appellant, by an amendment to his complaint, alleged that "his signature was obtained to said release through the fraudulent representations of the defendant's surgeon and the claim agent as to the extent of his injuries, that he would be ready for service in two months, and employment would be waiting him at Texarkana, and, relying upon these statements, he was induced to sign the release."

The case was tried before the jury, and, as before stated, the court gave a peremptory instruction in favor of appellee.

Learned counsel for appellant attempt to bring the facts of his case within the rule laid down by this court in *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Hambright,* 87 Ark. 614, where it was held that a settlement with an injured employee, based upon untrue representations made by the company's surgeon as to the extent of the injuries, was not binding on said employee, who subsequently repudiated the settlement and sued for damages. The letter of Doctor Vasterling, when read in the light of the attending circumstances, can not be construed to amount to a representation as to the extent of his injuries. In the Hambright case it appeared that the plaintiff's injury was a very grievous one, and that the extent of it, as to permanency, was well known to the surgeon, but the jury found that the surgeon represented to the plaintiff that the injury was slight and that he would be well in a short time. There was a positive and affirmative representation that the injury was very slight. In the present case the surgeon merely stated that the unhealed area would require from two to four months' treatment, and added that appellant's sister, being a professional nurse at a sanitarium in Texarkana, could dress the foot at regular intervals. In the portion of the letter, which appeared to have been written upon a printed

blank, where there was a space for stating the probable duration of the injury, the blank was left unfilled, which shows that the surgeon was not through with the case, and did not attempt to give an opinion as to the full extent of the injury. Appellant was not finally discharged as a well man, and the surgeon was not holding out to him that he was cured, but the letter is more in the nature of an excuse or a reason why he should be allowed to leave the hospital before he recovered. The letter expressly stated that appellant assumed all risk in going—leaving the hospital before his wounds were healed. It should not, and can not, we think, be made the basis of a charge of untrue representations concerning the state of his injury. The fact that appellant's injury did not heal as rapidly as he anticipated, and that it was later found necessary to amputate his foot, does not prove that there was a misrepresentation of facts by Doctor Vasterling, or even a mistake as to his diagnosis.

No other attack is made upon the release, and we are of the opinion that the circuit court was correct in holding that this attack was not sustained by the evidence.

Other questions in the case need not be discussed, for appellant was bound by his release, and could not recover any more damages.

Affirmed.

BAGNELL TIMBER COMPANY v. SPANN.

Opinion delivered March 11, 1912.

SALE OF CHATTELS—EFFECT OF UNACCEPTED PROPOSITION.—A mere proposition by one to buy certain property at a price named, without any acceptance by the other, does not constitute a binding contract of sale.

Appeal from Desha Circuit Court; *Antonio B. Grace*, Judge; reversed.

STATEMENT BY THE COURT.

The plaintiff, R. Spann, brought suit against the timber company for damages for failure to inspect and receive certain railroad ties, which he claimed to have gotten out for them under contract.

If any contract was made, it was by correspondence, and it was alleged that the contract was as follows:

"St. Louis, Mo., June 27, 1908.

"Mr. R. Spann, Kelso, Ark.

"Dear Sir: Your letter of the 26th received, and, replying to same, would advise that we will take all the white oak ties you can get us out at or near Kelso the balance of this year at thirty-two cents for first class and fifteen cents for culls for strictly white, post and burr oak ties to be well made and full up 6x8x8, and delivered on the right-of-way at or near grade where they can be loaded. We also wish to say that we can take all the red and black oak ties you can get us out the balance of this year at or near Kelso at twenty-five cents for first class and ten cents for culls, delivered on the right-of-way at or near grade.

"Yours truly,

"C. E. Meyers, Secretary."

And further:

"Plaintiff says that under the above contract, relying upon the defendant to comply with it in all respects, he employed men and teams at great expense and loss of time to get out said ties and deliver them upon the right-of-way of the said railroad. This was all done in due time and the ties mentioned in "Exhibit A" were all delivered according to contract. After said ties were delivered he demanded of defendant that it come or send an inspector and inspect the ties and pay him for the same, and that it promised often to do so, but failed, and still fails, to inspect the ties and pay him for them."

"Exhibit A" to the complaint was an account against the company debtor to R. Spann, 1908, as follows:

Bagnell Tie Company, Dr. to R. Spann, 1908.

December 1—To 2,640 Cypress Ties, 32	$ 844.80
December 1—To 1,854 White Oak Ties, 32	592.00
December 1—To 1,280 Red Oak Ties, 25	320.00
	$1,756.80

subject to inspection.

"R. Spann states the above account is just and true, and due to him, *subject to inspection,* and the said ties have all been delivered upon the right-of-way of the M., H. & L. Railroad, and that he has often demanded of the debtor to inspect the ties according to contract, and inspection has never been made.

"R. Spann."

A general demurerr was filed to the complaint; also an amended and supplemental answer. The company denied any indebtedness whatever to plaintiff; that he made or delivered upon the right-of-way of the M., H. & L. Railroad the ties mentioned in "Exhibit A" to the complaint, or that any ties were so made and delivered to the defendant under or by virtue of any contract with it; denied that the plaintiff delivered to the defendant any ties of the kinds or grades or sizes set out in the letter of its secretary, made a part of the complaint, that he ever had any ties that would come within such grades that were free from lien; that the ties he did make were inferior and did not come up to the specifications, and that he recognized he did not have any contract with the defendant, and attempted to sell them to the Western Tie Company and others. In the supplemental answer the defendant admits that its secretary wrote the letter on June 27, set out in the complaint, but denied that it entered into any contract with the plaintiff as to the ties, and stated that the letter was written to him in answer to an inquiry as to what they would pay for ties on the right-of-way and also stating that the Western Tie & Timber Company are paying 32 cents here. That to that letter Spann responded on the 29th, as follows:

"Kelso, Ark., June 29, 1908.

"Bagnell Timber Company, St. Louis, Mo.

"Dear Sir: Yours 27th received. Please let me know when you will take my ties. Will you advance the hauling, ten cents each? I have 3,000 cypress ties also. Awaiting your pleasure, I am, respectfully, R. Spann."

Denied that any contract was made, or that plaintiff employed teams and men at any expense or loss of time to get out the ties for the defendant; denied that any ties were delivered upon the right-of-way of the railroad or any point mentioned in the Meyers letter, or made for or delivered to defendant. It says that the correspondence amounted only to negotiations relative to making a contract which was never made, that the plaintiff during the time mentioned in the Meyers letter hauled ties for other persons and sold and disposed of his ties without regard to any contract with this defendant.

The testimony shows that it was the custom of the tie company to take and pay for such ties gotten out for and sold

to it as were inspected by the railroad company's tie inspector and subject only to such inspection. That none of the ties claimed to have been made for and delivered to the defendant by plaintiff had ever been inspected by any railroad tie inspector, or at all. There was some testimony tending to show that some of the ties claimed to have been made by plaintiff would come within the specifications of the Meyers letter, and would be of the value of the prices fixed therein, that plaintiff had notified the company of the ties being delivered and asked for an inspection thereof, all of which was denied by the company.

The court instructed the jury and it returned a verdict with interest, amounting to $762.35. From the judgment thereon defendant appealed.

X. O. Pindall, for appellant.

1. The letter sued on was not a contract, and the demurrer to the complaint should have been sustained. 10 S. D. 611; 187 Pa. St. 18, 67 Am. St. Rep. 563; 5 Am. St. Rep. 103; 30 Ark. 194.

2. If all the correspondence could be held to constitute a contract, still the custom as to inspection would control. 45 La. Ann. 920; 40 Am. St. Rep. 40; 86 Ga. 408; 9 Wash. 614; 107 Cal. 327; 18 Cal. 208.

J. W. Dickinson, for appellee.

KIRBY, J., (after stating the facts). It is contended by appellant that it made no contract with appellee for the delivery of the ties to it, and with this contention we agree. Certainly, the letter expressing a willingness to take all the ties of certain kinds, grades and specifications that appellee might make and deliver at the designated place along the right-of-way of the railroad line can not be held a contract, and all the correspondence between the parties does not, in our opinion, show any contract of sale of the ties. Nowhere did appellee agree to sell any ties whatever to appellant nor to make or deliver to appellant any number of ties, within a specified time, or at all. In other words, from the entire correspondence it appears only that the company offered to take and pay the price designated for the ties, coming within the specifications mentioned in the letter, along the right-of-way in accordance with the terms, and would even advance ten cents per tie for the cost of hauling

to the right-of-way, but it made no advance whatever, neither was it asked to do so, nor did appellee accept such offer or agree to furnish it any ties whatever, nor notify the company that he intended to or would do so, neither was he bound under the circumstances to sell or deliver to the company any ties at all. Not being bound himself to the sale or delivery of the ties, there was no contract between the parties, since it was not binding upon both of them. *Eustice* v. *Meytrott,* 100 Ark. 510; *Turner* v. *Baker,* 30 Ark. 194.

Appellee could not recover damages for the breach of an alleged contract which did not, in fact, exist. The judgment is reversed, and the cause dismissed.

NEWPORT STAVE COMPANY *v.* HALL.

Opinion delivered March 18, 1912.

1. APPEAL AND ERROR—INSTRUCTIONS—EXCEPTIONS IN GROSS.—Where the exceptions to the court's several instructions were in gross, they will not be considered when the correctness of only one of them is questioned. (Page 627.)
2. MASTER AND SERVANT—LIABILITY FOR ACTS OF SERVANT.—Evidence tending to prove that defendant's servant was guilty of negligence, which caused plaintiff to be scalded by steam escaping from a boiler, was sufficient to sustain a charge of negligence. (Page 627.)
3. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—WHEN QUESTION FOR JURY.—Where plaintiff stopped for a few moments near defendant's engine, and it did not appear that there was reason for him to anticipate any danger, it was not error to leave to the jury the question whether plaintiff was guilty of contributory negligence. (Page 627.)

Appeal from Union Circuit Court; *George W. Hays,* Judge; affirmed.

Gaughan & Sifford, and *Marsh & Flenniken,* for appellant.

1. Considering the evidence in its aspect most favorable to appellee, the proof is not legally sufficient to show negligence. 97 Ark. 486; 35 *Id.* 602. Defendant was only bound to use ordinary care to prevent the injury. 6 Words & Phr. 5029; 11 L. R. A. 689; 26 Am. St. 842; 14 Pac. 633; 59 S. W. 13.

2. This was purely an accident. 1 Words & Phr. 63; 63 L. R. A. 416; 50 Am. Rep. 352; 27 L. R. A. 365.

3. Plaintiff was guilty of contributory negligence. 82 Ark. 534, 97 *Id.* 486.

Mahoney & Mahoney and *Powell & Taylor,* for appellee.

McCULLOCH, C. J. The plaintiff was scalded by water expelled from a steam pipe at defendant's mill, and sues to recover damages. Defendant was operating a stave mill, and used an engine and boiler leased from John P. Holmes, plaintiff's employer. Holmes contracted with defendant to supply the boiler with sufficient water, and he assigned that duty to plaintiff, whose other work for Holmes was to superintend the making and hauling of stave bolts, the business in which Holmes was then engaged. On the morning the injury occurred, the plaintiff went to the mill to ask Kinard, the engineer (defendant's employee) about the supply of water, and walked up near the engine, where Kinard and one Miller, the commissary keeper, were sitting. He asked Kinard about the water, and the latter replied that it wouldn't last longer than 3 o'clock in the afternoon. Kinard immediately walked away, and plaintiff squatted down beside Miller to ask about sending some groceries to the woods, and in a few moments a small quantity of hot water from the steam pipe struck him in the face and scalded him.

The pipe from which the hot water escaped ran from the pop-valve, and was connected with the boiler. It was elevated, and extended four or five feet from the boiler, the end being about eight feet from the ground. Plaintiff was about ten feet from the end of the pipe and in range of it when Kinard walked away from him and when he was struck by the water. The escape of the hot water was caused in this wise: Kinard climbed up to the pop-valve to adjust it. At first it was set so that it would pop off when the steam pressue was 40 pounds; he ran the set screw down so that it would pop off at 90 pounds pressure, and then so that it would pop off at 110 pounds pressure. He pulled the lever and tried it at that pressure, and then it was that the sudden pressure of steam expelled the hot water from the pipe. This all occurred, according to the testimony, in a short space of time—about two minutes or less. Kinard knew that plaintiff was sitting, when he left him, in range of the pipe. He says he didn't know that there was

any water in the pipe. The presence of the water in the pipe was caused according to Kinard's testimony by the condensation of steam. Plaintiff testified that the steam would condense in the pipe, and also that when the boiler had too much water in it some of the water would get into the pipe.

The only question presented is whether or not the testimony was sufficient to sustain the charge of negligence. The exceptions to instructions were in gross, and can not be considered, as the correctness of only one of them is now challenged. *Dowell* v. *Schisler*, 76 Ark. 482. It is insisted that the injury occurred purely from an accident which could not reasonably have been foreseen, and that the resultant injury by reason of the escaping water was too remote for the act of the engineer in pulling the lever to be treated as the proximate cause. We think the testimony presented a question for the jury to determine whether the engineer was guilty of negligence which was the proximate cause of the injury. He knew that the plaintiff was squatting within range of the pipe, and that if any water came from the pipe it was likely to strike him. The testimony tends to show that water was likely to accumulate in the pipe, and that the engineer knew this or could have known it by the exercise of ordinary care. He admits that it could accumulate there, and that if he had thought about it at the time he would have known it.

The question was also one for the jury whether or not plaintiff was guilty of contributory negligence in stopping in range of the pipe. He stopped there only for a few moments, and he did not know that the engineer was working with the pop-valve. It does not appear that any danger from that source was to be anticipated unless the lever should be pulled.

Affirmed.

WELLS v. STATE.

Opinion delivered March 18, 1912.

1. LARCENY—ALLEGATION OF OWNERSHIP.—In indictments for larceny, the allegation of ownership is material and must be proved as alleged. (Page 629.)

2. SAME—SUFFICENCY OF ALLEGATION OF OWNERSHIP.—In an indictment for larceny of cotton jointly owned by two persons and held by an

agent of both of them, it was sufficient to allege a joint ownership by them. (Page 629.)

3. INSTRUCTIONS—CONFLICT.—Where the court in one instruction told the jury that unless they found from the evidence that the appellant had established an alibi they should convict him, and in another instruction that if the proof was sufficient to raise in their minds a reasonable doubt of guilt then it was their duty to acquit, the two instructions can not be harmonized. (Page 630.)

4. SAME—ALIBI—BURDEN OF PROOF—It is error to instruct that defendant has the burden of proving an alibi. (Page 630.)

Appeal from Monroe Circuit Court; *Eugene Lankford*, Judge; reversed.

H. A. Parker, for appellant.

1. Instruction No. 1 on the question of alibi as a defense is erroneous; while instruction No. 4, given at appellant's request, correctly states the law. The two are in irreconcilable conflict.

If a defendant who relies upon the plea of alibi fails to produce a preponderance of evidence in support of that plea, still, if his proof upon that question raises a doubt as to defendant's guilt upon the whole case, it is the jury's duty to acquit. 103 Ala. 36; 94 Ala. 14; 52 Pac. 352; 59 Ark. 379; 55 Ark. 244; 24 Cal. 61; 31 Fla. 166, 172 Ill. 367; 25 Cyc. 152.

The giving of contradictory instructions is reversible error. 101 Ark. 37; 74 Ark. 437; 72 Ark. 31.

Hal L. Norwood, Attorney General, and *William H. Rector*, Assistant, for appellee.

There is no conflict in the instructions on the question of alibi. Instruction No. 1 properly placed the burden on the defendant to establish the plea, and No. 4 informs the jury that the defense is made good when from all the testimony in the case the jury have a reasonable doubt whether or not the defendant was present, etc. Taken together, the two state the law with reference to alibi.

McCULLOCH, C. J. Appellant was convicted under an indictment for grand larceny, charging him with having stolen 1,100 pounds of seed cotton, of the value of $40, the property of H. Whitefield and W. L. Jeffries. The evidence tends to show that Whitefield was a tenant of Jeffries on the latter's plantation in Monroe County, and that the crop was mortgaged

to Jeffries to secure the rent and also a debt for supplies. Whitefield had turned the crop over to the agent of Jeffries, who weighed up the cotton in a pen on the farm, from which the evidence tends to show it was stolen.

It is contended that there was a variance between the allegations and the proof as to ownership. The rule established by our decisions as well as by other authorities is that in indictments for larceny the allegation as to ownership is material and must be proved as alleged. *Merritt* v. *State*, 73 Ark. 34. The proof in this case showed that the cotton was in the actual custody of Hogan, the agent of the mortgagee, Jeffries. The special ownership could therefore have been laid in him, and it would have been sufficient to sustain the indictment, but the general ownership could also have been alleged and proved, and it was sufficient to do so. Rapalje on Larceny and Kindred Offenses, § 92. The agent of the mortgagee was also the agent of the mortgagor for the purpose of disposing of the property; and as both had an interest in the property, and it was in the possession of the agent of both, it was sufficient to allege a joint ownership by them.

It is claimed that the cotton was stolen from the pen in the field, and the evidence is sufficient to warrant a finding that it was stolen one night after it had been weighed up by Hogan. Wagon tracks were traced from the pen, through the field and woods, and signs of cotton on the limbs of trees and bushes were seen along the route of the wagon through the woods. The wagon was traced from the cotton pen to the house of one Will Chestnut, where it appeared to have stopped, and then passed on. Will Chestnut's wife, Callie, testified that that night appellant and his wife drove up to the house on a wagon load of seed cotton, and inquired about getting out of the gate. Will Chestnut testified that the next day he met appellant at a certain store, and that the latter told him that he had passed the house the night before with some cotton, and asked witness not to say anything about it.

Appellant introduced a number of witnesses tending to show that he attended a party or dance at a house several miles distant, and could not have taken the load of cotton away from the pen that night. These witnesses, if believed, established

a complete alibi for appellant. The court, over appellant's objection, gave the following instruction:

"You are instructed that the defendants rely upon an alibi, which is a valid defense to the crime charged; but you are further instructed that the burden of proving such alibi is upon the defendants, and, unless you find from the evidence that the defendants have established such alibi, you will find the defendants, or either of them, guilty."

The court also gave, at the request of appellant, the following instruction:

"The jury are instructed that the burden of showing an alibi is on the defendant, which can be shown by a preponderance of the evidence; but if, upon the whole case, the testimony raises a reasonable doubt that the defendant was present when the crime was committed, he should be acquitted, that is to say, in arriving at a conclusion as to whether the defendant committed the crime or not, they can only take into consideration all the testimony that has been introduced to the jury upon the question of an alibi with all the other testimony in the case, in arriving at the fact as to whether there was a reasonable doubt that the defendant committed the crime or not."

The instruction on this subject, given by the court over appellant's objection, was not a correct statement of the law. *Blankenship* v. *State*, 55 Ark. 244; *Ware* v. *State*, 59 Ark. 379. It was directly in conflict with the other instructions given at the instance of appellant, and the two can not be read together in harmony. It has often been said that the whole law can not be stated in one instruction, and it is necessary, generally, to set forth different phases of a case in separate instructions. However, where instructions are irreconcilably in conflict, they can not be read together, and are calculated to mislead the jury. *St. Louis, I. M. & S. Ry. Co.* v. *Rogers*, 93 Ark. 564. Such is the case here. One of the instructions told the jury that, unless they found from the evidence that the appellant had established an alibi, it was their duty to convict him. The other stated that if the proof on that subject was sufficient to raise in the mind of the jury a reasonable doubt as to guilt, then it was their duty to acquit. The two instructions can not be harmonized, and the giving of both left the jury the choice of following either as they saw fit. There was a sharp conflict in

the testimony, and appellant had the right to have his case submitted to the jury upon correct instructions. On account of this error the judgment is reversed, and the cause remanded for a new trial.

BYRD v. PINE BLUFF CORPORATION.

Opinion delivered March 18, 1912.

1. MASTER AND SERVANT—LIABILITY OF MASTER.—An electric light company is not responsible to its employees for the defective condition of wires on the inside of a private building which it has not installed nor undertaken to keep in repair. (Page 633.)
2. SAME—NEGLIGENCE.—Where a servant of an electric light company was killed while employed to remove certain wires from a building and had been duly cautioned not to allow such wires to come in contact with any live wires therein, the master will not be responsible upon the ground of its failure to furnish him a safe place in which to work. (Page 634.)

Appeal from Jefferson Circuit Court; *Antonio B. Grace*, Judge; affirmed.

Caldwell & Brockman and *Crawford & Hooker*, for appellant.

1. The only question is whether there was sufficient evidence to warrant the submission of the case to the jury on the question of negligence. 63 Ark. 94; 77 *Id.* 556; 70 *Id.* 74; 71 *Id.* 305; 73 *Id.* 561; 71 *Id.* 446; 91 *Id.* 337; 87 *Id.* 498.

2. Many cases hold it to be the duty of an electric company, before sending its current through an apparatus installed in a building by other parties, to make reasonable inspection to see whether it is fit for use. 71 N. J. L. 430; 58 Atl. 1082; 31 Cal. 301; 73 Pac. 39; 59 S. E. 626; 29 Ky. L. Rep. 38; 6 L. R. A. (N. S.) 459; 91 S. W. 703; 111 App. Div. 353; 98 N. Y. Supp. 124; 26 R. I. 427; 59 Atl. 112; 81 Ill. App. 322; 190 Ill. 367; 60 N. E. 357; 40 La. Ann. 467; 209 Pa. 571; 18 Col. App. 131; 70 Pac. 447; 9 Kan. App. 301; 98 N. Y. Supp. 781. In all these cases and many others the person injured were licensees, but the companies were held to the highest degree of care commensurate with the danger involved. 122 N. W. 199; 24 L. R. A. (N. S.) 451.

3. There is a line of decisions that where the inside wiring is done by an independent contract with the owner of the build-

ing, and only accepted by him, the company owes no duty, further than not to wantonly or knowingly injure a licensee; but this does not apply where the company sends its employee to work on wires to which it furnishes the electricity. 2 Bailey, Pers. Inj. to Master & Serv., § § 2561, 2571, 2895; 137 Pa. 148; 45 L. R. A. 267; 16 *Id.* 43; 190 Mo. 621; 89 S. W. 865.

4. There was evidence of negligence, and it was error to direct a verdict for defendant. 161 Mass. 583; 28 L. R.A. 596; 122 N. W. 499; 46 L. R. A. 745; 164 Mass.; 32 L. R. A. 400; Black, Proof & Pl. in Acc. Cases, § 110 *et seq.*; 59 Ark. 215; 40 La. Ann. 467; 94 Ark. 566; 135 S. W. 925.

Bridges & Wooldridge, for appellee.

1. Defendant was negligent and assumed the risk. 96 Ark. 500.

2. Where an individual who owns property does his own wiring, or has it done, and the electric company only supplies the current by connection with the wiring already done, responsibility ends when the connection is properly made. 63 Pac. 949, 951; 16 L. R. A. 43.

McCULLOCH, C. J. The Pine Bluff Corporation (a private corporation) is engaged in the business of furnishing water, gas and electricity to the people of the city of Pine Bluff, and John Byrd was employed as a workman in the gas and water department. He was killed by an electric shock on account of a wire, of which he had hold and which he was removing from a building, coming in contact with an uninsulated electric light wire, and this is an action against the company to recover damages on account of his death. The trial court instructed a verdict in favor of the defendant, and this appeal raises solely the question whether or not the evidence was sufficient to warrant the submission of the case to the jury.

Byrd was sent by his employer to remove from a store building, then occupied by Stern & Levy, the old gas fixtures and apparatus, the use of which had been discontinued by the occupants. He had with him a helper, who was working under him, and they both were advised of the danger of allowing the wire to come in contact with an electric light wire. After taking down the fixtures inside of the building, it became necessary to remove the small copper wire tubing through which

the gas had been supplied. This wire ran along the ceiling of the building between two electric light wires, and came out of the building at the top of a window, and thence to the ground through a three-quarter inch iron pipe. After cutting loose his wire on the inside, Byrd was standing on a box on the outside of the window, drawing the wire through a hole in the window casing, when the end of the wire on the inside of the building fell across an uninsulated electric light wire, and the shock resulted. Byrd cried out in his pain, and his companion came to him and removed the wire, but too late to save his life. The uninsulated part of the electric wire, with which the gas wire came in contact, covered a space of about two inches, and was about a foot from the meter, which was up on the inside of the wall near the top of the window through which the gas wire came, the uninsulated space being between the meter and the ceiling.

It does not appear from the testimony who put in the electric wiring in the building, and there is no evidence that the defendant corporation had anything to do with it. Mr. Levy, the only witness who testified on that subject, stated that the house was wired for electricity before they moved into the building about three years before the accident, and that the electricity had been supplied by another company in Pine Bluff engaged in that business, but the service had been discontinued after the installation of the gas in the building. Later they decided to use electric lights instead of gas, and employed the defendant to furnish electricity and remove the gas fixtures. Some time before this—the exact time is not disclosed—the defendant attached its wires to the wires on the outside of the building and proceeded to furnish electric current. There is no evidence that defendant had anything to do with the installation or maintenance of the wires and appliances on the inside of the building.

The burden was upon the plaintiff to show by competent testimony that the death of Byrd was caused by some negligent act of his employer, the Pine Bluff Corporation. This we think plaintiff has entirely failed to do. The defendant was not responsible for the defective condition of the wires on the inside of the building. It had the right by contract with the owner to furnish the current of electricity and to allow the

owner to assume the responsibility for the condition of the appliances in the building. It was not bound to maintain a system of inspection to see that the wires were kept properly insulated. 1 Joyce on Electric Law, § 445-C; *National Fire Ins. Co.* v. *Denver Consolidated Electric Co.*, 16 Col. App. 86; 63 Pac. 949.

We are aware that there are authorities which tend to sustain the contrary view, but we believe it to be unjust, as well as unsound upon principle, to say that a lighting company is compelled to maintain in good repair appliances on the inside of a private building which the owner has a right to install for himself or by some one else of his own selection, and who does, in fact, install and maintain the same.

An obligation on the part of the lighting company to inspect and maintain the wires and other appliances on the inside of the building necessarily excludes the right of the owner to assume that responsibility himself. Of course, it would be different where the company was employed to put in the appliances, and maintain them, for then there would be a continuing duty to exercise proper care to see that they were kept in safe condition. We think it is sound to hold that the owner has the right to have his own building wired, and to contract with the lighting company merely to furnish the electricity, and under those circumstances the company is not responsible for the condition of the wires on the inside of the building. This disposes of any contention of negligence on the part of the defendant in failing to keep the wires insulated.

But it is insisted that there was a special duty resting upon the master to make the working place of the servant reasonably safe, and that this involved the duty to inspect the wires for the purpose of ascertaining whether it was reasonably safe for the servant to work there. It is not correct to say that there is always a duty on the part of the master to make the working place safe. Sometimes that devolves upon the servant himself. *Southern Anthracite Coal Co.* v. *Bowen*, 93 Ark. 140. And so it is in this case. Byrd was sent there to remove the gas wires and other apparatus from the building. His employer was guilty of no negligence in causing the alleged dangerous condition. It was not guilty of negligence in failing to warn him of the danger of coming in contact with electric light wires,

for the plaintiff's evidence shows affirmatively that he was properly warned on that subject, and that he, in turn, warned his helper to observe the same precaution. He knew, in other words, that it was dangerous for the wire which he was removing to be allowed to come in contact with a live electric wire, and it was a part of his duty to see that there should be no such contact. Under the circumstances it was, as before stated, a part of his duty to take the necessary precautions for his own safety, and no obligation rested upon the master to inspect the place in advance and make the necessary repairs, so that he could remove the gas apparatus in safety.

The proof in this case fails entirely to show any negligence on the part of the defendant or a failure in the discharge of any duty which it owed to its injured servant. Under the circumstances, the servant assumed the risk of any danger attending the work which he was sent there to perform. The instruction of the court was therefore correct, and the judgment is affirmed.

DICKSON v. DICKSON.

Opinion delivered March 18, 1912.

DIVORCE—RESTORATION OF PROPERTY—MISTAKE.—A postnuptial conveyance by a husband to his wife in consideration of love and affection will not be cancelled, upon a divorce being granted to her, on account of his being mistaken as to the extent of affection which existed between the parties at the time of the conveyance.

Appeal from Benton County Chancery Court; *T. Haden Humphreys,* Chancellor; reversed in part.

Appellant, pro se.

C. M. Rice, for appellee.

The deed to appellee was valid and based upon a sufficient consideration. The McNutt case, 78 Ark. 346, settles this controversy conclusively in favor of appellee. See also 80 Ark. 458; 81 Am. Dec. 758; 13 Cyc. 704, and note 79; *Id.* 743; and note 20; 60 Am. Dec. 682; 29 N. E. 524; 92 N. E. 162; 7 Am. St. Rep. 863; 13 Cyc. 531; 81 Ill. 176; 75 Ark. 131; 34 Miss. 18; 13 Cyc. 529.

McCULLOCH, C. J. The plaintiff, E. H. Dickson, and his wife, Arizona Dickson, the defendant in this case, were

married in the year 1872, and lived together in Benton County, Arkansas, until December, 1905, when the defendant instituted suit in the chancery court for divorce. The pleadings were made up and proof taken, and the cause was submitted to the chancellor and taken under advisement until the next term of court. In the meantime Mr. Floyd, one of the attorneys for the plaintiff, E. H. Dickson, endeavored to bring about a reconciliation of the parties, and succeeded in his effort. The plaintiff, besides other property, owned two lots in the city of Bentonville, and he moved a house thereon from another piece of property, improved it at a cost of several thousand dollars, and conveyed it to his wife by warranty deed, the consideration expressed in the deed being "the love and affection subsisting between him and his wife Arizona Dickson, and the sum of $1.00 paid." Thereupon she dismissed her action for divorce, and returned to her husband, and they resided together in the house just referred to. After having lived together for awhile, they again separated, and the plaintiff instituted this suit for divorce, on the grounds of desertion and cruel treatment; and he also asked that the deed to his wife be cancelled and the property conveyed thereby be restored to him. He alleged in his complaint that the deed was executed in order to bring about a reconciliation between him and his wife, and on condition that they continue to live together as husband and wife and occupy the property jointly as a home. He alleged further in the complaint that he did not intend to convey her the absolute title, but merely a life estate. Mrs. Dickson had, prior to this time, employed one Jesse Crabaugh to construct a sidewalk around the property under the requirement of the city ordiance, and in consideration therefor had agreed to convey to Crabaugh a strip seventy-five feet wide off the west side of said lots. The plaintiff alleged in his complaint that Mrs. Dickson had no authority to enter into such contract or make such conveyance, and that he had notified Crabaugh of his objections thereto, and he sought also to enjoin his wife from executing a deed pursuant to her agreement with Crabaugh, who was joined as defendant in the action.

The defendant, Mrs. Dickson, filed her answer and a cross complaint, in which she denied all the allegations of her husband's complaint with reference to misconduct on her part,

and she asked for a divorce on the alleged ground that her husband had been guilty of such indignities as rendered her condition intolerable. She denied that said deed was executed by her husband upon any condition whatever or upon any consideration except that named in the deed itself.

Crabaugh answered, and asked that, in the event his contract with Mrs. Dickson for the conveyance of the portion of the lots be set aside, a lien in his favor be declared on the property for the price of the construction of the sidewalk.

The case was heard by the chancellor upon the depositions of witnesses, including the plaintiff and defendant themselves, and oral testimony, and a decree was rendered denying the plaintiff's prayer for divorce but granting a divorce on cross complaint of the defendant. The court found that, the deed from the plaintiff to defendant having been executed upon the consideration of "love and affection subsisting between him and his wife, Arizona Dickson, and the sum of $1.00," the consideration failed because "no love and affection existed between the plaintiff and defendant at the time of the execution of said deed, and that the attempted reconciliation failed." The court cancelled the deed and restored the property to plaintiff, but, in accordance with the terms of the statute, decreed to the wife one-third of the personal property of her husband absolutely and one-third of all the lands of which he was seized and possessed, and appointed a commissioner to set apart the same to her. The court further found that the conveyance to Crabaugh of the seventy-five foot strip off the west end of said lots was an exorbitant consideration for the construction of the sidewalk, and should not be enforced, but declared a lien in favor of Crabaugh for the fair price for the construction of the sidewalk, which the court found to be the sum of $168.70, which included interest.

The plaintiff and defendant each appealed to this court. Crabaugh did not appeal.

After a careful consideration of the record, we are of the opinion that the evidence is sufficient to sustain the finding of the chancellor as to the alleged grounds of divorce set forth by the respective parties, and sufficient to sustain the decree denying the divorce upon the allegations of the complaint and granting it on the allegations of the cross complaint. The

decree in that respect is not against the preponderance of the testimony.

Both parties, in their respective testimony, as well as in their pleadings, make charges against each other of ill-treatment, but the plaintiff's charges against his wife are entirely uncorroborated, and the charges made against him by his wife were sustained by her own testimony, which finds distinct corroboration in the testimony of their married daughter. It is shown that the plaintiff treated his wife with studied neglect, and frequently quarreled with her, and offered her gross insults. He called her a liar and a thief, and frequently reproached her on account of the alleged standing and conduct of her family, which he said brought disgrace upon his children. He admitted some of these things on the witness stand, and attempted to justify them by saying that his statements were true. Their daughter, Mrs. Patten, testified that she was present on occasions, and heard her father speak to her mother in terms of gross insult, calling her a liar and thief, and also heard him accuse her of prowling around at night. She said that her father frequently used insulting language towards her mother, and that such conduct on his part was almost an everyday occurrence. Upon that state of the proof, we are of the opinion that the finding of the chancellor is sustained by the preponderance of the evidence, and the decree in this respect should be affirmed.

The decree with respect to the cancellation of the deed can not, however, be sustained. The plaintiff claims in his testimony that he executed the deed to his wife on condition that she would come back and live with him as they had lived before. And, to use his exact language, he stated that "the conditions were that she was to return home and live a more faithful and agreeable wife than she had theretofore." He does not undertake to state any other condition upon which the deed was executed, but he does say that it was contemplated that the property was to be a home for both of them, and that he had no intention of conveying her the absolute title. Mr. Floyd, who was plaintiff's attorney and prepared the deed, but who withdrew from the case before the trial below, was called as a witness and testified, without objection from either party. He states that he brought about the reconciliation be-

tween Mr. Dickson and his wife, and that, after conferring with Mrs. Dickson's attorney, it was agreed that plaintiff would convey the property to his wife. He does not state any condition in the execution of the conveyance, though he does say that he advised Mr. Dickson that, in the event plaintiff became entitled to a divorce, the property would be restored to him. The defendant and her daughter, Mrs. Patten, both testified that there was no agreement with reference to the conveyance except that, "if she would live with him, he would treat her right and make her the deed." Their testimony tends to establish the fact that she did go back to her husband, and was not thereafter at fault in her conduct toward him. The chancellor's finding upon the question of divorce necessarily implies a finding that the plaintiff was at fault in his conduct toward defendant, and that the latter was not at fault. It necessarily follows that, under this state of the case, the plaintiff was not entitled to a restoration of the property. Under those circumstances the property was not "obtained from or through the other during the marriage and in consideration and by reason thereof," within the meaning of the statute. *McNutt* v. *McNutt,* 78 Ark. 348. The ground upon which the chancellor decreed the restoration of the property, namely, that there was a failure of consideration, because no affection actually existed between the parties at the time of the execution of the deed, is untenable. This is settled by the case of *McNutt* v. *McNutt, supra,* and the case of *Kinzey* v. *Kinzey,* 115 Mo. 496, which we cited with approval in the McNutt case. In that case it was said: "No property was obtained from the plaintiff by imposition or deceit. He was simply mistaken in the moral worth and virtue of one of the objects of his bounty. From the consequences of such a mistake of judgment a court of equity can not relieve him."

In this case, as in the McNutt case, there is no claim of imposition or deceit having been practiced. The proof does not sustain the contention that the deed was executed upon any kind of conditions, and, as before stated, a court of equity will not set aside a conveyance on account of a mistake as to the extent of affection which existed between the parties at the time of the conveyance.

That part of the decree which declares a lien on the lots,

instead of enforcing the agreement to convey seventy-five feet off the west end, operated for the benefit of the defendant, and Crabaugh did not appeal. The defendant does not now complain of that part of the decree, and the same should be affirmed.

The decree, in so far as it cancels the deed from plaintiff to defendant and restores the title to plaintiff, is reversed, and the cause is remanded with directions to enter a decree dismissing the complaint with reference thereto.

TAYLOR v. EVANS.

Opinion delivered March 18, 1912.

1. MASTER AND SERVANT—NEGLIGENCE—EVIDENCE.—Evidence that defendant employed plaintiff to do certain work in a certain manner, and failed to instruct an inexperienced fellow-servant so as to protect plaintiff while performing such work, is sufficient to sustain a finding that defendant was guilty of negligence. (Page 644.)

2. SAME—CONTRIBUTORY NEGLIGENCE.—It was not contributory negligence for plainiff to board certain cars while in motion if it was necessary for him to do so in order to perform the work assigned to him. (Page 645.)

3. WITNESSES—IMPEACHMENT—EVIDENCE.—It was not error to refuse to admit in evidence plaintiff's original complaint, either as an admission on his part or for the purpose of impeaching him, where the uncontradicted testimony shows that he knew nothing about its contents. (Page 645.)

4. MASTER AND SERVANT—ASSUMED RISKS—NEGLIGENCE OF MASTER.—Where a servant was injured in obeying the commands of the master, it was not error to instruct the jury that the servant in obeying the master's commands does not assume any risks occasioned by the negligence or carelessness of the master unless he has knowledge of such negligence or carelessness and of the danger incident thereto. (Page 646.)

5. SAME—INSTRUCTION.—It was not error to instruct that if plaintiff was injured while attempting to perform his duty according to the master's instructions he was not guilty of contributory negligence. (Page 647.)

6. INSTRUCTION—HARMLESS ERROR—The giving of an abstract instruction will not constitute reversible error where it appears that no prejudice could have resulted from its being given. (Page 647.)

7. SAME—GENERAL OBJECTION.—A general objection was insufficient to point out an inaccuracy in an instruction to the effect that it was the master's duty to avoid injuring the servant, instead of to use ordinary care to that end. (Page 648.)

8. SAME—GENERAL OBJECTION.—A general objection is insufficient to point out an inaccuracy in an instruction which told the jury to allow damages which the plaintiff "has endured, if any, and which he is liable to endure, if any, as the result of his injury," instead of telling them to allow damages according to what the evidence established as the result of his injury. (Page 648.)

Appeal from Yell Circuit Court, Dardanelle District; *Hugh Basham,* Judge; affirmed.

G. O. Patterson and *Sellers & Sellers,* for appellant.

1. The original complaint was admissible for the purpose of showing an admission, the issue being sharply drawn as to whether appellee was hurt in trying to get on the car, as alleged in the original complaint, or after he had got to his place by being jerked off. The court erred in excluding the original complaint, and in refusing to allow plaintiff to be cross examined touching its allegations. 21 Pac. 359; 20 Pac. 473; 8 S. W. 549; 1 Enc. of Ev. 438.

2. Instruction 5, on the duty of the servant was, unauthorized. While engaged in his duty and obeying orders, he assumes the risks incident thereto. And plaintiff's minority, no proof being made of deficiency in intellect or experience, does not affect the case. 134 S.W. 638; White on Pers. Injuries, § 301.

3. Instruction 6 on the duty of the defendant was abstract, because no issue was raised as to the place or appliances furnished, and no attempts made to prove any cause of action except the pulling forward of the train by the engineer. Instructions must be based on evidence. 89 Ark. 24; *Id.* 279; 88 Ark. 20; *Id.* 594; *Id.* 172; *Id.* 231; *Id.* 454; etc. They must also be based upon the issues. 85 Ark. 322; 132 S. W. 998; *Id.* 1000; 82 Ark. 499; 90 Ark. 284; 134 S. W. 202; 3 Brickwood's Sackett on Instructions, § 4032; 61 Ill. App. 464; 133 S. W. 499; 133 S. W. 819; *Id.* 816; 63 Ark. 65; 89 Ark. 581; 87 Ark. 190; 80 Ark. 68; 112 S. W. 30; 8 L. R. A. 765; 148 Ill. App. 158.

4. Instruction 8, given at plaintiff's request, is plainly erroneous. It relieves plaintiff of all duty to care for his own safety, eliminates the law of contributory negligence, permits recovery without proof of negligence on the part of appellant, and is abstract in that there was no claim in the amended complaint, nor any proof, that plaintiff was hurt by a failure to check up. 91 Ark. 102; 63 Ark 65; 76 Ark. 436; 77 Ark. 458; 78 Ark. 100; 80 Ark. 261; 21 Am. & Eng. Enc. of

L. 498; 131 S. W. 945; 62 Ark. 164; *Id.* 235; 65 Ark. 429; 77 Ark. 398; 80 Ark. 5; 127 S. W. 715; 49 S. W. 323, 325; 31 S. W. 885; 40 S. W. 386; 130 S. W. 709; 31 S. W. 885; 40 Ark. 322.

5. The court's instruction on the measure of damages allows a recovery for medical attention and medicine without proof that he had expended any money for these purposes. 136 S. W. 267. It allows a recovery for loss of time or wages, without proof, he being a minor, that his earnings were his own. 11 Am. & Eng. R. Cas. (N. S.) 291; 66 Tex. 225; 89 Wis. 38; 88 Ill. App. 375. And it is particularly erroneous in allowing a recovery for pain and suffering plaintiff is liable to suffer. 3 Brickwood's Sackett on Instructions, § 3573, note; *Id.* § 3575, note; 80 S. W. 282; 51 Am. St. Rep. 917; 120 N. W. 306; 46 Am. St. Rep. 854; 71 S. W. 905; 121 Ill. App. 334; 104 S. W. 709; 9 Am. Cases, 1222, 72 Neb. 16; 9 Am. Cases, 1050, 75 S. C. 102; 158 N. Y. 254; 53 N. E. 22; 73 Wis. 147.

Brooks, Hays & Martin, Paul McKennon and *J. T. Bullock,* for appellee.

1. The court properly excluded the original complaint from the evidence because it was shown that appellee knew nothing about its contents.

2. The instructions were more favorable to appellant than he had the right to expect or the law warranted. This is especially true of instruction 3, wherein the court erroneously charged the jury that plaintiff could not recover if his injury was the result of the engineer's negligence, he being a fellow-servant. Acts 1907; 90 Ark. 543.

3. The question of contributory negligence was for the jury, and was fully and fairly submitted to them under proper instructions. As to the assumption of risk, the servant has the right to rely on the presumption that the master has performed his duty and will not expose him to unnecessary dangers or extraordinary risks. 95 Ark. 291, 295, and authorities cited.

McCULLOCH, C. J. The plaintiff, Willard Evans, sues the defendant, W. H. Taylor, who is his employer, to recover damages on account of personal injuries received while in the latter's service. The defendant was operating a coal mine, and plaintiff was working for him at the mine. Plaintiff was about nineteen years of age at the time, and as cars of coal were

brought out of the slope of the mine, by means of a locomotive engine, to the tipple, where the coal was broken up, it was his duty to take charge of the cars, and, together with the man working with him, to push them into the cage or elevator, to be carried up to the coal breaker. His work was called "caging," and he was called a "cager." A short distance from the tipple there was a switch, where cars of rock brought up in the coal train were cut out of the train and run back upon a sidetrack to be unloaded. Plaintiff alleges, and his evidence tends to show, that it was also his duty to uncouple the rock cars at the switch. This was done, according to his testimony, in the following manner: When there were cars of rock in the train, the engineer would sound four blasts of the whistle, to notify the cager, and slow up for the latter to board the car. The rock cars would be at the end of the train, and, as soon as they passed the switch going up grade, plaintiff would board the front rock car and stand on the bumper, put his foot on the chain which served as a coupler, and press it down, and, as slack was given by the engineer. he would draw the coupling pin, thus disconnecting the car, the speed of the train being then increased on his signal and the train continuing forward and the rock car running back down grade on the side track. Plaintiff worked under the direction of the "top boss," who had instructed him to do the work in that manner, and on the day of the injury the boss had sent him to do that work. In his original complaint, he alleged that, on the occasion of his injury, he was engaged in that work, and that the engineer gave the signal, and he took the usual position to board the car for the purpose of uncoupling it, and that while he was attempting to board it the engineer failed to slow up at the usual place, and that by reason thereof he was thrown from the car and injured. Subsequently he amended his complaint so as to allege that, after he had boarded the car and had taken his accustomed place for the purpose of uncoupling it, and before he signalled the engineer, the latter, without looking back for the signal, suddenly increased the speed, thus causing him to be thrown from the car.

Negligence of defendant is charged in the following particulars: "That it was negligence on the part of the defendant's engineer to fail to look back from his place and see

whether or not said rock cars were uncoupled just before increasing the speed of his engine as heretofore stated; that it was negligence in said engineer to so suddenly increase the speed of said engine without knowing whether or not said cars had been uncoupled; that said engineer negligently failed to slow up the speed of said engine to enable plaintiff to uncouple said cars; that the superintendant of said mines negligently employed and placed in charge of said engine the man who was in charge at the time of plaintiff's injuries, and negligently failed to give him proper instructions concerning the uncoupling of cars of rock; that he negligently failed to instruct said engineer to slow up the speed of said engine for the purpose of uncoupling rock cars; that he negligently directed said engineer not to stop or slow up for the purpose of uncoupling rock cars, and negligently failed to inform plaintiff of this fact."

Defendant denied, in his answer, that it was a part of plaintiff's duty to uncouple rock cars, or that he was instructed to do that work, and denied that plaintiff was engaged in that work when he was injured. He denied each charge of negligence, and alleged that plaintiff was injured by reason of his own negligence in getting on the cars, where he had no right to be, and in failing to exercise proper care for his own safety.

The court, by specific instructions, took away from the jury the question of negligence of the engineer and negligence of the superintendent in employing an incompetent engineer.

Plaintiff's testimony tends to show that he was directed to uncouple the rock cars in the manner before stated; that he had boarded the car, for the purpose of uncoupling it, when the engineer, without looking back or waiting for the signal, and without giving slack, so that the coupling pin could be drawn, suddenly increased the speed, thus causing plaintiff to be thrown from the car and severely injured.

The testimony adduced by defendant contradicted plaintiff's contention, and tended to show that it was not his duty to uncouple the rock cars, but that when injured he was attempting to board the cars for the purpose of riding to the tipple.

The jury returned a verdict in plaintiff's favor, assessing damages in the sum of $1,990, and judgment was rendered accordingly, from which defendant appealed.

It is, in the first place, insisted that the evidence is not

sufficient to sustain a finding that defendant was guilty of negligence in any respect. If, as plaintiff stated, he was instructed to uncouple the cars in the manner indicated, and it was the custom to do it in that way, defendant owed him the duty to give proper instructions to the engineer to observe the signals and take proper precautions to protect him while performing the work. The engineer, who had been at work on the engine only two or three days, testified that he had had no instructions to slow up in order to let any one cut off rock cars. This was sufficient to justify a finding that defendant was guilty of negligence in directing plaintiff to do the work in that way without instructing the engineer, so the plaintiff would be protected. If, as claimed, plaintiff's injury was caused by the omission to give such instructions, then defendant is liable. The testimony is sufficient to warrant a finding of those facts, and it is therefore sufficient to sustain the verdict.

It did not constitute negligence for plaintiff to board the cars in the usual course of his work, when it was necessary for him to do that in order to perform the work assigned to him.

Error is assigned in the court's refusal to permit defendant to read in evidence the original complaint, for the purpose of contradicting the plaintiff, and also in refusing to permit the cross examination of the plaintiff concerning the allegations of the original complaint. The record in the case discloses that, on cross examination, plaintiff was asked whether or not he had in his original complaint alleged, as grounds of recovery, that the negligence consisted of the engineer's failure to slow the train down and in running it too fast. Plaintiff replied that he did not know anything about what the complaint contained. It was competent, for the purpose of proving an admission on the part of the plaintiff, and also for the purpose of impeaching him, to read the complaint in evidence, or to prove by him, on cross examination, that he had made allegations in the original complaint inconsistent with his present contention. *Gibson* v. *Herriott*, 55 Ark. 85; *Valley Planting Co.* v. *Wise*, 93 Ark. 1; 1 Ency. of Ev. 438.

The evidence being competent only for the purpose of showing an admission, or as establishing a contradictory statement of the plaintiff, it is not admissible, where it does not appear that the plaintiff knew of the allegations of the original

complaint, or at least where it affirmatively appears that he was not aware of the contents of the complaint. It would be without probative force, either as an admission or as a contradictory statement, unless it was shown that the plaintiff was aware of the contents of the paper. Counsel for defendants were permitted to ask the plaintiff about the contents of the complaint, and the reply was that he knew nothing about the contents of it. No effort was made to prove that plaintiff had authorized his counsel to incorporate the allegation in the complaint or that he knew that the facts were thus alleged in the complaint. Therefore, it was not proper to read to the jury as an admission a paper the contents of which the evidence showed the plaintiff was not aware of.

The following instruction, given at the instance of the plaintiff, was objected to, and is now assigned as error:

"In obeying the commands of the master, the servant does not assume any risks occasioned by the negligence or carelessness of the master, unless he has knowledge of such negligence or carelessness, and the danger incident thereto."

It is contended that this instruction was inapplicable, because the danger of being thrown from the moving train was one of the incidents of the service which plaintiff assumed. We can not, however, lend our approval to this contention, for, if the plaintiff was put to work in obedience to the command of the master, he did not assume the risk of danger from negligence of the latter in failing to exercise ordinary care to protect him. He did assume the ordinary danger of being thrown from the cars as one of the risks incident to the service, but not those caused by a lack of precaution resulting from the negligent omission of the master. We think the instruction quoted above was a correct one, and was applicable to this case.

The following instruction was also objected to:

"The jury are instructed that it is the duty of the master to furnish a servant a reasonably safe place in which to work and reasonably safe appliances and machinery with which to work, and that it is further the duty of the master to handle its appliances and machinery so as to avoid the injury of a servant; and if you find from the testimony in this case that the defendant failed in either of these particulars, and that by reason of such failure the plaintiff was injured without fault or care-

lessness on his part, then it will be your duty to return a verdict for the plaintiff."

This instruction is, as contended, open to the objection that the part of it which referred to the master's duty to furnish reasonably safe appliances and machinery was abstract. There was no allegation of negligence in that respect, and no proof whatever that plaintiff was injured by reason of any defect in the appliances or machinery. We can not conceive that the jury could have been misled by including this in the instruction. It is error to give abstract instructions; and where it appears that the jury might have been misled thereby, it constitutes prejudicial error which calls for reversal. This is so in a case where the employee is injured in some way by reason of a defect in the machinery or appliances; and unless there is some evidence of negligence on the part of the master in failing to exercise care in that respect, it would constitute error to give an abstract instruction submitting the question to the jury. But in the present case, where the plaintiff did not claim that his injury resulted by reason of any defect in the cars, but that he was thrown from the train solely on account of the sudden increase of speed, we can readily see that no prejudice could possibly have resulted from giving this instruction. Therefore, it is our duty to disregard the error, and treat it as non-prejudicial.

The court gave the following instruction over defendant's objection, and the same is assigned as error:

"You are instructed that if you find from the testimony that the plaintiff was directed by the defendant, or his agent, to cut the string of cars and to uncouple the cars loaded with rock, and that it had been the custom so to do, and that the plaintiff, following said instructions in the usual way, attempted to perform his duty in the usual way, but that the defendant failed to check its engine, or caused the same to jerk the cars as the plaintiff was attempting to perform his duty as directed, then the plaintiff was not guilty of contributory negligence in attempting to perform his said duty."

Learned counsel rely, in their assault upon the correctness of this instruction, upon the principle often announced to the effect that negligence of the master does not relieve the servant from using due care. We do not, however, think that the in-

struction just quoted conflicts with the principle, for if, as stated therein, the servant was performing his work in the usual way and following instructions in the usual way, and the master failed to take proper steps to protect him in his work, then he was not guilty of contributory negligence. This instruction does not say that the duty did not rest upon him to exercise due care, and it is, therefore, not open to the objection which learned counsel make to it.

Defendant interposed a general objection to the following instruction:

"You are instructed that if the plaintiff was employed by the defendant, and it was a part of his duty to board and uncouple the cars of rock from the cars of coal, which cars were being pulled by an engine on a track, then it was the duty of the defendant to so handle and manage its engine and cars, as to avoid injuring the plaintiff; and if you find that the defendant failed in the manner alleged in complaint in this, without fault or carelessness on the part of plaintiff, then it will be your duty to return a verdict for the plaintiff."

This instruction was incorrect, but it should have been met by a specific objection. A general one was not sufficient to point out its inaccuracy. *St. Louis, I. M. & S. Ry. Co.* v. *Barnett,* 65 Ark. 255; *Mt. Nebo Anthracite Coal Co.* v. *Williamson,* 73 Ark. 530; *St. Louis, I. M. & S. Ry. Co.* v. *Bowen,* 73 Ark. 594; *St. Louis, I. M. & S. Ry. Co.* v. *Dallas,* 93 Ark. 209; *St. Louis, I. M. & S. Ry. Co.* v. *Carter,* 93 Ark. 589; *St. Louis, I. M. & S. Ry. Co.* v. *Hartung,* 95 Ark. 220.

The court gave, over defendant's objection, another instruction on the measure of damages, stating, among other elements of damage, the one for pain and suffering "which he has endured, if any, and which he is liable to endure, if any, as the result of his injury." The objection was a general one, which was insufficient to properly call the court's attention to the inaccuracy of the instruction. The court evidently meant to say, with reference to the future pain and suffering, that damages should be assessed according to what the evidence established in that respect. Doubtless, the language would have been corrected by the court if a specific request had been made. See cases cited *supra.*

There are other assignments of error with respect to rul-

ings of the court and in the giving and refusing of instructions, but we find no error and nothing further of sufficient importance to call for discussion. Judgment affirmed.

KIRBY, J., dissents.

TAYLOR v. SHELL.

Opinion delivered March 18, 1912.

MORTGAGE—RIGHT TO REDEEM FROM FORECLOSURE SALE.—Where a mortgagor of land died, and thereafter the mortgagee foreclosed the mortgage, and bought in the land, it was not error to permit the mortgagor's heir, before confirmation, to redeem the land from such sale, under Kirby's Dig., section 5420, in the absence of a waiver of the right of redemption by the mortgagor.

Appeal from Grant Chancery Court; *Jethro P. Henderson,* Chancellor; affirmed.

STATEMENT BY THE COURT.

George J. Shell and wife executed a deed of trust on certain lands in Grant County, Arkansas, to secure a certain promissory note. Shell and his wife died. The note became due, was not paid, and the payee and beneficiary, appellant herein, foreclosed the deed of trust. The lands were duly sold under the decree of foreclosure, and appellant purchased the lands for $270, which was less than the amount of the debt due her, same being about $295. Appellee, who was an heir of George J. Shell, before the sale was confirmed applied to the court within the time allowed for redemption under mortgages, and asked that he be allowed to pay the sum of $300, and that the land be deeded to him. He alleged in his application that the lands were worth the sum of $500, and that the sale was for an inadequate price. The court accepted a bid of $295, and entered a decree adjudging and holding "that the sale of said lands made to appellant, Mary C. Taylor, be set aside and held for naught, and that the said George T. Shell be declared to be the purchaser thereof at the sum of $295, and said commissioner was ordered and directed to make a deed to the said George T. Shell."

The appellant "excepted to the order and decree of the court in refusing to confirm the report of the commissioner in making sale to her and in refusing to direct a deed made to her

and in setting aside said sale, and in ordering and directing that the bid of George Shell be accepted by said commissioner and said commissioner ordered and directed to make a deed to said appellee, George Shell."

Crawford & Hooker, for appellant.

1. In the absence of fraud, irregularity or misconduct, a judicial sale will not be set aside for mere inadequacy of price. 77 Ark. 219; 3 Md. Ch. 377; 117 U. S. 180; 65 Ark. 152; 46 N. J. Eq. 306; 49 Ill. 158; 180 Ill. 627; 80 Mich. 85.

T. E. Toler, for appellee.

1. All presumptions are in favor of the correctness of the decree. 45 Ark. 240; 63 *Id.* 513; 64 *Id.* 611; 97 *Id.* 537.

2. The debtor's equity of redemption is always protected in courts of chancery. Pom. Eq. Jur., note to 1192; 2 Jones on Mortg., § 1671. Courts permit redemption at any time before confirmation of sale. 41 Neb. 867; 55 Ark. 307; 32 *Id.* 391.

3. On payment of debt, interest and costs, appellee was entitled to redeem. Kirby's Dig., § 5420; 57 Ark. 198; *Id.* 536.

WOOD, J., (after stating the facts). In the absence of a showing to the contrary, it will be presumed that the decree of the court was correct.

There is nothing in the record as abstracted by appellant to show that the grantors in the deed of trust waived their right to redeem under section 5420, Kirby's Digest. Assuming that such right had not been waived, the decree of the court is correct. For, in the absence of such showing, the decree should be treated as granting to appellee redemption from the sale. The decree giving him such right was entered before the sale was confirmed.

It matters not in what form the application of appellee for redemption was couched, unless the grantors in the deed of trust had waived their right of redemption, appellee would be entitled to it, and the decree of the court granting such rights will not be reversed because of informalities in the petition of the applicant.

The decree of the court, for aught that appears to the contrary in the record, was tantamount to allowing appellee the right to redeem, and, so treated, it is correct, and it is unneces-

sary for us to consider the question of whether or not the sale should have been confirmed to appellant as urged in her brief.

The judgment is affirmed.

KELLEY v. STATE.

Opinion delivered March 18, 1912.

1. VENUE—SUFFICIENCY OF TRANSCRIPT.—Under Kirby's Dig., section 2326, requiring that the clerk of the county from which a criminal cause is transferred shall make out "a full transcript of the record and proceedings in the cause, including the order of removal, the petition therefor, if any, and the recognizance of the defendant and of all witnesses, and shall immediately transmit the same, duly certified under the seal of the court, to the clerk of the court to which the removal of the cause is ordered," *held* that the defendant can not complain because the original indictment and application for change of venue were transmitted, instead of certified copies. (Page 653.)
2. ELECTIONS—OFFENSES AGAINST PRIMARY ELECTION LAW.—Under the primary election law (Acts 1909, c. 165, section 4), the offenses of falsifying the returns of a primary election and of knowingly making a false count of the ballots cast are separate and distinct. (Page 654.)
3. INDICTMENT—MISNOMER OF OFFENSE.—It is immaterial that the indictment misnames the offense if the particular facts necessary to constitute the offense are specifically and accurately alleged. (Page 655.)
4. ELECTIONS—FALSIFYING RETURNS OF PRIMARY ELECTION.—Under Acts 1909, c. 165, section 4, providing that any judge or clerk who shall falsify the "returns" of a primary election shall be deemed guilty of a felony, etc., the returns consist of the poll books in which is entered the certificate of the officer conducting the election, together with a list of voters and one or more of the tally sheets, which are required to be carefully enveloped, sealed and delivered to the officer or board designated by the statute. (Page 655.)
5. SAME—INSTRUCTIONS.—Under an indictment for falsifying the returns of a primary election, it was error to instruct the jury to find defendant guilty if he substituted ballots cast thereat. (Page 656.)

Appeal from Prairie Circuit Court, Southern District; *Eugene Lankford*, Judge; reversed.

Thomas & Lee, C. F. Greenlee and *Manning & Emerson*, for appellant.

1. The court had no jurisdiction. The clerk failed to certify copies of the indictment, proceedings, order of removal, as required by statute. Kirby's Digest, § 2326; 38 Cyc. 938;

58 S. W. 686, 690; 7 Nev. 83-95; Black, Law Dict. 1183. (1 ed.); 15 Ark. 624; 33 *Id.* 815; 36 *Id.* 237; 38 *Id.* 221; 48 *Id.* 94, 105; 63 *Id.* 130; 72 *Id.* 613.

2. The indictment charges no offense. Acts 1909, § 4, p. 506.

3. There was a fatal variance in the proof and the indictment. Defendant was charged with "*falsifying returns,*" while the evidence only tends to show a false count of ballots. 15 Cyc. 376; 91 Ill. 525; 25 Minn. 106; 61 N. W. 322; 29 Minn. 351; 65 N. W. 800; 13 Ark. 62; 29 *Id.* 299; 34 *Id.* 160; 60 *Id.* 141; 61 *Id.* 115; 55 *Id.* 389; *Id.* 242.

4. In view of the authorities *supra,* the court's charge was erroneous.

Hal L. Norwood, Attorney General, and *Wm. H. Rector,* Assistant, for appellee.

1. The omission of the clerk to certify copies of indictment, motion for change of venue, order, etc., was an irregularity merely, and was waived by failure to object before verdict. It is not jurisdictional. Kirby's Dig., § 2326; *Wolf* v. *State,* ms. op.; 73 Ark. 148; 35 *Id.* 118; Kirby's Dig., § 2427; 43 Ark. 233; 46 *Id.* 141; 77 *Id.* 428.

2. The indictment charges an offense under Acts 1909, § 4. This act makes it an offense *in any manner* to falsify the returns of an election. The inconsistency between the commencement and the descriptive part of an indictment is immaterial. 34 Ark. 282; 36 *Id.* 246; 71 *Id.* 82; Joyce on Ind. § 185; 60 Minn. 309. The "returns of an election" consist of the certificate, tally sheets, poll books and *ballots.* Kirby's Dig., § § 2832, 2833-4-5-6-7, etc.

3. There is no variance, and there is no error in the instructions. Cases *supra.*

WOOD, J. 1. Section 4 of act 165 of the Acts of 1909, provides as follows: "Any judge or clerk, serving at any such primary election, who shall in any manner falsify the returns of the same, or knowingly make a false count of the ballots cast, or aid or abet any such act of any other person. or knowingly permit such to be done, shall be deemed guilty of a felony, etc."

Appellant, who was a clerk at the primary election held in Monroe County on January 15, 1910, was indicted under the

above section. The indictment charged him with the crime of "falsifying returns of election, committed as follows:" The indictment then sets out his official character, and recites that a primary election was called, etc.; then recites that appellant "did then and there unlawfully, wilfully, falsely, fraudulently and feloniously and knowingly falsify the returns of Brinkley Township in said election to the central committee, in that the said Tom Kelley did then and there falsely, fraudulently and knowingly take from W. L. Hinton, a candidate for county treasurer of Monroe County at said primary election, 68 votes so cast for the said W. L. Hinton aforesaid, and credit the same to W. L. Graham, a rival candidate for treasurer aforesaid," etc.

The case was, upon change of venue, tried in the southern district of the Prairie County Circuit Court. The appellant, after a verdict of guilty was returned against him, moved an arrest of judgment, setting up that the court was without jurisdiction because there was not filed in the Prairie Circuit Court a certified copy of the indictment, nor of the motion for change of venue filed in the circuit court of Monroe County before the commencement of the trial, etc. And also alleging that the indictment used in the Prairie Circuit Court did not charge appellant with a public offense.

It appears that the clerk of the Monroe Circuit Court, after an application for change of venue had been filed and an order of the court made ordering the case transferred to the circuit court of Prairie County, Southern District, made a transcript of the record entries showing the orders of the court up to and including the granting of the change of venue, but, instead of making a transcript of the indictment and other papers, mailed the indictment and other papers filed in the case to the clerk of the Prairie Circuit Court, and attached to his transcript of the record entries a certificate to the effect that the foregoing contained a true copy of the record, and then further certified as follows: "I further certify that the original indictment, the demurrer, the motion for a continuance and the motion for change of venue are also transmitted with this cause."

After change of venue is ordered in criminal cases, the statute requires that "the clerk of the county in which the same is pending shall make out a full transcript of the record and proceedings in the cause, including the order of removal, the peti-

tion therefor, if any, and the recognizance of the defendant, and of all witnesses, and shall immediately transmit the same, duly certified under the seal of the court, to the clerk of the court to which the removal of the cause is ordered." Kirby's Digest, § 2326.

The appellant contends that the failure of the clerk of the Monroe Circuit Court to certify copies of the indictment and application for change of venue was not a compliance with the above statute, and that therefore the Prairie Circuit Court had no jurisdiction.

The purpose of the statute was to enable the court in the county to which the venue was changed to have before it as a part of the record the contents of the indictment, so that the court and jury before whom the cause was to be tried should be informed of the nature of the charge against the accused. It was absolutely necessary, to give the court jurisdiction, that there should be a copy of the indictment that was returned by the grand jury in the county where the cause originated. There could not be a trial without a copy of the indictment or the original indictment itself. While the statute does not contemplate that the original indictment shall be sent to the county to which the change of venue is ordered, nevertheless where this is done, under the certificate of the clerk showing that it was the original indictment, it is sufficient to give the court to which the case is sent jurisdiction. A copy of the indictment could not advise the court any more accurately of the charge than the original indictment. The irregularity in the transmission of the original, duly certified to, instead of a copy, as the statute directs, works no prejudice to the right of the accused to have the court and jury before whom he is tried notified of the charge made against him, and to be fully advised himself of such charge.

Under our statutes and decisions a case will not be reversed where the defects and irregularities in the proceedings are merely formal, and do not result in prejudice to the accused. The defect in the record complained of here was not substantial, and could not possibly have resulted in any prejudice to appellant. Kirby's Digest, § 2605; *Lee* v. *State*, 73 Ark. 148, and cases there cited.

2. Under the statute it is an offense to falsify the returns

of a primary election, and also an offense to knowingly make a false count of the ballots cast. These are separate and distinct offenses. The indictment names the offense, "falsifying election returns," but in setting forth the particulars constituting the offense it shows that the real offense charged is that of a "false count of the ballots."

A discrepancy or mistake in the naming of an offense in an indictment will not vitiate the same if the particular facts necessary to constitute the offense are specifically and accurately described. "The name of the crime is controlled by the specific acts charged, and an erroneous name of the charge does not vitiate the indictment," *State* v. *Culbreath*, 71 Ark. 80; *Johnson* v. *State*, 36 Ark. 242; *Lacefield* v. *State*, 34 Ark. 282; *Harrington* v. *State*, 77 Ark. 480. The indictment is valid as a charge against appellant for making a false count of the ballots cast.

3. There was evidence tending to show that at a primary election in Monroe County, held in January, 1910, a number of votes which were cast for W. L. Hinton for county treasurer were counted for his opponent, W. L. Graham. A number of witnesses testified that at such election they had voted for Hinton. When the ballots bearing the numbers opposite their respective names were examined, they appeared to have been cast for Graham, an opponent of Hinton for the nomination to the office of county treasurer. One of the witnesses introduced by the State testified that he was on a table in the dining room of the hotel and looked under the transom that was raised by having a 38-calibre cartridge placed under it. He was looking through that small crack; could partly see in the room where the election was being held. When a party voted, he would hand his vote to Mr. Hawkins (who was one of the judges of election); he would open the ticket, and it seemed that some of the tickets were acceptable and all right. The ballot box was in front of him on the table. "Mr. Hawkins would put them in, and would reach over in front of Mr. Kelley and take a substitute, and put the original in his pocket and reach over and get one in front of Mr. Kelley and call out the number and put it in the box. I never saw any one hand in the tickets that were in front of Kelley. Hawkins burned the tickets something like every twenty minutes. I saw him burn them twice.

Kelley was three or four feet from Hawkins. Kelley was an arm's length from the tickets on the table. I saw him scribble on them. From where I was, I could not tell what he was doing. He would lay them in a pile. Hawkins might not have put the ballots that were voted in the fire; it might have been ballots that folks had attempted to vote, and that he mutilated or destroyed in some way; but he put something in his pocket and took something out of his pocket and burned it; burned the same kind of paper that the ballots were. Could not see the names of the persons on the paper."

Among other instructions, the court gave, over the objection of appellant, the following:

"1. You are instructed that if you find from the evidence that the defendant substituted ballots cast at the election held January 15, 1910, in Brinkley Township, Monroe County, Arkansas, and that said substitution resulted in taking votes from W. L. Hinton and giving the same to Wallace Graham, or that he knowingly permitted others to so change or substitute ballots in this manner, or consented or connived at such changing of such ballots, you will find the defendant guilty."

"3. You are instructed that knowingly making false returns of any primary election to the central committee of any political party which has ordered the holding of such primary is a felony; and if you find from the evidence that the defendant knowingly made false returns to the central committee of the election held January 15, 1910, by substituting other ballots than the ballots cast by the voters to conceal such false returns, you will find the defendant guilty."

"5. You are instructed that if you find from the evidence that W. L. Hinton was a candidate for treasurer of Monroe County, Arkansas, on the 15th day of January, 1910, at a primary election called and held by the Democratic party of that county to nominate candidates for county treasurer, and that at said primary election he received more than twenty-four votes; and that the defendant, knowing this fact, knowingly and fraudulently certified to the central committee that he, the said Hinton, received only twenty-four votes, then you will find him guilty in this case."

The statute under which the appellant was indicted does not define "election returns." Indeed, the statute is very de-

fective and uncertain in this particular. But under our general election law, which the Legislature doubtless had in mind, an idea by analogy of what is meant by "election returns" is obtained from section 2832 of that law, which is as follows:

"After the examination of the ballots shall be completed the number of votes cast for each person shall be enumerated under the inspection of the judges, who shall prepare and sign in duplicate a certificate showing the number of votes given for each person and the office for which such votes were given, which certificates shall be attested by the clerks. And, after making such certificate, the judges before they disperse shall put under cover one of said tally sheets, certificates and poll books and seal the same, and direct it to the board of county election commissioners."

The meaning of "returns" is defined in 15 Cyc., p. 376, as follows:

"Returns consist of the poll books in which is entered the certificate of the officer conducting the election, together with a list of voters, and one or more of the tally sheets, all of which are to be carefully enveloped, sealed and delivered to the officer or board designated by statute." See also *State* v. *McFadden*, 65 N. W. 800-2; *People* v. *Ruyle*, 91 Ill. 525-528, and other authorities cited in appellant's brief.

From the above it will be seen that the offense which the proof tends to show that the appellant committed, if he committed any offense, was not that of "falsifying the returns" of an election. The court erred, therefore, in submitting the question to the jury upon that theory. As above stated, if appellant is guilty of any offense at all, under the charge and under the proof it was the offense of making a false count, and "not of falsifying returns." Appellant was indicted for "falsely," etc., taking votes cast for Hinton and crediting same to Graham. There is no charge that appellant "knowingly permitted others" to "change" or "substitute" ballots. Instruction No. 1 was therefore erroneous and prejudicial because it submitted an issue that was not alleged. Nothing should be assumed, and nothing can be taken by intendment in a criminal charge of this kind. The appellant was entitled to a trial upon the charge as laid against him.

The court therefore erred in its instructions to the jury, and for this error the judgment must be reversed, and the cause remanded for a new trial.

KIRBY, J., dissents.

FELTON v. BROWN.

Opinion delivered March 18, 1912.

1. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—A chancellor's finding of facts which is clearly against the preponderance of the evidence will be set aside. (Page 663.)
2. LACHES—DELAY.—Where a daughter accepted a conveyance from her father in consideration of her release of any interest in his estate, and waited for twenty-five years, and until he had been dead for three years, before seeking to rescind the release for alleged fraud, she is precluded by her laches. (Page 663.)
3. HOMESTEAD—DOWER—ABANDONMENT.—Where a widow, in pursuance of a family agreement, conveyed her homestead and dower interests in certain lands of her husband to one of his heirs, she will be held to have abandoned her rights therein. (Page 664.)
4. FAMILY SETTLEMENT—ENFORCEMENT.—Where a widow and two of the heirs agree that a sum of money left by the deceased husband should go to one of the heirs to equalize his share of the estate, and such agreement was executed, it will be enforced as between the parties to it. (Page 668.)

Appeal from Lonoke Chancery Court; *James B. Reed*, Special Chancellor; reversed in part.

Trimble, Robinson & Trimble, for appellants.

1. Mary A. Felton was entitled to her homestead right in the entire 160 acres. The decree setting aside the release from Alice L. Lamb is not supported by the evidence. The interplea should have been dismissed. She was estopped. 13 Cur. Law, note 58, par. 17, p. 1598; 56 W. Va. 611; 64 S. E. 911; 81 Kan. 210; 106 *Id.* 279.

2. Where a parent executes a series of deeds to children, evidence of what he said is competent on question of advancement. 81 Kan. 210.

3. Grantor's statements nearly a year after conveyance are inadmissible to show that property was not transferred as an advancement. 91 N. E. 364.

4. The $550 in the bank was no part of the estate; it belonged to Louis Felton.

A. C. Martineau, for appellees.

1. The widow abandoned her homestead. 21 Cyc. 608; Thompson on Homest. & Ex., § 267; 48 Ark. 236; 20 Cyc. 932, 973; 62 Ark. 61.

2. The evidence sustains the finding as to Alice Lamb. 9 Cyc. 454, § 2; Anson on Cont. p. 216. It was obtained by undue influence and there was no consideration. 9 Cyc. 456, § 6; 40 Ark. 28; 20 Cyc. 110, 111, 112.

3. There was no gift to Louis Felton, either *causa mortis* or *inter vivos*. 60 Ark. 169.

WOOD, J. 1. This a suit by the appellant, Mary A. Felton, to have homestead allotted and dower assigned to her in certain real and personal property. She is the widow of Marion Felton, deceased. At the time of his death he owned and occupied 160 acres of land, which constituted his homestead. He also owned about 193 acres of other land, twenty acres of which were well improved and adjoined the homestead on the west. The rest was unimproved. He owned personal property of the value of something more than $400, and had in the bank $550.

His children were Alice, George, Garland, Watt, Louis, Carrie and Media. Louis and Carrie were the youngest, and lived with Felton and his wife at the time of Felton's death. After his death Carrie intermarried with one Brown, and before his death Media had intermarried with one B. F. Smith, Alice was also married. Louis and Carrie, and her husband. Brown, were made parties defendant to the suit. The defendant Louis Felton did not resist the claim of appellant Mary A. Felton. The defendant Carrie Brown and her husband filed an answer and cross complaint, in which they set up that a certain agreement had been entered into between appellant Mary A. Felton, and Louis and Carrie, by which certain of the real estate and personal property belonging to her father at the time of his death was allotted to appellant Mary A. Felton as her share, and prayed that said agreement be carried out. She made Louis a defendant to her cross complaint. Louis and Mary A. replied to the answer and cross complaint, in which they denied the agreement alleged therein, and set up

that instead there was a different agreement entered into between them as to the division of the property.

The appellee Alice Lamb was the daughter of Marion Felton by a former wife, and a half-sister of Carrie Brown and Louis Felton. She intervened in the suit, claiming one-third interest in the estate of her father, Marion Felton.

Mary A. Felton and Louis Felton answered the intervention, denying that Alice Lamb had any interest in the subject-matter of the suit as one of the heirs of Marion Felton; alleged that she had received her interest by way of advancement; and that as evidence of that fact she had executed a deed of release unto the other heirs of all her interest in the estate. Alice Lamb replied to this answer, admitting that she did sign the deed of release, but alleging that same was obtained by fraud and undue influence, and that there was no consideration paid for same. She prayed that the deed of release executed by her be set aside and cancelled.

The court found that the deed of release executed by Alice Lamb was procured from her by her father, Marion Felton, by undue influence, and was without consideration and void, and entered a decree cancelling the same and allotting to her a one-third interest in the estate making her share equally with her half-brother, Louis Felton, and her half-sister, Carrie Brown.

This presents the first question for our attention.

There was adduced in evidence a deed executed by Alice Lamb to the heirs of Marion Felton, in which, for an alleged consideration of $1,100, she released unto the other heirs all of her "right, title and interest in and to the real and personal estate of the said Marion Felton."

There was testimony on behalf of appellee Alice Lamb tending to show that she inherited forty acres of land from her mother. Alice Lamb testified that on the 23d of November, 1880, she joined with her father and with her stepmother, Mary A. Felton, in conveying her interest in the land she inherited from her mother to one Edward Chapman; that on the same day her father and Mary A. Felton conveyed to her (she then being unmarried), in exchange for this land, the eighty acres on which she now resides; that she afterwards married with Eagle, and immediately took possession of the eighty acres conveyed to her by her father in exchange for her interest in her mother's

estate. She stated that she and her husband built a house on the property, and that in July, 1884, the house burned, and with it the deed which she had received from her father to the eighty acres, but which had never been recorded. She further testified that after the deed was destroyed she asked her father to make her a new deed, but this he refused to do unless she would execute a deed of release. She stated that her father represented to her that she would lose her title to the land, and that she, being ignorant of the law and relying upon him, executed the release in evidence to the other heirs. She further testified that the consideration named in the release of $1,100 was never paid her by her father, and that he had never given her anything in money or property, and that the only consideration for the release was the deed of her father to the eighty acres of land on which she was then residing.

There was evidence in her behalf tending to show that the land she inherited from her mother, which she claims to have given in exchange for the eighty acres deeded to her by her father was very valuable, being cleared and on a public road, and hat the land which her father deeded to her in exchange was at the time unimproved and worth only about $300; that soon after the exchange was made her husband began to pay taxes on the same. The deed of release was executed on the 29th day of May, 1885, over four years after the alleged deed of Alice Lamb conveying to her father her interest in her mother's estate.

Witness H. T. Bradford testified, concerning the deed of release, that the same was acknowledged before him as justice of the peace; that he had no recollection as to whether any money consideration was talked of or not at the time. He gave it as his opinion that the consideration was a certain tract of land she got. He said that in his opinion a deed which bears the same date as the deed of release was the consideration the $1,100 mentioned in the deed of release.

Mary A. Felton testified concerning this, that the land that Alice inherited from her mother was not more valuable than the land she got from her father; that the land that she inherited from her mother was about worn out; that Alice received as much of the estate as the other children; she got eighty acres of land and a horse, also a cow and calf; that Mr. Felton, during his life-

time made advancements to his children as they became of age and married. Alice got her part just as the others had got their parts. The eighty acres of land she got was good land; between twelve and fifteen acres of it was fenced, and had been worked a year. She saw Alice frequently after Mr. Felton conveyed her the land, and Alice never expressed any dissatisfaction. On the contrary, she said that she got the pick of the estate; that she got a fine piece of land that would make her a good home, and she was well satisfied with it. She sold to her father the land that she inherited from her mother. Witness knew Alice's father paid her for the land.

George Felton testified that his father made provision for all of the children except Louis and Carrie during his lifetime; that he gave them their part of the estate. The same arrangements were made with Alice as were made with the others. The eighty acres given to Alice were given her as her part of the estate. He gave her also horses, cows and hogs, and gave to her husband at that time provisions to run the place. "When any of us married," said the witness, "Pa would give us our part of the estate. The only ones he didn't provide for were the two youngest, Carrie and Louis. Alice got as much as the balance of us did. I signed my right to the balance of the heirs when I got my part of the estate, and so did she."

Another one of the heirs, W. L. Felton, testified substantially to the same state of facts. And these witnesses say that their father put up himself one house on the eighty acres of land that he gave Alice as her part and helped put up another that was burned. One of these witnesses said that when Alice went to marry her father told her that she would have to have a home, and he was going to give her that eighty acres of land. "Father said to her: 'I have a mare here I will give you and put you up a house on that land for your interest in the Burris place,'" referring to the land Alice Lamb inherited from her mother. Witness further stated that Alice accepted it, and he never heard of her making any complaint regarding the part of the estate she got from her father until after the suit came up, which was twenty-five or thirty years after she had received the eighty acres of land from her father.

Carrie Brown testified that she heard her father say that

he gave Mrs. Lamb the eighty acres where she was living for her interest in his estate.

The testimony of all these witnesses was to the effect that it was the intention of their father that Carrie and Louis, the youngest children, should share equally in the estate that was undisposed of at the time of his death, reserving to Mrs. Mary A. Felton her homestead and dower interest.

We are of the opinion that the court erred in finding that the deed of release executed by Alice Lamb to the other heirs was procured by her father under undue influence and without consideration. The clear preponderance of the evidence tends to show that this release was executed in consideration of the fact that she had before received her share of the estate, and was in recognition of that fact. It is scarcely believable that the father. who is shown to have been so generous and fair to all of his children in the disposition of his estate, and so careful to provide for them, would have deliberately set out to deceive his daughter, Alice, and misrepresent the facts to her, as she claimed he did. We are of the opinion that the preponderance of the evidence shows that she received ample consideration for the land which she inherited from her mother, and which she afterwards conveyed at her father's request.

But, whether this is true or not, she is estopped by laches from setting up that the deed of release executed by her to the estate at the instance of her father was void for fraud and misrepresentation. She was of full age at the time this deed was executed, and was under no disability. She married a few weeks after the deed of release was executed. Even if it could be said that she was under her father's influence at the time the same was executed, after her marriage and when she had moved away from him, it could not be said that there was any presumption of undue influence, and certainly none is shown by the evidence. She waited for about twenty-five years, and until this suit was brought, before taking any steps to have such release cancelled for the deception and fraud which she now claims her father perpetrated upon her in order to have her execute such release. If her father defrauded her out of her interest in her mother's estate, as she now claims, it was her duty to have sought the interposition of a court of equity long before her

father's mouth was sealed in death. It does not speak well for her to have waited until her father had died and then set up her claim which necessarily involves the integrity of his character. She should have made known her objections before his death, but even after his death she waited nearly three years before she indicates any dissatisfaction.

The decided preponderance of the evidence shows that the deed of release was not fraudulently obtained. It was based upon a valid consideration, and is binding upon her. *Squires* v. *Squires*, 65 W. Va. 611, 64 S. E. 911; 13 Current Law, p. 1598, par. 17, note 58. The court therefore erred in annulling the deed of release, and in decreeing to appellee Alice Lamb one-third of the estate of her father.

2. Concerning the allotment of homestead and dower, Carrie Brown testified substantially as follows: "I entered into an agreement, after my father died, with mother and Louis as to a division of the real estate. My father had planned as to what part he wanted for Louis and for myself on the home place. I was to get eighty acres of the home place and the twenty acres west of the home place. Louis was to get the balance of the home place. We all made a division of the property. We deeded Louis his part. He and mother wanted to make a deed for my part. The deed we made was acknowledged before J. S. Williams. Mr. Williams also wrote the deed I was to have. The deed that was made to my part, my mother had it, and was going to put it on record. I don't know why she didn't put it on record. It was written up and signed in the fall of 1908. Louis got more of the land in the bottom to equal mine. Louis was to receive the $550 my father had on deposit in the bank to make the improvements on his place equal to mine. This was part of the consideration. I was to have the property all my life; mother give me possession of it under the agreement. We were to all live together as one family. Father suggested the division during his lifetime. He told mother and Louis how he wanted the property divided on the home place. When the division was made, mother was to have the homestead as long as she lived."

J. S. Williams testified that after Marion Felton's death Mrs. Felton wanted him and Trimble to divide the property between her daughter, Carrie, and her son, Louis. They made

a division of the property, and divided it equally. He testified also to a division of the real estate. He prepared the deeds. Mrs. Felton stated that she wanted everything settled during her lifetime. Each deed contained the same number of acres. Mrs. Felton refused to relinquish her dower in any of the land. One clause in the deed was that she was to control her daughter's part, that is the home place, during her lifetime. She said she wanted it divided by the ditch like Mr. Felton wanted it divided, and that the money in the bank was to make the improvement on Louis' part equal to Carrie's. There was a second deed made in which Mrs. Felton relinquished her dower to the part that Louis was to receive. He didn't think that they divided the home place. They made a division of about 175 acres in the bottom. Nothing was said by Mrs. Felton about sixty acres being reserved for herself in the division. Mrs. Felton was to control the land that was deeded to Carrie Brown jointly during her lifetime. He made two deeds, one to Louis and one to Carrie.

Mrs. Felton testified that after her husband died they undertook a division of the personal property to carry out his wishes. She said there was a talk of a division of the real estate after Carrie married, but that it was never done. She at first stated that no deed was ever executed; said that Carrie would not sign the deed; said that in the division she (Mrs. Felton) was to get sixty acres of land absolutely as her own, and the children were to take the rest; that the whole matter of the division of the real property went through because Carrie refused to sign the deed. But in her cross examination she stated as follows: "The first division was that Louis was to get half of the real estate, and Carrie and me were to get the other half, but I was to hold her part while I lived, and hold all the farming tools; and what was left at my death, that was hers. Carrie and myself signed Louis a deed. The first partition was made; Mr. Williams, a justice of the peace, made the deed. I never delivered any deeds. The deeds were made to me. Carrie refused to sign. It was not the understanding that I was to hold Louis' part, just as I was Carrie's part. I declared to Carrie and Louis that I was going to hold her part as my homestead as long as I lived, but that I was going to deed Louis his

part absolutely without any restrictions. After I made the deed to Louis, I didn't expect to claim homestead right in the part that Louis got. Carrie and her husband were at the house when they married; I didn't object to the marriage. I never asked Mr. Brown to come and live with me; he just came anyway, and took possession of the premises; there was no understanding between him and me. When Mr. Brown and Carrie married, there was no ill-feeling existing between us. The first trouble came up about a year after we made a partition. The deed that Mr. Williams drew up to Carrie, I never turned over to her. I was keeping the deed for her; expected to turn it over to her at my death; that was the agreement. After she married, I wanted to arrange so that I could build a house for them to live in because I was tired of living with them, or they with me, for it looked like they were trying to shut me out, and I had an agreement that I would take sixty acres in the two deeds, thirty from Louis and thirty from Carrie. I stated to her that I was going to do this, and she never said a word. this didn't have anything to do with the partition made a year or two before."

At another place in her testimony she says: "The understanding was, when it was divided, that Carrie's part should remain on the place until after my death. Mr. Felton expressed an idea as to how he wanted the land divided between Louis and Carrie before his death, reserving the right of homestead and dower interest. My intention was to reserve my homestead in such a manner as not to be disturbed."

Louis Felton testified: "My understanding was that mother was to deed me mine and my sister hers, and I was to deed mother thirty acres and my sister was to deed mother thirty acres, and she was to take the sixty acres and do with it as she pleased. I agreed to this."

On cross examination, he says: "We agreed to have a division of the personal property and real estate. I was to get half of the personal property, and my mother was to get the other half for Carrie; that is, Carrie's part was to remain on the place, and my mother was to have the control and use of it. It was agreed in the first arrangments, but didn't go through until the other deed was made. I made Carrie a deed to her part

of the property. I think that was in the fall or spring after my father died. Something like a year after the first partition was made, I moved on my part and took possession. I drew the money that was in the bank."

The court, upon this testimony, found that, in pursuance of an agreement, "deeds were executed by Louis Felton to Mary A. Felton and Carrie Felton, and delivered to Mary A. Felton, and deeds were executed and delivered by Mary A. Felton and Carrie Felton to Louis Felton; that Mary A. Felton went into possession and held the same as her dower and homestead for more than two years, until the filing of this suit; that Louis Felton went into posession of the part deeded to him immediately after said agreement, and has held the same since that time.

The court further found that the deed executed and delivered to Louis Felton by Mary A. Felton and Carrie Felton was without consideration and void as between Louis Felton and Carrie Felton, and that the deed alleged to have been executed to Mary A. Felton and Carrie Felton and delivered to Mary A. Felton was never delivered to Carrie Felton, and was without consideration and void as between Mary A. Felton and Louis Felton.

The court further found, after describing the lands that were conveyed under the agreement from Mary A. and Carrie Felton to Louis Felton, that, by reason of said agreement in setting out to Mary A. Felton said homestead and dower and said conveyance to Louis Felton, she has abandoned and released all of her right, title and interest as to homestead and dower in that part of the land embraced in the deed to said Louis Felton; that she is entitled to homestead only in that part of the home place not conveyed to the said Louis Felton, and entitled to dower in all that part of the land belonging to the estate of Marion Felton not embraced in the deed of conveyance to the said Louis Felton, and entered a decree according to his findings.

The court also adjudged and decreed "that Louis Felton account to Carrie Brown and Alice Lamb for the $550 received from the Bank of Central Arkansas, and also for rents amounting to $160 collected for the year 1910 on land in his possession.

The court, in its decree, specifically described the lands set apart as homestead and dower, and gave her dower, in addition to the homestead, out of the lands that were embraced in the deed executed by her and Carrie to Louis.

The plaintiff, Mary A. Felton, appealed from the decree in so far as the same affected her homestead and dower rights. Louis Felton also appealed. The appellees Carrie Brown and Alice Lamb appealed, but their appeal seems to have been abandoned. The attorney for them closes his brief by asking that the decree of the lower court be affirmed.

We are of the opinion that the decree of the chancellor in regard to the homestead and dower rights of the appellant Mary A. Felton is supported by a preponderance of the evidence. A decided preponderance of the evidence shows that Mary A. Felton and her children, Louis and Carrie, entered into an agreement by which they divided the property, real and personal, after Marion Felton's death, and that the parties to the agreement took possession of the respective interests allotted to them, and that the agreement was fully consummated. The effect of the agreement on the part of appellant Mary A. Felton was to abandon her homestead and dower right in the lands that were, by the agreement, allotted to Louis Felton. Such a disposition of the property was authorized under section 15 of Kirby's Digest, there being no administration and no debts.

After the appellant Mary A. Felton had once abandoned her homestead in the solemn form as indicated by her deed, under the agreement, she could not thereafter claim it. See 21 Cyc. 608, and cases cited.

3. The court was correct in its finding that the $550 deposited in the bank in the name of Marion Felton at the time of his death was the property of his estate. This $550 was not a gift, either *inter vivos* or *causa mortis*, to Louis Felton. There was some testimony tending to show that he performed services for his father, and that it was the intention of his father to reward him for such services by giving him the $550, and that it was the intention that this money should go to Louis when his father died; but, although the gift may have been intended, it was never perfected by delivery prior to Marion

Felton's death. If his father was indebted to Louis Felton, then that debt was a claim against the estate, which, to be allowed, would have to be settled in the course of administration.

Being the property of the estate, it was disposed of under the agreement, and we can see no reason why the agreement, which the evidence shows was entered into and fully consummated, should not be carried out as the parties made it. Under this agreement Louis Felton was to receive and did receive the $550 as a part of his division of the property.

The court therefore erred in cancelling such agreement as between Louis and Carrie Felton and in entering judgment in her favor for any part of the $550. The judgment therefore, in this respect, is reversed.

The decree of the court in regard to the homestead of Mary A. Felton is affirmed. In other respects it is reversed, and the cause will be remanded with directions to enter a decree in accordance with this opinion, and for such other proceedings as may be necessary pursuant to law.

TRUMBULL v. HARRIS.

Opinion delivered March 18, 1912.

EVIDENCE—VARYING WRITING BY PAROL.—Proof of a collateral agreement not inconsistent with the terms of a written contract, and constituting in part the consideration therefor, may be made by parol evidence.

Appeal from Montgomery Circuit Court; *C. T. Cotham*, Judge; reversed.

STATEMENT BY THE COURT.

Appellee brought this suit against the appellants to recover damages for an alleged breach of contract. This suit is based on the following contract, which was entered into on May 2, 1907:

"Know all men by these presents that Wm. Harris, of Black Springs, Arkansas, Montgomery County, party of the first part, and the Trumbull-Danville Lumber Company, of Black Springs, Montgomery County, Arkansas, party of the second part:

"That party of the first part agrees to manufacture all the timber on the J. T. Petty tract of timber containing 480 acres, more or less, in a merchantable manner, in such sizes as the party of the second part may from time to time direct, including cutting of the logs, hauling same to mill, piling the lumber and kiln drying such portions of it as the party of the second part may require, in consideration of the sum of six dollars ($6) per thousand feet. The party of the second part agrees to allow the party of the first part the use of all necessary lumber for mill shed and houses the party of the first part may require, and all such lumber so used is to revert to the party of the second part upon completion of this contract. The party of the first part agrees to quarter-saw such oak as the party of the second part may require at ten dollars per thousand feet. The party of the first part agrees to allow the party of the second part to withhold the sum of one dollar per thousand feet on all lumber furnished the party of the second part, and whatever above one dollar that the party of the first part desires to pay until such time as the party of the first part reimburses the party of the second part for such sums of money as the party of the second part may advance for the purpose of the sawmill and equipment and interest. This contract is to remain in force by mutual agreement between both parties until such time as is mutually agreed to terminate the same.

"The party of the second part agrees to pay the party of the first part on the 10th of each month for all the lumber manufactured during the previous month, after deducting one dollar per thousand to be applied to the credit of the party of the first part, on the money advanced by parties of the second part for the purchase of mill and equipment and supplies, also deducting for commissary goods furnished the party of the first part during the previous month.

"Party of the second part agrees to pay the party of the first part $2.75 per thousand feet for all lumber burned in the dry kiln.

"Party of the first part agrees to furnish lumber to the party of the second part as fast as the capacity of his mill will permit, unavoidable delays excepted."

After the contract was executed, appellee made a contract with the Southern Boiler & Engine Works for the purchase of

certain sawmill machinery for the price of $1,800. This machinery was erected on the land embraced in the contract, and the Trumbull-Danville Lumber Company paid the freight and made the first payment for the appellee. Appellee also erected some houses on the land preparatory to running his mill, and the money to do this was advanced by the lumber company; the advances so made amounted to something over $900. Appellee cut about 200,000 feet of lumber. After that the Bear State Lumber Company succeeded in business the Trumbull-Danville Lumber Company, and the former company proceeded to carry out the contract of the latter. Appellee says there was no change in their manner of doing business, and that their contract went on as before with Trumbull and Danville as managers of the Bear State Lumber Company. Appellee then cut about 400,000 feet of lumber, and delivered it to the Bear State Lumber Company under his contract with the Trumbull-Danville Lumber Company. He said that about the last of November Trumbull forbade him cutting any more pine on the land, and refused to meet the running expenses of his sawmill as it had been doing before. Appellee then went on and cut oak timber on the tract, but did not cut any more pine. Appellants refused to advance him any more money with which to pay the purchase price of his mill machinery, and the vendors of the mill machinery came and took it away from him. On the 28th of January, 1908, appellee and the Bear State Lumber Company entered into the following contract, in writing:

"This agreement made and entered into on the 28th day of January, 1908, by and between William Harris, party of the first part, and the Bear State Lumber Company, party of the second part.

"The party of the first part agrees to deliver to the party of the second part the following property, towit: One sorrel horse mule, about ten years old and sixteen hands high. One dark bay horse mule about fourteen years old and about sixteen and one-half hands high, and one log wagon and all the lumber and logs cut on the Petty tract of land, and all buildings placed there by the party of the first part, and one set of double harness; and, in consideration of the above, the party of the second part agrees to satisfy one chattel mortgage for $319.50,

given by the party of the first part to the Caddo Valley Bank, and dated 12th day of August, 1907, and one chattel mortgage given by the party of the first part to Trumbull & Danville for $..... on machinery, and all the notes that Trumbull & Danville hold against him, and to settle store accounts as follows: B. E. Milam, $10.70; R. M. Reece, $19.45; Rowton Bros. & Bradberry, $1.40; Abernathy & Crane, $7.65; Graves & Johnson, $3.59; Black Springs Mercantile Co., $21.45; and one note given to W. E. Watkins & Bro. for one wagon, and $12.50 to be paid in the store.

"And it is agreed and understood by and between the parties hereto that this contract takes effect immediately."

Appellee says that he had about 200,000 feet of lumber on hand when this contract was made, and it was turned over to the lumber company in payment of what he owed it, and the other persons named in the contract of January 28, 1908. Appellee stayed on the land a month after this contract was made, but he never cut any more timber. Appellants adduced evidence tending to show that appellee never did pay them for the first advances they made in the purchase of his machinery for it, and that appellee was indebted to them during the whole time the contract was in force, and for that reason they refused to honor his pay roll in November; that they refused to make him further advances on the payment of the purchase price of his machinery because he was indebted to them, and that the vendors of the machinery took the machinery away from him in the fall of 1907 because he failed to meet his payments. Appellants also offered to prove that, at the time the contract of January 28, 1908, was entered into, it was understood between the parties that the contract was rescinded, and that appellee was turning over to appellant all of the property and did not intend to cut any more timber. The court sustained objection to this character of testimony, and the appellants duly saved their exceptions thereto.

The jury returned a verdict in favor of the appellee for damages in the sum of $1,200. The case is here on appeal.

Gibson Witt and *J. I. Alley*, for appellants.

1. Extrinsic evidence is admissible for the purpose of

showing that an executory contract had been settled. 92 Ark. 50; 94 *Id.* 471; 90 *Id.* 272; 95 *Id.* 450.

2. The agreement of January 28, by its terms put an end to the original contract. 93 Ark. 447.

Pole McPhetrige, James S. Steel, J. S. Lake and *James D. Head,* for appellee.

1. The settlement is plain and unambiguous, and can not be varied nor contradicted by oral testimony. 75 Ark. 55; 9 Cyc. 773-4.

2. There is no error in the admission or rejection of testimony. 96 Ark. 190; 92 *Id.* 310.

HART, J., (after stating the facts). It is first contended by counsel for appellant that the agreement of January 28, 1908, by its terms put an end to the original contract, and that under it appellee is precluded from maintaining this action, but we can not agree with them in this contention. In this respect, this case is different from that of the *Cherokee Construction Company* v. *Prairie Creek Coal Mining Company, ante* p. 428.

In that case, the language of the new or substituted agreement was very broad and comprehensive. It purported to be in full settlement of all matters and differences between the parties, and the court held that the language of the contract embraced all matters that might be in dispute between the parties under the original contract, and that parol evidence could not be introduced to vary the terms of the new contract or agreement. There it was attempted to be shown that certain matters embraced in the original contract were not intended to be included in the settlement, and the court held that under the express language of the new agreement this could not be done because it would operate to contradict or vary its terms. Here the language is not sufficiently broad and comprehensive to preclude appellee from maintaining this action for damages for breach of the original contract.

It is next contended by counsel for appellant that the court erred in refusing to admit testimony to the effect that it was understood or agreed between the parties at the time the new agreement was made that the old contract was at an end, and that the new contract was made for the purpose of rescinding it altogether. This testimony, we think, was competent. It

is the theory of the appellee in this case that appellants committed a breach of the contract the first of December, 1907, by failing to meet his pay roll, and that appellee was prevented from performing his contract by this act; that, having been prevented from performing his contract, he turned over the property in satisfaction of what he owed appellants, and in order to get them to pay other outstanding indebtedness which he owed. He admits that he turned back to them all the houses and all the other property which he used in running the saw mill, and that the vendors of the machinery took that away from him, but he says that this was done after appellants had refused to allow him to perform his contract with them according to its terms, and that therefore he could not run his mill, and had no use for the property connected therewith.

On the other hand, appellants claim they advanced appellee more than $900 to be used in paying for his machinery and in making preparations to perform his contract; that appellee never paid any of this indebtedness, and that because of this fact they refused to meet his pay roll on December 1, 1907; that on January 28, 1909, they had a full settlement of all matters included in the original contract, and that it was understood between them that the original contract was terminated thereby.

"While the contract remains executory on both sides, an agreement to annul on one side is consideration for the agreement to annul on the other, and *vice versa.*" 9 Cyc. 593-4.

We do not think that the effect of the excluded testimony was to vary or alter the terms of the contract of January 28, 1908, as copied in the statement of facts. That agreement went merely to the settlement of the indebtedness between the parties, and did not purport to be an agreement between them as to all matters embraced in the original contract.

The evidence excluded tended to establish a collateral agreement which involves no contradiction of the written agreement, and does not in any way vary its terms. In other words, the excluded evidence did not in any manner tend to contradict or vary any language of the contract of January 28, 1908, or any of the terms thereof, but only tended to establish a distinctly collateral agreement between the parties which was not

considered necessary to be put in writing when the written agreement was executed, but which in fact constituted, in part, the consideration for it. The authorities are that proof of such an agreement not inconsistent with the terms of the written contract, may be made by parol evidence. *Weaver* v. *Fletcher*, 27 Ark. 510; 17 Cyc. 713-17.

For the error as indicated in excluding this testimony the judgment must be reversed, and the cause remanded for a new trial.

QUEEN OF ARKANSAS INSURANCE COMPANY *v.* MILHAM.

Opinion delivered March 18, 1912.

INSURANCE—LIABILITY OF INSURER FOR PENALTY AND ATTORNEY'S FEE.—Where the insurer claimed a set-off, which was allowed by the insured, and the cause went to trial upon an issue as to whether the insurer owed anything, and the insured recovered the amount sued for less the above set-off, he was entitled to the statutory penalty and an attorney's fee.

Appeal from Grant Circuit Court; *W. H. Evans*, Judge; affirmed.

Manning & Emerson and *A. W. Files*, for appellant.

The court erred in allowing the penalty and attorney's fee. 93 Ark. 84; 92 *Id.* 378; 94 *Id.* 578. A motion for a new trial was unnecessary; the error appears upon the face of the judgment. 57 Ark. 370; 61 *Id.* 33.

Thomas E. Toler, for appellee.

1. There is no bill of exceptions. 37 Ark. 37; 38 *Id.* 216; 39 *Id.* 558; 42 *Id.* 488; 52 *Id.* 554; 95 *Id.* 332.

2. Appellant contested the claim, and never made any offer to confess judgment for the amount due. 94 Ark. 578; 86 *Id.* 115.

HART, J. Appellee had his stock of goods insured by the appellant for $500. On June 2, 1910, while the policy was still in force, the goods were destroyed by fire. Appellee made the necessary proofs of loss, and forwarded them to appellant; appellant's adjuster, after making the necessary investigation, agreed to pay the appellee the sum of $423.36 in settlement of the loss. Subsequently appellee made demand upon the appellant

for the payment of this sum, and, upon refusal of the appellant to pay the same, instituted this action to recover it.

Appellant answered, denying that it owed appellee the amount claimed by him, and, as a further defense, set up a breach of certain of the conditions of the policy. Subsequently appellant filed an amendment to its answer in which it alleged that the appellee owed it the sum of twelve dollars and the accrued interest for a part of the premium for the policy sued on, and asked that the same be allowed as a credit or set-off against any amount that might be found to be due appellee. Appellee then filed an amendment to his complaint, in which he admitted that he owed the appellant the premium note of twelve dollars and interest, and asked for judgment in the sum of $423.36 as the amount sued for. The jury returned a verdict for the sum of $423.36. The court then heard the testimony as to what a reasonable attorney fee would be in the case, allowed eighty-five dollars, and judgment was rendered accordingly. The case is here on appeal.

There was no bill of exceptions filed in the case, and appellant's counsel only ask for a reversal of the judgment on the ground that the court erred in allowing 12 per cent. penalty and the attorney's fees under the statute. There was no error in this.

The loss was adjusted, and appellant agreed to pay appellee the sum of $423.36. It refused to pay the same after demand made therefor, and appellee instituted this action to recover it. Appellant answered, denying owing the amount sued for, and setting up alleged breaches of the conditions of the policy.

When appellant filed its amended answer and claimed as a set-off the amount due it by appellee on the premium note, appellee at once conceded that the amount should be deducted from the amount sued for in his original complaint, and only asked judgment for the difference, which was $423.36. If appellant wished to avoid the penalty and attorney's fee provided for in the statute, it should have offered to confess judgment for that amount, and thus have ended the suit. It did not do so, but elected to go on and contest the claim of the appellee on other grounds, and thereby became liable for the

penalty and attorney's fee provided for in the statute when appellee recovered the amount sued for. *Industrial Mut. Ind. Co.* v. *Armstrong,* 93 Ark. 84-5; *Pacific Mutual Life Ins. Co.* v. *Carter,* 92 Ark. 378; *Home Fire Insurance Co.* v. *Stancell,* 94 Ark. 578-83.

Judgment will be affirmed.

APPENDIX

I.

OPINIONS NOT REPORTED.

Martin *v.* State; appeal from Pike Circuit Court; Jefferson T. Cowling, Judge; affirmed January 15, 1912; *per* Kirby, J.

Morgan *v.* Morgan; appeal from Mississippi Chancery Court; Edward D. Robertson, Chancellor; affirmed, January 29, 1912; *per* Hart, J.

Morris *v.* Ferrell; appeal from Mississippi Chancery Court; Edward D. Robertson, Chancellor; affirmed January 29, 1912; *per* McCulloch, C. J.

Brickey *v.* Ashley; Brickey *v.* Ketchum; appeals from Conway Chancery Court; Jeremiah G. Wallace, Chancellor; affirmed February 12, 1912; *per* Hart, J.

Carr *v.* Vance; appeal from Craighead Chancery Court; Edward D. Robertson, Chancellor; affirmed February 19, 1912; *per* Kirby, J.

Pugsley *v.* Lake; appeal from Clay Circuit Court, Western District; Frank Smith, Judge; affirmed February 19, 1912; *per* Wood, J.

Phillips *v.* Phillips; appeal from Pulaski Chancery Court; John E. Martineau, Chancellor; reversed February 26, 1912; *per* Kirby, J.

Jordan *v.* State; appeal from Monroe Circuit Court; Eugene Lankford, Judge; affirmed February 26, 1912; *per curiam.*

May *v.* Ausley; appeal from Van Buren Circuit Court; George W. Reed, Judge; affirmed March 11, 1912; *per* Hart, J.

II.

CASES DISPOSED OF ON MOTION.

W. L. Graham *et al. v.* The State of Arkansas for the use of Monroe County; Monroe Circuit Court; Eugene Lankford, Judge; reversed and remanded on confession by appellee that the same error occurred

in this cause as in No. 1741, decided November 6, 1911; February 5, 1912; *per curiam.*

Kansas City & Memphis Railway Company *v.* T. A. Bennett *et al.;* Washington Circuit Court; J. S. Maples, Judge; affirmed as a delay case, with penalty, February 12, 1912; *per curiam.*

Kansas City & Memphis Railway Company *v.* Jane Neale *et al.;* Washington Circuit Court; J. S. Maples, Judge; affirmed as a delay case, with penalty, February 12, 1912; *per curiam.*

T. J. Dearing *v.* Zelphia Owens; Independence Circuit Court; R. E. Jeffery, Judge; appeal dismissed pursuant to stipulations of counsel, February 12, 1912; *per curiam.*

Aaron Hill *v.* Sebastian Coal & Mining Company; Sebastian Circuit Court, Greenwood District; Daniel Hon, Judge; affirmed for noncompliance with rule nine, February 19, 1912; *per curiam.*

The A. L. Clark Lumber Company *v.* F. S. Ewing; Pike Circuit Court; J. T. Cowling, Judge; compromised and settled and appeal dismissed by consent, February 19, 1912; *per curiam.*

J. D. Townsend, *Ex parte;* certiorari to Johnson Circuit Court; Hugh Basham, Judge; petition denied and judgment of circuit court denying application for bail affirmed, February 26, 1912; *per curiam.*

Virgil Cox *v.* The State of Arkansas; Jackson Circuit Court; Joseph W. Phillips, Special Judge; appeal dismissed on Attorney General's motion, March 11, 1912; *per curiam.*

The State of Arkansas *ex rel.* the Attorney General *v.* W. M. Tweedy; Pulaski Circuit Court, Second Division; F. Guy Fulk, Judge; appeal dismissed, March 11, 1912; *per curiam.*

H. J. Taggart *et al. v.* J. D. Carlisle; Sebastian Chancery Court, J. V. Bourland, Chancellor; affirmed under rule seven, March 11, 1912; *per curiam.*

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