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CASES DETERMINED

IN THE

Supreme Court of Arkansas

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JUDGES AND OFFICERS

OF THE

SUPREME COURT

DURING THE PERIOD OF THIS VOLUME

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CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

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*BRADLEY LUMBER COMPANY *v.* HAMILTON.

Opinion delivered July 7, 1913.

1. APPEAL AND ERROR—PRESERVATION OF TESTIMONY—RECORD.—Evidence taken orally in the chancery court may be preserved only by having the same reduced to writing at the time and properly identified by the court and filed and made a part of the record, by order of the court, or afterward having it reduced to writing and brought into the record by bill of exceptions; and the court may not, by *nunc pro tunc* entry, bring into the record, by recitals in the decree of what was his recollection of testimony of witnesses. (Page 3.)
2. APPEAL AND ERROR—PRESERVATION OF TESTIMONY.—To preserve testimony taken orally in a chancery court, by recitals in the decree, the testimony itself, *in haec verba*, must be set forth at length, and a mere recital of the chancellor as to his recollections is insufficient. (Page 4.)
3. APPEAL AND ERROR—PRESUMPTION WHEN EVIDENCE IS NOT BROUGHT UP.—Where the record on appeal does not contain all the testimony taken before the chancellor, it will be presumed that every question of fact essential under the pleading to sustain the decree, was established by the absent evidence. (Page 4.)

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

D. A. Bradham and *B. L. Herring,* for appellant.

The court had the power to amend its decree by *nunc pro tunc* entry after the lapse of the term. 23 Cyc. 867; 141 Pa. St. 266, 21 Atl. 592; 70 Fed. 656, 17 C. C. A. 317; 51 Ark. 287.

It was unnecessary to bring up the oral evidence, since it is clear that it was confined to the point of identifying a record which is not in dispute. 48 Ark. 45, 50; *Id.* 60, 65.

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*For opinion on motion to modify decree see *Bradley Lumber Co.* v. *Hamilton. Infra,* page 598.

J. R. Wilson and *Williamson & Williamson,* for appellees.

An amendment of a record can not be based upon a judge's recollection of the facts or his affidavit in regard to the error to be corrected. 57 Ill. App. 688; 37 *Id.* 199; 50 Mo. 490; 8 Mo. App. 290; 90 Va. 794; 30 Cent. Dig., "Judgments," 623; 13 Cal. 107; 23 Cyc. 880. The testimony of the three witnesses who gave their testimony *ore tenus* before the court, not having been brought into the record in the manner provided by law, and the rules of this court, the judgment should be affirmed. 98 Ark. 269; 77 Ark. 195; 84 Ark. 429; 83 Ark. 424, 426; 81 Ark. 428; 58 Ark. 134; 45 Ark. 240; 80 Ark. 79.

WOOD, J. This suit was instituted in the Bradley Chancery Court by Mrs. A. A. Hamilton, in behalf of her husband, A. A. Hamilton, and by George Hamilton and Charlie Hamilton, in their own right, to cancel a certain deed executed by the State Land Commissioner to C. C. Colvin, and from C. C. Colvin to the appellant herein, the Bradley Lumber Company, and for an accounting for timber which it was alleged had been cut and removed from the lands by the appellant. The appellees deraigned title from the Government through an alleged patent to one John C. Gillis, and by deed from Gillis to the Hamiltons.

The appellant denied the allegations of appellees' complaint, and deraigned title through an alleged forfeiture to the State for nonpayment of taxes, and the purchasing thereof by its grantor, C. C. Colvin. Appellant also set up the two years' statute of limitation under tax title and the seven years' statute of limitation by adverse possession.

The decree in the case was rendered May 31, 1912. The decree recited that the action came on for final hearing upon the pleadings and certain documentary evidence and depositions of witnesses (naming them), certain deed and tax records brought in by the clerk, J. A. Watkins, and "the oral testimony of Henley S. Turner, H. E. Bond

and J. A. Watkins," taken *ore tenus* at the bar of the court, and also an agreed statement of facts.

After the term of the court had lapsed at which the decree was rendered, on January 28, 1913, appellant filed a motion for a *nunc pro tunc* order, amending the recitals of the decree so as to show that the oral testimony of Henley S. Turner, H. E. Bond and J. A. Watkins was confined to the point of identifying a record book of the county clerk's office introduced in evidence, entitled, "Record A of Lands Sold for Taxes." The court heard and allowed the motion of the 19th day of March, 1913, and ordered the recitals of the decree rendered May 31, 1912, to be amended by adding, after the recital in the decree, "and the oral testimony of Henley S. Turner, H. E. Bond and J. A. Watkins, taken *ore tenus* at the bar of the court," the following: "And the oral testimony of these three witnesses was to the point, and only to the point of identifying the records of sales of forfeited lands for taxes of 1882, set out above, so far as the court remembers."

The court could not, by *nunc pro tunc* entry, bring into the record, by recitals in the decree of what his recollection of the testimony of witnesses was, testimony taken orally before the court. The only way of preserving testimony taken orally before the chancery court was to have same reduced to writing at the time and properly identified by the court and filed and made a part of the record by order of the court, or afterward having it reduced to writing and brought into the record by bill of exceptions.

The testimony itself must be brought into the transcript of the record, and not the recollection of the judge as to what it contained, or as to what it pertained. Although the recitals of the decree in the first instance may have been as corrected by the *nunc pro tunc* order at a later term, still, this would not have been sufficient to meet the requirements of the law for preserving the testimony taken orally before the court. *Beecher* v. *Beecher*, 83 Ark. 426.

To have preserved the testimony taken orally before the court by the recitals in the decree, the testimony itself *in haec verba* would have to be set forth at length therein, and not merely a recital of the chancellor stating what his recollection of the same was. The memory of the chancellor as to the purport of the testimony can not be taken as a substitute for the testimony itself. In *Pirtle* v. *Southern Lumber Co.,* 98 Ark. 269, this court held that the certificate of the chancellor as to what a lost deposition contained is a matter outside of the record, and can not be considered on appeal. Only the record itself can be looked to, and the record of the testimony taken orally is the testimony itself, preserved in the ways pointed out above.

The chancellor might be mistaken in his recollection concerning the testimony. Therefore, the testimony itself is the only thing that can be considered. The issues in the case could not have been determined except upon a consideration of all the testimony in the case; and whether or not the chancery court erred in its findings and decree can only be determined by a consideration of all of the evidence. Since some of the testimony that was before the chancellor has not been brought into this record, we must assume that every question of fact essential under the pleadings to sustain the decree was established by the absent evidence. *Barringer* v. *Bratcher,* 90 Ark. 214; *London* v. *Hutchens,* 88 Ark. 467; *Stuckey* v. *Lockard,* 87 Ark. 232; *Brown* v. *Nelms,* 86 Ark. 368; *East* v. *Key,* 84 Ark. 429; *Beecher* v. *Beecher, supra; Hardie* v. *Bissell,* 80 Ark. 74.

The decree is affirmed.

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

Opinion delivered July 7, 1913.

1. CARRIERS—CARRYING PASSENGER BEYOND STATION—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.—Where a railroad company carried plaintiff, a passenger, beyond her station, it is a question for the

jury whether the passenger was guilty of contributory negligence in walking back, so as to bar a recovery for injuries sustained thereby. (Page 9.)

2. INSTRUCTIONS—CONFLICTING INSTRUCTIONS.—Plaintiff sued a railway company for damages sustained by reason of being carried past her station, and walking back; *held*, an instruction is erroneous which charges that plaintiff had a right to walk back, and leaving to the jury the question whether, under the circumstances, she was justified in walking back, since it contains irreconcilable propositions, misleading to the jury. (Page 10.)

3. APPEAL AND ERROR—INSTRUCTIONS—GENERAL OBJECTIONS.—An instruction is erroneous in form, when it contains irreconcilable propositions, and a general objection to the same is sufficient. (Page 10.)

4. APPEAL AND ERROR—INSTRUCTIONS—OBJECTIONS.—Where an instruction given by the court contains irreconcilable propositions, an objection to the same is sufficiently raised by a requested instruction in conflict with the objectionable parts of the instruction given by the court, and where an instruction is defective in substance, a general objection to the same is sufficient. (Page 10.)

5. INSTRUCTIONS—REQUISITES.—An instruction to be a correct guide to the jury, must, as a whole, be consistent and harmonious. (Page 10.)

6. DAMAGES—PERSONAL INJURY—INSTRUCTION.—An instruction on the matter of damages, is defective, which does not require the jury, in case of a verdict for the plaintiff, to base their finding as to amount of damages, on the evidence in the case. (Page 10.)

Appeal from Chicot Circuit Court; *H. W. Wells*, Judge; reversed.

STATEMENT BY THE COURT.

Plaintiff, an elderly lady, lived at Luna, in Chicot County. She had a daughter living at Arkansas City, in Desha County. The daughter was very ill, being confined, and the plaintiff having been informed of this fact, purchased a ticket, on September 6, 1911, for Arkansas City, and took passage on defendant's road from that place. The train connected at Lake Village with a northbound passenger train, which, in turn, made connection at Trippe Junction with another of defendant's trains for Arkansas City. Plaintiff had never been over this line, and when the auditor came to take up her ticket, she informed him of this fact; told him she was on her way to

see her daughter, and asked him to put her off at the proper station so she could make connection for Arkansas City. The auditor neglected to put her off at Trippe, where she could have made connection with the train for Arkansas City, and could have arrived there at about 3 o'clock in the afternoon. The auditor, instead of putting her off at Trippe Junction, put her off at Halley, four miles from Trippe Junction. No train would pass Halley going to Arkansas City until 11 o'clock the following day. Plaintiff tried to hire a horse, but could not secure one. It was about 1 o'clock when the train left her at Halley. She had received news that her daughter was about to die, and being unable to get any one to take her, she walked to Trippe Junction. She stated that she took the walk to get to her daughter; that she could not get any way to ride. She had nowhere to go unless she stayed there and sat up in a colored boarding house. She didn't want to do that, and thought that her daughter would be dead any way. She was informed by the agent at Halley that she could catch a train going to Arkansas City at Trippe about 8 o'clock that night. She made every effort to get some means of conveyance to take her there, and, having failed, decided to walk. She walked to Trippe and carried her basket. It was a hot day. When she got there, she fell on the floor. Her limbs were cramped, and she thought she was going to die. She went to a lady's house and stayed until the train came. She was carried to the train. It was about 9 o'clock when she reached her destination. She was not able to get off the train; a gentleman helped her off and helped her part of the way. She was suffering as much as any one could on their feet. For nine weeks she was not able to get out of bed.

The plaintiff was not very well before she started on her journey to Arkansas City. She had been in delicate health for six months before she went to see her daughter. Was in a "generally debilitated condition."

It was shown that during the illness that resulted to plaintiff from this journey, she suffered from cramps, sick stomach, headache and high fever, and that this condition continued for something near three months.

The appellee sued the apellant for damages. The appellant denied the allegations of the complaint, and the above are substantially the facts developed at the trial.

The court gave, at the request of appellee, the following prayers:

"2. If you find from the evidence that plaintiff purchased a ticket and took passage upon defendant's train to go to see her daughter, whom she had reason to believe was dangerously ill, and by the carelessness and negligent conduct of defendant's employees, and without fault on her part, she was put off at the wrong station, and if you further find from the evidence that she would have had to remain at said station for a period of nearly twenty-four hours to get another train to take her to her destination from that point; and if you further find that she was advised by the station agent at Halley that she could catch an earlier train at Trippe station, she had a right to elect to walk to said station, if she could not get other means of conveyance, without assuming the risk incident to taking such walk, and if you further find from the evidence that the circumstances justified her in electing to walk, and that, as a result of walking to Trippe Junction under these circumstances, she suffered in bodily health and sustained injury, the defendant company is liable in damages for such injury and pain and suffering ensuing therefrom, if you find that she was so injured."

"3. If you find for the plaintiff in this case you will assess her damages at such sum of money as in your judgment will fairly compensate her for all the damages she sustained of which the negligence of defendant was the proximate cause, and in arriving at such sum you may consider loss of time and extra expense on account of sickness and pain and suffering which she underwent, if you find that such pain and suffering was the proximate result of defendant's negligence."

The court refused prayers of the appellant to the effect that plaintiff would not be permitted to recover damages augmented by her own action in unnecessarily and negligently exposing herself to hardship and suffer-

ing, and if she was not compelled to undertake to walk from Halley to Trippe, or that the auditor could not reasonably expect her to do so under the circumstances, and that she voluntarily undertook the walk, that she could not be permitted to recover because of her own contributory negligence, notwithstanding any negligence of the railway company.

The court granted a prayer of appellant to the effect that the burden was on the plaintiff to show that she was induced to debark from the train at the wrong station by reason of the conduct of appellant's auditor, and also that the burden was on plaintiff "to show by a preponderance of the evidence that she suffered injury as the direct and proximate result of the negligent conduct of the auditor in inducing her to alight at Halley instead of Trippe."

And the court granted this further prayer of appellant:

"2. Before you would be warranted in finding for the plaintiff in this case, you must find from the evidence that the injury complained of was the direct and proximate result of carelessness and negligence of the defendant, and that nothing was done by the plaintiff, herself, which in any way amounted to carelessness and negligence on her part and contributed to the injury complained of."

The jury returned a verdict for the plaintiff in the sum of $2,500.

This appeal has been duly prosecuted.

E. B. Kinsworthy, J. C. Knox and *T. D. Crawford,* for appellant.

1. Whether or not it was negligence on the part of an aged woman in plaintiff's enfeebled condition to undertake to walk a distance of four miles on a hot day, was a jury question. The court erred in giving instruction 2.

2. Instruction 3 was erroneous in not telling the jury to assess plaintiff's damages at such sum as they might *find from the evidence* would fairly compensate

her, etc. 105 Ark. 205. It erred also in directing them to consider loss of time and extra expense on account of sickness, whereas, there was no proof that she incurred any particular amount as extra expense on account of sickness.

Garland Streett, for appellee.

1. Instruction 2 expressly leaves the question of whether the plaintiff was guilty of contributory negligence to the jury, in requiring them, before they could find that she had the right to elect to take the walk, to find from the evidence that the circumstances justified her in so doing. But the instruction is correct without such qualification. 146 S. W. 849. Moreover, if erroneous, such error was cured by instruction 2, given at appellant's request.

2. There is no merit in appellant's objection to instruction 3. The jury's oath as well as the instructions of the court, taken as a whole, restricted the jury to a finding based upon the law *and the evidence.*

WOOD, J., (after stating the facts). The court erred in granting appellee's prayer for instruction No. 2. It was a question for the jury to determine as to whether or not the appellee was negligent in undertaking to walk from Halley to Trippe station, under the facts which the testimony tended to prove.

It did not follow as a matter of law that if the jury found the facts as recited in the first part of the second instruction, given at appellee's request, that "she had a right to elect to walk to said station, if she could not get other means of conveyance, without assuming the risk incident to taking such walk." It was still a question for the jury to determine as to whether or not appellee was negligent and assumed the risk incident to the journey, even though the facts were as stated in the first part of the instruction, for the undisputed evidence shows that appellee was a woman sixty-nine years of age, and that she was in a debilitated condition at the time, and that it was a hot day. Under those circumstances, which the first part of the instruction ignored, it was a jury ques-

tion as to whether or not she was guilty of contributory negligence in walking from Halley to Trippe station.

While the undisputed evidence shows that the aged mother was induced to take the long walk of four miles out of love and deep solicitude for her daughter who was so critically ill, it was nevertheless for the jury to say whether or not one of her age and enfeebled condition should have undertaken such a journey under the circumstances disclosed by the evidence. The first part of the instruction tells the jury that she had a right, under the circumstances, to walk to said station without assuming the risk incident to taking such walk, and the latter part of the instruction leaves it to the jury to say whether or not, from the evidence, "the circumstances justified her in electing to walk," but the two propositions are wholly inconsistent and irreconcilable, and were well calculated to mislead the jury. In this respect, the instruction was inherently erroneous, and no specific objection was required to present the error of the court's ruling, because it was not a mere defect in verbiage or form, but one of substance, to which a general objection would be sufficient. But even if a specific objection had been necessary, prayer No. 2 of the appellant, which the court granted, was in direct conflict with the objectionable part of prayer No. 2 of the appellee, and was tantamount to a specific objection to such prayer.

To furnish the jury a correct guide, the charge of the court as a whole must be consistent and harmonious. *St. Louis, I. M. & S. Ry. Co.* v. *Steed,* 105 Ark. 205; *St. Louis, I. M. & S. Ry. Co.* v. *Rogers,* 93 Ark. 564, and cases there cited; *A. L. Clark Lumber Co.* v. *St. Coner,* 97 Ark. 358; *St. Louis, I. M. & S. Ry. Co.* v. *Brown,* 100 Ark. 107; *Hodge-Downey Co.* v. *Carson,* 100 Ark. 433; *Dare* v. *Harper,* 101 Ark. 37, 140 S. W. 983.

Appellee's prayer for instruction No. 3 was defective in that it did not require the jury, in case of a favorable verdict for the appellee, to base their finding as to the amount of damages on the evidence in the case. See *St. Louis, I. M. & S. Ry. Co.* v. *Steed, supra.* This instruc-

tion, however, when taken in connection with the other prayers, was not so misleading to the jury as to constitute reversible error.

For the error in giving instruction No. 2, the judgment is reversed and the cause remanded for a new trial.

CASEY *v.* INDEPENDENCE COUNTY.

Opinion delivered July 7, 1913.

1. COUNTY DEPOSITARY—LEGALITY OF "BID."—Under the act of 1907, p. 485, as amended by the act of May 4, 1911, p. 252; where a county court received bids from certain banks desiring to become the county depositary, *held*, that an offer from a bank whereby it agreed to pay a certain per cent. more on the funds than any other bid received, was not a bid. (Page 15.)
2. COUNTY DEPOSITARIES—APPOINTMENT.—Under the act of May 4, 1911, p. 252, amending the act of 1907, p. 485, no discretion is given the county court in the matter of soliciting a depositary for county funds, but the selection must be made by advertisement, and awarded to the highest responsible bidder, who shall comply with the terms of the act. (Page 15.)
3. APPEAL AND ERROR—PARTIES—PARTY AGGRIEVED.—In a proceeding under Acts of 1907, p. 485, as amended by act, 1911, p. 252, to select a county depositary, when a citizen and taxpayer has been permitted to intervene before the depositary was designated, he is entitled to appeal under section 1487 of Kirby's Digest, permitting an appeal to the circuit court from a final order of the county court, upon the filing of an affidavit by the aggrieved party. (Page 16.)

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

STATEMENT BY THE COURT.

In pursuance of an act of the Legislature, approved April 22, 1907, as amended by an act approved May 4, 1911, the county court of Independence County, at its January term, 1913, received bids from such banks as might desire to become the county depositary. Three banking companies filed sealed written proposals. The First National Bank made a bid of 2½ per cent, and the Union Bank & Trust Company made a bid of 4½ per cent

per annum for the funds of the county. The Citizens Bank & Trust Company stated in its written proposal that it proposed to pay one-quarter of one per cent per annum higher than any other bid, provided that its bid should not exceed 4½ per cent per annum.

The bids were opened by the county court at noon on the 6th day of January, 1913, that being the first day of the term. On the 13th day of January, 1913, a subsequent day of the term, Samuel M. Casey, by leave of the court, filed his intervention, in which he stated that he was a citizen and taxpayer of Independence County, and objected to the receiving or acceptance by the county court of the proposed bid of the Citizens Bank & Trust Company on the ground that it was not a legal bid. On the said 13th day of January, 1913, the court made an order, accepting the bid of the Citizens Bank & Trust Company, and designating it as the depositary of the funds of said county and adjudged that it pay interest on same at the rate of 4½ per cent per annum upon the daily balances for a period of two years from date. On the same day the intervention of the said Samuel M. Casey was overruled and dismissed. Thereupon, Casey filed his affidavit and bond for an appeal from the judgment of the county court designating the Citizens Bank & Trust Company as the county depositary. The Union Bank & Trust Company also filed its affidavit for an appeal to the circuit court, in which it stated it was a taxpayer of Independence County, and took its appeal as such, as well as being a bidder.

In the circuit court a motion was made to dismiss the appeal on the ground that neither Casey nor the Union Bank & Trust Company was the party aggrieved, and, therefore, entitled to appeal under section 1487, Kirby's Digest. The circuit court overruled the motion to dismiss the appeal, but affirmed the judgment of the county court designating the Citizens Bank & Trust Company as depositary for Independence County. Casey and the Union Bank & Trust Company have appealed to this court.

Samuel M. Casey and *Samuel Frauenthal,* for appellant.

A citizen and taxpayer may appeal from the finding of the court in this action. 66 Ark. 82; 73 Ark. 523; 101 Ark. 246; 51 Ark. 159; 43 Ark. 42; 54 Ark. 409; 73 Ark. 67; 144 S. W. (Ark.) 214; 79 Ark. 236; 149 S. W. (Ark.) 511.

2. On appeal, the case was before the circuit court for trial *de novo,* and the circuit court was under the duty to try the case upon its merits under the law, without regard to what was done by the county court. 33 Ark. 508; 34 Ark. 240; 79 Ark. 504; 63 Ark. 145.

3. There is in substance no difference in the offer submitted by the Bank of Forrest City, 91 Ark. 211, and that of the Citizens Bank & Trust Company in this case. The proviso in the offer of the latter company "that it will make our bid not to exceed 4½ per cent," does not make it any more a competitive bid than the former, but in reality makes it more unfair, because it was a limitation upon its offer. It was, in fact, no bid at all, but a species of sharp practice which should have received condemnation instead of acceptance. 91 Ark. 311.

4. Under the terms of the amendatory act of 1911, it was the duty of the county court to readvertise for bids. Acts 1907, p. 490; Acts 1911, p. 253. From the passage of this amendment, the county court no longer had authority to make a private agreement with any bank to become the depositary for the county at an agreed rate of interest. The latest act covers the whole subject-matter of letting the depositary, and will take precedence over the former. 41 Ark. 149; 100 Ark. 504; 1 Lewis & Sutherland, Stat. Con., § 247.

McCaleb & Reeder, for appellee.

1. The appeal should have been dismissed. 149 S. W. 511; 77 Ark. 586, and cases cited.

The affidavit for appeal was insufficient in failing to allege that appellant believed himself to be aggrieved. Kirby's Dig., § 1487; 18 Ark. 209; 99 Ark. 56, 59, and cases cited.

2. The order of the county court, in designating the Citizens Bank & Trust Company as depositary was proper. Act No. 208, Acts 1907. Section 8 of this act was not affected by the amendatory act of 1911 (Act No. 258), and was left in full force. Lewis & Sutherland, Stat. Con., § 267; 125 S. W. 1140; 152 S. W. 43; 94 Ark. 311, 314, 315, 316.

3. The bid of the Citizens Bank & Trust Company was competitive.

HART, J., (after stating the facts). The judgment is sought to be upheld on the authority of the *Bank of Eastern Arkansas* v. *The Bank of Forrest City;* 94 Ark. 311, and *Regan* v. *Iron County Court, et al.,* 125 S. W. (Mo.) 1140, but we do not think the principle announced in either of these cases sustain the position taken by the county court. In the case of the *Bank of Eastern Arkansas* v. *The Bank of Forrest City, supra,* appellee, in its proposal, did not name any specified rate of interest, but stated that it agreed to pay five-sixteenths of one per cent more on the funds than the highest and best bid that should be made by any other bidder.

The county court adjudged it to be the best bidder, and made an order designating it as the county depositary. This court held that it was not the best bidder, because it did not name a distinct and certain sum, but upheld the judgment on the ground that the act of 1909, under which the case arose, provided that the court should have a right to reject any and all bids, and that in event the bids offered should be deemed too low, the court might order the funds deposited with one or more banks in the county which it might select, at a rate of interest that might be agreed upon between the court and the banks. So, too, in the Missouri case just cited, the county court was given the power to reject any and all bids, and the court held that, when the whole act was construed together, the county court was given a discretion in selecting a county depositary, and that this discretion should not be controlled on appeal in the absence of a showing of abuse.

In the instant case, the Citizens Bank & Trust Company proposed "to pay to said county of Independence the rate of one-quarter of one per cent per annum higher than any other bid, *provided, however,* that it will make our bid not to exceed 4½ per cent upon the county funds of said county."

It will be noted that this proposal does not name a certain and specified rate of interest. In the case of *Webster et al.* v. *French et al.,* 11 Ill. 254, which was cited in the case of the *Bank of Eastern Arkansas* v. *The Bank of Forrest City, supra,* it was held in effect that a proposal to be recognized as a bid must contain a distinct proposition which can be acted upon taken alone and without reference to anything out of itself. The court, in discussing a proposal similar to the one under consideration, said that, if this form of bidding is allowed, one man, by offering a nominal sum above all others, might appropriate to his own advantage the judgment of others who might have gone to great trouble and expense to form a correct opinion, when the intention was to give each bidder the benefit only of his own judgment. The court further said that the effect of it would be to drive away all prudent and reasonable men, and to destroy all fair competition in the bidding. In the application of this principle to the present case, we hold that the offer of the Citizens Bank & Trust Company was no bid at all. As we have already seen, the act of the Legislature providing for a depositary of county funds was passed April 22, 1907. See Acts of 1907, 485. The act was amended May 4, 1911. Acts of 1911, 252.

The act, as amended, provides in effect that if from any cause, no selection of a depositary shall be made at the time fixed by the terms of the act, that the same may be selected at any subsequent term of the court or adjourned day of it, but the act further provides that upon failure to select a depositary, it shall be the duty of the county judge to again advertise for bids pursuant to the terms of the act. Thus, it will be seen that no discretion is given to the county court in the matter of selecting a

depositary; but the selection must be made as provided by the terms of the act, and this requires the selection to be made by public advertisement to the highest responsible bidder who shall comply with the terms of the act.

It is next contended that the appeal should have been dismissed by the circuit court because the parties appealing did not have the right to appeal from the order. In the first place, the record shows that Casey was allowed to intervene and thus become a party to the proceedings. The record shows that the order designating the Citizens Bank & Trust Company as depositary was made on the 13th day of January, 1913. It also shows that the intervention of Casey, as a citizen and taxpayer, was filed on that day, and on the back of it appears the following endorsement: "Examined and not granted, January 13, 1913." (Signed) "J. W. Scott, Judge."

The order dismissing the intervention of Casey was not entered of record until January 14, 1913, and is as follows:

"On the 13th day of January, 1913, came Sam M. Casey, a taxpayer and citizen of Independence County, and files his intervention in the matter of designating a depositary for Independence County, Arkansas, and objecting to the court awarding and designating the Citizens Bank & Trust Company as the depositary for Independence County under the bid as submitted by it on the 6th day of January, 1913, a former day of this term of court, in which bid the said Citizens Bank & Trust Company offered and bid for said funds one-fourth of one per cent higher than any other bid, provided the same should not exceed 4½ per cent; and the court thereupon overruled and dismissed the said objection and remonstrance of the said Sam M. Casey, and thereupon designated the Citizens Bank & Trust Company as such depositary for Independence County under its said bid as aforesaid, and to this ruling and judgment, and order of the court the said Sam M. Casey duly excepted and objected, and thereupon he filed his affidavit and bond for an appeal from said judgment and order of the county

court designating the Citizens Bank & Trust Company as such depositary, to the circuit court, and said appeal is by the court granted."

The case came up for trial *de novo* in the circuit court, and the circuit court was warranted in holding that Casey was allowed to become a party to the proceedings before the order designating the Citizens Bank & Trust Company as county depositary was made, and he was therefore entitled to an appeal as the party aggrieved within the meaning of section 1487, Kirby's Digest. Moreover, in the case of *Lee County* v. *Robertson,* 66 Ark. 82, the court held:

"Where a citizen and taxpayer of a county appeared in the levying court, and asked to be made party to an order misappropriating county funds, and made objections thereto, and was treated as an adverse party in that court, though not formally made a party, he will be entitled to appeal to the circuit court from the order making such appropriation."

The designation of the bank as county depositary was an order affecting the revenues of the county, and each taxpayer was interested in such order. The order was illegal and was tantamount to an allowance and enforcement of an illegal exaction against every taxpayer of the county. Therefore, under the ruling of *Lee County* v. *Robertson, supra,* Casey was entitled to appeal.

It follows that the judgment will be reversed and the cause remanded for further proceedings according to law.

MISSOURI STATE LIFE INSURANCE COMPANY *v.* HILL.

Opinion delivered July 14, 1913.

1. INSURANCE—CANCELLATION OF POLICY—EVIDENCE.—Evidence *held* sufficient to show an agreement between the parties to cancel a policy of life insurance. (Page 23.)

2. INSURANCE—LAPSE OF POLICY—ACTION OF PARTIES.—Where the insurer and the insured, by their acts indicated that they considered a policy of insurance as having lapsed, the court will follow

the construction and interpretation of the contract adopted by the parties themselves, as shown by their acts and conduct. (Page 23.)

3. INSURANCE—KNOWLEDGE OF CANCELLATION—ESTOPPEL.—The beneficiary of a policy of life insurance, who has knowledge of an agreement between the insurer and insured amounting to its cancellation, is estopped from asserting any right under the policy. (Page 23.)

Appeal from Mississippi Circuit Court, Osceola District; *W. J. Driver,* Judge; reversed.

STATEMENT BY THE COURT.

This is an action by Dua Frances Hill against the Missouri State Life Insurance Company to recover three thousand dollars upon a policy of life insurance issued November 15, 1905, on the life of Charles Frederick Hill, the husband of the plaintiff. The plaintiff was designated as beneficiary in the policy. On August 28, 1911, Hill borrowed on his policy $354.00, its full loan value. On November 1, 1911, Hill wrote the company asking an extension of sixty days on his premium maturing November 1, 1911. The insurance company granted the extension and Hill executed a note for the premium, due January 15, 1912, without grace, and promised to pay to the insurance company at its home office in St. Louis, Missouri, the amount of the premium note. On December 15, 1911, the insurance company wrote Hill reminding him of the fact that his note would mature January 15, 1912; that it was payable at the home office of the company in St. Louis, Missouri, and that in order to keep his insurance policy in force payment must be received "on or before due date." On January 13, 1912, Hill placed a letter in the postoffice at Joiner, Arkansas, properly addressed to the defendant at St. Louis, Missouri, and stamped, containing a check for the amount of his premium note. The testimony on the part of the plaintiff tends to show that in due course of mail this letter would have reached St. Louis on the evening of the 13th day of January, 1912, and should have been received by the plaintiff in due course of mail on that day, or, at latest, on the day following. The testimony

on the part of the defendant tends to show that it did not receive the letter until January 16, 1912, and that, according to its custom, the date of the receipt of the letter was stamped on it immediately after it was opened. On the same day, January 16, 1912, the defendant wrote to Hill the following letter:

"As our renewal premium notes do not provide for any days of grace, in accordance with notice sent you, and as your remittance tendered in payment thereof did not reach this office until today, one day after due date, the above policy has lapsed, and before we can consider the acceptance of the settlement tendered, it will be necessary that you fill out, date and sign, in the presesnce of witnesses, and attach blank application for reinstatement and return the same to this office for the consideration of our medical department."

When Hill received this letter he handed it to his wife and said to her, "This policy has lapsed." She took the letter and read it. Having received no answer to this letter, the defendant on January 26 again wrote Hill, calling his attention to the fact that the policy had lapsed and that they could not receive the check as payment of the premium until they received his application for reinstatement. They inclosed him another blank for reinstatement and urged him to fill it out and send it in by return mail. On February 5, 1912, they again wrote Hill as follows:

"Up to the present time we have not received a reply to our communication of January 26, with reference to application for reinstatement under the above-numbered policy.

"Now, Mr. Hill, under no consideration can we consider the acceptance of the remittance tendered in payment of your past due note without reinstatement. In this connection we wish to state that an application for reinstatement is nothing to be feared if you are in as good health now as you were when taking out the policy and have had no serious sickness, accident, etc., since

then. In that event, we see no reason for an unfavorable action.

"We regret very much to have to cause you this additional trouble, but the provisions of your note and the strict insurance laws of this State must be complied with; otherwise, we would soon get ourselves into trouble."

Having received no answers to any of these letters, the defendant on February 17, 1912, wrote Hill substantially as it did in the letter last copied above and urged him to advise it by return mail what he intended to do in the matter. On March 22, 1912, not having received any answers to any of the letters, the defendant wrote Hill as follows:

"Not having received a reply to our various communications addressed to you, we herewith return your check tendered in payment of renewal premium note for $112.80, with interest, due January 15, 1912, under the above-numbered policy."

The insurance company heard nothing further in regard to the matter until after Hill's death, which occurred September 1, 1912. After this correspondence Hill applied and secured a policy of insurance on his life in the New York Life Insurance Company and told his wife that he intended to be reinstated with the Missouri State Life Insurance Company in the fall of 1912 if he was able.

The testimony on the part of the plaintiff tended to show that Hill was accustomed to paying his premiums on the policy in question by sending a check for the amount through the mail to the insurance company. The officers of the insurance company admitted that if the check had been received on or before the 15th day of January, 1912, the defendant would have accepted it in payment of the premium.

The jury returned a verdict for the plaintiff for $2,588.90, being the amount of the policy sued on, less the loan obtained by Hill from the insurance company on his policy. From the judgment rendered, the defendant has duly prosecuted an appeal to this court.

J. T. Coston, for appellant.

1. When Hill deposited the letter containing the check in the postoffice, he thereby made the United States mail his agent for the delivery of the letter and check to the appellant, and the failure of his agent to deliver the check on or before the 15th of January, 1912, worked a forfeiture of the policy *eo instanti,* by virtue of the terms of the policy and the premium note. 17 Ark. 431, 433; 30 Cyc. 1269; 3 Cooley, § 2368; 93 U. S. 31.

2. Hill acquiesced in the forfeiture, he recognized the validity of the forfeiture, ratified and acquiesced in it and abandoned all claim under the policy. 43 N. W. 197; 106 S. W. 681, 682; 63 Fed. 772; 74 Pac. 690; 178 U. S. 345; *Id.* 347; *Id.* 327; *Id.* 351; 3 Cooley, 2833.

Appellee, pro se.

1. Forfeiture of a life insurance policy is not favored by the courts, and will not be declared unless there is some substantial ground upon which to base the same. 183 U. S. 25; 127 Fed. 651; 96 U. S. 234; *Id.* 572; 104 U. S. 252; 41 Fed. 506; 80 Pac. 213; 62 Atl. 681.

2. Silence is not a waiver. 148 S. W. 626; *Id.* 631; 25 Cyc. 848; 101 Mo. App. 93; 25 Cyc. 784; 126 Fed. 83.

The mere fact of taking out insurance in another company does not affect his rights or interest under the contract involved here. 25 Cyc. 785; 72 S. W. 436; 182 Fed. 850.

3. When Mr. Hill deposited his letter with his personal check inclosed, duly stamped and addressed to appellant, in the United States mail in time for the check to have reached appellant on or before January 15, 1912, this was a payment of the premium note, and appellant could not declare a forfeiture. 159 Fed. 833; 77 Hun. 556, 28 N. Y. Supp. 931: 156 Fed. 294; 74 N. W. 394; 35 S. E. 616; 25 N. E. 299; 71 N. C. 480; 32 S. E. 728.

HART, J., (after stating the facts). It is contended by counsel for the defendant insurance company that when Hill deposited the letter containing the check for his premium in the postoffice he thereby made the United States mail his agent for the delivery of the letter and

check to the defendant, and the failure of his agent to deliver the check on or before the 15th day of January, 1912, by virtue of the terms of the policy and the premium note, worked a forfeiture of the policy. On the other hand, it is contended by the plaintiff that the United States mail had been employed by the insured for transmitting his premiums to the company on the policy sued on, and that the insured "having deposited in the postoffice, properly addressed and stamped, a letter containing a check for the premium in apt time to have reached the insurance company before the premium note was due no forfeiture of the policy could be declared. The conclusion we have reached renders it unnecessary to decide this contention. If it be assumed that the insurance company had no legal rights under the terms of the insurance policy and of the premium note under the circumstances to forfeit the policy the fact remains that it claimed the right to do so and exercised that right.

"The rule as to the inability of the insurer to cancel the policy on its own initiative does not prevent an abandonment of the contract by agreement of the parties. And in the absence of fraud or coercion, such abandonment, if definite, will be effective, though at the time the company is erroneously claiming the right to forfeit or avoid the policy on account of some alleged violation of its conditions." Cooley's Briefs on the Law of Insurance, § 2883.

The defendant insurance company several times wrote to Hill, the insured, and called his attention to the fact that, under the provisions of his insurance policy and premium note and the strict insurance laws of the State of Missouri, it was necessary to file an application for reinstatement and that, unless he did so, his policy would be forfeited. The insurance company called his attention to the fact that nothing was to be feared in making his application for reinstatement provided he was in as good health as when he took out the policy and had had no serious sickness, accident, etc., since that time. Upon

his repeated refusal or neglect to answer its letters, the insurance company on March 22, 1912, returned to the insured his check tendered in payment of his renewal premium note, and the insured received and accepted the check returned to him. The record shows that he afterwards procured a policy in another company and this is conclusive proof of the fact that he was not sick at the time the company declared his policy forfeited and is also proof of the fact that, by signing up the blank application for reinstatement, he might have kept his policy in force. He made no attempt to obtain a judicial interpretation of his contract of his insurance. He did not return to the insurance company his check for the premium note and insist that his policy of insurance was still in force. On the contrary, he kept the check and made no reply to the insurance company. Under the circumstances this amounted to a voluntary agreement between himself and the insurance company to cancel his policy and the effect was to terminate the contractual relation between himself and the insurance company. The case is not one where the company is seeking after the death of the insured to declare the insurance forfeited, but the question is whether or not, under all the circumstances adduced in evidence, the contract of insurance was terminated by the parties themselves during the insured's lifetime, and we hold that it was. Under the undisputed facts and circumstances adduced in evidence no other conclusion can be drawn than that both parties considered the contract of insurance at an end, and, in accordance with the general rule as to the construction of contracts in determining the intention of the parties, we will follow the construction and interpretation of the contract adopted by the parties themselves as shown by the acts and conduct.

The plaintiff, who was the wife of the insured, and the beneficiary named in the policy, had knowledge of all the facts which we have above set forth and which we do not deem it necessary to repeat here. Therefore, we hold that under the principles announced in the

case of *Franklin Life Insurance Company* v. *Morrell,* 84 Ark. 511, the plaintiff was estopped to assert that the policy had not been cancelled and that she can not assert any rights under the policy in this suit.

The evidence in the case is undisputed and the case appears to have been fully developed. Therefore, the judgment will be reversed and the cause of action dismissed.

JONES v. OLDHAM.

Opinion delivered July 7, 1913.

1. STATUTES—REPEAL BY IMPLICATION.—A general act does not repeal, by implication, a prior special act on the same subject when the acts are not repugnant nor inconsistent. (Page 28.)
2. ROAD IMPROVEMENT DISTRICTS—REPEAL OF STATUTES.—General Act 302, p. 1179 of Acts, 1913, which creates the Department of State Lands, Highways and Improvements, does not repeal Special Act 212, p. 864, of the Acts of 1913, creating certain road improvement districts in Lonoke and Prairie counties. (Page 28.)

Appeal from Lonoke Chancery Court; *John E. Martineau,* Chancellor; affirmed.

STATEMENT BY THE COURT.

The question presented by this appeal is whether a special act, No. 212, of the 1913 session of the Legislature entitled, "An Act Creating Certain Road Improvement Districts for the Purpose of Building, Constructing, Maintaining and Repairing the Public Roads of Lonoke and Prairie Counties," is repealed by Act No. 302, of the said session of the Legislature, entitled, "An Act Creating the Department of State Lands, Highways and Improvements."

Appellant, in his petition, sets out that he is an owner of a large tract of land within the boundaries of said District No. 2, in Lonoke County; that the commissioners designated in the special act to carry on the said road improvement have organized themselves into a body and formulated plans for making the road improvements, at a cost of $120,000, and made contracts look-

ing to the carrying out of the plans and completing the project; that the benefits accruing to the tract of land by reason of the improvement have been assessed and extended against the lands and the commissioners are about to contract for the sale of bonds and the awarding of the contracts. He alleged further that the act under which they were proceeding was a special act and that Act 302 is a general act and that the road improvement district was not created in accordance with its provisions and prayed for an injunction.

A demurrer was interposed to the complaint and the court held that the special act was not repealed by the general law and dismissed the complaint for want of equity, and from the judgment this appeal is prosecuted.

James B. Reed, for appellant.

The special act was repealed by the later general act covering the same subject-matter. The special act conflicts with the general act in that it names the commissioners of the district, and fixes the boundaries thereof, whereas the later act leaves the boundaries to districts to the State Highway Commission and the county courts, and provides for the appointment of an engineer to take charge of and supervise the work. 88 Ark. 324; 82 Ark. 306; 97 Ark. 546; 134 U. S. 206; 78 U. S. 153; 100 Ark. 504; 92 Ark. 600.

Thos. C. Trimble, Jr., and *Chas. A. Walls,* and *Rose, Hemingway, Cantrell & Loughborough,* for appellee.

It was not the intention of the Legislature to interfere in any manner with existing laws relating to the creation of highway, drainage or other improvements.

A general law does not operate to repeal a special law upon the same subject passed previously at the same session of the Legislature. 4 Ark. 410; 78 Ill. 548. An act repealing all laws and parts of laws in conflict with it does not repeal those not in conflict. 73 Ark. 533.

A general statute does not repeal a prior special

statute where there is no express repeal and no invincible repugnancy between the two. 93 Ark. 621.

In construing a statute, it is the duty of the courts to give it, if possible, such construction as will render it effective. 63 Ark. 576. And where an act is passed within a few days after the passage of another act on the same subject, it will not be presumed that the Legislature intended to repeal the act first passed, unless there is an irreconcilable conflict between the two. 84 S. W. 641. See, also, 84 S. W. 408; 116 Ill. App. 481; 82 N. W. 549; 106 Wis. 584.

Repeals by implication are not favored. The repugnancy or inconsistency between two acts must be wholly irreconcilable in order to work a repeal of the former act by the later one. 50 Ark. 132; 72 Ark. 119; 120 Cal. 384; 82 Ill. App. 227; 59 N. E. 1124. The presumption is always against the intention to repeal where express terms are not used. 100 Va. 687; 109 U. S. 1035.

Where a special act applies in a particular case, it excludes the operation of a general act upon the same subject. 84 Ark. 329; 68 Ark. 130.

KIRBY, J., (after stating the facts). The special act names the commissioners of Road District No. 2, prescribes all their duties for the carrying out of the contemplated project and improvement, and fixes the boundaries of the district. It is complete within itself, furnishing all the authority and procedure necessary for the completion of the contemplated improvement. The general law, creating the Department of State Lands, Highways and Improvements, provides that road improvement districts "may be formed under it" and the manner of their organization, but it also makes provisions for the construction of highways, drainage and levee improvement districts, bridges, ditches and other improvements of like kind.

Said department is authorized to collect statistics and data on the subject of roads, drainage and other improvements and to give its service free to all State and county officers having need therefor, and it is author-

ized by section 15 of the act to investigate any highway or other public improvement and make a report thereon. It can require reports and information from the various county judges, commissioners of road improvement districts and other officers at its discretion and is required to prepare a uniform system of blanks upon which all officers employed on public improvements shall make regular reports to the department.

Section 20 provides: "The department shall aid and advise in the formation and management of roads and other improvement districts throughout this State, and it may detail such officers and employees for the promotion and organization of such districts, as it may see fit, as well as for the introduction of improved methods or systems of any kind in road building, and public improvements."

It is required by section 19 to furnish uniform plans and specifications for highway improvements when requested by the proper authorities and if the improvement is of sufficient importance, required to send a qualified expert to plan or supervise the same.

Section 39 prescribes how applications shall be made for improvements "under said act" and how the district may proceed under its terms where a charter has been granted "under same."

The State highway engineer may be detailed by the commission to assist any district when called upon for his services.

In section 59, the department is required to direct and supervise all improvements in any highway charter in the district, "created hereunder" and in section 77, whenever any road or highway is being supervised or improved under this act," etc.

A proviso in section 33 states: "Provided, the supervision and approval of the State Highway Commission shall be proper only in case of districts and organizations created under this act."

Section 86 provides that all laws in conflict herewith are hereby repealed.

Repeals by implication are not favored and the general rule is that a general act does not repeal a prior special act on the same subject where the acts are not repugnant nor inconsistent. *Chamberlain* v. *State,* 50 Ark. 132; *State* v. *Grayson,* 72 Ark. 119; *State* v. *S. W. Land & Timber Co.,* 93 Ark. 621.

There was by this act no express repeal of the special act providing for the creation of road improvement districts in Lonoke County, and of course the general clause repealing all laws in conflict does not operate to repeal any law not in conflict. *Pratt* v. *Dudley,* 73 Ark. 57; *Struther* v. *People,* 116 Ill. App. 481; *State* v. *Commissioner of Public Lands,* 106 Wis. 584, 82 N. W. 549.

There is no irreconcilable inconsistency or repugnancy between the two acts and the improvement can be carried on under the provisions of the special act without the necessity for applying any of the provisions of the said general law. The Legislature could easily have expressly repealed the special act if there had been any intention upon its part to do so, or the same result would have followed had the provisions of the general law been such as to manifest a clear intention that it only was applicable to all improvements of the kind included in it thereafter to be made. *Chicago, R. I. & P. Ry. Co.* v. *McIlroy,* 92 Ark. 601; *King* v. *McDowell,* 107 Ark. 381; 155 S. W. 501; *Trehy* v. *Marye,* 100 Va. 40. No such clear intention, however, appears from its provisions, but, on the contrary, from the proviso in section 33, it appears expressly that the supervision and approval of the State Highway Commission is proper only in cases of districts and organizations created under the act manifesting an intention to limit its application to districts and organizations created under its terms. We hold, therefore, that there was no repeal of the special act by the general law.

There is no intention of passing upon the scope and effect of said general law further than to hold that it does not repeal the said special act providing for the making of improvements in Lonoke and Prairie counties.

The court committed no error in sustaining the de-

murrer to the complaint and dismissing it for want of equity. The decree is affirmed.

MIDLAND VALLEY RAILROAD COMPANY *v.* SCOVILLE.

Opinion delivered July 7, 1913.

1. DAMAGES—PERSONAL INJURIES—PERMANENT INJURY—INSTRUCTION.—In an action for damages against a railroad company for personal injuries, where there is no testimony tending to show that plaintiff was permanently injured, it is error to include the question of permanent injuries, in an instruction on the matter of damages. (Page 31.)
2. APPEAL AND ERROR—PREJUDICIAL ERROR—REMITTITUR.—Where the trial court committed error in the giving of an instruction, and the record does not show whether the error was prejudicial or not, and where the instruction may have influenced the jury in fixing the amount of damages, the court will not order a remittitur, but will remand the cause for a new trial. (Page 31.)

Appeal from Sebastian Circuit Court, Fort Smith District; *Daniel Hon,* Judge; reversed.

Edgar A. de Meules and *Sol H. Kauffman,* of Muskogee, Oklohoma, for appellant.

1. The testimony entirely fails to prove the existence of permanent injuries, and it was error to instruct the jury that appellee could recover for such injuries. 187 Pa. St. 337.

Where there is no proof of permanent injury, the charge on the measure of damages should not submit that question. 107 S. W. 453; 150 Mich. 235; 85 S. W. 671; 120 Ga. 465; 98 S. W. 303; 119 La. 344; 94 S. W. (Mo.), 799; 64 N. Y. 817; 63 N. Y. S. 1067; 90 Ky. 369; 14 S. W. 357; 29 Am. St. Rep. 378; *St. Louis, I. M. & S. Ry. Co.* v. *Bird,* 153 S. W. 107; 82 Ark. 499; 102 S. W. 696; 90 Ark. 278; 19 S. W. 659; 155 S. W. (Ark.), 510; 53 Ark. 7; 13 S. W. 138; 78 Ark. 279; 29 Okla. 538; 120 Pac. 253.

2. The verdict was excessive. 124 N. Y. S. 411; 119 N. Y. S. 220; 120 N. Y. S. 1088.

Kimpel & Daily, for appellee.

1. There was sufficient evidence to show that the injury was permanent, and to warrant the court in giving instruction complained of. 67 Ark. 531; 145 S. W. 391.

If the injury caused any change in the plaintiff's condition which would be lasting, it is a permanent injury. 2 N. J. Eq. 154-162.

2. The verdict was not excessive. 90 Ark. 108; *Id.* 64; 89 Ark. 9; 88 Ark. 12; 87 Ark. 109; 82 Ark. 11; 101 Ark. 254; 98 Ark. 425.

KIRBY, J. The railroad brings this appeal from a judgment awarding $700 damages for personal injuries to appellee, resulting from turning over his wagon at a crossing. It complains of the excessiveness of the verdict and the error of the trial court in submitting the question of the permanency of the injury to the jury without any testimony upon which to base it in instruction No. 2, as follows:

"If the plaintiff, James Scoville, recovers, the measure of his damages is a sum which will fairly compensate him for the injury received, if any, and the loss defendant has occasioned him, if any. Several ingredients go to make up such damages. He is entitled to damages for bodily pain and mental anguish, if any; also, from the permanent injury arising from the hurts to plaintiff, if any; also for the loss of time from his business."

The complaint alleges a permanent injury, but the most the testimony shows is that the appellee's side, back and hip were bruised; that he was kept indoors on account of it for three days and not permitted by his physician to return to his usual work until after ten days. He said that his side hurt worse than his hip and that his arm was dressed by the physician four or five times; that his side hurt him when he lifted anything up to the time of the trial, which occurred five months after the injury; that he spit up blood four or five days after it occurred. That he was away from his business for

ten days and was making at the time the injury occurred $1.75 per day. There was no testimony relative to the payment of doctor's bills, the railroad company's physician having treated the patient, nor any testimony tending to show that the injury was permanent, unless it be appellee's statement at the time of the trial, five months after the injury that "my side hurts me every time I lift anything."

The appellee resumed his usual work at the end of ten days, and although he stated at the time of trial that lifting still caused his side to hurt, there was no indication of the extent of the pain nor any testimony relating to its probable continuance.

In *St. Louis, I. M. & S. Ry. Co.* v. *Bird,* 106 Ark. 177, 153 S. W. 107, the court said:

"Unless there is testimony, tending to show with reasonable certainty that the injury is permanent, the court should not permit the jury to assess any damages for permanent injury. * * * But to fulfill the requirements of the law, there must be affirmative testimony to the effect that the injury was permanent before the jury would be authorized to find that such was the fact and the court should not allow the permanency of the injury to be considered as an element of damage where the witnesses themselves are uncertain as to whether there would be any permanent injury and where the nature of the injury *per se* does not show that the injury was permanent."

There was no testimony tending to show that appel-cluding the question in the instruction which was specifically objected to.

The record of the case furnishes no reasonable indication of the prejudicial effect of the error with the jury in the amount of the damages assessed. It may be that it did not operate to increase the damage awarded, aplee was permanently injured and the court erred in inpreciably, and, upon the other hand, it might have largely influenced them in fixing the amount, and, such being true, we do not think the case one where the court should

fix the amount of a remittitur to be entered that would remove the prejudicial effect of the erroneous instruction. It is a question that only the jury can properly determine.

For the said error the judgment is reversed and the cause remanded for a new trial.

GLASS v. STATE.

Opinion delivered July 7, 1913.

1. BURGLARY—EVIDENCE—SUFFICIENCY.—Evidence *held* sufficient to warrant a conviction for burglary. (Page 33.)
2. BURGLARY—UNEXPLAINED POSSESSION OF STOLEN PROPERTY.—The unexplained possession of property recently stolen, will warrant a conviction of burglary, as well as of larceny, where the larceny is proved to have occurred at the time of the breaking and entry of the house. (Page 34.)
3. TRIAL—ARGUMENT OF COUNSEL.—Where counsel uses improper language in his argument to the jury, no reversible error is committed, where opposing counsel objects to the improper argument, and his objection is sustained by the court. (Page 34.)

Appeal from Sebastian Circuit Court, Fort Smith District; *Daniel Hon,* Judge; affirmed.

Jo Johnson, for appellant.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee.

SMITH, J. Appellant, together with one Peter Glass, was indicted for burglary alleged to have been committed by entering the house of G. C. Jackson in the night time, with the burglarious intent of stealing $300 in money being in said house. There was a severance and appellant was convicted and sentenced to three years' imprisonment in the penitentiary, and this appeal is prosecuted from that judgment. The appellant demurred to the indictment, and assigns as error, in the motion for a new trial, the court's action in overruling the demurrer, but he points out no defect in it and we have observed none.

The point upon which appellant chiefly relies is that the evidence is insufficient to support the verdict, and it must be said that it is somewhat scant, but we think it legally sufficient to support the verdict. The evidence on the part of the State was to the effect that G. C. Jackson, the owner of the building alleged to have been broken into, was engaged in the grocery business in Fort Smith, and had two rooms connected with his store in which he lived with his wife, and his sister-in-law lived with them and had been keeping company with the appellant, who was entirely familiar with the premises.

Jackson testified that on January 15 he lost between $235 and $240 in silver and bills, a small diamond ring and a gold watch, all of which were in a washstand drawer in the living room, and that he saw the money there a few minutes before he left the house at 7:40 p. m. to get a shave, and as he went out he saw the appellant standing across the street, talking with a companion, and he testified that no one could have gotten to the money without coming through the store or entering the back door, which he had locked before leaving, but which door was open when he returned. He also testified that appellant had been without employment for eight months prior to the loss of his money, although the proof shows he had done a few days' work in the factory of a folding bed company. Jackson further testified that since the loss of his money appellant had apparently had plenty of money and had been riding around to neighboring towns on the cars.

Mrs. Jackson testified that appellant's companion who had been standing out on the street with him came in just after her husband left and bought a nickel's worth of tobacco, and she was impressed that something was wrong and went into the back room and found the back door slightly open and the money gone. It was shown by a police officer, a jeweler who had sold Jackson the ring, and by appellant's sister that appellant had given the missing ring to this sister, who lived in Sallisaw, Oklahoma. Appellant undertook to prove an alibi, and offered evidence in support of it, which, while not alto-

gether consistent, would have been sufficient for that purpose had it been credited by the jury. But it evidently was not believed by the jury, and their verdict concludes that question. If appellant took the money and the ring he must necessarily have committed the offense of burglary in doing so, and the unexplained possession of property recently stolen will warrant a conviction of burglary as well as of larceny where the larceny is proved to have occurred at the time of the breaking and entry of the house. *Gunter* v. *State,* 79 Ark. 432.

Appellant excepted to various statements made by the prosecuting attorney in his argument to the jury, none of which would call for the reversal of the case, except the statement that "if defendant was not guilty, the court would have taken this case from the jury when the defendant made the motion." There is a supplemental certificate to the bill of exceptions made by the trial judge in which he certifies that the above quotation was erroneously copied into the bill of exceptions, and that the language quoted should be stricken out as it was not used by the prosecuting attorney. However that may be, the record which shows the use of the language quoted also shows that appellant objected to it as an improper argument and that the court sustained that objection. The language above quoted is very similar to that employed by the prosecuting attorney in the case of *Thomas* v. *State,* reported in 107 Ark. 469, 155 S. W. 1165, and for the use of which that case was reversed. But there the court did not sustain the objection while here the objection was sustained. In the Thomas case, *supra,* it was said that the language used would ordinarily be understood by jurors of average intelligence to mean an expression of opinion as to the weight of the evidence, and that, when understood in that light, the failure of the court to disapprove the statement would be accepted as an approval of a statement of the court's view that the evidence was of sufficient weight to sustain the verdict and would call for the reversal of the case. In such cases the court should leave no uncertainty in the

minds of the jury, and such action should be taken as would remove all doubt about the opinion entertained by the court, and, if this is not done, a reversal only can cure the error. But such action was taken here, if the language was in fact used.

Other questions are presented in the brief which we consider unnecessary to discuss, and the judgment of the court below is affirmed.

SMITH v. SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY.

Opinion delivered June 16, 1913.

1. EVIDENCE—CONFLICT—VERDICT.—Where there are conflicts in the testimony of witnesses the questions of fact are settled by the verdict of the jury. (Page 47.)
2. TELEPHONE COMPANIES—DUTY TO GIVE SERVICE.—Under Kirby's Digest, § 7948, providing that "every telephone company doing business in this State and engaged in a general telephone business shall supply all applicants for telephone connection and facilities, without discrimination or partiality, provided such applicants comply with the reasonable regulations of the company," etc., a telephone company is only required to furnish service to applicants who comply with its reasonable regulations. (Page 47.)
3. TELEPHONE COMPANIES—REASONABLE RULES—QUESTION FOR COURT.—Whether the rules of a telephone company, made under Kirby's Digest, § 7948, requiring applicants for service to comply with its rules, are reasonable, is a question for the court. (Page 49.)
4. TELEPHONE COMPANIES—RULES AND REGULATIONS.—Where a city ordinance authorizes a telephone company to make a certain charge for installing a telephone, when a line has to be constructed over a certain distance, the rule may be applied to all applicants for service, whether within the city limits or not. (Page 50.)
5. TELEPHONE COMPANIES—RULES AND REGULATIONS—APPLICATION FOR SERVICE.—Under section 7948 of Kirby's Digest, a telephone company may make reasonable rules and regulations governing applications for service, and when such rules require a payment in advance by the applicant, and he has knowledge thereof, nothing but a tender will be a sufficient observance of the rule. (Page 50.)

Appeal from Pulaski Circuit Court, Second Division; *Guy Fulk,* Judge; affirmed.

STATEMENT BY THE COURT.

Appellant brought this suit against the telephone company, claiming the penalty denounced by law for discrimination against him in failing to supply him with telephone service at his residence at 1304 Olive street, in Argenta, Arkansas.

The complaint alleges that he was a resident within the corporate limits of Argenta, within the boundaries of the territory where the defendant operates a telephone system in said city. That it maintains a telephone system and lines for the use of the public in said city; that he applied to the defendant to furnish him the usual telephone service, signifying a willingness to comply with all the reasonable requirements and all lawful demands the defendant might make, but that the defendant refused to comply with his request and wilfully discriminated against him, its action being contrary to and at variance with a practical compliance of the request of the plaintiff, "and discriminatory in that other subscribers in said vicinity were receiving and are receiving the services of the defendant as above requested by the plaintiff, under conditions entailing no greater expense or hardship upon the defendant than would have been entailed by compliance with the plaintiff's demand and request."

The answer denies that the plaintiff demanded on December 8, 1911, that he be furnished with telephone service at his residence address and that he offered to comply with the reasonable rules and regulations of the telephone company or pay its reasonable charges as the condition of compliance with his request and that it discriminated against him. It denied that he resided within the territory where it operated and that it was supplying other customers within the vicinity of his residence with telephone service under conditions entailing no greater expense or hardship than would have been incurred on compliance with his demands. Alleged

that it was under the statute and the common law permitted to establish reasonable rules and regulations for the government of its business in supplying the public with telephone service. That in the proper exercise of its discretion it had prescribed the rules requiring persons desiring telephone service and connection for local exchange service whose residence was more than two blocks distant from the defendant's pole line to deposit with it a sum of money sufficient to reimburse it for the extra expense of building to such residence or place of business. That it had uniformly enforced said rules and regulations against all persons similarly situated with the plaintiff; that it did not discriminate against him in enforcing said rules and regulations which were adopted in good faith and under the belief that it had the right to make them both under the statute and under the common law and its franchise with the city of Little Rock and "that it offered to install a telephone and furnish plaintiff telephone service at said number on Olive Street, Argenta, provided he would comply with its rule and regulation, by depositing with it sufficient money to reimburse it for the extra expense of building to his residence; that he declined to do this, and that, for this reason, it refused to install said telephone at said place; that said rule and regulation was reasonable and not arbitrary; that it protects the defendant from waste, and benefits the public."

It alleged further that it uniformly enforced the rule for the purpose of conserving its resources and property and to enable it to economically and profitably serve the public. That it was adopted and enforced in good faith in the belief that it was reasonable and just. The city of Little Rock regarded it so. Alleged further that it was operating a telephone exchange in the city of Little Rock under a franchise from said city. That the city of Argenta was located across the river therefrom and that it had no exchange in said city and no contract or franchise with it, binding it to operate one; that it has never held itself out as engaged in furnishing telephone service to all of the citizens or inhabitants of Argenta; that as

to Argenta and its inhabitants, it has only undertaken to serve certain districts therein; that it adopted this course from necessity; that the city of Argenta covers a large area of territory and embraces within its corporate limits many sparsely settled communities and a great many communities inhabited by people who can not afford and do not wish telephone service; that plaintiff resides in one of such communities, his residence facing a large unplatted field, and being surrounded on the other side by the homes of negroes and people who are unable to afford and do not wish telephone service.

From the testimony it appears that Clement A. Smith, appellant, is a physician, and living at 113 North Olive Street, Argenta, in December, 1911, but moved therefrom on the 15th of said month to 1304 Olive Street, which was three blocks from Main Street, and which extends out to Twenty-seventh Street, beyond the plaintiff. He applied for his phone to be changed to his new address just before moving, went to the office of the telephone company in Little Rock, asked for the manager and talked with the lady, who said she was the assistant manager; told her he desired the phone moved from 113 North Olive Street to 1304 Olive Street, and she told him to come back in two or three days and she would let him know about it. When he returned, Mr. Stout, the manager, who was in the office, being told he was the man who desired the phone removed, said he would send a man out to investigate it; and later told him, "We have sent a man over to investigate and we find that you are not living near the line and you can not get a phone;" he said, "the only way you can get a phone is you will have to get poles and put wires up yourself, and if you do that we will connect with you;" told the plaintiff he could either do this or move on to the line of the company, to which he replied he was a physician and needed the phone and was willing to do anything reasonable to get it, but could not do that. He was then told he would have to build the line himself; this was upon the second conversation, following that with the lady and the first conversation had with the manager. He said further

that the demand was made on December 8 and the phone never had been put in and the suit was brought on the 11th or the 12th of January following.

Not being pleased with the manager's statement, he wrote the company a letter, asking the company to give him service. Said letter is as follows:

"Southwestern Telegraph & Telephone Company, Little Rock, Ark.:

Dear Sirs: In regard to moving my phone, 2586, 113 Olive Street, Argenta, Ark., you said I would have to build my line. I was talking to a man in the country; he said he could furnish the poles at 12½ cents per foot. If I buy the poles, will I have to have them put in, or will you pay for any kind of work being done? Please let me know soon. Yours truly,

(Signed) C. A. Smith."

To which he received the following reply, on December 20:

"Little Rock, Ark., December 20, 1911.

Dr. C. A. Smith, 102 South Magnolia Street, Argenta, Ark.:

Dear Sir: Replying to your letter of the 18th inst., will say that we would connect with a line which you would build from your residence to our construction. This is, of course, if you build and furnish entire line. We do not, under any circumstances, build a portion of the line. We will install telephone and make necessary connection, if you will do as per above. Before you take any steps toward building this line, it would be best that you take the matter up with authorities in Argenta, as to the right to place poles on the streets of that city; that is, of course, if the streets on which you are to place poles are within boundary of the city limits.

Yours truly,

(Signed) C. Stout,

District Manager."

He testified that his residence was within the city of Argenta, the limits of which extended thirteen or fourteen blocks beyond him. That the telephone company served the residents of Argenta as such, placing

phones in various stores and houses; that the nearest phone to his residence was two blocks distant, at the St. Louis Cotton Compress No. 2. Another was three blocks distant on Thirteenth and Main. Another at the public school, three blocks from the plaintiff. That there were five or six phones within a radius of two or three blocks of his residence, all furnished by the defendant. He then went into a particular description of the location as to the different places at which phones were installed in relation to his residence.

In January he again wrote the defendant as follows:

"Southwestern Telegraph & Telephone Company, Little Rock, Ark.:

Sirs: I wrote you, but have never heard from you. I want telephone connection at 1304 Olive Street, Argenta, Ark. I have been living at 113 Olive Street, Argenta, Ark. I would like to have my phone moved to 1304 Olive. I am willing to pay proper toll of same usually charged. Trusting to hear from you by return mail,

Yours truly,

(Signed) C. A. Smith, M. D."

He said he had a talk with Mitchell, one of the defendant's employees and the contracting agent of the defendant after his application for a phone was put in, that he had also written him a letter, to which he had no reply.

The stenographer in the manager's office stated that on about December 15 or 16, the plaintiff came to the office and made an order to remove his phone from 113 North Olive to 1304 Olive Street. That she made an "outside move" order December 14, and cancelled it December 19, 1911; had a conversation with plaintiff on December 13. She told him she didn't think they had any facilities in that vicinity, but she would make the removal order and make the investigation. That the second time he came Mr. Stout was in, and he had about the same conversation as over the telephone. She suggested that he take his phone out and that would reserve

his number for him and that a "take out" order was entered on the 19th of December for 2586, "moved where we had no facilities and no other phones near this address." His number was reserved for him a considerable time and the company sent and canvassed his section of the city, which she promised to do between the 16th and 19th. That the company did this in all cases where there were no facilities; that they would have connected with his line if he had built one, whether they could have obtained other subscribers or not. The company would have built the line and connected with him if it could have gotten enough subscribers and told him so, or that it could build the line and connect with him, if he would pay six months' rent in advance and one-half the cost of construction beyond two blocks, and he objected to this.

Mitchell, the contracting agent, stated he went to the residence on January 4, and found it was three or four blocks off the line and tried to find what business could be procured in the vicinity, and, fearing there were no good prospects out there, mostly laborers and colored people living in the vicinity, did not succeed in getting any subscribers. Identified the report written, "No other prospects near this address;" also, "Line order No. 1577 will require increased plant facilities as follows: Twelve twenty-five-foot poles and cost of labor, estimated at $60, dated Little Rock, December 16, 1911." Line order No. 1577, signed by Bennett, plant foreman, which went through the manager's office; took it to see what business could be procured and whether it would justify building the line. He told the plaintiff the distance it was and the rules regarding the matter and that he would have to make a deposit to secure the service there. Did not tell him what the amount was, because he didn't know.

The defendant next introduced in evidence section 17, of the ordinances of the city of Little Rock, regarding its franchise, as follows: "Section 17. That said company shall furnish such telephone service, as is applied for by any one, to any point within the limits of

this city now or hereafter fixed, without favor or discrimination; provided, that where customers can be served with the telephone without placing poles the same shall be done without extra charge upon the payment of the subscriber of three months' rent in advance and the execution of a year's contract; where poles have to be placed, not exceeding two blocks, upon the execution of a one-year's contract and payment of six months' rent in advance, plus the cost of construction of the excess of the line over two blocks; said excess cost to be accredited on telephone rent due after the expiration of the six months paid in advance."

Witness said he saw Doctor Smith later in Little Rock, and, upon being asked about the phone, told him he was too far from the facilities. That he would have to make an advance payment or deposit to get the services, and when he was ready to accept it to call at the office. He did not say that he would accept the proposition.

The plant foreman, Bennett, said he examined the location on December 16, 1911, described the kind of houses and people living out there; he investigated it on the order of the commercial department and estimated that it would cost $60 to extend the line; stated how many poles would be required to carry the line two blocks, etc. This witness described the streets upon which the lines of the company are located in Argenta and also the connections with the different phones near the locality of the Smith residence, which he said was 1,000 feet across private property from the company's poles; the nearest their line reached his residence was on Thirteenth and Main. Said a line could have been constructed and a connection made from its nearest point in three days; that it was more than three blocks from Smith's residence to Compress No. 2, the defendant's wires going to Compress No. 2.

Mr. Stout, the manager, testified that Smith came and wanted service at the new address and he told him that they had no facilities in the neighborhood, but on receipt of his request had that neighborhood canvassed

for additional subscribers to justify the company in making the expenditure, and he told Smith that he was unable to get any. "He then asked me what he should do, and I told him if he would pay us six months' rent in advance and the cost of construction beyond the first two blocks of poles, which would be refunded to him after that six months' rental deposited had expired, we would put him in a telephone. He said that he was too poor and couldn't afford to put up that money, and asked me what other proposition we had. And I didn't say anything to that. Then he made a proposition to me to build the line from his residence to our construction, and asked me if we would connect with him there. I told him we would, and he said he would let me hear from him, and his letter of the 18th of December was relative to his proposition, to which I replied on the 20th, as set out." He denied that he suggested at all that Doctor Smith should build the line.

Doctor Adair, who formerly lived at the same address, told Smith, upon inquiry as to whether he could get telephone service, that he had never been able to get a telephone there, and of the reason why, and also of the company's regulations about the service. Smith denied this, and said that Doctor Adair told him he would have to do one or two things: That he would have to build the line and put in the poles himself and the company would make connection, and that if "I didn't do that I would have to move from that house to another house on the line." He denied that Adair told him anything about the rules of the company or the deposit required.

There was testimony by Doctor Bostick that he lived more than two blocks beyond the company's poles and had had the service installed without additional pay, but the testimony of other witnesses shows that his residence was within two blocks of the company's lines. Appellant did not pay nor offer to deposit any money for rent in advance, as required by the regulations in order to secure the service, and claims he was not advised of

the rule and that he would have been willing and was able to comply with it if it had been brought to his attention.

The court instructed the jury, giving the following among others over appellant's objections:

"The court instructs the jury that a rule of a telephone company, requiring the payment of six months' rentals in advance where such company has to build a line of telephone poles and wires a distance of two blocks to reach the subscriber, is reasonable; and that where the party desiring telephone service resides more than two blocks from the telephone company's line of poles, it is legal and reasonable for such company to require, in addition to the payment of said rentals in advance, that such person shall deposit a sum of money sufficient to reimburse such company for the cost of furnishing and building such additional line of poles and wires in excess of the said two blocks; and to credit such deposits on telephone rentals falling due after six months."

No. 2. "You are instructed that the burden is on the plaintiff to show by evidence fairly preponderating that he offered to comply with all of the defendant's reasonable rules and requirements after same were called to his notice; that if you find that he resides more than two blocks from defendant's line of poles, such burden is on him to show that he tendered the defendant six months' rental in advance, and, in addition thereto, that he offered to deposit with said defendant a sum of money sufficient to cover the cost of furnishing and building all of said line in excess of two blocks, and that if he has failed to show this by a fair preponderance of testimony, your verdict will be for the defendant."

The jury returned its verdict in favor of the telephone company, and from the judgment thereon appellant brings this appeal.

E. L. McHaney and *X. O. Pindall,* for appellant.

The first instruction was inapplicable, because the defendant had not pleaded that it had a rule applicable to telephone rentals *in Argenta;* it was further erroneous

in saying that the company had the right to require the payment of six months' rentals in advance where the company had to build a line, and that this rule was reasonable.

The court also errs in its second instruction in placing the burden on the plaintiff to show that he *tendered* to the defendant six months' rentals in advance, and that he offered to deposit a sum sufficient to cover the cost of furnishing and building all of said line in excess of two blocks.

The idea contained in other instructions that regard must be had to an applicant's location or surroundings where no franchise exists, makes the statute operative only where a municipality grants a franchise, and the company's liability dependant on the franchise. There is no such escape from the provisions of the statute. Kirby's Dig., § 7948; 81 Ark. 486, 493; 94 Ark. 533, 536, 538; 192 Fed. 200.

A. P. Wozencraft, Dallas, Tex., and *Walter J. Terry,* for appellee.

Where there is no dispute as to the existence of a rule, it is for the court, and not the jury, to declare whether it is or is not reasonable. Thompson on Electricity, § 200.

Appellant's objection to the charge to the jury that the burden was on appellant to show that he tendered six months' rental in advance, under the claim that the statute only requires that the applicant shall signify "in a proper way" his willingness to comply with the reasonable rules and regulations of the company, is answered by the fact that he did not signify such willingness in *any way.* 81 Ark. 486; 100 Ark. 546; 89 Ga. 777; *Id.* 754; 95 Ind. 29; 94 Ga. 336; 28 Fed. 181; Jones on Tel. & Tel. Companies, § 431; Craswell on The Law Relating to Electricity, § 372.

The test of the reasonableness of a regulation is whether it is fairly and generally beneficial to the company and all its customers, not whether some other rule would answer its purpose as well or better. 28 Fed. 181.

Whatever might have been the duty of the company if it had by contract or franchise expressly agreed to furnish all persons with telephone service, regardless of expense, location or surroundings, the law certainly would not require this in the absence of such franchise or contract. 183 U. S. 79; 46 Law. Ed. 103; 192 Fed. 200. See also 45 Ark. 158; 59 Am. St. 457; 19 Fed. 679; 52 Fed. 917; 1 L. R. A. 750.

KIRBY, J., (after stating the facts). It is insisted, first, that there is no evidence to support the verdict, that incompetent testimony was introduced and that the court erred in giving said instructions numbered 1 and 2.

There is no doubt but that the telephone company did refuse to furnish facilities and service to the address of Doctor Smith, except upon the condition of a compliance with its rules, nor can it be doubted that in reply to his letter about building the extension of the line to his residence it replied that it would not build any portion of the line, but would install a telephone and make necessary connections if he built and furnished the line. This does not show, however, that Doctor Smith offered to comply with the rules and regulations of the company, relative to furnishing service to persons situated in like condition with himself. The manager of the defendant company, its assistant manager, the contracting agent and the line construction foreman all testified that they told Doctor Smith of the rule requiring the deposit of money for the expense of construction and six months' phone rent in advance before connection was made with a subscriber located more than two blocks beyond the pole line of the company, unless enough subscribers could be procured in the locality to justify the expense, and that the appellee had the district canvassed for other subscribers and none could be obtained. These witnesses say that appellant did not accept nor indicate any intention of accepting the proposition as required by the rule and the manager testified that he (Smith) suggested building the line himself and was told by him that the

company would make the connection if he did so, and that the letters in evidence were written relative to that proposition only. The testimony was in conflict on this point, but the preponderance of it appears in the company's favor, and in any event the verdict of the jury against appellant settled the question of fact.

The ordinance of the city granting the franchise under which the appellee company operated, permitting the charge to be made upon which its rule was founded was also introduced in evidence, and the contracts with Bostick and Menea in Argenta, as well as other contracts and applications introduced in evidence, show that it was not only the rule but the custom of the company to require a compliance with it in order to the supplying of telephone service to the class of subscribers desiring it and like situated with appellant more than two blocks beyond the pole lines of the company both in Argenta and in Little Rock.

The statute, section 7948, Kirby's Digest, provides:

"Every telephone company doing business in this State and engaged in a general telephone business shall supply all applicants for telephone connection and facilities without discrimination, or partiality, provided such applicants comply, or offer to comply, with the reasonable regulations of the company. And no such company shall impose any condition or restriction upon any applicant that is not imposed impartially upon all persons or companies in like situation."

In *Danaher* v. *S. W. Tel. & Tel. Co.*, 94 Ark. 536, the court, construing the statute, said: "The telephone company in devoting its property to a use in which the public has an interest, becomes a public servant and is bound to serve the public impartially. It is like common carriers in that it is bound to serve those applying to it impartially and upon equal terms. * * * Being a public servant, it 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."

In the same case, 102 Ark. 550, 144 S. W. 926, *S. W.*

Tel. & Tel. Co. v. *Danaher,* the court said: "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 regulations, may refuse to furnish such telephone service without being guilty of discrimination. * * * Telephone companies by the necessity 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."

In *Younts* v. *Telephone Co.,* 192 Fed. 200, the court, construing this statute, said: "It is only when these facilities are granted generally to persons similarly situated as the plaintiff that the refusal to extend to him the same privileges may become a discrimination within the meaning of the statute."

It is true, the statute says that telephone companies engaged in the general telephone business shall supply all applicants for telephone connection and facilities without discrimination, etc., but certainly the statute was not intended to require that telephone service should be furnished all applicants therefor. It only denounces a penalty against discrimination and after an offer on the part of the person demanding service to comply with its reasonable regulations. It is prohibited from imposing any condition or restriction upon any applicant for service that is not imposed impartially upon all persons or companies in like situation; and the proof shows that the telephone company acquainted the applicant for service with its regulations requiring the payment of six months' rent in advance and the deposit of the cost of construction of the excess of the line over two blocks, where an extension is necessary to connect and give service, and that it required all persons in a like class or similarly situated with appellant to comply with said rules and regulations, and, such being the case, there could have been no discrimination against him within the meaning of the statute, the rule being reasonable. It was not contended that the rule was unreason-

able, but rather its existence and application was denied, and the court in the first instruction complained of declared it to be reasonable, and it was a matter for the court to determine. Thompson on Electricity, 200.

It is also true section 17 of the ordinance introduced in evidence as the rule of the company, relates only to furnishing service within the city of Little Rock, authorizing the charge therein to be made, but this did not prevent the company applying it, which the proof shows it did do as a rule and regulation to be complied with by all persons demanding service in localities where it operated without regard to whether it was within the limits of the city of Little Rock, or the sister city of Argenta across the river, and we fail to see the force of appellant's objection to instruction numbered 1 on account thereof. Neither do we see that instruction numbered 2 complained of was incorrect in declaring that the burden was upon the plaintiff to show by a preponderance of the testimony that he offered to comply with the defendant's reasonable rules and regulations, and if the jury should find that the residence where he desired the service was more than two blocks distant from the defendant's line of poles that the burden of proof would be upon him to show that he tendered the defendant six months' rent in advance, and, in addition thereto, offered to deposit with it a sum of money sufficient to cover the cost of furnishing and building said line in excess of two blocks, failing to show which that the verdict should be for the defendant. Since the rule required the payment in advance of the six months' rental, plus the cost of the extra construction, we can see no objection to telling the jury that the burden was upon the defendant to show he had tendered such amount, for his last letter, in which he said he was "willing to pay proper toll of same usually charged," certainly would not be regarded as an offer to pay said sum, neither was it intended to be such an offer, as explained by Doctor Smith, who said he did not even know that there was any such rule. This letter must be taken in connection with the other two, and also with the negotiations which had

been carried on between the parties and could not be considered a compliance or an offer to comply with the rule that would subject the company failing thereafter to comply with the demand, to the penalty denounced by the statute. It may be that if plaintiff had offered to pay in advance the required amount a tender thereof would not have been necessary, if the defendant had expressed an intention not to extend the service any way, but all the testimony shows, except that of appellant, that the company was willing to extend its facilities and give the service upon the compliance with its rule; that it canvassed the district to see if enough subscribers could be procured to give the service without requiring a compliance with the rule and that no disposition upon the part of appellant was shown to make the required payment in advance, the testimony, except his own, showing that he was unable to, or did not care to do so, and his own letter, relative to the building of the line, rather corroborates the statement of the manager that he himself suggested or asked if the service could be given if he constructed the line himself. The testimony on the part of the appellee showed the requirements of its rule; that it informed appellant of such requirement and the necessity for the payment in advance of the rental with the excess cost of the line, which would not be constructed and the service given except upon a compliance therewith upon the part of appellant, and we see no objection to the court having told the jury that after he was so advised that it was necessary on his part to show a tender of the money, and a failure thereafter of the telephone company to give the service, in order for him to recover the penalty for its failure to do so. Nothing else but a tender under such circumstances would have amounted to an offer to comply with its reasonable regulations within the meaning of the statute. *Danaher* v. *S. W. Tel & Tel. Co.*, 94 Ark. 533.

It was probably not necessary for appellee to introduce some of the testimony complained of, but it was done in order to meet questions raised by appellant in

the introduction of its testimony and to show in detail that there had been no failure on its part to comply with its rule in connecting with other residences and places of business nearest the residence of appellant; the jury might otherwise have inferred from some of the testimony, but for the introduction of this, that because such telephones were located near to this place, the company was required to give the service demanded by appellant and subject to a penalty for having failed to do so.

We find no prejudicial error in the record, and the judgment is affirmed.

THOMPSON v. SPECIAL SCHOOL DISTRICT OF PARAGOULD.

Opinion delivered June 23, 1913.

1. SCHOOL DISTRICTS—CONTRACT—ESTOPPEL.—Where a subcontractor seeks to enforce a contract with the school board, made after a forfeiture by the contractor, and it appears he finished the work on the strength of the agreement with the board; *held*, it was proper to refuse to submit to the jury the question of equitable estoppel against the district, where the district denied the making of any contract with the subcontractor. (Page 58.)
2. SCHOOL DISTRICTS—CONSTRUCTION OF BUILDING CONTRACT.—Where a subcontractor sues a school district to recover the cost of installing the plumbing in the school building, and it appears that the school directors relied upon the contractor and his surety to complete the building, and did not promise to pay the subcontractor to do the work, and that he did not rely upon any such promise; *held*, the district was not estopped by any conduct of its directors from denying liability on the alleged contract, sued on. (Page 58.)
3. WITNESSES—IMPEACHMENT—FOUNDATION.—Where a subcontractor sued a school district, claiming that a new contract had been made with him to do certain work, in order to lay a foundation for his impeachment, a witness for the contractor was properly permitted to answer the question as to whether he had not told a third party that the subcontractor had settled his claim with the contractor. (Page 60.)
4. WITNESSES—IMPEACHMENT—STATEMENTS TO THIRD PERSONS.—Where a witness testified that he did not recall making certain statements to a third person, in answer to a question asked to lay a

foundation for his impeachment, the third person may testify that the witness made the statement, in order to impeach him. (Page 60.)

Appeal from Greene Circuit Court; *W. J. Driver,* Judge; affirmed.

STATEMENT BY THE COURT.

The school district entered into a contract with the Southern Building Company, on April 13, 1908, whereby the latter agreed to erect a high school building, including plumbing and heating apparatus, in Paragould, Arkansas, according to plans and specifications, for the sum of twenty-seven thousand dollars ($27,000). The building company entered into a bond with the district, with the Title Guaranty & Surety Company, as surety for the faithful performance of the work and the performance of the covenants of the contract. The building company contracted with appellants to furnish all material and perform all work in installing the plumbing and heating apparatus for the building, and agreed to pay therefor the sum of twenty-seven hundred and fifty dollars ($2,750), payable as the work progressed. The appellants instituted this suit against the appellees, alleging in their original complaint certain breaches of the contract and bond; but it is unnecessary to set this out, as the case went to trial upon the issue as contained in the amended complaint, which is, in substance, as follows:

That after the plaintiffs had made the contract with the Southern Building Company to do the work of heating and plumbing on the building of the school district, and when a part thereof had been placed therein and the main part remained to be furnished and completed, plaintiffs having information that the contract firm was insolvent or was likely to become insolvent and had failed and refused to pay plaintiffs the sums due, reported the failure of the contracting company to pay plaintiff's as agreed, and informed the school district that they would refuse to further comply with their contract with the Southern Building Company and to finish the work of heating and plumbing said building, unless the defend-

ant school district would pay to these plaintiffs the amount then due and owing to them, for the work and labor to be done and materials to be furnished.

That said school district then entered into a contract with plaintiffs, by which it agreed to and undertook that, in consideration of the plaintiffs completing their said contract in the work of heating and plumbing said building, the school district would pay plaintiffs the said sum of money which was then due and owing to them, for materials furnished, work and labor done, and for the materials to be furnished and the work and labor to be done, in the completion of said contract.

That in pursuance of said contract so made between plaintiffs and the board of directors of said school district, who were regularly in session and present and acting on the proposition, plaintiffs completed said work in accordance with its contract made then with the school directors and the contract made with the contracting company, which work and labor done and the materials furnished were accepted by the defendant school district, and by reason thereof the defendant school district became indebted to the plaintiffs in the sum of twenty-five hundred dollars ($2,500), the balance due them on their contract, for which plaintiffs prayed judgment.

The appellees denied that they had entered into a contract with the plaintiffs to pay the claim sued upon, and set up that plaintiffs, after the completion of the work and its acceptance by the school district, had been paid by the Southern Building Company for their work, in the sum of two hundred and fifty dollars ($250) cash, and a note executed by the Southern Building Company, with sureties, to the plaintiffs, appellants, for the balance. Appellees also set up the statute of frauds.

There was testimony on behalf of appellants tending to show that the plumbing company entered into a contract with the Southern Building Company to install the heating and plumbing in the high school building, and were to be paid for same in the sum of between twenty-seven and twenty-eight hundred dollars. The contract to complete the building was made by the board

with the Southern Building Company. The building company entered upon its contract in the spring of 1908, and the work was completed about the first of September, 1909. When the work was about half done the school board declared the contract with the building company forfeited. After this, the plumbing company entered into a contract with the school board to complete the plumbing of the building. A notice was given that there would be a meeting called for the purpose of reletting the contract for the heating and plumbing. The first meeting was put off because of the absence of one of the members of the board. The next meeting was held on the 21st of December, and at that meeting witness, acting for the plumbing company, was present, and he testified that the board employed his company to put in the heating plant and connect up the plumbing work and that his company did complete the work.

On cross examination, witness stated: "There was no contract made and signed and given to me at that time, but the contract was verbal. I don't think the minutes show any contract, and I think they show all that was done." Witness further states that the notice he gave was to let the school board know that the building company had failed to keep their contract. The fact that the plumbing company was not getting its money for the plumbing and heating was talked of some half dozen times between witness and the school board, for the period of four or five months, in which it was stated that the plumbing company would not perform the work unless some arrangements were made. Witness had no writing to show that the school board had ever entered into a contract with the plumbing company to pay the building company's debts. He never filed any claim with the school board, that it should pay the twenty-five hundred dollars ($2,500); never made any demand on the school board for the twenty-five hundred dollars ($2,500), except in a way. Witness never went before the school board properly to demand it, but had gone far enough to know that they were going to contend over it, and he was going to sue them. He

did not present a claim for the twenty-five hundred dollars ($2,500), because he considered it already in and the board knew it. In regard to the note of the Southern Building Company, alleged to have been received and accepted by the plaintiffs in payment of the balance of their claim, witness testified: "The note never reached this town until after the contract between me and the school district was made." Witness never saw the note until after the contract had been made, when Simpson, his attorney, came back from Pine Bluff (where he had gone to try to collect from the Southern Building Company the amount alleged to be due), and told witness he had taken the note. Witness refused to accept the note in settlement. The note had a credit on it of $316.05. Witness never extended the payment of the note. The credit on the note was not accepted with an agreement to extend the time for the payment. Witness stated that he "let the Bank of Commerce investigate the matter of collecting the note, but that he did not consider that the plumbing company took any steps to collect it." Witness stated that he completed the heating and plumbing on the strength of the contract he had made with the board and not on account of the note. Witness knew before they offered to give him the note that the building company was an insolvent concern and that he had no legal right to collect the note. When the building company went into the hands of the receiver, witness left to his lawyer the matter of what to do and he supposed his lawyer filed proof of debt against the building company. Witness never received a cent out of the building company as a dividend.

In regard to the attempts made to collect the amount alleged to be due the appellants from the Southern Building Company, witness Simpson testified in part as follows:

"I wrote the note in question. The facts that led up to taking the note were that Mr. Thompson, under my instructions, refused to proceed with the contract until he was paid, and I advised him not to go any further. Notice was given by Mr. Thompson, as chairman

of the building committee, requesting the school board to discharge the Southern Building Company, dated on the 18th, and the meeting was held on the 19th. I finally went to Pine Bluff to see the Southern Building Company about the matter, and the note was taken from the Southern Building Company for the amount due appellants, but the note was not taken as a settlement of the debt. I was acting in the matter for the City Plumbing Company. Mr. Hood represented the building company at Pine Bluff, and the building company had in progress the construction of a large reinforced steel building. I told the building company that I had come to settle the balance that they owed the City Plumbing Company, and that I had to be satisfied before I would leave that town. Mr. Hood signed the note and I gave him the note to send away to be signed by others. My memory is that the note came back to Paragould just after the holidays. The news that the building company had gone into the hands of a receiver came to my knowledge shortly after the note was taken. The note was filed with the receiver for collection, but the receiver wrote there was nothing to be paid in assets." Over the objection of appellants, witness Simpson was asked the following question: "You may tell the jury what, if anything, Mr. Simpson said to you about having accepted the notes and settled the claim of the City Plumbing Company with the building company, at any time, either immediately after the holidays or thereabouts of 1909 and 1910?" The witness answered over the appellant's objection, as follows: "I had a conversation with Mr. Simpson some time between December 26, 1909, and January 3, 1910, on the streets of Paragould between the Bank of Commerce and the Globe Drug Store. Mr. Simpson said to me something like this: He says, 'Grizzard says for you to go up and connect the heating plant; we want to get the school started.' I made the remark that I was willing to do anything. He said the matter was practically settled, that the papers had been received here, and Mr. Thompson would be in possession of his money in sixty or ninety days."

J. Smith testified in behalf of the appellants that he was a member of the school board of the Paragould Special District in 1909, and that the school board entered into a contract with J. R. Thompson (representing the plumbing company), with reference to the plumbing and heating of the new school building. Thompson had a contract with the Southern Building Company to put this plumbing and heating in for them. Thompson was not getting any money for the work he had done and for that reason he said he was going to take his heating business out of there entirely. The matter was discussed several times between him and the school board. He received a note from the Southern Building Company but refused to accept it and refused to do the heating and plumbing unless the school board would stand good for his money, and the school board agreed for him to go ahead and do the heating and plumbing and they would stand good for it. Five of the other members of the board denied that the board had entered into a contract with Thompson, of the plumbing company, to do the plumbing and heating. The members of the board knew that Thompson was putting in the heating and plumbing, but never made any contract with him to do the same and to pay him for it.

The court on its own motion submitted the issues to the jury as to whether or not the school board had entered into a contract with the plumbing company to do the plumbing and heating of the school building and as to whether or not appellants had accepted the note of the Southern Building Company in payment for the work, instructing the jury that unless the school district had entered into a contract with the plumbing company to do the work, the latter could not recover; and also that if the plumbing company accepted the note of the Southern Building Company for the amount in controversy, as payment for the work done, the plumbing company could not recover. The court refused prayers for instructions, presenting to the jury the issue as to whether or not the school district was estopped from

denying liability because of the conduct of its directors. The jury returned the following verdict:

"Did the Paragould School Board at any lawful meeting, by vote or resolution, contract with or agree to pay the plaintiffs for installing and completing the job of heating and plumbing in the high school building? Answer, 'No.' We, the jury, find for the defendant."

The court rendered judgment in favor of the appellees and this appeal has been duly prosecuted.

Block & Kirsch, S. R. Simpson and *W. W. Bandy,* for appellant.

Johnson & Burr, for appellees.

WOOD, J., (after stating the facts). *First.* The court did not err in refusing to submit the issue of equitable estoppel to the jury. There was nothing, either in the pleadings or the proof, to warrant the court in submitting such an issue. The appellants in their complaint relied upon a contract, which they alleged they entered into with the board of directors, to do the work of heating and plumbing the building, in consideration that the district would pay them the amount of money which was due them from the Southern Building Company, contractor, and that they completed the work in accordance with the contract.

J. R. Thompson, representing the plumbing company, testified as follows:

"I completed the heating and plumbing on the strength of the contract made with the board," and the only other witness in behalf of appellants testified that he (Thompson) "refused to do the heating and plumbing unless the school board would stand good for his money, and the school board agreed for him to go ahead and do the heating and plumbing and they were to stand good for it."

It is clear that in view of the allegations in the complaint and the testimony above quoted that the doctrine of equitable estoppel could not be invoked by the appellants in this cause. They relied upon a contract entered

into with the school board. The appellees denied any such contract and the testimony on their behalf tends to show that no such contract was entered into. Only the issue of the right to recover on contract was made and the court was correct in confining the jury to the determination of that issue and therefore did not err in refusing appellant's prayers for instructions and in giving the instructions presenting such issue on its own motion. Even if the equitable estoppel had been made an issue by the pleadings, in our opinion there is an absolute want of evidence, as abstracted by appellants, to warrant a finding that the school district through the conduct of its directors estopped itself from denying liability to appellants for the amount in controversy. There is no evidence to show that the directors, as a body, or that any one of them acting singly, did anything to warrant appellants in completing the work of plumbing and heating the building upon any promise, expressed or implied, that the school district would pay for the same. On the contrary, the evidence in the record tends to prove conclusively that the school board was relying upon its contract with the Southern Building Company and the Guaranty Company, its surety, to complete the work and to pay for same.

It is unnecessary to discuss the evidence in detail. Appellees claim that a large portion of it has not been abstracted, and so much of it as appellants have abstracted does not, in our opinion, warrant a finding that the school district was estopped by any conduct of its directors from denying liability for the claim sued on. There is nothing to show that the directors, as a body or individually, did any act to warrant appellants in believing that the school board would pay them for the plumbing work on the building, nor that appellants did the work, relying on anything done or said by the directors. This would be necessary, even if estoppel were properly an issue in this controversy. *Trapnell* v. *Burton,* 24 Ark. 371, page 400; *Rogers* v. *Galloway Female College,* 64 Ark. 627. See *St. Francis Levee District* v. *Fleming,* 93 Ark. 490.

Second. There was evidence tending to prove that appellants finished the work on the school building, relying upon its contract with the Southern Building Company and that appellants took the note of the building company in payment for the work and finally completed and connected the work of plumbing, after receiving this note in settlement of the balance due them on their contract with the Southern Building Company. The evidence warranted the court in submitting this question to the jury, which it did upon proper instructions. There was no prejudicial error in the court permitting the witness Simpson to answer the question propounded to him by appellee's counsel, nor in permitting the testimony of the witness adduced by appellees to contradict the testimony of witness Simpson. The testimony was competent and its credibility was for the jury.

Finding no reversible error, the judgment is affirmed.

CYPRESS CREEK DRAINAGE DISTRICT *v.* WOLFE.

Opinion delivered June 23, 1913.

1. DRAINAGE DISTRICTS—STATUTORY PROVISIONS.—The third section of Act 110, p. 260, of the Acts of 1911, as amended by Act 455, p. 1227, of the Acts of 1911, defines the system of drainage contemplated by the Legislature in the organization of certain territory in Desha and Chicot counties into a drainage district, and provides that there shall be only one drain or canal, with laterals, to cost not more than $300,000. (Page 66.)
2. STATUTES—RULES OF CONSTRUCTION.—Acts of the Legislature should be so construed that every clause, sentence, or part, shall stand, if possible; and no section should be rendered nugatory, when it is possible to carry out the purpose of the Legislature without so doing. (Page 68.)
3. DRAINAGE DISTRICTS—ASSESSMENTS—FUTURE ASSESSMENTS.—It is premature for a chancery court to pass upon future assessments against the land in a drainage district. The land owners in the district have their proper remedy when the assessment is made. (Page 68.)

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

STATEMENT BY THE COURT.

This is an appeal from the judgment of the chancery court of Desha county, restraining the collection of assessments on lands, in what is known as the "Cypress Creek Drainage District." The Cypress Creek Drainage District was organized under Act 110 as amended by Act 455 of the General Assembly of 1911; approved June 2, 1911. It included within the boundaries of the district certain lands, which are described in the first section of the act, situated in the counties of Desha and Chicot. The number of acres of land in the whole district is 298,450, and the number of acres involved in the decree from which this appeal comes is 20,270. The title of the act is, "To organize certain territory in the counties of Desha and Chicot into a drainage district for the purpose of draining the lands in said district, with the right of issuing bonds and for other purposes."

The first section of the act creates the district and defines its territory.

The second section names the directors who shall then constitute the board of directors of the district, and provides the length of time for their terms of office, their qualifications, and for the election of their successors.

The third section, after providing for the meeting of the board of directors and the election of certain officers and prescribing rules for the manner of procedure on the part of the board and officers, provides as follows: "The intent and purpose of this act being to open up and make a drainage canal from the Lincoln County line to Boggy Bayou and of Boggy Bayou from the government levee to Clay Bayou in Chicot County, and the work from Boggy Bayou on down, shall be completed before the government is asked to move its Boggy Bayou levee. This board shall, as soon as practicable after the passage of this act, employ a competent engineer and other employees, and make a complete survey of said district from the Lincoln County line to said

bayou in Chicot County, and said engineer shall make all necessary maps, profiles, and furnish other information showing the size of the canal required for the purpose of this act. Said information to show the yardage of earth to be removed and other work required, and so complete in every detail, to enable the board to advertise for bids. The work shall be let to the lowest responsible bidder, who shall give bond in such amount as the board may determine. The board may make such rules and regulations as it may deem necessary for the speedy completion of said work. The board shall provide in like manner for the opening and constructing of a ditch or canal from the Lincoln County line to Boggy Bayou. After the completion of the main line ditches or canals, as above set forth, it may construct such general or main laterals, as will be of general benefit to the community, out of the funds in its hands, for the surplus sum, if there be a surplus.

The fourth section of the act contains a provision to the effect that "Said board shall avail itself of all proper and efficient means for the drainage of the territory within its limits. It shall co-operate with the Mississippi River Commission, the United States Agricultural Department, drainage districts now or hereafter formed in Lincoln County, Chicot and other counties. It may acquire drains, ditches and canals heretofore constructed within its territory by prior drainage districts by paying the original cost and expenditure made by such prior drainage district, etc."

The fifth section provides for the assessment of the benefits to be received and for the hearing before the board of directors, of objections by the property owners of any assessments, etc., and for an appeal from the finding of the board to the chancery court, and providing a lien on the land for the assessments adjudged, making the same paramount to other liens, except for taxes and assessments previously levied.

The sixth section provides, among other things, that "The board shall obtain rights-of-way for its drains,

ditches and canals without cost to the district wherever possible and award damages," etc.; and further, that "as soon as the board has determined upon a system of drainage in said district and upon the awards of damages to be made therein, it shall publish a notice, etc., giving the parties affected notice to come in and object to the awards and of right to appeal from the decision of the board and to demand an assessment of his damages by a jury."

The seventh section is as follows: "Said Cypress Creek Drainage District shall not cease to exist upon the completion of the contemplated drainage system, but shall continue to exist, for the purpose of preserving same, and may at any time deepen and widen any drain, ditches and canals, when conditions require it, or may construct additional drains, ditches and canals whenever the necessity of the district demands it."

The eighth section gives the board power to "carry any drains, ditches and canals constructed by them across any highway," etc.

The ninth section provides for the auditing of the accounts and of keeping the same on file, and prescribes the form of the warrants and for the reports of the financial condition of the district, etc.

The tenth section prescribes a penalty for obstructing a "drain, ditch or canal constructed in pursuance of this act, and providing that the board shall have full charge of the construction and maintenance of the ditches, drains and canals in said district."

The eleventh section provides for the right to pass over the lands in the district by those engaged in the drainage work.

The twelfth section is, in part, as follows: "For the purpose of constructing, completing and maintaining the drains, ditches and canals contemplated by the act in order to enable the board of directors to thoroughly carry out the purpose of this act, said board shall have power to borrow money from time to time, at a rate of interest not exceeding six per cent per annum, and to

that end issue negotiable bonds of said district, not exceeding three hundred thousand dollars ($300,000), payable in lawful money of the United States, at such time and place and in such denomination as the board may prescribe.

The intervening sections down to the seventeenth provide for the payment of the bonds and coupons in annual assessments, the manner of their collection, etc.

The seventeenth section provides that "nothing in this act shall prevent or affect the creation or formation of subdistricts, including portions of the territory embraced in the drainage district created hereunder, for the purpose of constructing lateral ditches."

The board of directors, acting under the supposed authority of the act, adopted a plan or system of drainage for the territory in the district, which contemplated five main drains or canals and numerous laterals, as shown by the plat made by the engineer of the board and approved by its committee on improvement.

The estimated cost of the building of the main drains or canals was about one million, six hundred thousand dollars ($1,600,000), and the estimated cost of the complete drainage system, acording to the plans adopted by the board, was two million, two hundred and seven dollars ($2,000,207). The cost of the five main drains or canals per acre to the land in the district would be $5.44. The benefits assessed against the land in all the districts were approximately five million dollars ($5,000,000). There was testimony tending to show that if only one ditch was constructed from Cypress Creek on the Lincoln County line to Boggy Bayou the land of the appellees, the petitioners, would not be benefited. The clear preponderance of the evidence tended to show that the lands in controversy would not be benefited by the improvements as contemplated by the appellant.

The chancery court held that section 3 of the act contains the plan of drainage for the district to carry out, and limits the amount that can be expended for that drainage; that the system of drainage prescribed and

authorized by the act was not such as the board of directors of appellant district had undertaken. The chancellor in his opinion, after setting forth certain provisions of the act, states as follows: "I think it clear from these provisions of this amended act that the Legislature only contemplated the one main drainage canal, reaching from the Lincoln County line to Chicot County, as set out in said act; that it intended to limit the board to the issuance of only three hundred thousand dollars ($300,000); and that it might use any surplus remaining after the completion of this main canal to the construction of such laterals as it might deem most beneficial. So, in this opinion I hold that said board can not adopt the plan mapped out by the Government's engineers under the present act, and thereby radically and materially change the plan contemplated by this act and thereby entail a burden of seven times the amount contemplated by the act."

The chancellor further found as follows: "I hold that the large preponderance of the evidence is that no benefit is or will be received by the lands involved in these suits, and decree that the injunction heretofore issued shall be and is hereby made perpetual."

Rose, Hemingway, Cantrell & Loughborough and *J. Bernhardt,* for appellant.

X. O. Pindall, for appellee.

WOOD, J., (after stating the facts). The chancellor was correct in finding that the third section of the act defines the system of drainage contemplated by the Legislature, and also in finding that the board could not expend more than the sum of three hundred thousand dollars ($300,000) to carry out the purpose of the Legislature as expressed in the act. The intent of the Legislature is not left to be gathered from doubtful language in various sections of the act, but it is clearly and unmistakably expressed in the third section, and where the intent is clearly expressed in unambiguous language, it is the duty of the court to give that language its full

force and effect. The court can not change the plain meaning of the words used by the Legislature without trenching upon its functions. Therefore, we are of the opinion that no authority can be found in the act for the construction of five main drains or canals, with laterals, at a cost of two million, two hundred and seven dollars ($2,000,207), when the language of the act defining the system clearly expresses that there shall be one main drain or canal, with laterals, to cost not more than three hundred thousand dollars ($300,000). To do so would be doing violence to the language of the act, and would be, in our opinion, the baldest kind of judicial legislation. The language of the third section plainly shows that the Legislature had in mind only one main drain or canal, and this the Legislature divided into two parts, viz: "From the Lincoln County line to Boggy Bayou," and "of Boggy Bayou from the Government levee to Clay Bayou." It is plain that in the matter of construction the Legislature had in mind these divisions of the main drain into two parts, for it says: "The work from Boggy Bayou on down shall be completed before the Government is asked to move its Boggy Bayou Levee." Then in another portion of this section the language is: "The board shall provide in like manner for the opening and constructing of a ditch or canal from the Lincoln County line to Boggy Bayou." It is clear that the main ditch or canal was treated as having these two parts, for, after the description of these parts, the language continues: "After the completion of the main ditches or canals as above set forth, it may construct such general or main laterals as will be of benefit to the community, etc., out of the funds in its hands, from the surplus and if there be a surplus." The use of the terms "main ditches" or "canals" in the plural shows that the main drainage ditch or canal before described was to be composed of the two parts as above stated, the one part running "from the Lincoln County line to Boggy Bayou," and the other "of Boggy Bayou from the government levee to Clay Bayou," both together

constituting the main drainage canal from its beginning at "the Lincoln County line" to its terminus at "Clay Bayou." In other words, the main canal, consisting of these two parts, was to begin at the Lincoln County line and to end at Clay Bayou. Wherever the words "drains," "ditches" and "canals" are used in other sections of the act, they must be held to have reference to the "general or main laterals" to the one main drainage canal. These "general or main laterals" are provided for in the third section of the act and are contemplated as a part of the drainage system, by which the water was to be run into and conducted through the one main drainage canal, as above described. To our minds it is clear that the Legislature did not intend that the system of drainage provided by the act should cost exceeding the sum of three hundred thousand dollars. The money to be expended for the work was to be borrowed "at a rate of interest not exceeding six per cent per annum," and "to that end negotiable bonds of the district were to be issued not exceeding three hundred thousand dollars." The only purpose of issuing bonds was to borrow money to do the work. That was the only method provided for raising the necessary funds, and as we construe this provision, it was a limitation upon the power of the board to borrow money in excess of the sum of three hundred thousand dollars. No greater sum than this was authorized to be expended in the prosecution of the work. This construction is strengthened by the language also of the third section providing that after the completion of the main ditches or canals, constituting the one main channel of the drainage system, as above explained, "general or main laterals" could be constructed from the "surplus fund," if there should be a "surplus." In other words, this shows that the sum of three hundred thousand was named as the sum to be expended and no more, and if it did not require this sum to construct the main drainage canal then the residue could be used in the construction of lateral drains. To give the act the construction contended for by appel-

lants, the third and twelfth sections would have to be entirely ignored. The construction we have indicated will harmonize all parts of the act, and at the same time effectuate the legislative intent so clearly expressed and shown in the third and twelfth sections. It is our duty to so construe the act that every clause, sentence or part shall stand if possible. No section should be rendered nugatory, where it is possible to carry out the purpose of the Legislature without so doing. *Wilson* v. *Biscoe,* 11 Ark. 44; *Kelly Heirs* v. *McGuire,* 15 Ark. 555; *Scott* v. *State,* 22 Ark. 369; *McNair* v. *Williams,* 28 Ark. 203; *Little Rock & Fort Smith Rd. Co.* v. *Howell,* 31 Ark. 119; *Beavers* v. *State,* 60 Ark. 129. The Legislature must be presumed to have had a competent knowledge of the subject-matter of the legislation. It must be presumed to have ascertained in advance the kind of improvement needed by the people affected thereby and the proximate cost of that kind of improvement. Page & Jones on Assessments, § 290. Since it has limited the cost of improvement to three hundred thousand dollars, it would be unreasonable to conclude that it had provided at the same time for a drainage system that would cost more than six times the sum fixed as the limit of its cost. Therefore, the chancery court was clearly correct in holding that the assessment based upon the alleged benefits to be derived from a system to be constructed according to the plan adopted by the appellant district was illegal and void. This conclusion makes it unnecessary to determine whether the assessment was also void for the other reasons alleged in the complaint.

The court further decreed "that no future assessment for drainage purposes be levied against any of the hereinafter described lands under the above mentioned act, creating the defendant district."

The assessments which the court declared illegal and void were made upon the alleged benefits to be derived from a system of drainage according to the plan adopted by the board of directors of the district, and that plan, as we have seen, was not authorized by the act. There

has been no assessment as yet upon the benefits, if any, to be derived by a system of drainage contemplated by the act, as we now construe it. When such assessments are made if any of the land owners in the district are not benefited they will have their remedy. It was premature in the lower court to pass upon that question before an assessment is made upon the plan of drainage contemplated by the act. It will be time enough when such assessments are made, if they are called in question, to determine that issue.

So much of the decree of the lower court, therefore, as declared that no future assessment for drainage purposes should be levied against any of the lands described under the above-mentioned act was premature, and therefore erroneous.

So much of the decree of the lower court, therefore, as declares that "no future assessment for drainage purposes be levied against any of the hereinafter described lands under the above mentioned act shall be levied" will be vacated and set aside, and the decree as thus modified will be affirmed.

ELLIS v. TERRELL.

Opinion delivered June 30, 1913.

1. APPEAL AND ERROR—QUESTION NOT RAISED BELOW.—In an action on a note, where the plaintiff did not challenge the sufficiency of the defendant's answer by demurrer or otherwise, but went to trial as though the issues were properly made, he can not, on appeal, for the first time, raise the question of the sufficiency of the answer. (Page 75.)

2. USURY—USURIOUS CONTRACT.—Under Kirby's Digest, § 5389, Mansfields' Digest, § 4732, a contract is usurious whereby a borrower in 1906, received $160, for which he promised to pay $200 in five years, with interest thereon at 6 per cent from the date of the loan. (Page 75.)

3. USURY—USURIOUS CONTRACT.—A contract is usurious whereby interest at the highest rate permitted by the statute is deducted at the time of making the loan if the loan is for a period of over twelve months. See Kirby's Digest, § 5382. (Page 76.)

4. JUDICIAL NOTICE—LAWS OF OTHER STATES.—Under Kirby's Digest, § 7823, the Supreme Court must take judicial notice of the laws of other states. (Page 77.)

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

STATEMENT BY THE COURT.

This suit was instituted by the appellant against the appellee to recover judgment on a promissory note of $200, which appellant alleged was executed by the appellee to appellant on the 1st day of December, 1906. The note was made payable on the 1st day of December, 1911. It bore interest at the rate of 6 per cent per annum from date, and, in order to arrange the payment of interest to the time of maturity, appellee executed five interest coupon notes in favor of the appellant in the sum of $12 each. Appellant alleged that all of the interest coupon notes except the last one had been paid, and that the last coupon note, which was due and payable December 1, 1911, was past due and unpaid; that the coupon notes bore interest after maturity at the rate of 10 per cent per annum, and that the principal note of $200 bore interest at the rate of 6 per cent from date. Appellant alleged that both the interest coupon note and the principal note of $200 were unpaid. He alleged that the note was secured by a mortgage on certain real estate, and prayed for judgment on the notes, and that the mortgage be foreclosed, etc.

The appellee answered, admitting that he executed the notes and mortgage, as alleged in the complaint. Averred that he only received the sum of $152 in all, towit: The sum of $50 in January, 1906, at the time the note was executed, and in March following $50, and in June following the sum of $52; that in June, 1907, after the loan had been made, and after repeated efforts on the part of appellee to get the balance due him from appellant, appellant sent its agent to appellee, at which time the $52 above mentioned was paid to appellee, appellant claiming that that was all that appellant could pay and that the balance of $7.50 was the amount the appel-

lant had to pay its agent for his services in making the loan. Appellee alleged that the contract and loan were usurious and known to be usurious by appellant at the time the note and mortgage were executed. Appellee prayed that the notes and mortgage be declared void and that the same be cancelled as a cloud on appellee's title to the land, and he prayed for judgment against the appellant in the sum of $48, and for such other relief as seemed equitable and just.

The appellant, in his own behalf, testified that he owned the note for $200 and the interest note for $12, bearing interest at 10 per cent per annum after date, both secured by the mortgage. He stated that the making of the loan was first suggested to him by the Jefferson Trust Company, which company stated that it was not authorized to make loans in Arkansas. The loan did not come to appellant through Mears, and Mears was not appellant's agent. If Mears charged a commission appellant was not aware of it. Appellant did not receive any commission and did not participate in what Mears received, if he received any. Appellant states that he paid the $200 to appellee through the Jefferson Trust Company. He did not receive any part of the $200 back. He had no agent in the matter other than to turn the money over to the Jefferson Trust Company to send to the appellee. When appellant paid the money over to the agent of the appellee appellant intended to charge only 10 per cent for this loan, and charged no more. Appellant's directions to the Jefferson Trust Company were to forward the money to the borrower. The contract expressed in the notes and mortgage is the contract made and intended.

Appellee testified that he contracted for the loan with one A. Mears, representing himself to be the agent of the Jefferson Trust Company, of South McAlister, Indian Territory. He agreed to make appellee a loan on his place of $200 at 10 per cent interest per annum. Appellee received only $161.10. He gave his note for $200, due in five years, with interest after maturity. In addi-

tion to this, appellee gave five coupon notes for $12 each, payable annually, without interest until after maturity of each note. Appellee paid four of these coupon notes

An authorization of E. Ashley Mears as appellee's agent was signed by appellee in July, 1907, but appellee at no time considered Mears his agent. The application appellee made was to the Jefferson Trust Company on the blanks furnished Mr. Mears by the company. The application appellee signed authorizing Mears to procure the loan was as follows: "I authorize E. Ashley Mears to procure a loan on my farm in Polk County, Arkansas, for $200, five years at 6 per cent, and promise to pay him a commission of $7.50 for his services procuring said loan."

Appellee also signed the application October 12, 1906, addressed to the Jefferson Trust Company, which, among other things, stated: "I hereby appoint and constitute the Jefferson Trust Company, of South McAlister, I. T., my agent or attorney in fact to negotiate and procure for me the loan hereby applied for, authorizing my said attorney to pay off all liens on said land and to send money or drafts therefor at my risk, and I hereby ratify and confirm all my said agent or attorney may do in the premises."

The note sued on was as follows:

"South McAlister, I. T.

"On the 1st day of December, 1911, I promise to pay to the order of Edward S. Ellis the principal sum of $200 with interest thereon at the rate of 6 per cent per annum from December 1, 1906, until maturity, payable annually, according to the tenor of five interest notes, being for $12 each, all of even date herewith, both principal and interest notes payable in gold coin, at the office of the Jefferson Trust Company, South McAlister, I. T.," with a clause making the whole amount due in case of failure to pay interest when the same became due, all sums to bear 10 per cent interest after maturity until paid, payable annually whenever the same became due according to the terms thereof, or by reason of the failure to pay

principal or interest. The note was dated December 1, 1906. The coupon notes were dated December 1, 1906, and read as follows (except as to the date when due): "On the 1st day of December, 1911, for value received, I promise to pay to the order of Edward S. Ellis, or bearer, $12, in gold coin, at the office of the Jefferson Trust Company, South McAlister, I. T., being interest due on my principal note of $200 of even date herewith. This note bears interest at 10 per cent per year after due until paid."

The check for $160, payable to the order of Wm. T. Terrell and E. A. Mears, and signed by the Jefferson Trust Company, dated December 1, 1906, was introduced in evidence. It bore the endorsement, "Pay First National Bank or order," (signed) "E. A. Mears, Wm. T. Terrell," and shows to have been paid December 11, 1906.

Several letters were introduced by the appellee, received by him from the Jefferson Trust Company, signed "Jefferson Trust Company, by E. S. Ellis, Secretary." In one of these letters appears the following: "We thought you understood that you were to receive $160 net, our mortgage being written at 6 per cent interest instead of 10 per cent interest, the rate you were to pay. This $40 deducted being on 4 per cent of the interest for five years. If you prefer to give commission notes for this $40 payable in one and two years and secure same by second mortgage on the same property, we are willing to do it, and, on your request through Mr. Mears, we will give the matter our prompt attention."

There are still other letters notifying appellee that his mortgage was due and urging payment thereof or arrangement for extension. In a letter December 20, 1911, the Jefferson Trust Company wrote appellee, in which it stated, among other things, "We do not know why you object to paying $25 for renewal of your loan for five years, when you paid $40 the other time, or when we made you loan, we thought we were making you a very fair proposition. You must think we are in busi-

ness for our health if you think we wish to renew the loan at 6 per cent."

The court, among other things, found as follows: "That the defendant set up the defense of usury, in that, at the time the contract was made the defendant gave his original note for $200, due in five years, and bearing 6 per cent interest from date, and that instead of getting the $200 he only received $160; and also gave his notes for the interest, payable annually, with these coupon or interest notes, bearing 10 per cent interest after due. At the time of this contract the court finds that plaintiff deducted and kept out $40, representing 4 per cent on the $200 for the five years."

The court found that the contract was usurious and void, and that the mortgage and notes should be cancelled, and entered a decree to that effect, and dismissed appellant's complaint for want of equity.

J. I. Alley, for appellant.

1. No usury is alleged nor proven. To constitute usury there must be at the time of making the contract an intention to charge an unlawful rate of interest (Kirby's Digest, § § 5389, 5390; 91 Ark. 461), and such unlawful interest must be actually taken or reserved. 54 Ark. 566; 83 *Id.* 35.

2. It is not usury to take the highest legal interest in advance from the loan for one year (60 Ark. 288), nor on paper running from twenty-three months to five years. 8 Wh. 338; 34 Ind. 116; 110 Ill. 235; 60 Ark. 288.

3. If the deduction was made by an agent of defendant it is not usury. 51 Ark. 535.

4. This is an Indian Territory contract. There is no presumption that the laws are the same as in Arkansas. 66 Ark. 77; 46 *Id.* 50.

W. Prickett, for appellee.

1. The plaintiff did not raise the issue in the lower court that the answer did not tender the issue of usury; he can not now object to the sufficiency of the answer. 71 Ark. 242; 72 *Id.* 47; 75 *Id.* 312; 106 Ark. 525.

2. Kirby's Dig., § § 5389-90, make the contract usurious and void. 60 Ark. 289.

3. This court takes judicial notice of the usury laws of the Indian Territory. Const. U. S., art. 6; 67 Ark. 302; Kirby's Dig., § 7823.

WOOD, J., (after stating the facts). Appellant contends that appellee did not set up in his answer a sufficient defense or plea of usury, but appellant did not challenge the sufficiency of the answer in the court below by demurrer or otherwise. He went to trial as if the issue were properly made, and we must so treat it here. The testimony was adduced on that issue, and appellant will not be heard here for the first time to raise the question that the answer was not sufficient.

The evidence was sufficient, in fact practically undisputed, to sustain the finding of the court to the effect that appellee executed his original note for $200 due in five years, bearing 6 per cent interest from date, and that he only received from the appellant, the payee of the note, the sum of $151.10, or, at most, the sum of $160, conceding that Mears was the agent of appellee. Appellee gave coupon interest notes payable annually, bearing 10 per cent interest after due. It thus appears that the appellant deducted at the time of the execution of the note sued on the sum of $40, or 4 per cent on the principal note of $200 for the period of five years.

Section 5389 of Kirby's Digest provides that, "All contracts for a greater rate of interest than 10 per centum per annum shall be void as to principal and interest." Art. 19, § 13, Const. of Ark.

Appellant and appellee, under the above statute and Constitution, were forbidden to contract for a rate of interest whereby more than 10 per cent per annum would be paid. As appellee only received a loan of $160, at the highest rate of interest for the full period of five years he should have paid, including principal and interest, the sum of $240. But, under the contract, as expressed in the note and shown in the evidence of appellee and the correspondence, appellee was compelled to pay

the principal note of $200 and five coupon notes of $12 each, making a total of $260, or $20 more than the legal rate. This is clearly usurious, unless appellant, under the law, could deduct the 4 per cent interest on the principal note of $200 for the full period of five years.

Our statute, Kirby's Digest, § 5382, provides that: "It shall be lawful for all persons loaning money in this State to receive or discount interest upon any commercial paper for a period not exceding twelve months, at any rate of interest agreed upon by the parties, not to exceed 10 per centum per annum." This statute was passed April 20, 1895, at the session of the Legislature following the decision of this court in *Bank of Newport* v. *Cook,* 60 Ark. 289, wherein we held that the taking of the highest rate of interest in advance on negotiable paper having twelve months to run is not usury. In that case the court had before it a negotiable note having only twelve months to run. The statute then in force only limited the right to discount commercial paper, but did not fix any limit as to time. The court having one year paper before it, only decided that there was authority for discounting such paper, but, of course, did not determine that the discounting of commercial paper for a longer period than one year was inhibited. Then, it being left open by the decision of the court, the Legislature following limited the time for discounting commercial paper to a period not exceeding twelve months. The Legislature having made it lawful to discount commercial paper for a period of twelve months, must have intended to prohibit the discounting of commercial paper having a longer time to run under the doctrine of *expressio unius est exclusio alterius.* This statute shows the legislative policy as to the subject of usury in this State. But even if there were no statute upon the subject, this court would not extend the doctrine announced in *Bank of Newport* v. *Cook, supra,* to commercial paper having a longer time to run than twelve months, for we are of the opinion that such time is as long as such paper should be allowed to be discounted under the trend of

our own decisions and the weight of authority in other jurisdictions.

Mr. Parsons, in his work on Contracts, says: "There seems to be a strong disposition to limit this practice to short paper, or at least not to apply it to long loans or discounts." 3 Parsons on Contracts, No. 131, quoted by Mr. Justice BATTLE in his dissenting opinion in *Bank of Newport* v. *Cook, supra.*

If it be conceded that the note in suit was an Indian Territory contract, still the laws of the Indian Territory at the time the note was executed were the same on the subject of usury as our law on that subject. Chapter 109, Mansfield's Digest of the Arkansas Statutes, was extended over the Indian Territory by act of Congress of May 2, 1890, and section 4732, chapter 109, Mansfield's Digest, provides: "All contracts for a greater rate of interest than 10 per centum per annum shall be void as to principal and interest." *Sulphur Bank & Trust Co.* v. *Medlock et al.*, 25 Okla. Rep. 73. See also *Brewer et al.* v. *Rust,* 20 Okla. 776.

This court must take judicial knowledge of the laws of other States. Kirby's Dig., § 7823. See, also, *St. Louis, I. M. & S. Ry. Co.* v. *Brown,* 67 Ark. 302; *St. Louis, I. M. & S. Ry. Co.* v. *Cleere,* 76 Ark. 377.

The judgment is therefore affirmed.

BEAL-DOYLE DRY GOODS COMPANY *v.* ODD FELLOWS BUILDING COMPANY.

Opinion delivered June 30, 1913.

1. CORPORATIONS—MUST BE SUED WHERE.—Under Kirby's Digest, § 6067, a domestic corporation must be sued in the county where it has its principal place of business, or where its chief officer resides; and only under Acts of 1909, p. 293, can it be sued in another county, where it has a branch office. (Page 80.)

2. JUDGMENTS—PRESUMPTION.—The presumption in favor of a judgment of a superior court, that all the prerequisites of the law have been performed, does not apply in the case of a direct attack on the judgment. (Page 81.)

3. VENUE—JOINT DEFENDANTS.—In an action against A. and B., where the complaint states no cause of action against A., the action is improperly brought in the county of A.'s residence, where if B. had been the sole defendant, under Kirby's Digest, § 6067, the action should have been brought in the county where B. had his principal place of business. (Page 81.)

4. LANDLORD AND TENANT—LIABILITY FOR RENT.—A complaint in an action for rent which joins A. and B. as defendants, and alleges only that A. was in possession of the premises as agent for B., does not state a cause of action against A. (Page 81.)

5. APPEARANCES—GENERAL APPEARANCE.—Defendant on special appearance moved to quash service of summons; *held*, where defendant answered, explicitly reserving its right under the motion, it did not waive its objection to the service. (Page 81.)

6. APPEARANCE—GENERAL APPEARANCE—APPEAL.—Although service upon appellant is defective, and appellant answers, but does not waive its objection to the service, it will be held to have entered its appearance, if after trial and judgment it appeals to the Supreme Court. (Page 81.)

Appeal from Clay Circuit Court, Western District; *W. J. Driver,* Judge; reversed.

STATEMENT BY THE COURT.

The Odd Fellows Building Company owned a certain building in the town of Corning and rented the lower story of it and a warehouse connected therewith to J. M. Hawks for the term of five years, beginning December 1, 1907. In January, 1911, the said Hawks was adjudged a bankrupt and the trustee in bankruptcy was authorized and directed to assign and transfer said unexpired lease to the Beal-Doyle Dry Goods Company, a domestic corporation. This suit was instituted in the circuit court by the Odd Fellows Building Company against the Beal-Doyle Dry Goods Company and Howard H. Gallup for the recovery of the amount claimed to be due for rent. The facts above stated were set out in the complaint and in addition thereto the complaint alleges:

"That the said Howard H. Gallup, a part of the time since the sale of said lease, occupied said building and controlled the possession of the same, commencing about October 10, 1911, and ending about January 15,

1912, by permission of and under some kind of an agreement with his codefendant, Beal-Doyle Dry Goods Company, and that said defendant, Howard H. Gallup, and his codefendant failed to pay this plaintiff for the time he so occupied said building. A statement of the account is herewith filed and marked exhibit 'A' to this complaint."

Service of summons was had on Howard H. Gallup in Clay County, Arkansas, and Beal-Doyle Dry Goods Company was served with summons in Pulaski County, Arkansas. The defendant Beal-Doyle Dry Goods Company obtained leave of the court to appear specially for the purpose of filing a motion to quash the service of summons on it. The motion reads as follows:

"Comes Beal-Doyle Dry Goods Company, and, appearing only for the purpose of this motion, and for no other, moves the court to quash the service in this cause as to it, and for grounds therefor states:

"That Beal-Doyle Dry Goods Company is a corporation organized and existing under and by virtue of the laws of the State of Arkansas; that it is situated in Pulaski County, Arkansas, that its principal place of business is in Pulaski County, Arkansas; that its chief officer resides in Pulaski County, Arkansas; that it is not situated in Clay County, Arkansas; that the summons in this case was served upon the defendant, Beal-Doyle Dry Goods Company, in Pulaski County, Arkansas.

"Wherefore, defendant asks that plaintiff's service be quashed as to it."

The court overruled the motion, and the defendant excepted to the action of the court. The defendant then, without waiving its rights under its motion to quash the service of summons, answered, denying the allegations of the complaint. There was a jury trial and a verdict against the defendant, Beal-Doyle Dry Goods Company, and judgment was rendered upon the verdict. The defendant has duly prosecuted an appeal to this court.

Sam T. Poe, for appellant.

1. A corporation can not be joined with another defendant for the purpose of being sued in any other county, except such counties as the statute provides for it to be sued in. Kirby's Digest, § § 6067, 6071, 6060-1, 6072; 77 Ark. 412, 417.

2. No joint cause of action is stated in the pleadings. 44 Ark. 229; Kirby's Dig., § 6067-6072.

F. G. Taylor, for appellee.

1. The summons was legally served on defendant. Acts 1909, p. 293.

2. The motion to dismiss for want of jurisdiction was properly denied. He who seeks an advantage by motion must see that the court rules upon it upon proper evidence and have same made of record. Here it simply appears that a trial was had on a controverted question of facts and a verdict was rendered for appellee, and this is conclusive. 72 Ark. 101.

HART, J., (after stating the facts). In its motion to quash the service of summons upon it the Beal-Doyle Dry Goods Company alleged that it is a corporation organized under the laws of the State of Arkansas; that its principal place of business is in Pulaski County, and that its chief officer resides in Pulaski County, Arkansas; that it is not situated in Clay County and that the summons in this case was served upon it in Pulaski County. These allegations are not denied, and it follows that, under section 6067, Kirby's Digest, the suit should have been brought against the defendant in Pulaski County, Arkansas. The Acts of 1909 provide that domestic corporations who keep or maintain in any of the counties of this State a branch office or other place of business shall be subject to suits in any of said counties and that service of summons shall be had upon the agent or employee in charge of its branch office in said county. Acts of 1909, page 293.

It is contended by counsel for the plaintiff that the record does not show but that the plaintiff had a branch office in Clay County and that service might have been

had under this statute. This was an appeal from the judgment of the circuit court and the presumption in favor of the judgment that all the prerequisites of the law have been complied with, which applies in case of a collateral attack on the judgment does not apply in case of a direct attack on the judgment, as in case of an appeal therefrom. *Walker* v. *Noll,* 92 Ark. 148; *Davis et al.* v. *Whittaker et al.,* 38 Ark. 435; *St. Louis, I. M. & S. Ry. Co.* v. *State,* 68 Ark. 561.

It follows, then, that in order to obtain service on the defendant under the Acts of 1909, above referred to, the record should show that service of summons was had in compliance with the provisions of the act.

Counsel for the plaintiff also seek to uphold the judgment under section 6072, Kirby's Digest, on the ground that Gallup, the codefendant of Beal-Doyle Dry Goods Company, resided in Clay County, and was served with summons there. In our statement of facts we have copied that portion of the complaint under which the plaintiff seeks to hold the defendant, Gallup, liable for the rent. A careful reading of it will show that the plaintiff only alleges that Gallup was in the possession of the building as agent for the Beal-Doyle Dry Goods Company, and, therefore, no cause of action against him is alleged in the complaint. The answer of the defendant, Beal-Doyle Dry Goods Company, in the form and manner in which it was made was not a waiver of the service of summons upon it. *W. T. Adams Machine Co.* v. *Castleberry,* 84 Ark. 573, and cases cited.

It follows that the judgment must be reversed. The defendant, Beal-Doyle Dry Goods Company, having entered its appearance by its appeal, is now in court, and no further service on it is required. *W. T. Adams Machine Co.* v. *Castleberry, supra; Waggoner* v. *Fogleman,* 53 Ark. 181; *Benjamin* v. *Birmingham,* 50 Ark. 433; *Gilbreath* v. *Kuykendall,* 1 Ark. 50.

WILLIAMS v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

Opinion delivered June 23, 1913.

1. CONTRACTS—EVIDENCE—PROOF.—An oral contract may be proved in the absence of fraud or mistake by a preponderance of the evidence only. (Page 86.)
2. EVIDENCE—PAROL EVIDENCE TO VARY WRITING—ADMISSIBILITY.—Parol evidence to show a different consideration for a written contract is admissible when the writing shows on its face that it was a compromise of the differences between the parties concerning the subject-matter stated, and that the amount to be paid was a part of the contract. When the consideration named in a contract is more than a mere receipt, it would be inconsistent with the writing itself to prove an additional or further consideration. (Page 86.)
3. APPEAL AND ERROR—INSTRUCTIONS—HARMLESS ERROR.—Where parol evidence was inadmissible to show a consideration other than that named in a written contract of release, an instruction that plaintiff must establish the contemporaneous oral agreement by a preponderance of the evidence, was not prejudicial. (Page 89.)

Appeal from Lonoke Circuit Court; *Eugene Lankford,* Judge; affirmed.

Trimble, Robinson & Trimble, Charles A. Walls and *Powell Clayton,* for appellant.

1. The instructions given at request of the defendant are based upon the theory that plaintiff was making an attack on the release signed by him and attempting to overcome the terms of a written contract by parol evidence, which can only be done by showing fraud or mistake.

Appellant's right to bring suit in the form laid and to recover for a breach of the contract is fully sustained by the authorities. 6 Ind. App. 289, 51 Am. St. Rep. 289, and note, p. 300; 49 W. Va. 494; 87 Am. St. Rep. 826; 173 U. S. 1; 35 L. R. A. 512, and note.

The verbal contract sued on is not within the statute of frauds. 29 Am. & Eng. Enc. of L. (2 ed.), 951; 3 L. R. A. 337, and note, p. 339; 5 L. R. A. 529. The proof of the verbal contract of employment is not an

attempt to vary or modify the terms of the written release. 55 Ark. 112; 27 Ark. 510; 91 Ark. 383.

2. There is no authority of law for instructing the jury that the evidence showing the existence of a simple contract for future employment must be "clear, convincing and conclusive." There was no attack made on the written release, and no fraud charged. 77 Ark. 128; 55 Ark. 112; 90 Ark. 426; 93 Ark. 312. The error in giving of an instruction which is inherently erroneous is not cured by the giving of another instruction correctly declaring the law on the same subject. 101 Ark. 37; 100 Ark. 433; 99 Ark. 377; 94 Ark. 282; 77 Ark. 201; 76 Ark. 224; 74 Ark. 585.

Thos. S. Buzbee and *John T. Hicks,* for appellee.

1. Appellant seeks to place the written release in the same category with simple receipts, and then to add to it, by parol testimony, conditions which are positively contradictory of the terms of the written instrument. The instrument is full and complete in itself. Acknowledgment of full satisfaction is clearly inconsistent with the claim that full satisfaction has not been accorded, but is to be accorded by employment running to an indefinite time in the future. The release in this case being full, comprehensive and complete, it is binding and can not be set aside except for fraud or mistake, and it can not be varied or contradicted by parol testimony. 96 Ark. 408; 154 S. W. 519; 46 Ark. 217; 32 Atl. (R. I.), 165; 71 Atl. (Me.), 712; 73 Pac. 113; 67 S. E. 978.

2. There was no error in the instructions. Those given for the plaintiff stated the law as favorably to him as he could expect, while those given for the defendant correctly stated the law on its theory of the case. 18 Ark. 65; 68 S. W. 543; 107 Fed. 61.

McCULLOCH, C. J. The plaintiff, Williams, was an employee of defendant company, and while working in its service received personal injuries on account of which he asserted a claim against the company for recovery of damages.

Negotiations between him and the company's claim agent were opened up, looking to an adjustment of the claim, and those negotiations resulted in a contract for settlement, which was reduced to writing, and reads as follows:

"Whereas, I, William Williams, of the county of Pulaski, State of Arkansas, was injured, at or near Argenta, Ark., on or about the 4th day of April, 1910, on a line of railway owned or operated by the Chicago, Rock Island & Pacific Railway Company, while working for said company, under circumstances which I claim rendered such company liable in damages, although such liability is denied by such railway company, and the undersigned being desirous to compromise, adjust and settle the entire matter; now, therefore, in consideration of the sum of three hundred dollars ($300) to me this day paid by the Chicago, Rock Island & Pacific Railway Company, in behalf of itself and other companies whose lines are owned or operated by it, I do hereby compromise said claim and do release and forever discharge the said Chicago, Rock Island & Pacific Railway Company, and all companies whose lines are leased or operated by it, their agents and employees, from any and all liability from all claims for all injuries, including those that may hereafter develop, as well as those now apparent, and also do release and discharge them of all suits, actions, causes of actions and claims for injuries and damages, which I have or might have arising out of the injuries above referred to, either to my person or property, and do hereby acknowledge full satisfaction of all such liability and causes of action. I further represent and covenant that at the time of receiving said payment and signing and sealing this release I am of lawful age and legally competent to execute it, and that before signing and sealing it I have fully informed myself of its contents and executed it with full knowledge thereof."

Subsequently the plaintiff was taken back into the company's service, first, resuming the work which he

had done prior to his injury, and was then employed as a flagman, but later was discharged and refused further employment.

He then instituted this action to recover on a verbal contract alleged to have been entered into by the company's agents whereby it undertook, as a part of the consideration of the aforesaid settlement, to give him employment during his lifetime at the same wages he was receiving at the time of his injury.

The defendant, in its answer, denied it had entered into any such contract with the plaintiff, and the case was tried before a jury upon that issue.

The trial resulted in a verdict in favor of the defendant, from which judgment the plaintiff has appealed.

The plaintiff testified that during the negotiations for settlement and at the time the written agreement was entered into the claim agent agreed that as a part of the consideration for the settlement the company would give him a "lifetime job" at the rate of wages he was receiving at the time of his injury.

The court gave two instructions requested by the plaintiff, telling the jury, in substance, that, if the defendant, at the time of the settlement and execution of the written release, "verbally agreed, in consideration of said release, to give the plaintiff permanent and steady employment at such work as plaintiff could perform in his then condition for the term of his natural life, at a stated compensation," and that, if the plaintiff agreed to do the work for the defendant and entered upon the performance of his contract and was discharged without cause, then the verdict should be in favor of the plaintiff, for a sum equal to the "present value of the money agreed to be paid him under the contract for the period of his life, less the present value of such sum as you may find he has earned or might have earned by reasonable diligence since his discharge by the defendant, and less such sums as he may be able to earn in the future by the use of reasonable diligence."

Upon the request of defendant, and over plaintiff's

objection, the court gave an instruction to the jury that the testimony showing the existence of said oral contract for future employment must be "clear, convincing and conclusive." The giving of this instruction is assigned as error.

It is not contended in this case that there was any fraud or mistake which would justify the court in setting aside the compromise agreement. In fact, this is not a suit to set aside the contract, but it is one to recover upon an alleged contemporaneous oral contract based upon the same consideration, namely, the release of the asserted claim for recovery of damages on account of personal injuries of the plaintiff.

If, in the absence of fraud or mistake, an oral contract can be proved, then the trial court erred in instructing the jury that any greater burden was upon the plaintiff than to establish the contract by a preponderance of the testimony. *Magill Lumber Co.* v. *Lane-White Lumber Co.,* 90 Ark. 426.

Ordinarily, that error would call for a reversal of the cause, but if the rules of evidence forbid proof of such oral contract where a written contract has been entered into of the nature shown in this case, then the instructions were more favorable to the plaintiff than he was entitled to, and the error was not prejudicial, and the judgment should be affirmed notwithstanding the erroneous instruction.

This court has decided that parol proof is admissible to establish the fact that other considerations, not recited in a deed or written contract, were agreed to be paid, when such proof does not contradict the terms of the writing. *Busch* v. *Hart,* 62 Ark. 330; *Magill Lumber Co.* v. *Lane-White Lumber Co., supra.*

The same rule is otherwise stated in opinions of other courts that, where the writing merely contains a recital or acknowledgment of the consideration, an additional consideration or other undertakings based upon the same subject-matter may be proved without varying the terms of the writing, but that, where the recital of

the consideration is part of the contract itself, or, in other words, that the amount or nature of the consideration is contractual, then to admit such proof would vary the terms of the contract, and is, therefore, inadmissible.

Professor Wigmore states the rule thus:

"In general, then, it may be said that a recital of consideration received is, like other admissions, disputable so far as concerns the thing actually received; but that, so far as the terms of a contractual act are involved, the writing must control, whether it uses the term 'consideration' or not." 4 Wigmore on Evidence, § 2433.

The Supreme Court of Minnesota, in a well-considered case, correctly stated the rule as follows:

"While the true consideration of written contracts may as a general rule be inquired into by evidence outside the writing, the rule is not without well-defined exceptions. It applies more particularly to contracts, wherein the consideration is expressed in general terms, as the acknowledgment of the payment of a stated amount of money. In such cases the true consideration may always be shown. * * * But where the expressed consideration is more than a stated amount of money paid or to be paid, and is of a contractual nature, parol proof is inadmissible to vary, contradict or add to its terms." *Kramer* v. *Gardner,* 104 Minn. 370, 22 L. R. A. (N. S.), 492.

The same rule is stated in 17 Cyc. 661, as follows:

"Where the statement in a written instrument as to the consideration is more than a mere statement of fact or acknowledgment of payment of a money consideration, and is of a contractual nature, as where the consideration consists of a specific and direct promise by one of the parties to do certain things, this part of the contract can no more be changed or modified by parol or extrinsic evidence than any other part."

The case of *White* v. *Railroad,* 110 N. C. 456, was one in which an action had been instituted on an oral agreement alleged to have been executed contemporaneously with a written release of compromise of claim

for damages, and the court held that the oral agreement could not be proved. The court said:

"In the nature of the matter, it was appropriate and orderly to specify the whole consideration. The language employed was appropriate and apt for that purpose, and in the absence of any provision or implication in the release to the contrary, it must be taken that it does. It, by its terms and effect, concludes the plaintiff, and he can not be allowed to allege that there was other and further consideration for it than therein expressed. The parties made it written evidence of their settlement and they must abide by it, unless, in some appropriate way and for sufficient cause, it shall be made to appear that it does not express truly the contract of settlement it purports to embody."

Chaplin v. *Gerald,* 104 Maine, 187, was a case almost identical with the present one. In the opinion the court said:

"The instrument in the case at bar is not incomplete but comprehensive, and appears to embrace an entire contract between the parties. It is not merely a receipt for money, which may be explained by parol; on the contrary, it is a formal release witnessing in plain and explicit terms an agreement discharging the defendants from all liability to the plaintiff for the injury he had received and which was to be 'final and conclusive.' The testimony of the plaintiff that the defendants agreed in addition to the $1,000, expressed as the consideration for the release, to furnish him employment as long as he should be able to work, is, we think, inconsistent with and tends to vary and contradict the written instrument."

Myron v. *Union Railroad Co.,* 19 R. I. 125, was also a similar case based on release such as found in the present case, and the court reached the same conclusion.

The only case brought to our attention holding to the contrary is *Pennsylvania Co.* v. *Dolan,* 6 Ind. App. 109, 51 Am. St. Rep. 289, where the court held that, a release executed similar to the one in the case at bar,

additional parol agreement to employ the plaintiff at a certain consideration was collateral to the issue and that oral testimony was admissible for the purpose of proving such an agreement. The court in its opinion recognized the general rule, however, that "where the parties have undertaken to specify the consideration in the writing, and where such consideration is contractual in its nature," parol testimony of additional agreement is inadmissible.

The contract before us contains more than a mere recital or acknowledgment of the amount to be paid as the consideration. The writing shows upon its face that it was a compromise of the differences between the parties concerning the subject-matter stated and that the amount to be paid was a part of the contract. That part of the contract constituted more than a mere receipt for the money paid, and it would be inconsistent with the express terms of the writing itself to prove an additional or further consideration.

In the recent case of *Cherokee Construction Co.* v. *Prairie Creek Coal Mining Co.*, 102 Ark. 428, there was a different application of the rule made, that being a suit to establish liability under a cause of action found to be embraced within the release, but we said:

"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. * * * 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."

So it can be said in the present case. The parties adjusted their differences and entered into a written contract, which covered, not only the claim to be released, but the amount to be paid in consideration of such re-

lease. That is, we think, conclusive upon the parties in the absence of a showing of fraud or mistake. The case was, therefore, submitted to the jury upon instructions more favorable to plaintiff than he was entitled to, and he can not complain of the error in one of the instructions. The verdict could not have been otherwise than in favor of the defendant upon the competent testimony, viewing it in its light most favorable to the plaintiff.

The judgment is, therefore, affirmed.

SEMBLER v. WATER AND LIGHT IMPROVEMENT DISTRICT No. 2.

Opinion delivered June 23, 1913.

1. IMPROVEMENT DISTRICTS—NEW DISTRICT—RIGHTS AND POWERS.—Where a water and light improvement district is formed embracing all of an existing district and additional territory for the purpose of reconstructing waterworks and lighting facilities, it is a new and independent district; and if it has been legally formed it may proceed with the work of reconstruction, with the single limitation imposed by the statute as to cost, which is that the cost of the reconstruction shall not exceed 20 per cent of the value of the real estate in the new district. (Page 95.)
2. IMPROVEMENT DISTRICTS—NEW DISTRICT COVERING PROPERTY EMBRACED IN EXISTING DISTRICT.—Where property is embraced in and assessed in a water and light improvement district, it may be embraced in a new district covering a broader territory, if additional benefits accrue to the property in the old district. (Page 97.)
3. IMPROVEMENT DISTRICTS—VALIDITY OF ORGANIZATION.—The validity of a new improvement district, embracing property already in an existing district, is not affected by the question of benefits accruing to the property in the then existing district; such question can be considered only in the assessment of benefits. (Page 97.)
4. IMPROVEMENT DISTRICTS—VALIDITY OF ORGANIZATION.—Kirby's Digest, § 5689, relating to improvements made by the owner in an improvement district, relates only to private ownership of property, and can not be extended so as to give the owners of property in an old improvement district credit for an improvement made by the old district, when it is merged into a new district. (Page 98.)
5. IMPROVEMENT DISTRICTS—NATURE OF, AND POWERS.—Improvement districts are governmental agencies and agents of the property owners, with limited authority, and the only powers of the district

are those conferred by the statute, either in express terms or by necessary implication. (Page 98.)

6. IMPROVEMENT DISTRICTS—RIGHTS OF PROPERTY OWNERS.—Property owners and taxpayers in an existing improvement district have the right to object to any unauthorized change in the property of the district. (Page 99.)

7. IMPROVEMENT DISTRICTS—SEWER DISTRICTS.—Owners of property not covered by a water system, may organize a sewer improvement district in anticipation of getting a supply of water. (Page 100.)

Appeal from Cross Chancery Court; *Charles D. Frierson,* Chancellor; reversed in part; affirmed in part.

J. C. Brookfield and *James B. McDonough,* for appellants.

1. There is in our State no statutory authority for the organization of a water and light improvement district for the reconstruction, repair and improvement of an old plant. Section 5664, of Kirby's Digest, relied on by appellees, authorizes the construction of an improvement, but does not authorize the reconstruction or repair of an old improvement. Water and Light Improvement District No. 2, is, therefore, invalid, and, as it includes the old district, the assessments are void because they exceed 20 per centum of the value of the real property in the district. 86 Ark. 1; 98 Ark. 543; 95 Ark. 575; Kirby's Dig., § § 5683-5716; 70 Ark. 211.

The Legislature, by the act of 1907, Acts 1907, p. 1142, authorized improvement districts to repair old plants. It was amendatory of, and supplementary to, the improvement district law of the State, Kirby's Dig., § § 5664-5742, inclusive, and must be understood and construed as a part of it. It is not in conflict with the Constitution—neither does it repeal the law requiring the consent of a majority of the real property owners. The act is a provision for the repair and improvement of old plants, and cures a defect in the old law. Page & Jones on Local Assessments, § 414, and cases cited; *Id.* § 963, and cases cited. See also Acts 1909, p. 742.

New assessments to rebuild old worn-out plants may be made where authorized by statute. Page & Jones,

§ § 380, 381, 463, 379, and authorities cited under each section. See also 59 Ark. 494, 28 L. R. A. 496; 42 Ark. 152; 69 Ark. 68; 67 Ark. 30; 59 Ark. 513; 52 Ark. 107; 48 Ark. 370; 42 Ark. 152.

2. There must be a statute authorizing the reconstruction of an old plant before there can be an assessment for reconstruction. Page & Jones, § § 464, 952, 962, 958, 379, 387, and authorities cited.

3. A sewer district and a sewer without use or without water is void. Page & Jones, § 401, and cases cited in note 12; *Id.* § 404.

An assessment can not be legally imposed on property in one improvement district to pay the cost of improvements in another. 50 Ark. 116.

Rose, Hemingway, Cantrell & Loughborough, for appellees.

1. The attempt of the city council to repeal the ordinance under which the sewer district was organized, was done long after the assessment was made, and after the time for objections to it had expired. The council had no right to pass the repealing ordinances, and they are invalid. 71 Ark. 4, 11.

So far as the construction of the improvements are concerned, the council had no authority to prohibit their construction and the use of the streets for that purpose. Kirby's Dig., § 5718; 97 Ark. 21; 42 Ark. 152; 55 Ark. 148, 157; 86 Ark. 1, 12; 67 Ark. 30, 37.

2. The law provides that a district may be created "for the purpose of grading or otherwise improving streets and alleys, constructing sewers or making any local improvement of a public nature." Kirby's Dig., § 5664. This court has held that the only limitations on the improvements are that they shall be *local* and of a *public nature.* 67 Ark. 37; 70 Ark. 457, 463, 469.

The inclusion of property within the boundaries of a district creates a *prima facie* presumption that it is benefited, and this presumption can only be overcome by proof of fraud or mistake. 52 Ark. 107, 112; 70 Ark. 451; 81 Ark. 208; 98 Ark. 550. In this case,

if the property in the new district that was not in the old was specially benefited beyond what the property in the old district was benefited, the varying extent of the several benefits was for the assessors to decide, subject to the statutory rights of appeal. 84 Ark. 267, 268.

Authority to construct an original improvement includes authority to reconstruct, or repair, and to reassess for that purpose. 34 Ind. 140; 80 Minn. 293, 83 N. W. 183; 32 Mo. App. 601; 48 N. J. L. 101, 2 Atl. 627; 164 N. Y. 258, 58 N. E. 130; 71 N. J. L. 526, 59 Atl 16; 109 Ky. 1, 58 S. W. 371; 89 Cal. 304, 36 Pac. 885; 20 Minn. 424. The act which appellants say provides a method for reconstructing a waterworks plant, Acts 1907, p. 1142, is invalid for the same reason that the act creating the Russellville Waterworks District, Acts 1907, p. 41, was held to be invalid. 84 Ark. 390.

McCULLOCH, C. J. This litigation draws in question the validity of two local improvement districts in the city of Wynne, Cross County, Arkansas.

One of them is a district formed for the purpose of reconstructing and extending the system of waterworks and electric lights previously constructed and maintained by another improvement district in the same city; and the other is a district formed for the purpose of constructing a sewer system in the specified territory.

Three suits were instituted, and afterwards consolidated and tried together.

During the year 1899, an improvement district, designated as "Water and Light Improvement District No. 1," was organized in the incorporated town of Wynne, embracing a portion of the territory of said town. The cost of that improvement amounted, according to the showing made in this case, to "twenty per centum of the value of the real property in said district, as shown by the last county assessment," which is the maximum cost permitted under the statute. Kirby's Dig., § 5683. A portion of the cost of that improvement remains unpaid, and of the bonds issued to raise money for the payment of the cost of construction, the sum of $7,000 remains

unpaid at this time. The water and light system so constructed has been maintained in the district up to the present time, but has become out of repair.

The territory of the town of Wynne was subsequently extended, and after the population of the town had greatly increased, it was converted into a city of the second class.

The first controversy arose concerning a proposal to extend the water and light service outside of the limits of the original district, and the first of these three suits was instituted by some of the owners of real property in the district to restrain the board of commissioners from so extending the service beyond the limits of the district.

A district was then organized, designated as "Water and Light Improvement District No. 2," embracing the territory of district No. 1 and much other territory of the city of Wynne, the purpose of said organization being stated in the petitions and ordinances as follows:

"For the purpose of reconstructing the present waterworks constructed by Waterworks Improvement District No. 1, and digging a new well, building a new reservoir and extending the line of pipes so that the water supply in the district will be increased and extended and adequate fire protection afforded," and "also to reconstruct and improve the present electric light plant installed by Water and Light Improvement District No. 1, so that the present plant shall be reconstructed, the current changed from direct to alternating current, and the line of wires extended, so that the property in the district will be supplied with adequate electric lighting facilities."

After the organization of District No. 2 was completed and assessments had been levied, property owners in the old district instituted a second action to declare the organization invalid as being unauthorized by statute.

Another district was organized, designated as "Sewer District No. 1," which embraced the same territory as that covered by Water and Light District No. 2,

and was for the purpose of constructing a sewer system in the district.

After the organization of that district was complete and the assessments levied, a third suit was brought by owners of real property therein for the purpose of declaring the same invalid.

In the meantime, the city council had passed an ordinance undertaking to repeal the ordinance creating the sewer district.

In the new water and light district, and also in the sewer district, sales of bonds were negotiated, and in each of the suits an injunction was sought against the consummation of the sale of bonds. In each of those two suits the board of improvement of each district filed an answer and also a cross complaint, seeking to enforce the assessments levied for the two improvements. It should be added, also, that according to the allegations of the complaint, each of the improvements provided for in the organization of the two districts was estimated to cost 20 per centum of the value of the real property in the district, as shown by the last county assessment.

These are the suits that were consolidated and tried together below, and, for convenience, will be designated as suits No. 1, No. 2 and No. 3, respectively, numbering them in the order in which they are stated above.

Upon final hearing, the chancellor dismissed each of the complaints for want of equity, and the plaintiffs appealed.

Suit No. 1 appears to have become unimportant, and is not pressed for the reason that the relief sought therein is embraced within suit No. 2, involving the validity of Water and Light Improvement District No. 2. That case, therefore, passes out of consideration.

It is contended that the organization of District No. 2 is invalid for the reason that it is, in effect, an attempt to reconstruct and repair the old water and light plants of District No. 1, to extend the service thereof, and to extend the boundaries of the district; and that those sub-

jects are covered by statutes which have not been complied with.

Reliance is placed, in support of this contention, upon the act of May 28, 1907, authorizing the increase of the capacity of waterworks and lighting systems; Act No. 245, approved May 13, 1909, authorizing additional assessments in a district for the purpose of making repairs; and Act No. 246, approved May 13, 1909, authorizing the extension of territory of improvement districts. It is argued that those statutes are exclusive in their operation, and that there can be no increase or repair of a system or extension of territory of a district except in compliance with the terms thereof.

It is contended, also, in the same connection, that the reconstruction of the improvement is part of the same project as the old improvement, and that the statute would be violated if the additional improvement should be undertaken to cost more than 20 per centum of the value of the real property in the district. In other words, the contention is, as we understand it, that the original construction and the proposed reconstruction and extension of the old plant must be treated as a single improvement and that the whole cost must not exceed 20 per centum of the value of the real property in the district.

We are of the opinion, however, that the formation of a new district is a new and independent project which constitutes of itself a single improvement, and that it does not fall within the statutes mentioned above, and is not restricted by the 20 per centum limitation upon the cost of the original improvement. If the district was legally formed, and has the right to proceed with the reconstruction of the old plant, it may be treated as a new and independent project, constituting a single improvement undertaken by the new district, and the only limitation imposed by the statute, so far as the cost thereof is concerned, is that the additional improvement, or, rather, the proposed reconstruction and extension, shall not cost more than 20 per centum of the value of

the real estate embraced in the whole of the new district.

The fact that part of the territory embraced in the new district is already covered, and the property therein assessed for the construction of the old water and light plants, affords no reason why it can not be embraced in a new district covering a broader territory if additional benefits accrue to the property in the old district. That was decided in the case of *Boles* v. *Kelley,* 90 Ark. 29, and in the recent case of *Lee Wilson & Co.* v. *Wm. R. Compton Bond & Mortgage Co.,* 103 Ark. 452, 585, 146 S. W. 110.

The inclusion in the new district of property embraced in the old one, if the new improvement is of such a character that additional benefits may accrue to the property in the old district, relates only to the assessment of the benefits, and that is a question which arises in making the assessments. To illustrate: The benefits accruing to the property in the old district from the improvement constructed therein should be considered in determining the benefits to accrue from the new improvement. But, as before stated, that is a question which does not affect the validity of the organization of the new district, but is considered only in the assessment of benefits, and each of the property owners is afforded, under the statute, an opportunity to challenge the correctness of assessments levied on his property. The remedies were pointed out by this court in the case of *Kirst* v. *Improvement District,* 86 Ark. 14.

The most serious question presented in this case is, whether a new district can be formed for the purpose of reconstructing or extending an improvement, such as the water or light plant, constructed, owned and operated by another district.

This necessarily involves the taking over of the old improvement by the new district, or, at least, a merger of the old district into the new, so far as the ownership of the improvement is concerned. If any authority can be found in the statute for the cession of the property by the old district to the new, or the taking over of the

old property by the new district, then we see no reason why, if it constitutes a benefit to the old district to reconstruct, repair and extend it, it can not be done as a new and single improvement to be paid for by assessments on all the property in the new district. But we are unable to find any authority in the statute for such a proceeding as the cession of the property of the old district to the new. The city council has no authority to cede the property or to transfer the title from the old district to the new. Neither have the property owners of the old district that power, either individually or collectively. There is an entire absence of legislation on that subject. We have a statute (Kirby's Digest, § 5689) which provides that, if, in the construction of any improvement, an owner of property in the district "shall be found to have improved his own property in such manner that his improvement may be profitably made a part of the general improvement of the kind in the district, the value of such improvement made by the owner shall be appraised, and he shall be allowed its value as a set-off against the assessment against his property." The principle declared in that statute, if it could be applied to property owned by an improvement district, would cover the difficulty we find in the present case; but, unfortunately, that statute relates only to private ownership of property, or, rather, improvement by the individual owner of his own property, and can not be made to extend the right so as to give the owners of property credit for an improvement made by the district, when it is merged into a new district. That very principle is the one which controls in the manner of assessing property in a new district where the property of an old district has received benefits from another improvement, but it is not applicable so as to allow the old improvement to be taken over by the new district and credited upon the assessments of individual owners in the old district. Further legislation is required to do that, and to authorize the cession of the old improvement to the new district. It is within the province of the Legislature to provide for such merger

or cession as is herein indicated upon such just and equitable terms as may be deemed appropriate; but the courts can not read any such authority into the statutes. Improvement districts are, in a sense, governmental agencies, and, at the same time, agents of the property owners, with limited authority, and the only powers they have are those conferred either in express terms or by necessary implication.

Now, it will be observed that the new district was organized solely for the purpose of taking over and reconstructing and extending the water and light systems owned by the old district, and, since we find no authority for taking over the old property, the project must fail because the organization is to do a thing which the statute does not authorize. If the new organization should proceed with the reconstruction and extension of the old water and light systems, there would necessarily arise a conflict in the question of ownership and control between the two districts, the old district not being extinguished nor its rights to the property lost by the organization of the new district.

Appellants are property owners and taxpayers in the old district, and have the right to object to any unauthorized change in the property or buildings of the district. They are, in this proceeding, asserting their right to prevent any such unauthorized changes.

We are, therefore, of the opinion that the object of the new organization fails for want of authority to acquire the water and light plants constructed by the old district, and that the whole proceeding must be declared invalid.

Now, as to suit No. 3, relating to the sewer improvement district, we discover no reason why that district should be invalidated and further proceedings thereunder enjoined.

The only ground urged is that it covers territory not now covered by the old water system, and that sewers without water would be no benefit.

The theory is correct, but it does not follow that the

owners may not provide for sewers in anticipation of getting a supply of water, and the fact that the present scheme for supplying water in the additional territory failed, affords no reason why the property owners, if they desire to improve their property by constructing sewers, should not be allowed to proceed in that direction. Other means may be provided, either by the city or by the formation of an independent and separate improvement district, to furnish water in that locality, and in anticipation of that property owners have the right to organize a district to construct sewers. The city council had no authority to abolish this sewer district. *Morrilton Waterworks* v. *Earl,* 71 Ark. 4.

It follows that the decree of the chancellor is correct in suit No. 3, relating to the sewer district, and that decree is affirmed; but the decree in suit No. 2, relating to the organization of Water and Light Improvement District No. 2, and the enforcement of assessments thereunder, is reversed, and the cause remanded with directions to enter a decree in accordance with the prayer of the complaint.

It is so ordered.

STATE *ex rel.* THE ATTORNEY GENERAL *v.* RAILROAD COMMISSION OF ARKANSAS.

Opinion delivered July 7, 1913.

1. WATERS—WATER POWER—FRANCHISE.—Under the act of May 13, 1905 (Laws of 1905, p. 769), granting the power to the State Board of Railroad Incorporation to grant franchises to corporations to develop water power, the Railroad Commission, which succeeded the State Board of Railroad Incorporation, is not authorized to extend the time for the construction of a dam, which was limited by order of the first board. The powers of a board must be strictly confined to those conferred by the statute. (Page 103.)
2. WATERS—AMENDED FRANCHISE—TIME FOR ERECTING DAM.—The act of March 12, 1913, p. 696, does not authorize the Railroad Commission to extend the time within which a water power company may erect its dam. (Page 104.)

3. CERTIORARI—SCOPE OF REMEDY.—When the action of public officers or bodies is purely legislative, executive or administrative, although it involves the exercise of discretion, it is not reviewable on *certiorari*; but where the tribunal acts in a judicial or *quasi*-judicial capacity, and makes an order in excess of its powers, it is reviewable on *certiorari*. (Page 105.)

4. CERTIORARI—SCOPE OF REMEDY.—Where the Railroad Commission extends the time in which a corporation may erect its dam, under Act 1905, p. 696, the order may be reviewed on *certiorari*. (Page 107.)

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

Wm. L. Moose, Attorney General, and *Mehaffy, Reid & Mehaffy,* for appellant.

The commission had no power in the premises except to grant the franchise, etc. 19 Cyc. 1460; Castle's Dig., § 8002; 3 Thompson on Corporations, § § 2863-4, 2878; 132 Fed. 901; 211 U. S. 265; Thompson on Corporations, § § 2874-2866; Acts Ark. No. 163, March 12, 1913; Endlich on Int. Stat., § 407; 6 Words & Phrases, § 5105.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

1. Certiorari will not lie. 6 Cyc. 737; *Ib.* 738; Kirby's Dig., § § 1315-16; 52 Ark. 220; 61 *Id.* 607; 62 *Id.* 196; 69 *Id.* 591; 73 *Id.* 606; 80 *Id.* 201; 70 *Id.* 589; Bishop on Noncontract Law, ¶ ¶ 785-6; Mechem on Pub. Officers, ¶ 637; 74 Pac. 71; 96 N. W. 673; 152 S. W. 1012; 40 Cyc. 667.

2. The powers of the commission are judicial or *quasi*-judicial, and can not be controlled by mandamus or certiorari. 94 Ark. 422.

3. The commission had the power to extend the time to complete the work. Acts 1905, p. 769; Acts 1913, No. 145; 145 S. W. 199; Acts 1913, No. 163; 11 Ark. 47; 89 *Id.* 384; 101 Ark. 223; Kirby's Dig., § 5448; *United States* v. *Lane,* U. S. S. C. April 15, 1913, ms. op.

McCULLOCH, C. J. The Attorney General challenges, in this proceeding, the power of the Railroad Com-

mission to make an order extending the time for constructing a power dam under a franchise previously granted to the Garland Power & Development Company of Arkansas, a domestic corporation.

On May 11, 1910, the State Board of Railroad Incorporation granted to the Garland Power & Development Company a franchise to erect a dam upon the Ouachita River at points mentioned, and the franchise so granted contained a provision that the "Garland Power & Development Company shall, within four years from the date of this order, put in direct operation and be prepared to deliver electric current to customers, and to develop and operate water powers upon Ouachita River in Garland and Montgomery counties."

It was doubted whether the statute conferred the power to grant such franchise upon the Board of Railroad Incorporation or upon the Railroad Commission, the language of the statute being ambiguous; but this court held that the first-named board possessed the power under the statute. *Garland Power & Development Co.* v. *State Board of Railroad Incorporation,* 94 Ark. 422.

Since that time, the Legislature has amended the statute so as to transfer the power from the Board of Railroad Incorporation to the Railroad Commission of the State.

On May 9, 1913, the Garland Power & Development Company filed its petition before the Railroad Commission, reciting the former proceedings, and asked that the time for constructing the dam and beginning operation under the franchise be extended for the term of four years from that date. The reasons for the request were stated in the petition, and the commission made an order granting the extension of time. The validity of that order is challenged in this proceeding, and the Attorney General sued out a writ of *certiorari* before the circuit court of Pulaski County to quash the order. The circuit court rendered judgment dismissing the petition, and the Attorney General appealed to this court.

The act of May 13, 1905, under which the franchise

was granted, merely empowered the State Board of Railroad Incorporation to "grant to such corporation the franchise of erecting such dam or dams, which franchise shall state the maximum compensation per horsepower to be received by such corporation for the use of the power generated." The act contains no provision for fixing the time during which the franchise may be operated, or the time the improvement must be put into operation.

The question of the effect of the Board of Railroad Incorporation putting in the provision limiting the time to four years, does not arise in this case, and we, therefore, refrain from any discussion on that point.

What we are called upon to decide is, whether the Railroad Commission, as the successor to the Board of Railroad Incorporation, in the exercise of this power, has the authority to subsequently insert the provision or make an order extending the time.

It is plain that the commission possessed no such power, and that the order is void.

The statute only authorized the granting of franchises for the erection of dams and the fixing of maximum compensation per horsepower to be received for the use of the power generated. The Board of Railroad Incorporation was authorized to exercise only such power as was clearly expressed or necessarily implied from the language used in the statute. It could, in other words, exercise only such powers as were expressly or by necessary implication conferred, it being a tribunal created especially to exercise this particular function. The Board of Railroad Incorporation, as well as the Railroad Commission, its successor in the exercise of this power, are clothed with authority with respect to other matters, but the statute limits its power, with respect to granting this franchise, solely to the matters indicated above. It is but the statement of an elementary principle that the powers of the board must be strictly confined to those conferred by the statute. No authorities are necessary to support that principle, and none to the contrary are cited by counsel for appellees.

The power with respect to granting the franchise is not a continuing one, and was exhausted with its exercise in granting the franchise.

The General Assembly of 1913 enacted a statute, approved March 12, 1913, which is relied on by counsel to sustain the power to grant the extension. Section 1 of the act provides that any corporation organized for the purpose of producing power for manufacturing and other lawful purposes, and which has procured a charter from the State for the development and operation of water power, "may, at any time, before the construction of such dam shall have been completed, file with the Railroad Commission of Arkansas, with the Secretary of State, and with the county clerk of the county or counties in which the lands pertaining to such water power are situated, an amended survey, estimate and engineer's report, making such changes in the location or plan of construction of its principal power dam, and otherwise, as it shall deem necessary and advisable;" and that the commission "may, upon a hearing on said application, permit such corporation to amend its survey, estimate and engineer's report, and make such changes in the location or plan of construction of its principal power dam, and otherwise, as may appear to it necessary and advisable."

It is insisted that the authority of the commission to permit an amendment of the estimates, of the surveys, and the location and plans of construction, necessarily implies the power to extend the time for completing the improvement.

We do not think, however, that the statute just referred to enlarges the powers of the commission in any respect except as to those matters named in the statute itself.

Some stress is laid in the argument on the words "and otherwise" as having some significance in enlarging the powers of the commission.

But, we think that those words refer merely to the changes in the surveys, estimates and reports, and in the

location and plan of construction. The commission has the power merely to "permit such corporation to amend its survey, estimate and engineer's report, and make such changes in the location or plan of construction of its principal power dam, and otherwise, as it may deem necessary and advisable." The words "and otherwise" have no reference to time for completing the improvement.

Learned counsel for appellee cite the recent case of *Little Rock Ry. & Electric Co.* v. *Dowell,* 101 Ark. 223, as sustaining their contention.

That case related, however, to the power of the city council of Little Rock to amend a franchise by consent of the owner. It has no bearing on the present case for the reason that a city council is fully authorized by statute to deal with the question of granting franchises and providing utilities for the public, and the power conferred is clearly a continuing one. The city council acts in a legislative, as well as an administrative, capacity, and the power over that subject is necessarily continuing, and gives it the power to amend a charter except so far as it disturbed vested rights. The doctrine of that case has no application here, for the statute does not confer any general power over the subject, and it was not a continuing power.

A very serious question presented is, whether the writ of *certiorari* is the appropriate remedy.

This is, by no means, free from doubt; but we have reached the conclusion that it is the proper remedy.

The law on that subject was stated by Judge BATTLE in the case of *Pine Bluff Water & Light Co.* v. *City of Pine Bluff,* 62 Ark. 196. He states the rule to be that "when the action of the officers or public bodies is purely legislative, executive and administrative, although it involves the exercise of discretion, it is not reviewable on *certiorari,*" but that where the tribunal acts in a judicial or *quasi*-judicial capacity, and makes an order in excess of its powers, which is void, it is reviewable on *certiorari.* "But it is not essential," said Judge BATTLE in that case,

"that the officers or bodies to whom it lies shall constitute a court, or that their proceedings, to be reviewable by the writ, should be strictly and technically 'judicial' in the sense that word is used when applied to courts. It is sufficient if they are what is termed '*quasi*-judicial.' "

The test, therefore, is whether the act sought to be reviewed is done in a judicial or *quasi*-judicial capacity, and not merely in a legislative, executive or administrative capacity.

The rule is clearly stated in 4 Encyclopedia of Pleading and Practice, pp. 74-78, where it is said that, "The decisions as to what are, or are not, judicial acts, are so varying and frequently so directly conflicting that it is difficult to deduce from them any general rules or principles."

In *Pine Bluff Water & Light Co.* v. *City of Pine Bluff, supra,* which involved the action of the city council in attempting to impose burdens upon the exercise of a franchise previously granted, this court held that the ordinance was legislative, and not reviewable on *certiorari.*

In *McConnell* v. *Arkansas Brick & Mfg. Co.,* 70 Ark. 568, 589, the court held that an act of the State Board of Penitentiary Commissioners, in attempting to revoke a contract previously entered into with respect to the leasing of convicts, was an executive or ministerial act, and could not be reviewed on *certiorari.*

In the case of *Garland Power & Development Company* v. *State Board of Railroad Incorporation, supra,* we held that the Board of Railroad Incorporation, in the exercise of the power conferred with respect to this matter, exercised discretion which would not be controlled by mandamus, and in the later case of *Ouachita Power Co.* v. *Donaghey,* 106 Ark. 48, the same rule is announced. In neither of the cases, however, did we undertake to decide whether the board acted in a judicial or *quasi*-judicial capacity.

Discretion may be allowed in the exercise of legis-

lative, executive or administrative powers without bringing the act within the category of the judicial function. *Pine Bluff Water & Light Co.* v. *City of Pine Bluff, supra.*

We are of the opinion that, when the nature of the act involved in this case is considered, the power conferred by the statute was intended to be exercised by the board in a judicial or *quasi*-judicial capacity, and that the order may be reviewed on *certiorari.* The authorities are far from harmonious on this question, but those cited in the briefs strengthen us in the view that *certiorari* is the proper remedy in this instance.

It follows from what we have said that the order of the Railroad Commission extending the time was void, and must be quashed. The judgment of the circuit court is, therefore, reversed and judgment will be entered here quashing the order of the Railroad Commission.

EXCHANGE NATIONAL BANK *v.* STEELE.

Opinion delivered June 30, 1913.

1. BILLS AND NOTES—NOTE—NEGOTIABILITY.—A note containing an unconditional promise to pay a certain sum of money is negotiable, although given as the purchase price of certain mules, and containing a reservation of title in the animals as security. (Page 112.)

2. BILLS AND NOTES—BONA FIDE HOLDER.—One who takes negotiable paper before maturity as security for a debt, without notice of any defect, receives it in due course of business, and is a *bona fide* holder. (Page 113.)

3. BILLS AND NOTES—PAYMENT TO PERSON OTHER THAN HOLDER—DISCHARGE.—The maker of a negotiable note who pays the same to the payee, who is not the holder, is not discharged from his obligation to the holder, unless it is shown that the payee was authorized to receive payment, or that the holder led him to believe that the payee was so authorized. (Page 113.)

4. BILLS AND NOTES—PAYMENT—SUFFICIENCY OF EVIDENCE.—Where maker of a note paid same to the payee, who was not the holder, the evidence *held* insufficient to show that the holder authorized payment to the payee. (Page 114.)

Appeal from Lonoke Circuit Court; *Eugene Lankford,* Judge; reversed.

STATEMENT BY THE COURT.

This was a suit in replevin, brought by appellant in the Lonoke Circuit Court, to recover the possession of two mules, the appellant claiming title to the mules as an innocent purchaser of a note given to Eagle & Co., of England, Ark., by T. E. Tolson for the purchase price of said mules, the title thereto remaining in Eagle & Co. until the full purchase price should be paid. Eagle & Co. did a large business at England and borrowed large sums of money from the appellant bank and deposited as collateral for these loans various notes payable to their order and taken in the course of their business. The note which forms the basis of this suit reads as follows:

"On or before the 1st day of October, 1911, for value received the undersigned promises to pay to Eagle & Co., or order, one hundred and eighty dollars, with interest at 10 per cent per annum from date until paid, negotiable and payable at England, Ark., it being for one brown mare mule, sixteen hands high, nine years old, named Kate; one brown horse mule, fifteen and one-half hands high, six years old, named Jack; and this day delivered to the maker of this note, with the understanding and agreement by and between the maker of the note and Eagle & Co. that the title of above described property is and shall remain in said Eagle & Co. until above amount is paid in full."

It is undisputed that appellant became an innocent purchaser of this note on the 24th of January, 1911, but appellees claim that they paid the note in question to Eagle & Co., on or about December 1, 1911. Appellant alleged that appellees were in possession of the mules, claiming the title thereto and had refused to deliver them upon demand made therefor and that they were worth $207, and judgment was prayed for the recovery of their possession, or for their value in case delivery could not be had. Appellant filed proper affidavit and bond, but

appellees filed cross bond and retained possession of the mules, and in their answer denied appellant's right to the immediate possession and alleged that they were entitled to the possession by virtue of having paid to Eagle & Co. for Tolson the note sued upon. That this payment was made on December 1, at which time Eagle & Co. transferred the mules to them, and that they made this payment without any knowledge of any claim in favor of plaintiff. The value of the mules as stated in the complaint was denied in the answer, but admitted upon the trial to be $207.

Various exceptions were saved by appellant during the progress of the trial which we need not discuss here, for under our view of the law as applicable to the undisputed evidence in this case, a verdict should have been directed for appellant. It is admitted that the note was in appellant's possession at the time the payment was made to Eagle & Co., but appellees insist that they should be protected in their payment because appellant had constituted Eagle & Co. as its agent to collect this and other notes given and used as this one was, and they say that if express authority to this effect had not been given, that such authority was implied from the course of dealing between the bank and Eagle & Co. The only witnesses who testified in the case were T. J. Hudson, who was the bookkeeper for Eagle & Co., appellee Steele, and Hussman, the assistant cashier of the bank, and Tolson, the maker of the note. There was no evidence on the part of the appellees that they had any personal knowledge of the course of dealing between Eagle & Co. and the bank, and the evidence in regard to Eagle's agency and authority in the collection of the notes, or of their course of dealing from which such authority could be inferred, consisted of the evidence of Hudson and of Hussman. Hudson testified that Eagle & Co. borrowed large sums of money from the appellant bank and deposited notes payable to them as collateral security always for an amount in excess of the sum borrowed. Upon his examination by appellee he was asked these questions:

Q. Did the Exchange National Bank ever collect any of these notes from the parties—who collected these notes from the parties—notes put up as collateral security?

A. Eagle & Co. Up until about two years before he failed, Eagle had paid the plaintiff (appellant) the amounts he had borrowed from it.

Q. In collecting these notes, have you frequently sent to the bank for the notes, collected them and sent the money to the Exchange National Bank?

A. We have done that, not frequently.

Q. When you got the money and when you got the note back from the bank, did you then turn the note over to the party who paid you?

A. Yes, sir.

Q. Did the Exchange National Bank ever make any objections to the collection of these notes which they held as collateral security?

A. None that I ever heard of.

Q. Now, of these notes which you had placed there and of which you did not have possession, who made the collection of these notes, you or the Exchange National Bank?

A. We have been in the habit of making the collections. When Eagle's note in favor of the bank fell due and he did not have the money to take it up, we usually asked for more time; sometimes on the same collateral. We sometimes exchanged collateral with the bank. The note in suit was paid to Eagle & Co. by Mr. Steele for Mr. Tolson.

These answers were all given over appellant's objections and Hudson further testified over appellant's objection that the appellant bank did not notify any maker of the notes held by them of their possession, and further that sometimes Eagle & Co. would have a party who would refuse to pay his note until they sent to the bank and got it. That when this was done they would write for the note and send the bank a check for the amount

of the note. This witness also gave the following answers:

Q. Do you know whether or not the Exchange National Bank knew you were making these collections of these notes?

A. I do not know about that; I suppose they did, but I do not know.

Q. On any of them, you do not know whether or not the bank knew you were making collections?

A. Of course, when they were past due. I reckon the bank thought we were collecting them, but I do not know whether they knew it.

And he testified that when Mr. Steele came to pay the note his recollection was that he told him the note was deposited in Little Rock, but nothing was said about any custom or authority claimed by Eagle & Co. to make the collections, but upon his cross examination by appellant he testified that Eagle & Co. had no authority to collect the notes which they had transferred to that bank, but that they simply assumed authority to do so; that Eagle would write to the bank for one of the notes which had been deposited as collateral and would either send other collateral to take the place of the note which they had requested the bank to send or would send the bank a check to take up the note which they had requested to be sent. And he was asked this question:

Q. As a matter of fact, you were not constituted agents to collect these notes?

A. I do not know of any authority.

Upon the part of the appellant, Hussman testified that "when the collateral notes would begin to fall due, the bank would call Eagle's attention to the fact and request him to take them up or to give live paper and the bank never accepted a note as collateral which was past due." That when the collateral notes were beginning to fall due and Eagle & Co. would take them up, the bank did not know where they got the money for that purpose; in a good many cases Eagle & Co. would send the bank a check and request it to send a certain note, which note

would be sent, but that the bank never authorized nor relied on Eagle & Co. to collect any notes which the bank held as collateral.

Moore, Smith & Moore and *Geo. A. McConnell,* for appellant.

1. One who takes negotiable property before maturity, as security for debt, without notice of any defect, receives it in due course of business, and is a *bona fide* holder. 94 Ark. 387; 143 S. W. 112; 144 *Id.* 908.

2. Payment to the payee is no defense unless the note is surrendered. 182 Ill. 454; 21 Ark. 393; 150 S. W. 411; 75 Ark. 170.

3. Eagle & Co. were not agents of plaintiff. 92 Ark. 315.

4. It is error to single out instructions 1 and 2 and read them to the jury. 73 Ark. 148; 88 *Id.* 458.

Gray & Hutto and *Vaughan & Akers,* for appellee.

1. The evidence shows Eagle & Co. were the agents of the bank in collecting the note. 83 Ark. 440; 150 S. W. 410; 50 Ark. 458.

2. There was no "singling out" of instructions by the court nor "glaring error" in the court's charge. The court summed up the whole case fairly and impartially. 88 Ark. 458.

3. There is evidence to support the verdict; no prejudicial error in the instructions and this court will not reverse. 57 Ark. 461; 77 *Id.* 556-7.

SMITH, J., (after stating the facts). Notwithstanding the reservation of title in the note herein set out, this was a negotiable note. It was an unconditional promise to pay a sum of money named and the recital of the consideration for which it was given, and the security reserved to insure its payment, did not destroy its negotiability. There was no option for the payment of anything but money and the reservation of title to the mules merely furnished a security for its payment which did not affect its negotiability. *Third Nat. Bank of Buffalo* v. *Spring,* 63 N. Y. Supp. 410. The rule in such cases

and the reasons therefor are stated and discussed in the opinion in the case of *Farmer* v. *Bank of Malvern,* 89 Ark. 132.

It is well settled in this State that one who takes negotiable paper before maturity as security for a debt, without notice of any defect, receives it in due course of business and is a *bona fide* holder. *Exchange Nat. Bank* v. *Coe,* 94 Ark. 387; *Haldiman* v. *Taft,* 102 Ark. 45, 143 S. W. 112; *Miles* v. *Dodson,* 102 Ark. 422, 144 S. W. 908.

In this case, therefore, the bank's right of recovery can be defeated only upon the theory that Steele had the right to make the payment to Eagle & Co. In the case of *Koen* v. *Miller,* 105 Ark. 152, 150 S. W. 411, it was said: "If the maker of a negotiable note pays the same to the payee, who is not the holder, he is not discharged from his obligation to the holder without showing that the payee was authorized to receive payment or that the holder led him to believe that he was so authorized." And to the same effect is the case of *Block* v. *Kirtland,* 21 Ark. 393. But appellees insist that the facts of this case bring them within the exceptions stated in the Koen case, *supra.* We have quoted the evidence upon that subject, and when we have given it its highest probative value, in appellee's favor, we think it insufficient to support the finding that Eagle & Co. was authorized to receive this payment or that the bank had led appellees to so believe. There is nothing in this proof which would charge the bank with any knowledge that Eagle & Co. were making any collections for it or that they were taking any action in regard to the collateral notes not consistent with their use as collateral. The undisputed proof is that Eagle & Co. did a very extensive business and handled large sums of money and did only part of their banking business with appellant. The inference is unsupported by any legal evidence that the bank had any knowledge that Eagle was assuming to collect any of these collateral notes as appellant's agent. The facts in the case of the *State Nat. Bank of St. Louis* v. *Hyatt,* 75 Ark. 170, are almost identical with the facts in the case

at bar, and the reasoning of the court there applies with full force here, and the court there, speaking through Justice RIDDICK, said: "The fact that a note is made payable at a particular bank does not of itself make the bank the agent of the payee or holder to receive payment and payment to a bank of the amount due on the note made payable there, when the bank does not have possession of the note or authority to collect it, does not discharge the maker, for under such circumstances the bank will be treated as the agent of the maker and not the holder."

Appellees insist that this case is similar to and should be governed by the rule announced in *Ladenberg* v. *Beal-Doyle Dry Goods Co.,* 83 Ark. 440, but a study of the facts of the two cases show their dissimilarity. In the Ladenberg case the court found that the jury was warranted in finding from the evidence that the agency, if unauthorized, had been ratified, while under this evidence there is no question of ratification. There could be no safety, nor security, for a bank in lending money if its permission to its debtors to redeem particular collateral by paying the face value of such collateral should be held to be either a grant of authority to the debtor to collect other collateral, or a ratification of the debtor's act in doing so. Transactions like those between appellant and Eagle & Co. are common and the conflict between their interests is such that no presumption of agency can be indulged, for if so, the value of the collateral as such would be destroyed and had as well be returned, for the bank then would have no protection except the sense of honor of its debtor. And we think the proof here was insufficient to warrant the submission of the question of agency to the jury. In fact, the issue of agency was not raised in the pleadings until after the conclusion of the evidence, when, over appellant's objection, appellees were permitted to amend their answer by setting up that Eagle & Co. were appellant's agents.

The judgment of the court is therefore reversed and the cause remanded.

TURLEY v. EVINS.

Opinion delivered June 30, 1913.

1. WILLS—EXECUTORS AND ADMINISTRATORS.—Kirby's Digest, § 13, which provides for the appointment of an administrator during a contest as to the validity of a will, does not authorize the appointment of an administrator after the will has been admitted to probate. (Page 118.)
2. WILLS—CONTEST—LOST WILL.—Where a will is contested on the ground of lack of testamentary capacity, the contents of a destroyed will may be proved without establishing it as provided in Kirby's Digest, § 8062. (Page 119.)
3. WILLS—PROBATE—JUDGMENT.—Where a will has been admitted to probate, the judgment to that effect is not subject to collateral attack. (Page 119.)
4. WILLS—LOST WILL—HOW PROVED.—A lost will may be proved at a trial, although it has never been reinstated as a lost record, Kirby's Digest, § 8062, not being exclusive, but proceedings in chancery under Kirby's Digest, § § 8062 to 8065, are necessary to establish the will as an instrument devising property and vesting title. (Page 120.)

Appeal from St. Francis Circuit Court; *Hance N. Hutton,* Judge; reversed.

STATEMENT BY THE COURT.

On March 5, 1912, Dr. J. E. Stone, late of St. Francis County, made a will which was signed and witnessed in the usual form and seven days later he died, and a few days thereafter the will was filed for probate before the probate clerk of that county. On April 11, 1912, Mrs. Eula Horn filed her "protest and contest," which was shortly thereafter heard by the probate court in connection with a petition for the appointment of an administrator pending the contest. The probate court dismissed the contest, admitted the will to probate and appointed Ellis Turley administrator. The contestant, Eula Horn, prayed an appeal to the circuit court from the order admitting the will to probate, and the contestee, Lizzie M. Evins, who was named as executrix in the will, appealed to the circuit court from so much of the order as approsecuted separately, but were consolidated in the circuit court and disposed of as a single case. Before per-

fecting her appeal to the circuit court, Mrs. Evins filed a formal petition, setting up the fact that the will of Doctor Stone had been admitted to probate, and that by its terms she was named as executrix, and she prayed that letters testamentary be granted her and that the appointment of Turley as administrator be revoked. The court refused to grant this petition upon the ground that Mrs. Evins had previously consented to the appointment of Turley.

In her remonstrance to the probating of the will, dated March 5, 1912, Mrs. Horn alleged: First, that on May 5, 1905, Doctor Stone had made a will in proper form at a time when he was in good health and of sound mind by which he devised to contestant the larger portion of his property. That this will was made in accordance with the desire of Mrs. Mansfield R. Stone, the wife of the testator, and contestant's sister, from whom testator had derived most of his property. Second, that the will, dated May 5, 1905, is in the possession of Mrs. Lizzie M. Evins, or that if it is not in her possession, it has been destroyed by her, or at her instance, and contestant asked that she be required to produce the will, and that upon her failure to do so, contestant be permitted to prove the contents thereof. Contestant alleged that by the terms of said will she was made the residuary legatee, after devising to other relatives small sums of money. Third, contestant says further that the paper writing, dated March 5, 1912, purporting to be the last will and testament of Doctor Stone, is not his will for the reason that it was made at a time when he was laboring under great nervousness, superinduced by a long illness, and the use of opiates and medicine to such an extent that he was incapable of understanding the force and effect of any act he might perform, and other specific allegations were made, the effect of which was to allege a lack of testamentary capacity.

In the circuit court Mrs. Evins filed a demurrer to the remonstrance of Mrs. Horn, which was sustained, and letters testamentary were ordered issued to Mrs.

Evins, and this appeal was prosecuted from that judgment by both the administrator and the contestant.

S. H. Mann and *J. W. Morrow,* for appellants.

1. On demurrer the allegations of the remonstrance are taken as true. Under section 8032 Mrs. Evins should have been summoned to produce the prior will.

2. Sections 8062 to 8065, Kirby's Dig., and section 8032, are not in conflict, and Mrs. Evins should have denied the allegation of having or produced the will.

3. Turley was improperly removed as administrator. Mrs. Evins, if eligible, is estopped to assert her rights. 16 Cyc. 798; 90 Ark. 439.

Walter Gorman, for appellee.

1. The remonstrance states no cause of action. 75 S. W. 1072; 85 *Id.* 893; 74 *Id.* 215.

2. Kirby's Dig., § 8032, does not apply. *Id.* § 8042; 29 Ark. 50.

3. The remedy is in chancery. *Id.* §§ 8062 to 8065.

4. Mrs. Evins was clearly entitled to administer the estate pending the contest. Kirby's Digest, § § 10, 13, 36; 91 Ark. 73.

SMITH, J., (after stating the facts). The first question is the right of administration pending the contest. Section 13 of Kirby's Digest provides that if the validity of any will be contested, letters of administration shall be granted during the time of such contest to some person other than the executor, who shall take charge of the property and administer the same under the direction of the court and account for, pay and deliver all moneys and property of the estate to the executor or regular administrator when qualified to act. It appears from the record that Mrs. Evins consented to the appointment of Turley as administrator, but there is nothing to indicate that she was thereby waiving her claim to have letters testamentary issued to her upon the determination of the contest. In fact, it affirmatively appears that such was not her intention. Prior to the probate of the will, she could not act, and her consent to the appointment of

Turley during the time of her disqualification is not inconsistent with her subsequent demand for the issuance of letters to her. Nor is she required to postpone her demand for letters until the litigation is finally settled. In the case of *Steen* v. *Springfield,* 91 Ark. 75, it was held that section 13 of Kirby's Digest, above quoted, did not require the appointment of a temporary administrator to take the place of the executor during the period of the contest after the will has once been admitted to probate and letters testamentary have been issued to the executor. It was there said, "The sole design (of section 13) is to provide for a temporary administrator to take charge of and preserve the estate until the will can be admitted to probate and letters testamentary issued to the executor, if qualified. It is merely for the protection of the estate, and not to provide for neutrality towards both contestants and the beneficiaries under the will. * * * The pendency of a contest does not disqualify, even temporarily, the executor named in the will, but the delay in admitting the will to probate prevents his appointment by the court, and may render it necessary that a temporary administrator be appointed. If the will be admitted to probate and the letters testamentary granted, then there is no necessity for the appointment of a temporary administrator under section 13, even though the contest continue or is thereafter instituted." The circuit court was therefore not in error in ordering the issuance of letters to Mrs. Evins.

It is urged that Mrs. Horn shows no right to prosecute this contest, and that if there was a lost or destroyed will which gave her any interest in Doctor Stone's estate that she would first have to establish it in the manner pointed out in sections 8062 to 8065 of Kirby's Digest.

The existence of the will of May 4, 1905, is recited in the will of March 5, 1912, and is expressly revoked by it, and, under the terms of the first will, Mrs. Horn is made the residuary legatee, although she was only a sister-in-law of the testator. Under the allegations of the remonstrance, the 1905 will was not revoked because of

the lack of testamentary capacity at the time the 1912 will was made. We think the proceeding adopted by Mrs. Horn was a proper one to raise the question of the validity of this 1912 will and to defeat its probate, if invalid.

Sections 8038, 8039 and 8040 of Kirby's Digest provide for the contest of probate of wills before the probate court and define the practice by which all persons interested in the probate may be summoned to appear. And when any contest has been decided in the probate court and an appeal taken to the circuit court, the decision there given is a bar to any other proceeding to call the probate or rejection of the will in question, subject to the right of appeal or writ of error to the Supreme Court, and subject also to the right of a court of chancery to impeach such final decision for any reason which would give it jurisdiction over any other judgment at law. Kirby's Digest, § 8041. And when a will has been probated, the court's order to that effect is not subject to collateral attack. *Caraway* v. *Moore,* 75 Ark. 146; *St. Joseph's Convent* v. *Garner,* 66 Ark. 623; *Ludlow* v. *Flournoy,* 34 Ark. 451.

The establishment of the will of 1905, whether lost or destroyed, is one question, the probate of the will of 1912 is another. Mrs. Horn, under the allegations of her remonstrance, had the right to resist the probate of the 1912 will, and for that purpose could offer proof of the first will which gave her an interest in the estate which she would not have if the 1912 will was a valid one. *Flowers* v. *Flowers,* 74 Ark. 215.

If by the introduction of this proof the probate of the 1912 will was defeated, then Mrs. Horn could proceed under the provisions of sections 8062 to 8065 of Kirby's Digest to establish the 1905 will as a lost or destroyed will, and, if successful in that attempt, the title to the property devised would vest in the legatees therein named. It would require this proceeding to vest the title to property devised in the 1905 will. But appel-

lant's purpose is not to vest title, but to defeat the probate of the 1912 will. Kirby's Digest, § 8062, is as follows:

"Whenever any will shall be lost, or destroyed by accident or design, the court of chancery shall have the same power to take proof of the execution of such will, and to establish the same, as in the case of lost deeds."

But this provision of the statute for the restoration of lost deeds and wills is not exclusive. The existence of a deed may be proved at a trial, although it has never been reinstated as a lost record. *Carpenter* v. *Jones,* 76 Ark. 163; *Stewart* v. *Scott,* 57 Ark. 153; *Calloway* v. *Cossart,* 45 Ark. 81.

So in this contest the existence of the 1905 will may be proved for the purpose of defeating the probate of the 1912 will. But a proceeding in chancery under the provisions of sections 8062 to 8065 would be necessary to establish the 1905 will as an instrument devising property and vesting title.

The judgment of the circuit court is therefore reversed, and the cause remanded with directions to overrule the demurrer and for further proceedings not inconsistent with this opinion.

BARRY v. WHITE DRUG COMPANY.

Opinion delivered July 7, 1913.

1. APPEAL AND ERROR—NECESSITY FOR BILL OF EXCEPTIONS.—Where there is no bill of exceptions, the insufficiency of the evidence as a ground for reversal can not be considered. (Page 123.)
2. BILL OF EXCEPTIONS—SIGNATURE OF JUDGE.—A part of a transcript, to be a bill of exceptions, must be an unqualified certificate of the trial judge that the matters and things contained therein are true; the signature of the judge is indispensable. (Page 123.)
3. BILL OF EXCEPTIONS—REQUISITES—INDORSEMENT OF COUNSEL.—Under section 1, page 192, of Laws of 1911, providing that the parties might agree in writing as to the correctness of a bill of exceptions, by indorsement thereon by counsel of record, the certificate of counsel that the writing was a copy of all the evidence in the cause, is insufficient when it does not contain objections to the

admission and exclusion of testimony and exceptions to rulings thereon. (Page 124.)

Appeal from Faulkner Circuit Court; *Eugene Lankford,* Judge; affirmed.

S. W. Rogers, for appellant.

G. W. Bruce and *A. C. Martin,* for appellee.

The office of a bill of exceptions is to bring into the record not only the evidence adduced at the trial but also all objections or exceptions to the rulings of the trial court upon the admission or rejection of testimony or the effect thereof, or to the giving or rejection of instructions, as well as to bring into the record the instructions given and refused, and all other matters material to the decision of the case, which are not a part of the record proper, occurring in the progress of the trial. Such a bill of exceptions must be authenticated by the certificate of the trial judge, attesting its correctness, and filed with the clerk of the court within the time allowed; otherwise there is no bill of exceptions. 42 Ark. 488; 91 Ark. 566; 93 Ark. 316; 99 Ark. 97; 101 Ark. 84; 102 Ark. 439; 145 S. W. (Ark.) 887; *Id.* 888; 148 S. W. (Ark.) 496.

The authentication of a bill of exceptions must be unqualified; hence, an agreement by counsel, under authority of the act of 1911, that "The within is copy of all *evidence* taken at the within trial," is not sufficient to authenticate a *bill of exceptions.* 99 Ark. 97; 101 Ark. 84.

S. W. Rogers, for appellant in reply.

When a bill expressly purports to set out the evidence it will be presumed to do so, unless it appears from the contents of the bill that portions are omitted. 27 Miss. 379. A recital is sufficient if it shows by reasonable construction that none of the evidence is omitted. Hence, a substantial endorsement is sufficient. 9 Ark. 480; 7 Ark. 548; 36 Ark. 500; 49 Ark. 364; 36 N. E. 452. A certification that all the evidence is contained is not

absolutely essential. The fact may be shown by the recitals of the bill itself. 38 Ark. 102; 137 Ill. 580; 6 Ill. 418; 12 Ill. 74; 28 Ill. 135.

SMITH, J. On January 25, 1912, the appellee, White Drug Company, by R. D. White, executed four promissory notes of $37.50 each to the order of the American Manufacturing Company, a corporation organized under the laws of the State of Tennessee. Said notes were due and payable in three, four, six and seven months respectively from date, and were all attached to a printed order form for certain goods and advertising matter. On the margin of this order was written in large black type: "These notes are to be detached only by the American Manufacturing Company." Appellee ordered the goods and executed the notes with the express understanding that the manufacturing company execute their bond in the sum of $150, guaranteeing to appellee the faithful performance of their part of the contract. The bond was executed and delivered, and soon after the acceptance of the order and notes the manufacturing company detached the notes from the order forms and before the maturity of any of them sold them to appellant.

The first of these notes was paid at maturity, but the remaining three were each presented at maturity but appellee refused to honor them. The notes were protested and returned, whereupon appellant brought suit for $123.45, which represented the aggregate of the three notes and protest fees. The appellant claimed to be an innocent purchaser of the notes for value and before maturity, but this was denied by appellee, and the cause was tried upon that issue. The court instructed the jury, defining an innocent purchaser and declaring his rights as such, and the jury returned a verdict for the appellee, and from the judgment of the court pronounced thereon this appeal is prosecuted. Appellant insists that the court erred in its instruction to the jury submitting the question as to whether appellant was in fact an innocent purchaser, for the reason, as contended

by him, that there was no evidence to support a finding that he was not an innocent purchaser.

The grounds urged by appellant's counsel for a reversal of the case can not be considered by the court in the absence of a bill of exceptions, setting forth the facts upon which he relies. *Madison County* v. *Maples,* 103 Ark. 44, 145 S. W. 887; *Carnehan* v. *Parker,* 102 Ark. 439; *Huff* v. *Citizens Nat. Bank,* 99 Ark. 97. Beginning with page numbered 1 of the transcript, there is what purports to be a bill of exceptions and the writing copied into the transcript bears that caption and at page 28 of the transcript and at the conclusion of the instrument, denominated a bill of exceptions, there appears a blank certificate in proper form attesting the fact that it is a true and correct bill of exceptions. But this instrument is not signed by the judge and therefore can not be treated as a certificate to the bill of exceptions. "We have held that a bill of exceptions must be an unqualified certificate of the trial judge that the matters and things therein contained are true. A qualified certificate is insufficient." *Williams* v. *Griffith,* 101 Ark. 84. Here there is no certificate whatever by the trial judge. Following this unsigned bill of exception are a number of pages containing the transcript of the record before the justice of the peace and a number of exhibits to depositions and following these exhibits is the following certificate: "Agreement of attorneys, the within is a copy of all of the evidence taken in the within trial. Signed Bruce & Bruce, A. C. Martin, attorneys for defendant; S. W. Rogers, attorney for plaintiff." It is contended that this certificate makes a proper bill of exceptions under the act of April 28, 1911, entitled "An Act to regulate the practice incident to appeals to the Supreme Court in certain cases." This act reads as follows:

"Section 1. In all cases, except indictments charging a felony, where the parties to an action agree in writing upon the correctness of a bill of exceptions by endorsement thereon, signed by one or more counsel of record of the respective parties, it shall be the duty of

the clerk of the court, in which the case is pending, to at once file such agreed bill of exceptions and the same shall become a part of the record as fully, completely and effectively as though approved, signed and ordered filed by order of the court or judge trying the cause.

"Provided, said bill of exceptions is filed within the time fixed by the court for filing the same."

Does this certificate comply with the terms of this act? Prior to its passage a bill of exceptions was signed either by the trial judge, or in certain cases might be attested by bystanders, and this act is intended to provide another method by which bills of exceptions may be agreed upon and become a part of the record. But litigants may avail themselves of the benefits of this act only by complying with its requirements. There is nothing about this act which rendered it unnecessary to incorporate into the bill of exceptions anything which was formerly required to be incorporated. And its effect is simply to provide that when this has been done the parties may agree to its correctness, whereupon it becomes effective as such without the signature of the judge trying the same, provided it is filed within the time limited for filing. The bill of exceptions is primarily a notation of the objections made in the progress of the trial and exceptions preserved to adverse rulings by the trial judge thereon. The bill of exceptions should not only contain the evidence, but the objections that were made to the introduction or rejection of testimony and exceptions to adverse rulings thereon. It also contains the instructions that were given and those that were refused and the objections to rulings made by the court on such instructions and the exceptions preserved to adverse rulings thereon. It is essential that all these matters should be properly brought forward in a bill of exceptions and that there should be attached to this bill of exceptions the signature of the judge trying the case, or the agreement of the attorneys of record verifying its correctness. The certificate of the attorneys here is that the paper writing is a copy of all the evidence taken at the

trial and this certificate would not be sufficient if signed by the trial judge, and does not meet the requirement of the act set out above, which undertakes to dispense with the necessity of the trial judge's signature.

It appears therefore that there is no bill of exceptions, and, in accordance with many decisions of this court, the judgment of the court below will be affirmed.

RICE v. SCHOOL DISTRICT NO. 20, BRADLEY COUNTY.

Opinion delivered July 14, 1913.

1. SCHOOL DISTRICTS—DIRECTORS—ACTION—MEETINGS.—Two directors may act for the school district and bind it by their contract only at a meeting at which all the directors are present, or of which they all have had notice. (Page 129.)
2. SCHOOL DISTRICTS—MEETING OF DIRECTORS.—The mere presence together of the three directors of a school district, is not a school meeting, where they have not met pursuant to notice, unless it is made so by the participation for that purpose of all the directors. (Page 129.)

Appeal from Bradley Circuit Court; *E. E. Williams*, Special Judge; affirmed.

STATEMENT BY THE COURT.

This was an action by G. A. Rice against School District No. 20 of Bradley County for the collection of $180 alleged to be due him upon a contract to teach school for said district. The case was tried before a jury, impaneled for that purpose, and a verdict was returned in favor of the school district and this appeal is prosecuted to reverse the judgment rendered thereon.

The complaint alleged that appellant was a regularly licensed teacher of Bradley County and that he had entered into a contract with the directors of the appellee school district to teach a school for said district for three months during the summer of 1912 at a salary of sixty dollars per month. That at the time for opening the school he appeared at the schoolhouse and began school, according to his contract, when the school direc-

tors came to the schoolhouse with another teacher and ordered him to desist teaching and give up possession of the schoolhouse, and thereafter refused to allow him to perform his contract. The answer denied all the material allegations of the complaint and specifically denied that any contract had been made with appellant. The controverted points in the case are, whether or not all of the directors were present and participated at a meeting of the directors, at which appellant was employed to teach, and whether or not the law was correctly declared in regard to the necessity for such a meeting.

Appellant testified that he had applied to a Mr. Morgan, who was one of the school directors for the school, but Morgan had declined to consent to his employment, although the other two directors were willing that the school should be given to him. Appellant further testified that in company with the other two directors he went to the home of Morgan to consult with him about the employment of a teacher and the preparation of the notices for the annual school election. That when they arrived at Morgan's house they found him at work in his barn and when they went out there they were told by him that he did not want to discuss the school question at his house and that he did not want appellant to have the school. Appellant further testified that Morgan was asked his objections to the appellant as a teacher and answered these questions by stating his objections to appellant, and that one of the directors said: "Well, we can fix up the school notices," and that Morgan assented that this should be done and appellant filled in the blanks in the notices and after they had been prepared, one director asked the other if he had the school contract with him, and, upon its being produced, these two directors signed the contract and presented it to Morgan, who refused to sign it and also refused to sign the notices, although a few days later he did sign the notices. The two directors, who signed the contract, testified and substantially corroborated appellant.

Morgan testified that appellant and the other direc-

tors came to his house and found him at work in his barn, and when they stated the object of their visit, he declined to participate in the meeting which they attempted to hold, and that he stated the would not consider the question of the employment of a teacher until the annual school meeting was held. And he denied having any knowledge whether the notices of the school election were prepared at that time or not, although he admits that a few days later he signed the notices of the school election, and at the time of this meeting discussed the question of moving the schoolhouse and whether anything should be said upon that subject in the notices, when they were prepared.

The court gave an instruction asked by the district as follows: "The court instructs the jury that where a party, a member of the board of school directors, had no notice in writing of the time, place and purpose of a meeting, and two members of the board went to the field where the third director was at work, and the third director was present for the purpose of carrying on the work of his farm, and not for the purpose of a meeting of a board of school directors and did not participate in the proceedings of said board, and if you believe from the evidence in this case two of the directors of School District No. 20 attempted to make a school contract with G. A. Rice, under the conditions just set out, the contract made by the said two directors was illegal, and did not bind the district, and if you find that the alleged contract was made under the conditions above set out, your verdict will be for the defendant."

And refused an instruction asked by appellant to the following effect:

"The court instructs the jury that if you believe from the evidence that all of the directors were present at and took any part in anything that was done at the meeting of the board of directors of School District No. 20, held at the residence of S. W. Morgan on 22d day of April, 1912, and then and there at least two of the members of said board agreed to the employment of the

said plaintiff, G. A. Rice, as teacher for said district for a term of three months during the summer of 1912, and entered into a written contract with him for said term at a monthly salary of $60, and you further find that the plaintiff offered and held himself in readiness to teach the school and carry out his part of the contract, then your verdict will be for the plaintiff for the amount sued for, and it makes no difference whether S. W. Morgan consented to the employment of plaintiff or signed the contract."

And appellant excepted to the court's action in giving one instruction and refusing the other.

In addition, the court gave of its own motion the following instruction: "The court instructs the jury that if you believe from the evidence in this case that all three of the school directors of School District No. 20 was present and participated in the meeting in which the contract in this suit was made, although only two directors signed said contract, then you will find for the plaintiff in the sum of $180."

Was the law properly declared and is the verdict unsupported by the evidence?

D. A. Bradham, for appellant.

1. The instruction given at appellee's request, and set out in the opinion, is abstract and misleading, under the facts developed in this case, and is therefore erroneous. 1 Brashfield, Instructions to Juries, § 83; 54 Ark. 336; 14 Ark. 537; 6 Ark. 156.

An erroneous and misleading instruction is not cured by a correct instruction on the same subject. 101 Ark. 37; 99 Ark. 377.

2. The instruction requested by appellant should have been given. A written notice is not necessary where all the directors are present and participate in the proceedings. 83 Ark. 491; 4 Tex. 602-611.

J. R. Wilson, for appellee.

The instruction complained of is correct. 69 Ark. 162.

SMITH, J., (after stating the facts). The law is settled that two directors may act for the district and bind it by their contract only at a meeting at which all the directors are present, or of which all have had notice. If notice of a meeting has been given, then the two directors present may act, although the third failed to attend the meeting. Neither is it necessary that any notice of a meeting be given if all the directors are present and participate in a meeting. Subject to these restrictions, the directors may meet at any time or place, and the law prescribes no procedure for the transaction of the business of the district when they have met. *School District* v. *Bennett*, 52 Ark. 511; *Alex Marr* v. *School Dist. No. 27, Cleburne County,* 107 Ark. 305, 154 S. W. 944. But there must be a meeting, the law contemplates that the directors shall have the power to contract in the name of the district, only after consultation and deliberation, and for this purpose requires the directors to meet. The mere presence together of the three directors is not a school meeting, where they have not met pursuant to notice, unless it is made so by the participation for that purpose of all the directors. A very similar question arose in the case of *School District No. 49, Faulkner Co.,* v. *Adams,* 69 Ark. 162, where Justice HUGHES for the court said:

"It was competent for two of the three school directors, being a majority of the school directors, if all were present and participated in the meeting, or had written notice of the time, place and purpose of the meeting as required by law, to make a legal contract to employ a teacher, by which the district would be bound; but without such notice or the voluntary presence of all the members of the board no legal contract could be made. Where a party or member of the board had no notice of the time, place, or purpose of the meeting, and two members of the board went to the residence of the other member and while he was present for some other purpose, and, not for the purpose of a meeting of the board of school directors and protested against their action as a board, as in this case, the two could make no contract to bind

the district." * * * "The corporate authority must be exercised by the proper body."

The instructions given declare the law substantially as here announced and the instruction asked by appellant was properly refused for the reason that it told the jury the contract was a valid one if Morgan took any part in anything that was done at his residence, on the occasion above mentioned. The jury had the right to accept as true Morgan's version of the conversation had between him and the other directors, yet this instruction would require the jury to find that Morgan participated in this meeting even though he did no more than suggest that the notices, when prepared, should submit to the electors the question of moving the schoolhouse.

Affirmed.

EASLEY v. STATE.

Opinion delivered July 14, 1913.

1. APPEAL AND ERROR—VERDICT—CONFLICTING EVIDENCE.—A verdict of guilty will not be disturbed on appeal if there is any evidence of a substantial character to support it. (Page 134.)
2. HOMICIDE—APPEAL—HARMLESS ERROR.—Where the defendant was not convicted of murder in the first degree, an error in an instruction as to that degree is harmless and therefore not prejudicial. (Page 134.)
3. EVIDENCE—HEARSAY EVIDENCE.—Evidence that one witness told another witness that a third witness had told her that deceased fired a shot at defendant before defendant began firing, *held* hearsay. (Page 135.)
4. EVIDENCE—RES GESTAE.—In a trial for homicide, evidence that while defendant was shooting at deceased a bystander cried out, "My God, you have killed him! Don't shoot any more;" *held* competent as part of the *res gestae*. (Page 136.)
5. EVIDENCE—RES GESTAE.—Where defendant was on trial for homicide, under the plea of self-defense, evidence that he shot another person at the same time is admissible as part of the *res gestae*. (Page 136.)
6. TRIAL—ARGUMENT OF COUNSEL.—Where, upon objection to argument of the prosecuting attorney, the court admonished the jury to "just consider the evidence in the case, gentlemen," the re-

mark of the court removed any prejudicial effect of the argument. (Page 137.)

7. TRIAL—ARGUMENT OF COUNSEL—OBJECTIONS AND EXCEPTIONS.—Counsel for the defense must not merely object to improper argument of the prosecuting attorney, but must save an exception if the court rules adversely or fails to rule at all. (Page 137.)

Appeal from Lawrence Circuit Court, Eastern District; *R. E. Jeffery,* Judge; affirmed.

O. C. Blackford and *W. P. Smith,* for appellant.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee; *L. B. Poindexter* and *H. L. Ponder,* of counsel.

HART, J. Lon Easley was indicted for the crime of murder in the first degree, charged to have been committed by shooting Claibe Pinnell in Lawrence County, Arkansas. He was tried at the same term of the court and convicted of the crime of murder in the second degree, his punishment being fixed by the jury at twenty-one years in the State penitentiary. From the judgment of conviction he has duly prosecuted an appeal to this court.

A physician who examined the body of the deceased, Claibe Pinnell, after he was shot, testified that he found a hole about one inch below the eye on the left cheek where the bullet had entered. That he made an opening in the back of his head and found the bullet. That the bullet had punctured the top layer of his skull and was lodged in the muscles of his neck. That it passed the base of the brain and cut the spinal cord in two where it went out and caused instant death. Another witness for the State testified that he did not see the shooting but heard the shot fired; that just after the shooting he saw the defendant, Easley, and asked him what was the trouble and that Easley replied that he had just killed Claibe Pinnell. That he afterwards saw Claibe Pinnell lying on the ground dead, in the town of Hoxie in Lawrence County. The State here rested. Lon Easley, the defendant, for himself, testified as follows:

Red Dempsey and Claibe Pinnell were together in

the town of Walnut Ridge on the night that I killed Pinnell. They were both drinking and went from Walnut Ridge to Hoxie. I was town marshal and heard Red Dempsey using profane language in front of a store house. I arrested him, and, putting my left arm through Dempsey's right arm, started off with him. Claibe Pinnell came running up behind us and said "wait." When he got up to us he said, "You won't lock this man up, nor no other man." Just as he said this he drew his pistol and fired. I saw the pistol coming right up in my face and struck it up with Red Dempsey's arm. Pinnell fired right by my face and my face was powder-burned all over. He kept on firing, and the next shot I think was the shot that hit Dempsey. I ran into the street and Dempsey ran the other way. Pinnell kept shooting at me, and I finally got my pistol out and commenced shooting at him. I did so because he was still shooting at me and I thought he was trying to kill me. I had a thirty-eight calibre Smith & Wesson pistol. Pinnell shot at me with a thirty-two calibre pistol. Pinnell and I were good friends. When Pinnell fired at me I swung Dempsey around and he fired again and hit Dempsey. Dempsey was not quite as close as Pinnell when he was shot as I was when Pinnell shot at me.

Several other witnesses for the defendant testified that they heard the shooting and that two or three shots from the smaller pistol were fired first, and that they then heard the reports from the larger pistol. The physician who extracted the bullet from the body of Red Dempsey said that he gave the bullet to Red Dempsey and that he thought it was a bullet from a thirty-two calibre pistol. Several other witnesses for the defendant testified that Claibe Pinnell and Red Dempsey were drinking and conducting themselves in a boisterous manner on the night that Pinnell was killed. That Pinnell's reputation in that community where he had lived all his life was that of being a dangerous and turbulent man, especially when he was drinking.

In rebuttal, Red Dempsey was introduced as a wit-

ness in behalf of the State. In response to the question, "Did Claibe Pinnell make the statement to Lon Easley there at that time (referring to the time he was killed) he could not lock you or anybody else up?" and answered, "He did." Later on, in response to the questions asked by the prosecuting attorney, he stated that Pinnell came up to where he was in custody of the defendant and told the defendant that he (Dempsey) had not done anything, that the street car was coming and that if the defendant would turn him (Dempsey) loose they would take the car and go home. He also stated that the only thing Pinnell said to the defendant was that if he would turn him (Dempsey) loose they would catch the car and go back to Walnut Ridge. He also said that Pinnell did not shoot at the defendant until after the defendant had fired at him; that the defendant shot two or three times before Pinnell began firing. That he had stepped aside a few paces and during the shooting said to the defendant, "My God, you have killed him; don't shoot him any more."

The State also introduced wtinesses who testified that the reputation of the defendant for truth and morality in the community was bad. One witness testified that the defendant came in to his restaurant shortly after the killing and said, "I have got the damn son-of-a-bitch, but I don't know whether he shot me or not," or something like that. Another witness testified that on the night of the killing the defendant was in Walnut Ridge and he heard him say (referring to Pinnell and Dempsey) that if they went down to Hoxie that night they would never get back alive. It was also proved by the State that the defendant had been several times convicted of the illegal sale of whiskey.

Other testimony was introduced by the defendant tending to corroborate his statement and to contradict the testimony of Red Dempsey.

It is first earnestly insisted by counsel for the defendant that the evidence is not sufficient to warrant the verdict. We have not attempted to set out the evidence

in detail but believe that we have given the substance of it as favorably to the defendant as the record will warrant. It is not our duty to pass upon the credibility of the witnesses, and even though we might think that the preponderance of the evidence was greatly in favor of the defendant it is our duty to uphold the verdict if there is any evidence of a substantial character to support it. In this view of the case, we do not deem it necessary to enter into an extended discussion of the evidence. It is sufficient to say that if the evidence introduced by the State, which we have recited above, was believed by the jury, it was sufficient to show that the defendant was actuated by malice when he killed the deceased and the jury were warranted in finding him guilty of murder in the second degree and fixing his punishment at twenty-one years in the penitentiary.

Counsel for defendant next contend that "the court erred in placing him upon trial for murder in the first degree after the State had rested its case without proving premeditation and deliberation, and also that the court erred in instructing the jury as to murder in the first degree, over the objection of the defendant at the time." It is well settled that this court will only reverse a judgment for errors that are prejudicial to the rights of a defendant. As the defendant was only convicted of murder in the second degree, it is plain, whether the instructions on murder in the first degree were erroneous or not, they did him no harm. *Kilgore* v. *State,* 73 Ark. 280; *Rogers* v. *State,* 60 Ark. 76. The order of the admission of the testimony was a matter within the discretion of the trial court and the judgment will not be reversed unless an abuse of that discretion was shown. As we have already seen, the defendant was not convicted of murder in the first degree and the action of the court could not have resulted in any prejudice to him. Moreover, the record shows that the defendant saved no exceptions to the court's action in this regard but voluntarily placed his own witnesses on the stand at

the conclusion of the testimony given in behalf of the State.

Counsel for the defendant offered to prove by certain witnesses that Mrs. Claibe Pinnell, wife of the deceased, had stated to them that she had gone to see Red Dempsey, and, after telling him that he would probably not get well, asked him to tell the truth about the shooting of her husband by defendant; that Dempsey told her that deceased fired two shots at the defendant before the latter began firing. Mrs. Pinnell was a witness in the case and denied that she told Red Dempsey that the probabilities were that he would die and she denied that he told her that her husband shot at the defendant twice before the latter fired. She also denied that she had made the statements to the witnesses offered to be introduced in evidence by the defendant, as above stated. The court did not err in excluding the testimony, because it was hearsay. In discussing similar testimony in the case of *Sutherland* v. *State,* 76 Ark. 487, the court said:

"Lee Newman, a witness on behalf of the State, testified that he did not see the defendant cut deceased's throat, but that he told George Pruitt and George Burns that he did. Over the objection of appellant, witnesses George Pruitt and George Burns were permitted to testify in substance that Lee Newman told them that he saw defendant cut deceased's throat. This testimony of Pruitt and Burns was hearsay, and therefore incompetent. It was not in contradiction to anything the witness Newman had testified to, and was not therefore admissible to impeach such witness."

It is insisted that the court erred in allowing the prosecuting attorney to ask defendant if he did not shoot at Red Dempsey and that the latter hallooed at him and said, "For God's sake, don't kill him." The court did not err in this regard. In the first place, the defendant denied that Dempsey made any such exclamation, and, if he had answered that Dempsey had made such exclamation, it was competent as part of the *res gestae. Ford* v. *State,* 96 Ark. 582; *Childs* v. *State,* 98 Ark. 430.

Under the rule announced in these two cases the testimony of Dempsey to the effect that he hallooed to the defendant while he was shooting at Pinnell, "My God, you have killed him, don't shoot any more," was competent.

The court stated to the jury that they were not trying the defendant for shooting the witness Dempsey, and that the answers of the witness Dempsey in regard to that matter could only be considered in determining the question as to whether or not the defendant was acting in his necessary self-defense at the time the shooting was done and in determining the facts and circumstances surrounding the shooting of the deceased, Pinnell. That the testimony could only be considered as throwing light on that transaction. This ruling was in accord with the decision of *Childs* v. *State, supra,* where the court, in discussing a similar proposition, said:

"The defendant's brother was present the whole time and struck deceased as soon as the defendant ceased shooting him. It was all a part of one transaction, and it would be difficult to give a connected and correct account of the occurrence without stating all that was said and done concerning it. Under the law, all that occurred at the time and place of the shooting which had reference thereto or connection therewith was part of the *res gestae. Byrd* v. *State,* 69 Ark. 537. *Res gestae* are the surrounding facts of a transaction, explanatory of an act, or showing a motive for acting." *Carr* v. *State,* 43 Ark. 99.

The prosecuting attorney, in the course of his argument to the jury, said:

"The law doesn't compel you to find a motive. The State is not required to prove a motive. But if you are looking for a motive, suppose that Claibe Pinnell knew something on Lon Easley that would probably send him to the penitentiary." Upon objection being made to this argument, the court said, "Just consider the evidence in the case, gentlemen." If it be said that the argument of the prosecuting attorney was the statement

of a matter of fact not in evidence, the remarks of the court eliminated it from the consideration of the jury and cured any error caused thereby.

Counsel for the defendant also urge that the judgment should be reversed because of certain other remarks made by counsel for the State in his closing argument of the case. The objection made by counsel for defendant to the remarks is as follows:

"To which statement counsel for defendant at the time duly excepted, and requested that his exceptions be noted of record, which was accordingly done."

In the case of the *Kansas City Southern Railway Company* v. *Murphy,* 74 Ark. 256, the court said:

"From the above cases these propositions may be deduced: The control of argument is in the sound judicial discretion of the trial judge, and it is his duty to keep it within the record and within the legitimate scope of the privilege of counsel, and this he should do on his own initiative; if he fails to restrain counsel, then it is the right of opposing counsel to object to the argument. This should be a definite objection to the alleged improper remarks, and call for a ruling of the court thereupon, and if the court then fails to properly restrain and control the argument within its proper bounds, and to instruct the jury to disregard any improper remarks and admonish the counsel making it, then an exception should be taken to the action of the court. A mere exception to argument interposed to make a record in the appellate court, and not calling for a ruling of the trial court, is insufficient."

The ruling there made has been uniformly adopted by the court in its subsequent decisions, and, among them, we cite the following: *Bell* v. *State,* 84 Ark. 128; *American Insurance Co.* v. *Haynie,* 91 Ark. 43; *Fogel* v. *Butler,* 96 Ark. 87. In the application of the rule it will be seen that counsel for the defendant contented themselves merely with an exception to the remarks of counsel for the State and did not ask a ruling of the court on their objections, and there is nothing presented for

our review in this regard. Counsel should first have made an objection which called for a ruling of the court, and if the court ruled adversely to them or failed to rule at all, they should have saved an exception to the action of the court in this regard. Then the matter would be properly here for review.

The judgment will be affirmed.

TINER v. STATE.

Opinion delivered June 23, 1913.

1. INDICTMENT—PRESENCE OF PRIVATE COUNSEL IN GRAND JURY ROOM.—A conviction for murder will not be reversed because of the presence in the grand jury room of private counsel for children of deceased, during the inquiry, said counsel not being present when the grand jury was deliberating or voting. (Page 145.)
2. INSTRUCTIONS—SPECIFIC OBJECTIONS—REVIEW.—A general exception to certain instructions will not be entertained on appeal if any of them are good; nor will a general exception to the refusal to give several instructions requested collectively, be considered on appeal, if any of them are bad. (Page 146.)
3. WITNESSES—IMPEACHMENT—TESTIMONY AT FORMER TRIAL.—In a murder trial a witness may be impeached by oral proof of contradictory statements made by him at the coroner's inquest, and the contradictory statements may be proved by members of the coroner's jury. (Page 147.)
4. WITNESSES—CROSS EXAMINATION.—Cross examination should be permitted as to all matters developed on direct examination, and it may be extended into all circumstances surrounding or affecting the transaction which the witness has detailed in his direct examination. (Page 148.)
5. EVIDENCE—CUMULATIVE EVIDENCE—EXCLUSION OF.—It is not error to refuse to admit evidence that is only cumulative of the other testimony which was admitted. (Page 148.)
6. TRIAL—ARGUMENT—EXHIBITING CLOTHING OF DECEASED.—Where the clothing of deceased was exhibited in evidence before the jury, there was no error in permitting the prosecuting attorney to use the garments for illustration in his closing argument. (Page 149.)
7. TRIAL—PRESENCE OF CHILDREN OF DECEASED.—A conviction will not be set aside because the children of deceased were present in the court room and wept during the closing argument of the prosecuting attorney. (Page 149.)

8. EVIDENCE—CONFLICTS IN TESTIMONY—PROVINCE OF JURY—VERDICT.—It is the province of the jury to pass upon conflicts in the testimony. (Page 150.)

9. HOMICIDE—EVIDENCE—SUFFICIENCY.—Evidence *held* sufficient to warrant verdict of murder in second degree. (Page 150.)

Appeal from Randolph Circuit Court; *John W. Meeks,* Judge; affirmed.

STATEMENT BY THE COURT.

The defendant, Thomas L. Tiner, was indicted for the crime of murder in the first degree, charged to have been committed by killing John R. Davis. He was convicted of murder in the second degree, and the jury assessed his punishment at a term of twelve years in the penitentiary. From the judgment of conviction, the defendant has duly prosecuted an appeal to this court.

James Hurn was the principal witness for the State, and testified substantially as follows:

I am eighty-six years old, and live about fifty yards from Swartz postoffice, in Randolph County, Arkansas. I saw John R. Davis shot from his horse in front of the defendant's wine cellar on the morning of the 24th of September, 1912. Just before the shooting, Davis came from the direction of Dr. John W. Brown's, who was his son-in-law, and rode up to the postoffice at Swartz, where he usually got his mail. After calling for his mail, he rode up in front of my house where I was splitting wood. He had a single barrel shotgun, which he was carrying on his right side with the stock under his right arm and the muzzle down toward his right foot. He was holding the gun with his right hand near the trigger. After some little talk with me, he said, "I was going home this morning, and I thought I would take my gun with me. I suppose Tom Tiner has threatened my life." He then said, "Uncle Jim, there is another thing I want you to do for me. I want you to stand here and watch me until I pass that cellar." He said this two or three times. The cellar he referred to was Tom Tiner's wine cellar. I moved a little from where I was splitting stove wood, so I could have a full view to the cellar along the side of the road,

and see him go on up. There was a little box house over the cellar, and just before Davis got to the cellar, I saw the smoke and heard the report of a gun. Davis threw up his left hand and said, "Oh, Lord," and fell off on the right side of his horse. When Davis left me at the wood pile, after asking me to watch him pass the cellar, he carried the gun as he had it while talking to me. I did not see him change the position of the gun, or raise it. He made no attempt to use the gun. When Davis left me, he traveled toward the west, and the wine cellar was on his left side. The road was generally used for travel by the public. From where I was standing when Davis was killed to where he fell is about 150 yards. The defendant's house is about 100 yards west of the wine cellar, and his son Joe lives a little east of the wine cellar, but both live on the same side of the road as the wine cellar. I was greatly excited by the shooting, and hallooed to my son and son-in-law, who were picking cotton near by, and told them that Tom Tiner had killed John Davis. Soon afterward the defendant walked past my yard, and said to me, "Uncle Jim, if you want to see a dead man, there is one lying up yonder in the road." I said, "Tom, that is the worst thing you ever done in all the days of your life." He then said, "I killed John Davis this morning. I had to kill him in self-defense." I only heard the report of one gun. I can hear pretty well with one ear, but not good with the other. I had my good ear turned toward Davis when he was killed. My eyesight is fairly good, but I can not see as well as a young man. I wear glasses when I read, but I did not have them on when I was watching Davis ride by the wine cellar.

James Hurn, Jr., a boy fifteen years of age, and a grand-son of the witness, James Hurn, testified that on the morning of the killing, he was at the spring of the defendant, which was about fifty yards from his wine cellar, getting a bucket of water. That he heard three shots fired. That when the first two shots were fired, he was at the spring, dipping up water. That he started

home running, and when he got about four steps from the gate leading out of the spring road into the road, the third shot was fired. That he looked up the lane and saw defendant fire a gun toward the wine cellar. On cross examination, he stated that he had not told certain named persons that he did not know anything about the killing except what his grandfather had told him. He said that he told his mother the next day about seeing the defendant shoot toward the cellar, but never told any one else. That he thought nothing about seeing the defendant shoot toward the cellar until Dr. John W. Brown asked him about it just before he testified at the preliminary examination. He said he then told Doctor Brown about it.

Other witnesses for the State testified that three shots were fired. That two of them were fired in rapid succession, and then after a short interval, another was fired. Most of the witnesses said that the first two shots were from a shotgun and the third from a rifle. One of the witnesses said that the first shots were from a shotgun and rifle, and the third from a shotgun. The interval between the first two shots and the third one was variously estimated by the witnesses from eight or ten seconds to fifteen seconds. One of them stated that there were two shots in quick succession, and then an interval of hardly a minute when the third one was fired.

Dr. John W. Brown testified that he examined the body of the deceased and found two wounds, one by a shotgun, and the other by a rifle. They both took effect in the left arm two or three inches below the shoulder, and that under ordinary circumstances, either one would have caused immediate death. That Davis was in the habit of traveling the road where he was killed, and had left his house that morning to go home. That he had a single barrel shotgun with him when he started home, and frequently carried it with him.

Thomas L. Tiner, the defendant, testified in his own behalf substantially as follows:

On Sunday preceding the Tuesday on which John R. Davis was killed, Davis and Jesse Cagle came to my wine cellar. They said they wanted their mail, but I had no key to the postoffice. I brought some wine out and gave it to them. Davis and I went down in the cellar together. My son and his wife, who, previous to her marriage, had lived at Dr. John Brown's house, had separated. After talking about the separation for a little while, Davis accused me of being the cause of my son not living with his wife. I disputed his word. He then grabbed his pocket for his pistol, and I grabbed him to keep him from shooting. There were two shots fired from the pistol. As soon as help arrived, I ran out, and went to the house. That evening, my sons told me that Davis had said that he would kill me the first time he caught me with a gun or pistol. On the Tuesday morning following, I was sitting in my office in the wine cellar, working on my books. I heard horse's feet, and, looking up, saw Davis with his gun. I dodged down and grabbed my gun, and Davis fired. Then I fired and jumped back and grabbed another gun and fired it, and Davis fell off of his horse. I then told my son to go and tell Tom Hurn what I had done, and for him to come and take charge of me. I surrendered myself to him. I never fired Mr. Davis's gun or any other gun toward my wine cellar. What Davis meant while in the wine cellar on the Sunday preceding his death when he said that I was the cause of the trouble between my son and his wife was, that my son's wife had said there had been improper relations between her and Doctor Brown.

On cross examination the defendant said: "I had asked my son to bring my gun home on Friday before the killing, and he brought it home on Monday. I shot Davis with the rifle after I had shot him with the shotgun. I was not hunting for Davis, but was trying to keep out of his way. My office at the wine cellar is my place of business, where I keep the books for both my stores, and I am there every day. Davis fired first, and I shot him with the rifle after I had shot him with the

shotgun. When I shot the second time, Davis was working his gun with his hands, and I did not know but that it was a pump gun. I stayed all night in my office at the wine cellar on Sunday and Monday nights preceding the killing. On Sunday evening, my son came to me and told me not to go out of the office, that Davis was standing in James Hurn's field, about fifty yards from the door, and would kill me if I went out. So my wife brought me some quilts and a pillow, and I stayed there Sunday and Monday nights.

One of the sons and a daughter-in-law of the defendant both testified that they saw the beginning of the shooting, and that Davis shot first. Jesse Cagle testified substantially as follows:

I was with Davis at the wine cellar of the defendant on Sunday morning preceding the killing, and Davis and the defendant went into the wine cellar after we had drunk some wine. In company with one of the others present, I started to the postoffice to get our mail, and on our way back we heard two reports from the wine cellar, which sounded like pistol shots. We ran to the wine cellar, and I asked what was the matter. Davis's coat pocket was on fire, and he said Tom Tiner shot at him twice, and he wrung the pistol out of his hand. He further told us that he did not want any trouble, and did not want to kill the defendant, and asked us to say nothing about the occurrence. Other evidence was adduced by the defendant tending to discredit the testimony given by James Hurn and his grandson. Numerous witnesses testified that they knew the reputation of the defendant in the neighborhood where he lived for peace and quietude, and that it was good.

Other evidence will be stated and referred to in the opinion.

S. A. D. Eaton, for appellant.

1. The action of the court in permitting private counsel for the children of the deceased to be in the grand jury room while the charge against appellant was being inquired into was reprehensible parctice which

ought not to be tolerated. 53 Miss. 425; 5 Okla. Cr. App. 266.

2. That part of the testimony of the witness, Brown, relative to what the deceased told him in the absence of appellant, was a self-serving declaration on the part of the deceased, was hearsay merely, and clearly inadmissible. 7 Cranch 290; 56 Ark. 331; 10 Ark. 638; 16 Ark. 628; 102 Mo. 170.

3. It was error to admit parol evidence of what the defendant testified at the coroner's inquest. Kirby's Dig., § 800. Being in custody, charged with the killing of Davis, and under oath, his testimony given at that time was not a voluntary statement. 137 Ill. 602; 27 N. E. 677; 110 Ala. 1; 25 La. Ann. 191; 60 Miss. 847. His testimony, as reduced to writing, if admissible at all, should itself have been introduced, being the best evidence of what he said. 2 Ark. 248; 59 Ark. 52; 21 Cyc. 996.

4. The testimony of Jesse Cagle, relative to what Davis told him on the Sunday preceding the killing, was inadmissible as being hearsay, and also a self-serving declaration on the part of the deceased.

5. The testimony of Annie Tiner was admissible for the purpose of showing what led up to the controversy between Davis and appellant, and Davis's motive for being the aggressor. 21 Cyc. 915, and cases; 2 Ark. 229; 14 Ark. 555; 43 Ark. 99; 52 Ark. 303.

6. The case should be reversed for the action of the court in permitting the prosecuting attorney to dress a chair in the bloody garments of the deceased, and to have the three daughters sitting in front of the jury, crying, while he was making his closing argument. It was an attempt to play upon the sympathy and prejudices of the jury, which was reprehensible in the extreme. 12 Cyc. 571; 2 Bishop, New Crim. Proc. 957, and cases cited; 58 Ark. 368; 48 Ark. 106.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee.

1. There is no merit in the objection raised to the

appearance of private counsel for the children of deceased before the grand jury while they were inquiring into the charge against appellant. *Richardson* v. *State,* ms. op.; 62 Ark. 516.

2. Objections in gross to the giving or refusal to give instructions are of no avail here. 38 Ark. 528; 65 Ark. 521; 75 Ark. 181; 84 Ark. 73; 86 Ark. 322; 87 Ark. 614.

3. If there was any error in admitting the testimony of Doctor Brown as to what the deceased told him, it was invited error, of which appellant can not complain. 95 Ark. 534; *Id.* 438.

4. There was no error in allowing oral proof to be introduced as to what appellant testified to before the coroner's jury, he having made statements in his testimony at the trial contradictory of those made at the coroner's inquest. 99 Ark. 462, 471.

5. The evidence sustains the verdict. It would sustain a verdict of guilty of murder in the first degree. Appellant can not complain that the jury reduced the finding to murder in the second degree. 95 Ark. 175; 105 Ark. 140.

6. There was no impropriety in the argument of the prosecuting attorney. 95 Ark. 237, 240.

HART, J. (after stating the facts). 1. It is first urged that the judgment must be reversed because the court permitted A. J. Witt, private counsel for the children of the deceased, to be in the grand jury room during the time it was inquiring into the charge against the defendant. It is not contended that he was present while the grand jury were deliberating or voting on the charge. The contention of counsel has been decided adversely to him in the case of *Bennett* v. *State,* 62 Ark. 516.

2. Counsel for the defendant assigns as error the action of the court in giving certain instructions, and in refusing others asked by him. He saved the following exception to the refusal to give said instructions:

"Of which said instructions, the court gave the ninth and eleventh, and refused to give any of the others. To

the refusal of the court to give instructions numbered 1, 2, 3, 4, 5, 6, 7, 8, 10, 12, 13, 15 and 16, as asked by the defendant, the defendant at the time excepted, and asked that his exceptions be noted of record, which was accordingly done."

The court, on its own motion, gave nineteen instructions, and counsel for the defendant saved the following exceptions to the giving of the said instructions: "To the giving of instructions numbered 1, 2, 3, 4, 5, 6, 7, 8, 10, 12, 13, 14, 15, 16, 17, 18, 19 and 20 by the court, on his own motion, the defendant at the time excepted, and asked that his exceptions be noted of record, which was accordingly done."

It has been uniformly held by this court that a general exception to certain instructions will not be entertained on appeal, if any of them be good. It is equally well settled that a general exception to the refusal to give several instructions requested collectively will not be considered on appeal, if any of them are bad. *Johnson* v. *State,* 84 Ark. 95; *Atkins* v. *Swope,* 38 Ark. 528, 539; *Geary* v. *Parker,* 65 Ark. 521, 525; *Young* v. *Stevenson,* 75 Ark. 181, 183; *Matthews* v. *State,* 84 Ark. 73; *Owens* v. *State,* 86 Ark. 317, 333; *St. Louis, etc. Ry. Co.* v. *Hambright,* 87 Ark. 614, 623. In the application of this rule, without setting out the instructions given and those refused, it may be said that some of the instructions asked by the defendant were argumentative, and others were faulty because they singled out facts, and were properly refused by the court, and it is conceded by the defendant that some of the instructions given by the court were correct.

3. It is claimed by counsel for the defendant that the court erred in permitting Doctor Brown to testify that Mr. Davis told him that he took the defendant's pistol away from him in his wine cellar. Counsel for defendant, in his cross examination of Doctor Brown, had brought out the fact that early on Monday morning preceding the day of the killing that John R. Davis had come to his house with a shotgun and a pistol, and that they

had gone to Pocahontas and turned over the pistol to the assistant prosecuting attorney. Many questions were asked Doctor Brown by the defendant in regard to this pistol, and what was done with it. Doctor Brown was also asked in detail as to the movements and conversation of himself and Davis on that day. Besides this, the defendant proved by other witnesses that the deceased had told them that he had taken the pistol away from the defendant at his wine cellar. Under these circumstances, we do not think that any prejudice resulted to the defendant, and it is well settled that a judgment will only be reversed for prejudicial errors.

4. The court did not err in allowing parol proof to be made as to what defendant testified to before the coroner's jury. The evidence on the part of the State tends to show that the defendant voluntarily testified before the coroner's jury, and the evidence now complained of was introduced for the purpose of contradicting the evidence given by the defendant on the trial of the case. The point is expressly so ruled in the case of *Caughron* v. *State,* 99 Ark. 462.

Neither did the court err in permitting the State to prove by the testimony of members of the coroner's jury contradictory statements made by witnesses for defendant before the coroner's jury. *Caughron* v. *State, supra.*

5. It is next assigned as error by counsel for the defendant that the court erred in permitting Jesse Cagle to testify that on the Sunday evening preceding the killing on Tuesday that the deceased had told him that a son of the defendant had pleaded terribly hard with him for the pistol, and that he had refused to give it to him, saying that he had won it in a victory. The court did not err in admitting this testimony. Cagle was a witness for the defendant, and in his direct examination the fact was developed that the defendant and deceased had had a quarrel in the wine cellar on Sunday morning, and the witness was asked all about this quarrel, and stated that Davis had told him at that time that the defendant had tried to shoot him, and that he had taken a pistol away

from him. Everything that occurred in the wine cellar was brought out and introduced in evidence by the defendant. It is well settled that cross examination should be permitted as to all matters developed on direct examination, and it may be extended into all circumstances surrounding or affecting the transaction which the witness has detailed in his direct examination.

6. Annie Tiner was a witness for the defendant. She was the wife of Dee Tiner, a son of the defendant, and they had been separated some time prior to the killing. She had resided in the family of Doctor Brown, a son-in-law of the deceased, for about four years prior to her marriage. She was asked this question: "Was Doctor Brown in any way instrumental in your separation?" And, over the objection of the State, the court refused to permit her to answer the question. The defendant set out that they would have proved in answer to the question that Doctor Brown was the immediate cause of the separation between herself and husband, and that she had confessed to her husband her criminal intimacy with Doctor Brown. That the deceased had asked her to repudiate that statement, and had declared that he would have the statement at any cost, and that this fact was communicated to the defendant prior to the difficulty. In the first place, it may be said that these answers were not responsive to the question asked. The particular objection made by the counsel for the defendant to the court's action in refusing to allow the witness to answer the question is, that the deceased had made a threat against the defendant, and this threat had been communicated to him. The defendant was allowed to introduce evidence of other threats that had been made by deceased and communicated to the defendant, and no attempt was made by the State to disprove them. The defendant was also permitted to prove by other testimony, which was not disputed, that bad blood existed between defendant and deceased on account of the separation of Dee Tiner and his wife, and that the deceased had threatened the life of defendant. Therefore, the

testimony refused was only cumulative of the other testimony which was admitted, and which the State did not contradict.

7. It is next insisted that the court erred in permitting the prosecuting attorney to dress a chair in the bloody garments of the deceased, and because three daughters of the deceased sat in front of the jury crying during the closing argument. The clothing of the deceased was exhibited in evidence before the jury, and there was no error in permitting the prosecuting attorney to use the garments for illustration in his closing argument. *Derrick* v. *State,* 92 Ark. 237. The daughters of the deceased had a right to be present at the trial, and the judgment will not be reversed because they shed tears during the argument.

9. Finally, it is insisted by counsel for the defendant that the evidence does not warrant the verdict. We can not agree with him in this contention. It is true there is an irreconciliable conflict in many essential respects between the testimony given by the witnesses for the State and that given in behalf of the defendant, but it was the peculiar province of the jury to pass upon this conflict. The defendant was indicted for murder in the first degree. The jury found him guilty of murder in the second degree, and fixed his punishment at twelve years in the penitentiary. Therefore, it is manifest that they did not believe the evidence adduced by either side in its entirety. It is contended by counsel for the defendant that it was a physical impossibility for young James Hurn to have run from the spring in time to have seen the last shot fired. They had measurements made of the distance, and this evidence tended to show that the witness could not have run this distance in the time stated by him. However, the witness himself gave the distance and his credibility was a question for the jury. It is probable, however, that the jury did not believe his testimony in this respect, or they would have found the defendant guilty of murder in the first degree. Even if the jury had discarded his testimony entirely, there was

sufficient evidence to have warranted the verdict of the jury. It is undisputed that bad blood existed between the defendant and deceased on account of the separation of the son of the defendant and his wife, who had formerly lived as a member of the household of the son-in-law of the deceased. They had a quarrel about this matter on the Sunday morning preceding the killing. The defendant remained in the wine cellar during Sunday and Monday night preceding the killing on Tuesday with his guns lying at hand, although his home was only a short distance away. It is true, he states, that he stayed there because he was afraid to go home. The jury may not have believed his explanation, and were warranted in believing from the circumstances, as they found them to exist, that defendant had become angered at Davis because of their quarrel at the wine cellar on Sunday morning, and had formed the design of killing him on sight; that the deceased had formed a similar design as to the defendant, and that in furtherance of this design, each began to shoot at the other as soon as they saw each other. The jury was fairly warranted from all the evidence in finding that each had formed the design of killing the other on sight, regardless of the fact of whether or not he believed his own life to be in danger. They may have thought that the parties entered into a mutual combat, and this view of the case warranted the verdict of the jury. If the testimony of the State in its entirety was believed by the jury, they would have been warranted in finding the defendant guilty of murder in the first degree. On the other hand, if the evidence adduced by the defendant in its entirety was believed by the jury, a verdict of acquittal would have been warranted.

We do not deem it necessary to enter into a further discussion of the evidence, but think it sufficient to say that the evidence supported the verdict of the jury.

The judgment will be affirmed.

ERDMAN v. ERDMAN.

Opinion delivered July 14, 1913.

1. CHATEL MORTGAGES—TRANSFER OF CHATTEL MORTGAGE.—The *bona fide* purchaser of a note secured by a chattel mortgage becomes the owner of the note and mortgage, and has the right to foreclose the mortgage without a transfer endorsed on the mortgage. (Page 159.)
2. EXECUTION—MORTGAGED PROPERTY.—Chattels covered by a mortgage are not subject to execution and attachment. (Page 159.)
3. FRAUDULENT CONVEYANCES—EVIDENCE—BONA FIDES.—Evidence *held* to show a transfer of a note and mortgage by a father to his daughter, not fraudulent as to creditors. (Page 159.)

Appeal from Lonoke Chancery Court; *John E. Martineau,* Chancellor; reversed.

STATEMENT BY THE COURT.

Appellant brought this suit to foreclose a chattel mortgage and subject to sale the mules in controversy, which had been seized by attachment at the suit of H. Beuchley, against her father, F. F. Erdman.

It was alleged that F. F. Erdman was indebted to Dan Lewis in the sum of $600, and on the 24th day of April, 1911, executed and delivered to him a promissory note for that sum due April 24, 1912, and bearing 10 per cent interest from maturity, and to secure the payment of same, he executed jointly with his wife, Josephine Erdman, a chattel mortgage, including the two mules in controversy. That on August 2, 1912, the mortgagee transferred the note for value to Nellie Erdman. That the mortgage provided that in case default should be made in payment, the mortgagee, the owner of the indebtedness secured by the mortgage is authorized to take charge of the property and sell and dispose of same; that default had been made; that no part of the note had been paid, except as appeared from the endorsements thereon. It was further alleged that Tom Burnett, as constable, had seized and taken from her possession the two mules, and refused to return them for the purpose of sale and foreclosing the mortgage. That he claimed to have taken them by a writ of attachment issued by a justice

of the peace in Carlisle Township, sued out in a case therein, wherein H. Beuchley was plaintiff and F. F. Erdman was defendant. That the constable was about to dispose of the property under an order of sale from the justice of the peace issued after the order of seizure of the property under an attachment. Prayed a temporary restraining order against the constable from selling the property under execution, for judgment against Erdman for the amount due on the note, that the same be declared a lien upon the property and foreclosure had to satisfy the indebtedness.

The constable answered, denying that Nellie Erdman was the owner of the note, and that she paid $600 therefor, and that F. F. Erdman and his wife were indebted to her in any sum; denied that the note had not been paid in full, and alleged that the mortgage was never sold or legally assigned and transferred to her; denied that default had been made in the payment of the note.

Alleged further that the transfer of the note to Nellie Erdman was fraudulent, that she was the daughter of F. F. Erdman and his wife; that the pretended transfer was made to prevent the attachment being issued, and that the note and mortgage had been satisfied in full.

H. Beuchley filed an interplea, alleging that he had instituted suit on August 20, 1912, against F. F. Erdman and his wife for the recovery of $127 due on account, and had an attachment issued against this property; that the mules had been advertised for sale by Mrs. Erdman; that before the property was attached he investigated the records and found that they had been mortgaged, and upon further investigation received a letter from the mortgagee, D. Lewis, stating that he had received his money, and that the mortgage was satisfied in full. That he examined the mortgage on August 12, 1912, and that it had not been transferred or assigned to Nellie Erdman, and that D. Lewis, the payee of the note, wrote him it was satisfied in full, and that he had not authorized its transfer or assignment. Alleged that the note and mortgage were transferred to Nellie Erdman after his attachment

was levied; that the attachment had been sustained, and Mrs. F. F. Erdman, as agent for her husband, appealed from the decision of the court sustaining it, and that the appeal was then pending in the circuit court. That the action by Nellie Erdman was instituted by collusion, and for the purpose of cheating, hindering and delaying him in the collection of his just debt, and that D. Lewis stated the note had been paid in full, and that he did not transfer or assign the same to Nellie Erdman, or authorize the transfer of same to her. That the pretended transfer of the note was fraudulent, and made with the intent to defeat the collection of the debt. Prayed that the complaint be dismissed; that the transfer under the assignment of the mortgage be cancelled and set aside, and that the injunction be dissolved.

Nellie Erdman filed an answer to the interplea, denying each of the allegations thereof.

F. F. Erdman filed an answer, and admitted the execution of the note and the mortgage to secure the indebtedness, and that same had not been paid, and that he had no defense to make against the foreclosure of the mortgage and the collection thereof.

It appears from the testimony that Nellie Erdman purchased the note about August 2, 1912, from Trimble, Jr., who stated at the time that he had it for collection, and had the right to sell and transfer it to her. That she paid him $600 with her check for the note, said check being on the German National Bank at Little Rock; that the note was secured by a chattel mortgage, and the property was in possession of Mrs. Erdman at the time she purchased the note. That these mules were afterward attached by H. Beuchley, and taken by the constable, one of the defendants in the suit, she, at the time, telling him she had a mortgage on them. She said further, that the note was delivered to her on August 2, 1912, and Mr. Trimble, at the time of the transfer thereof to her, agreed to transfer the mortgage; that she did not go to the courthouse and have it transferred, and that Mr. Trimble showed her his authority to transfer and assign the note,

which he did on August 2, 1912, and delivered it to her at that time.

Mrs. Erdman testified that she executed the note to secure her husband's indebtedness; that she was only surety thereon. She signed it because the mortgagee required it. She was also present when Mr. Trimble transferred the note to Nellie Erdman; stated that Mr. Trimble said he would have the mortgage transferred on the record that evening. The mules were attached on Monday morning, August 12. She told the constable when he came and seized them, that there was a mortgage on them. The mortgage was given to Mr. Lewis to secure the $600 note; that she had advertised the mules for sale properly, and the proceeds thereof were credited on the back of the note paid to Nellie Erdman. She denied having deposited the proceeds of the sale of her home in the German National Bank, and stated that her daughter paid $600 for the note.

T. C. Trimble, Jr., testified that he received a letter from D. Lewis, at Warrensburg, Mo., enclosing the note for $600, dated April 24, 1911, and due October 24, 1911, with interest from maturity until paid. The note was made payable to Dan Lewis or order, and included the two mules in controversy, in addition to other property. The note was sent to his firm for collection with instructions to exercise his best judgment in the collection thereof. That he went to Carlisle to see Mr. Erdman, and was advised that he had left the State, and that it was not his intention to return. He then went to see Mrs. Erdman, and she refused to pay the note, saying it was Mr. Erdman's debt. After some correspondence with Mr. Lewis, he instructed us to do the best we could with it; to do just the same as if it were our business, and he would be satisfied. After receiving these instructions, he again went to Carlisle to see Mrs. Erdman. Her daughter was present when he demanded the payment of the note. She again refused to make payment, and I proposed that if she would pay $600, the face value of the note, I would return the mortgaged property to her, and

she could do with it as she saw best. She declined to accept this proposition. He then left the house, and after he had gotten 100 yards away from the house, her daughter, Nellie Erdman, called to him and asked if she would be safe in purchasing same, and could enforce the mortgage the same as Mr. Lewis. He stated he told her he had full authority to transfer the note and mortgage, and that she would be perfectly safe in buying it, and would be subrogated to all the rights of Dan Lewis; and that he would transfer the mortgage on his return home. Upon this assurance, she gave him a check on the German National Bank of Little Rock, for the sum of $600. The check was signed by her and drawn on her account. He then made the proper transfer and assignment of the note in writing on the back thereof, and delivered it to her at the time. Assignment of the note was made on August 2, 1912. I returned home on the next train, and turned the check over to another member of the firm, after having first 'phoned to the cashier of the bank at Little Rock to know if the check would be paid. Through some mistake, he neglected to go to the clerk's office and make the transfer and assignment of the mortgage until the 12th of August, or just before the attachment was levied. On August 7, 1912, we sent a check to D. Lewis for $600, less our commission, and on the 9th of August, D. Lewis acknowledged receipt of same, and stated that it was satisfactory to him. As soon as they heard of the attachment, the senior member of the firm informed him (Beuchley) that there was a mortgage on the mules, not satisfied. On the 15th of August, we called Mr. Lewis's attention to the fact of what Mr. Beuchley had stated, and requested him to write Mr. Beuchley that the indebtedness had been transferred to Miss Nellie Erdman. On August 17, we received a letter from Mr. Lewis, and among other things, it stated: "I suggested to Mr. Beuchley from the first to consult with you about this, as I had entire business in your charge, and that you would likely know more about it than anyone." When I went to Carlisle on the morning of August 2, it was my

intention that if I did not collect the note to get possession of the property held under the mortgage. I became satisfied the property would not bring the debt at public sale, and I was anxious to do the best I could for our client. When Miss Erdman offered to buy the mortgage, paying the face value for same, $600, under the assurance that she would succeed to the rights of D. Lewis, I accepted her proposition. I never knew anything about any other claim against Mr. Erdman at the time. I never heard of Mr. Beuchley's claim, and never thought that any one anticipated attaching this property under this mortgage.

H. Beuchley stated that he was a merchant at Carlisle, was acquainted with F. F. Erdman and his wife and Miss Nellie Erdman. That F. F. Erdman, her father, was indebted to him on or about August 12, 1912, in the sum of $127 for merchandise. That he left the State, and left no property unencumbered. When he ascertained that the others were also going to leave, he tried to collect his account. He wrote to D. Lewis, to whom the mortgage was given, who replied on August 8, as follows: "I have just now a letter with a check from Mr. Trimble for my money. So I have no further claim on the mules." I sent this letter to my attorney at Lonoke, and instructed him that the mules were now free and advertised for sale by Mrs. Erdman. I had sent a collector to get the money, and they had said it was Mr. Erdman's debt, and he could pay the money himself. After the sale we got in correspondence with Mr. Lewis, and, knowing there were two mules left, and knowing that he had a mortgage on them, we looked up the record to see if it had been transferred. Said he received the following letters from Mr. Dan Lewis, the mortgagee:

"August 9.

"My Dear Mr. Beuchley: I had a letter from my son, Dan, who is now visiting in Carlisle, and he said you wanted to know if I had a mortgage on Erdman's mules, that Erdman owed you $150. I wrote Dan I had a mortgage on the mules, etc., and had the whole business in

Mr. Trimble's hands for collection. They owed me $600 on this mortgage. I just now have a letter with check from Mr. Trimble for amount of money, so I have no further claim on the mules, etc. My mortgage did cover the mules, implements, crops, tools, household goods, etc., but so far as I am concerned, all this stuff is open for you to attach now, if you should see fit to do so. I did not have Mr. Trimble's letter when I wrote Dan * * *"

"August 15.

"Dear Friend: As I wrote you on August 9, I sent my $600 note on Erdman to Mr. Trimble, Jr., for collection. I did not assign it over to any one. Mr. Trimble collected it, and I suppose just gave them their note after it was paid. You might ask Mr. Trimble about it, as he already knows a good deal about it. * * * But it is best for you to consult with Mr. Trimble about the whole business at once, if you have not already consulted some attorney. * * *"

After searching the records to see if there was any assignment of the mortgage, he had the mules attached. That he did this because Mrs. Erdman had advertised them for sale in the Carlisle paper. Miss Nellie had an advertisement in the same issue of the paper for the sale of an electric fan.

He admitted that he had been called on the phone by Judge Trimble on August 12, and told that Dan Lewis had a mortgage on the property, and he replied that Lewis said he didn't have any interest in them, and Mr. Trimble said, "There must be some mistake," to which he replied, "I suppose the man who owns the property knows what he is doing." He said that Nellie Erdman was a daughter of the defendant, and that the attachment was sustained by the court, and he got judgment for the amount sued for, and the property was advertised for sale, and the constable was enjoined from making the sale. The testimony shows that his account against Erdman was for merchandise and groceries furnished before Erdman left the State some time in April or May.

The constable testified that Mrs. Erdman, when he served the attachment and got possession of the mules, told him he was attaching mules that were covered by a mortgage to Dan Lewis.

The clerk testified that the mortgage had an endorsement on it, as follows: "For and in consideration of $600, do transfer and assign the within mortgage to Nellie Erdman, without recourse against me, either law or equity. August 2, 1912, D. Lewis, by Trimble, Robinson & Trimble, Attorneys. Attested by clerk, August 12, 1912." The transfer on the record was made August 12, 1912, in the afternoon.

The parties agreed and sold the mules, and they brought $200 in cash, which was deposited in the hands of the clerk of the court, subject to the order and decree.

The court held that the alleged transfer of the note and mortgage to Nellie Erdman was not a *bona fide* transaction and was fraudulent, and that Dan Lewis, the original mortgagee and payee, had received the full amount due him, secured by the mortgage prior to the bringing of the attachment, and that the alleged assignment was made to prevent the interpleader from collecting his debt. Sustained the interplea and rendered judgment for the amount claimed, with interest, and directed that it be paid out of the funds in the hands of the clerk. That the remainder thereof be paid to F. F. Erdman and his wife, and from the decree, Nellie Erdman appealed.

Trimble & Trimble, for appellant.

1. At the time of the purchase of the note and mortgage by appellant, the note only was at hand, and it was duly transferred and assigned to her in writing. The mortgage had been filed, pursuant to the statute, in the clerk's office, and could not be taken out. Through oversight, the transfer and assignment was not formally endorsed on the mortgage until subsequent to the time the attachment was sued out; but that does not affect the rights of the appellant, since the mortgage was but a mere incident of the debt which passed with the assign-

ment of the debt. 27 Cyc. 967; 11 Ark. 44; 18 Ark. 599; 18 Ark. 85; 60 Ark. 90.

2. Personal property included in a mortgage is not subject to execution or attachment. 94 Ark. 297; 42 Ark. 236; 58 Ark. 289-291.

Charles A. Walls, for appellee, Beuchley.

The evidence fully sustains the finding that the transaction between appellant and her mother as agent for her father, was not a *bona fide* transaction, and that the alleged assumption of the mortgage by appellant was fraudulent and made for the purpose of preventing appellee from collecting a just debt. 27 Cyc. 1290.

The chancellor's finding will not be disturbed where it is sustained by a fair preponderance of the evidence, nor even where the evidence is evenly balanced. 101 Ark. 510; 102 Ark. 51; 77 Ark. 305; 100 Ark. 370.

KIRBY, J. (after stating the facts). It is not disputed that the note for $600 to Dan Lewis, and the mortgage to secure the payment thereof, executed by F. F. Erdman and his wife, are valid instruments, and the testimony shows, without contradiction, in fact, that the note secured by the mortgage was duly transferred to Nellie Erdman upon her purchase thereof, and the payment of $600 of her own funds therefor.

Certainly the great preponderance of the evidence, if not the undisputed evidence, shows it was a *bona fide* transaction, and, under the law, she became the owner of the note, and the mortgage by reason of the purchase of the note and its transfer to her, and had the right to foreclose it without a transfer endorsed upon the mortgage. 27 Cyc. 967; *Wilson* v. *Biscoe,* 11 Ark. 44; *Biscoe* v. *Royston,* 18 Ark. 509; *Hannah* v. *Harrington,* 18 Ark. 85; *Pullen* v. *Ward,* 60 Ark. 90.

The mortgaged property was not subject to the execution and attachment, and appellant is entitled to have it subjected to the payment of the note purchased from the mortgagee. *Maxey* v. *Cooper,* 94 Ark. 296; *Buck* v. *Bransford,* 58 Ark. 289.

The court should have rendered a decree in favor of appellant, subjecting the mortgaged property to the payment of the note secured by the mortgage, of which she was transferee, free from the attachment lien of the interpleader, and directed the clerk of the court to pay the sum for which the property was sold to her to be credited upon the note.

The decree is reversed and the cause remanded with directions to enter a decree in accordance with this opinion.

BANKERS TRUST COMPANY OF ST. LOUIS v. MCCLOY.

Opinion delivered July 7, 1913.

1. CORPORATIONS—LIEN ON STOCK.—Under Kirby's Digest, § 853, which provides that stock of a corporation shall be transferred only on the books of the company and that it shall have a lien on the stock of its members for any debt due from them to it, *held* when a banking corporation takes over the assets and assumes the liabilities of other banks, a resolution of the banking corporation that in case of loss, the same will be charged to the respective banks, and dividends on the stock retained to reimburse it, passed prior to the issuance of stock, creates a mere conditional liability and not a debt to the corporation. (Page 166.)
2. CORPORATIONS—LIEN ON STOCK.—A lien on the stock of a corporation in favor of the latter, as between the corporation, its shareholders, and a purchaser with notice, may be created by by-law, or by common custom in such dealings. (Page 167.)
3. CORPORATIONS—LIEN ON STOCK.—The purchaser of shares of stock is chargable with notice of liens created under statutes or charter, but not those arising under the by-laws of the corporation, or under the custom of dealing between the corporation and its shareholders. (Page 168.)
4. CORPORATIONS—STOCK—NEGOTIABILITY.—Shares of stock in a corporation do not constitute negotiable paper within the law merchant, but are treated as *prima facie* evidence of unencumbered ownership of the holder thereof named in the certificate and upon the books of the company, and a purchaser of stock endorsed and assigned with power of attorney to transfer, is entitled to have the shares recorded on the books of the company in his name. (Page 169.)
5. CORPORATIONS—PURCHASE OF STOCK—REMEDY.—The purchaser of corporation stock, not chargable with notice of any lien thereon, is

entitled, as a matter of right, to have the stock transferred on the books of the company and new certificates therefor issued, and he may compel such transfer, or recover damages for failure to make the transfer. (Page 171.)

6. CORPORATIONS—SALE OF STOCK—WARRANTY.—Where a purchaser of stock in a corporation procured unencumbered stock, but voluntarily paid an unenforceable demand by the corporation against the stock, he can not recover the sum from the seller, on an implied warranty. (Page 171.)

Appeal from Drew Circuit Court; *H. W. Wells,* Judge; reversed.

J. C. Gillison, for appellant.

1. The stockholders' resolution, if regularly adopted, would not create, in law, any lien on the stock. Kirby's Dig., § 853. Nor was there any statutory lien. A contingent claim is not a "debt due." *Ib.;* 4 Thompson on Corporations, § 4000, p. 556.

2. There was no lien at common law. If any existed, it must be statutory. "Debt" means a sum *certain.* 1 Mass. 471; 31 N. J. Eq. 554. It never means a contingent liability. 37 Cal. 524; 54 Ala. 639; 53 N. J. Eq. 633; 98 Pa. 308-402; 31 Mich. 76; 2 Hill (N. Y.) 220; 3 Seld. 124; 17 N. Y. 458; 63 Fed. 707-722; 45 Minn. 238; 17 Wis. 181; 57 Am. Dec. 542; 17 Mich. 511; 14 Vt. 14; 94 N. W. 191; 58 Oh. St. 280; 10 Pa. St. 120; 3 Watts (Pa.) 394; 60 Ark. 198; 66 *Id.* 327; 68 *Id.* 235.

3. A resolution can not create a lien. 52 Mo. 377; 162 N. Y. 163; Helliwell on Stock, etc., 146-7-468, § 170, p. 309.

4. If there was a lien, it was waived. 4 Thompson on Corp., § 4004, p. 565 (1909 ed.); Cook on Corp., vol. 2, § 531 (4 ed.); 15 Mo. App. 55; 88 Mo. 567; 44 Minn. 183.

5. A purchaser without notice acquires the legal title. Helliwell on Stocks, etc., pp. 303, 304, 175-6, pp. 320-1-3-4; 4 Thompson on Corp., § 4007; 52 Pa. St. 280.

6. The assignment gave plaintiff title, and the refusal of the bank to reissue did not impair the title. 13 Otto. 800; 11 Wall. 369; 91 U. S. 65; 2 Conn. 777; 11 Wend. 628; 22 *Id.* 362; 8 Pick. 90.

7. If there was any lien it was statutory, and a purchaser is bound to take notice of a statutory lien. There was no express warranty, and no warranty as to quality or fitness is implied when the defects are known to the buyer, or he has knowledge sufficient to put him on inquiry. 35 Cyc. ¶ 9, p. 409; 2 Cook on Corp., § 532 (4 ed.). In the sale of personal property, there is no implied warranty except as to title. 45 Ark. 284.

8. There is no proof of damages, and the burden was on the party claiming damage. 2 Wigmore on Ev., § 1362; 7 Cyc. 457-8.

Williamson & Williamson, for appellee.

1. The statutes of this State give the bank a lien on stock for all debts due it. Sand. & Hill's Dig., § 1342; 66 Ark. 327, 331. Stock must be transferred on the books of the company. 66 Ark. 331.

2. Shares of stock are not negotiable instruments. Whoever buys takes subject to the equities and burdens which attend them. 10 Cyc. 589. The statutes and by-laws must be complied with. 88 Ark. 113; Kirby's Dig., § 853; 53 Ark. 298.

3. The statute of frauds must be pleaded. 71 Ark. 304.

4. There was no waiver.

5. A mere assignment does not convey title. The statute and by-law must be complied with. 88 Ark. 113.

6. There was an implied warranty of title that the stock was clear of all incumbrances. 24 Ark. 223; 45 *Id.* 284; *Ib.* 288; 53 *Id.* 295; 19 *Id.* 447-460; 10 A. & E. An. Cas. 168, note; 35 Cyc. 394; 46 Minn. 413; 165 N. Y. 108; Burdick on Sales, 92.

7. If the seller knew at the time of the sale that he had no title, the buyer has an action for deceit. 4 Ark. 467.

8. As to the damages, the findings will not be disturbed. 96 Ark. 606; 92 *Id.* 41; 81 *Id.* 108; 90 *Id.* 375; 94 *Id.* 532.

MCCULLOCH, C. J. Appellees, J. J. McCloy and V. J. Trotter, instituted this action in the circuit court of

Drew County against appellant, Bankers Trust Company of St. Louis, a foreign corporation, to recover damages, laid in the sum of $2,478, on account of the breach of an alleged warranty in the sale of certain shares of the capital stock of the Chicot Bank & Trust Company, a banking corporation domiciled and doing business at Lake Village, Chicot County, Arkansas.

The case was tried before the circuit court sitting as a jury, and the trial resulted in a judgment in favor of appellees for the recovery of the amount of damages claimed by them.

Appellant owned 160 shares of the capital stock of the Chicot Bank & Trust Company, of the face value of $100 per share. Negotiations between the parties looking to a sale of the stock were begun in February, 1910, which resulted in a sale of said shares by appellant to appellees on March 4, 1910, at the price of $109 per share. The negotiations were conducted and consummated through written correspondence and telephone conversations, appellees residing at Monticello, Arkansas, and appellant acting through its officers from the St. Louis office.

There was no express warranty of the stock, either as to the title or value, and appellees rely for recovery upon an implied warranty against encumbrances, and they adduced testimony tending to show that the stock was encumbered at the time of the sale to the extent of the amount named in the complaint.

The Chicot Bank & Trust Company was organized in August, 1907, and two other banking institutions doing business in Lake Village, namely, the Chicot Bank and the Bank of Lake Village, were at the time of its organization merged into it. The assets of the two old banking institutions were taken over by the new one and the liabilities thereof assumed and stock in the new institution was issued to the stockholders of the two old ones of the estimated face value of said assets.

At the first meeting of stockholders upon the organization of the Chicot Bank & Trust Company a resolution

was unanimously adopted and placed upon the records of the company reciting the conditions upon which the assets of the Chicot Bank and the Bank of Lake Village were to be taken over and the liabilities thereof assumed and stock issued in payment thereof, the estimated value of the assets of the Chicot Bank being $25,500 and of the Bank of Lake Village $20,247.50. The resolutions continued as follows:

"Said stock when issued shall be charged at par to the accounts of said banks on the books of said company, provided that the issue of said stock shall not exceed 97 per cent standing to the credit of said respective banks until all the bills receivable, loans, overdrafts and other indebtedness turned in by said banks as assets as shown by said exhibits have been collected, and should there be any loss on any such items, such loss shall be charged to said respective banks against said balances of accounts so retained, together with any extra expense incurred in collecting any of said items so turned in as assets or in the attempt of collection against said accounts so retained shall also be charged and any current expenses or current liabilities that said company may be required to pay and not shown on above exhibits and which said respective banks should have paid but have been overlooked; provided, further, that should said accounts so retained not be sufficient to cover all of above items that may be charged as provided, then this company is hereby authorized and empowered to, at any time, retain a sufficient amount of dividend declared and ordered paid on the aforementioned issue of stock to reimburse it for any and all losses and expenses incurred in the collection of the assets of either bank (provided that the real estate and furniture and fixture accounts turned in by both banks are not included in this provision, but same are accepted at the book and agreed value, and any loss sustained on same must be borne by said company), said balances of said accounts so to the credit of either bank shall be under the exclusive control of said company and may be retained by it until all of the bills receivable,

loans and other items shown on said exhibits are collected and satisfied to its satisfaction. Any balances remaining when said company finally decides to close said accounts may be paid to said banks in paid-up stock (at par) of this company or in cash as its board of directors may direct."

The stock sold and transferred by appellant to appellees was a part of the stock issued to the stockholders of the Bank of Lake Village in payment of said estimated value of the assets of that institution. Of that stock there were 147 shares issued to J. E. Franklin, who appears to have been one of the officers of appellant corporation, and who was a stockholder of the Bank of Lake Village. This stock, together with thirteen shares issued to other stockholders of the Bank of Lake Village, constituted the 160 shares sold and transferred by appellant to appellees.

The stock certificates were transferred in writing by appellant to appellees, but on the presentation of same for transfer upon the books of the company and issuance of new stock, the officers of the Chicot Bank & Trust Company called attention to the fact that the stock was encumbered with liability for any loss which might finally accrue upon the assumed liabilities and assets of the Bank of Lake Village, and said officers declined to issue new stock except upon the recognition and assumption by appellees of such liability. Appellees protested against any such liability, but finally accepted, under protest, the issuance of said shares of stock thus encumbered with the asserted liability.

Subsequently the Chicot Bank & Trust Company made demand upon appellees for the amount ascertained to be the *pro rata* part of such encumbrance charged against said stock, and the same was paid by appellees, the amount so paid, together with amounts deducted from dividends on the stock, aggregating the amount claimed by appellees in their complaint.

Appellees had no notice of the existence of the aforementioned stockholder's resolution when they purchased

the stock from appellant and paid for it, nor did they have any notice that the Chicot Bank & Trust Company asserted any lien against the stock. The first information on the subject which came to them was when they presented the assigned shares for transfer on the books of the company.

It is not contended that there existed statutory lien on the stock in favor of the Chicot Bank & Trust Company, and it is clear that none existed.

The statutes of this State provide that the stock of every such corporation shall "be transferred only on the books of such corporation in such form as the directors shall prescribe; and such corporation shall at all times have a lien upon all the stock or property of its members invested therein for all debts due from them to such corporation." Kirby's Digest, § 853.

There were no "debts due" to the corporation from appellant as shareholder when the shares were assigned.

The aforementioned resolution did not attempt to create a liability of the shareholders. It merely provided that, should there be any loss, the same should "be charged to said respective banks" and that the company was "authorized and empowered to, at any time, retain a sufficient amount of dividends declared and ordered paid on the aforementioned issue of stock to reimburse it for any and all losses and expenses incurred in the collection of the assets of either bank." It created an encumbrance against the stock itself which "followed the stock," so to speak. That encumbrance was a conditional liability and did not, in any sense, constitute a "debt due" to the corporation within the meaning of the statute. See authorities cited in appellant's brief.

There existed originally at common law no lien in favor of a corporation on its shares of stock for debts due from stockholders in the absence of statutory or charter authority. No lien could be created by by-law or resolution or by common custom, for the policy was to discourage secret liens which might hamper the transfer of shares of stock. 2 Cook on Corporations, § 521;

4 Thompson on Corporations, § 4000. But that policy was even at common law somewhat relaxed and the rule was recognized that such a lien might, as between the corporation and its shareholders and a purchaser with notice, be created by by-law, and even by common custom in such dealings. *Child* v. *Hudson's Bay Co.,* 2 P. Wms. 207. That is the law now, we think, according to the weight of American authority. 4 Thompson on Corporations, § § 4003-5; 2 Cook on Corporations, § 522; *Jennings* v. *Bank,* 79 Cal. 323; *Vansands* v. *Middlesex Co. Bank,* 26 Conn. 144; *Reading Trust Co.* v. *Reading Iron Works,* 137 Pa. St. 282; *Des Moines Nat. Bank* v. *Warren Co. Bank,* 97 Iowa, 204.

The distinction between liens created by statute or charter and those created by the by-laws of a corporation is pointed out in an opinion of the Supreme Court of Mississippi as follows:

"It is well settled that at common law a corporation has no lien on the stock of its shareholders for an indebtedness to it. Such liens, when they exist, result either from a provision in the charter to that effect, or from a by-law enacted by the corporation in pursuance of authority conferred by the charter. Usually the lien, when it exists at all, is given by the charter, which, being a public law, as well as the act by which the corporation is created, is notice to all persons dealing with the company. *Union Bank* v. *Laird,* 2 Wheat. 390. The lien may, however, be created by a by-law, as was held at an early day by Lord Chancellor Macclesfield in *Child* v. *Hudson Bay Co.,* 2 P. Wms. 207, and very generally since. When thus created, there seems to be some diversity of opinion as to its effect against an innocent purchaser of the stock for value and without notice of the lien. * * * This difference is more apparent than real, for it seems to be well recognized that a by-law has no extra-corporate force, and is only binding on those dealing with the corporation who have notice of it, or who deal with it under such circumstances that they are bound to take notice of it. A solution of the question will be found in

the right determination of the categories in which notice is inferred. By-laws of private corporations are not in the nature of legislative enactments, so far as third persons are concerned. They are mere regulations of the corporations for the control and management of its own affairs. They are self-imposed rules, resulting from an agreement or contract between the corporation and its members to conduct the corporate business in a particular way. They are not intended to interfere in the least with the rights and privileges of others who do not subject themselves to their influence. It may be said with truth, therefore, that no person not a member of the corporation can be affected in any of his rights by a corporate by-law of which he has no notice." *Bank of Holly Springs* v. *Pinson,* 58 Miss. 421.

The purchaser of shares of stock is chargeable with notice of liens created under statutes or charter, but not those arising under the by-laws of the corporation or under the custom of dealing between the corporation and its shareholders. The reason for this rule can not be stated in language clearer than that quoted above from the opinion of the Supreme Court of Mississippi. And that rule is sustained by the great weight of authority. 2 Cook on Corporations, § § 522 and 525; 4 Thompson on Corporations, § 4007; Helliwell on Stock and Stockholders, § § 47 and 164; *Bank of Holly Springs* v. *Pinson, supra; Bank of Culloden* v. *Bank of Forsyth,* 120 Ga. 575; *Des Moines Nat. Bank* v. *Warren Co. Bank, supra; Driscoll* v. *Mfg. Co.,* 59 N. Y. 96; *Buffalo German Ins. Co.* v. *Third Nat. Bank,* 162 N. Y. 163; *Anglo-Californian Bank* v. *Grangers' Bank,* 63 Cal. 359; *Just* v. *State Sav. Bank,* 132 Mich. 600; *Bryon* v. *Carter,* 22 La. Ann. 98; *Sargent* v. *Franklin Ins. Co.,* 25 Mass. 90; *Planters' Mut. Ins. Co.* v. *Selma Sav. Bank,* 63 Ala. 585; *Brinkerhoff-Farris Co.* v. *Home Lumber Co.,* 118 Mo. 447.

"Where the right to a lien rests on a by-law merely, it can not," says Mr. Thompson in his work on Corporations, "be enforced against a *bona fide* transferee of the shares who had no knowledge of its existence. A by-law

does not ordinarily impart notice. The policy of the law is against secret liens in respect of personal property and where the corporation establishes a by-law reserving a lien upon its shares for any debt due it by the holder of such shares it owes it to the public to make known that fact by printing a notice of it on the certificate of shares or by some other appropriate means." Sec. 4007.

The same author (section 4003) states the rule, and cites numerous authorities in support thereof, that "a by-law of this character would not be valid as against good faith transferees without notice of its existence where the only authority on the subject given the corporation by its charter or the general law was merely to prescribe and regulate the mode of transferring shares."

Shares of stock in a corporation do not constitute negotiable paper within the law merchant, but in some of the authorities such instruments are spoken of as possessing elements of quasi-negotiability, and the modern authorities generally lay down the rule that necessities of business require that shares of stock should be treated *prima facie* as evidence of unencumbered ownership of the holder thereof named in the certificate and upon the books of the company.

Judge Folger, speaking for the New York Court of Appeals in *Driscoll* v. *Mfg. Co., supra,* said:

"Shares of stock are in general personal property, to be dealt with as such, and with as much freedom and ease. The right to them is a chose in action, and though not transferrable, so as to give the same safety in dealing, as is given to a *bona fide* taker of negotiable paper, the current of authority in this State is to the protection of the *bona fide* vendee, against secret or equitable claims thereto of one who has indued the vendor with the *indicia* of ownership. It is evident that such a by-law as this in question, not made known upon the certificate of stock issued by the corporation, if it is to be upheld, is a very serious hindrance to the ease and safety with which sellers and buyers of shares of stock may deal therewith."

Mr. Justice Davis, speaking for the Supreme Court of the United States in the case of *Bank* v. *Lanier,* 11 Wall. 369, said:

"It is no less the interest of the shareholder, than the public, that the certificate representing his stock should be in a form to secure public confidence, for without this he could not negotiate it to any advantage."

Mr. Helliwell lays down the same doctrine as follows:

"Stock certificates are, at the present day, the basis of large commercial transactions throughout the world, and are bought and sold in open market with the same freedom which characterizes the transfer of promissory notes and other forms of securities. They are not, it is true, negotiable instruments; so far as practicable, however, they are held by the courts to possess the elements of negotiability. Under the corporate seal, the public is assured that the holder of a certificate is entitled to the number of shares stated therein, and that these shares are transferrable on the books of the corporation only in person or by attorney, and upon surrender of the certificate. This constitutes a representation on the part of the corporation that a purchaser of the certificate, upon presenting the same to the corporation, duly assigned, with power of attorney to transfer, may have the shares stated recorded in his name." Helliwell on Stock and Stockholders, p. 309.

The rule is unaffected by the fact in this case that the resolution giving a lien upon the stock, or, rather, the dividends, preceded the issuance of the stock and that the stock was issued pursuant to the resolution.

The resolution could not rise to a higher dignity than a by-law of the corporation. It was merely a contractual lien between the corporation and its shareholders, and all the reasons given for the requirement of notice to *bona fide* purchasers apply.

Appellees were *bona fide* purchasers for value without any notice of the bank's claim. There was nothing

upon the face of the shares of stock to give them notice and they were not, as we have already seen, chargeable with notice of the contents of the resolution adopted. They were entitled, as a matter of right, to have the stock transferred on the books of the company and new certificates therefor issued. The officers of the corporation had no legal right to refuse to make the transfer and issue new stock. Appellees had a complete remedy to compel the transfer or to recover damages from the corporation on account of such refusal to make the transfer. 2 Cook on Corporations, § § 389 *et seq.*

Since, as we have seen, appellees obtained a clear and unencumbered title to the stock by their purchase from appellant, with the right to compel the corporation to recognize the transfer, there was no breach of the implied warranty as to title. Appellees were not compelled to comply with the demands made by the officers of the corporation, and were volunteers in making payment of the sum demanded. The implied warranty was only against legally enforceable demands against the stock, and an enforceable demand, however just in morals, was not an encumbrance which constituted a breach of the warranty.

It follows that in no view of the case as presented by appellees have they any valid claim against appellant for damages, and the judgment is wholly without evidence to sustain it. The judgment is, therefore, reversed and the cause dismissed.

ARKADELPHIA MILLING COMPANY *v.* BARKER.

Opinion delivered July 7, 1913.

1. ACTION ON CONTRACT—TRANSFER FROM LAW TO EQUITY.—A mere matter of accounting will not give equity jurisdiction, and in order to show a ground for transferring a cause to equity, on account of the complicated nature of an account, it must appear that it would be difficult for a jury to determine the issues of fact involved. (Page 177.)

2. ACTIONS ON CONTRACT—TRANSFER FROM LAW TO EQUITY.—In an action on a contract when the matter involved is merely one of proof and calculation, with no special intricacies, equity has no jurisdiction. (Page 179.)

Petition for mandamus; *James M. Barker,* Chancellor; petition denied.

STATEMENT BY THE COURT.

The petitioner applies to this court for a writ of mandamus to compel the respondent as chancellor to hear and determine a certain cause which was originally brought by M. H. Purifoy, as plaintiff, against the Arkadelphia Milling Company, as defendant, in the circuit court of Ouachita County, and which was by that court transferred to the chancery court upon motion of the defendant therein, over the objection of the plaintiff. When the cause reached the chancery court the plaintiff therein moved to remand it to the circuit court, which motion was by the court granted.

The petitioner set up that Purifoy filed his complaint in the circuit court of Ouachita County, claiming an indebtedness against the petitioner in the sum of $3,395.54 for staves sold to the petitioner under three contracts, set out and made exhibits to the petition therein, but which it is unnecessary to set forth at length. The contracts showed definitely the prices agreed to be paid for the staves, specifying their kind, number, grade and value. The petition shows that Purifoy, in the original cause, claimed that the petitioner was indebted to him in the sum of $430 for breach of contract entered into between Purifoy and the petitioner here in regard to the bucking of certain staves.

The petition sets out the answer and cross complaint of petitioner, defendant below, herein, to the complaint of Purifoy in the original action, and the answer admitted the execution of the contracts, but denied that the defendant owed the plaintiff the amount sued for, and denied that it had breached its contract in regard to furnishing the bucker for the staves. Denied specifically the allegations of the complaint as to damages, and set up

that defendant had already overpaid Purifoy for all staves received by it under the contracts, setting up specifically wherein it had complied with its contracts with plaintiff, and alleging breaches of the contract upon the part of the plaintiff and claiming, by way of cross complaint and counter-claim, that the plaintiff was due it the sum of $1,675.42, the difference between the amount the defendant had furnished and advanced to plaintiff and the sum due plaintiff for all staves delivered under the contracts at the contract price.

The petition shows that defendant in the cause below attached an itemized statement of its account with the plaintiff, making the same an exhibit to its answer, counter-claim and cross complaint; and the defendant prayed judgment in the sum of $1,675.42.

The itemized account set out each item of cash furnished Purifoy, and sums up the total thereof. It itemized the number of staves received by it under the contracts, giving the grade, dimensions and price.

The petition further set forth the motion that was made in the original cause by the defendant therein to transfer to equity, in which it is stated that, "the grading, counting and averaging of the 116,680 staves makes up a long and complicated account and involves a very complicated system of standard measuring and grading staves." And, further, "that the pleadings and exhibits thereto show that a trial of this suit involves a long, complicated, mutual running account between the plaintiff and the defendant, and that a fair consideration of the issues herein involved can not be had in a court of law."

The petition also shows the response that was made by the plaintiff in the original cause to the motion to transfer; and the plaintiff, in his response, alleged "that as to the items set out in defendant's statement, made an exhibit to said motion, and purporting to show amounts paid by it to January 1, 1912, amounting in the aggregate to $5,138.57, plaintiff admits that each of said checks and drafts was issued by the defendant, and that

the cash was advanced as set out in said statement, and with a possible exception of three or four of said items, they are properly chargeable to plaintiff."

The petition shows that the cause was transferred on this motion to the chancery court, and that after the transfer had been made to the chancery court the plaintiff moved that court to transfer the said cause back to the law court, setting out in his motion that the answer did not contain any equitable defense, and that the action set up in the complaint was an action for debt on account and was cognizable in a court of law, and not in a court of chancery. The petition shows that the chancery court granted the motion to transfer or remand the cause to the circuit court, and refused to take jurisdiction of the cause. Wherefore, the petitioner prayed that a writ of mandamus issue out of this court compelling the chancery court to take jurisdiction and try the cause.

The chancellor, in his response to the petition herein, among other things, says that he assumed jurisdiction to hear the motion to transfer the cause to the law court after the same had been transferred to the chancery court. He heard the motion upon the allegations contained therein, and the exhibits thereto. He set forth in his response, "that counsel for plaintiff in said cause in arguing said motion admitted that all staves had been disposed of by defendant in the market, and no grading or measuring thereof could be had by any order of the chancery court, which statement was not controverted by counsel for petitioner when reference was made thereto by the court.

"It appeared to respondent, from the exhibits filed by petitioner, that there was nothing for a chancery court to discover by causing an accounting between the parties and plaintiff in said cause admitted that all items making up said account up to January 1, 1912, aggregating $5,138.57, with the exception of three or four items thereof, were all properly chargeable to plaintiff's account; that as to the remaining items arising out of expenditures by petitioner after it took possession of the

staves under its cross bond, and which consist of amounts paid out in preparing said staves for market as they were to have been prepared under the contract, plaintiff admitted that each of said items had been expended by petitioner, but denied any of them were chargeable to plaintiff's account, plaintiff contending that petitioner was liable to him for the staves in the condition they were when it took them under the cross bond. Wherefore, it seemed to respondent there was no element of complication of account but a mere question of law as to whether said expense is to be charged to plaintiff's account; that as to the counting, measuring and grading of said staves, it appeared from the exhibits filed in said cause by petitioner that it had already caused each of said staves to be counted, graded, classified and measured, and the value thereof, at the contract price extended, and the total value of all staves extended and stated; that upon consideration of said matters, respondent was of the opinion that petitioner had a full and complete remedy at law, and sustained said motion to remand and ordered the cause remanded to said circuit court."

McMillan & McMillan, for petitioner.

The fact that both parties have stated an account does not relieve the situation. The number of transactions and the large differences between them make it impractical to try the case before a jury.

This case is cognizable in chancery, and jurisdiction should have been retained by that court, even though the original jurisdiction may have been concurrent with that of the circuit court. 91 Ark. 231; 95 Ark. 122; 2 Am. Dec. 291, 298, 299, 306, 307, 308; 8 Ark. 57; 31 Ark. 353; 49 Ark. 576; 51 Ark. 198, 201; 89 Ark. 143; 74 Ark. 277; 82 Ark. 550; 3 Pomeroy, Eq., 471, 472, note; 1 *Id.* 176; 48 Ark. 576; 102 Ark. 343.

Warren & Smith and *T. W. Hardy,* for respondent.

1. The chancery court has no jurisdiction of this case. Mere intricacy of accounts will not give equity

jurisdiction. Bispham's Prin. Eq. (2 ed.), § 483; 8 L. Ed. (U. S.), 499; 98 Fed. 939; 120 Fed. 440; 20 Am. & Eng. Ann. Cases, 901; 88 Ark. 108.

2. Where jurisdiction is concurrent the court first obtaining jurisdiction should retain it. 11 Cyc. 983, 985.

3. The chancellor exercised his discretion in the discharge of a judicial function which can not be controlled by mandamus. 98 Ark. 505; 82 Ark. 483; 80 Ark. 61; 77 Ark. 101; 28 Ark. 295.

WOOD, J., (after stating the facts). In *Loeb* v. *German National Bank,* 88 Ark. 108, the motion to transfer alleged that "the defendants had been customers of the plaintiff for nearly four years; had continuously borrowed money from it, executing to plaintiff about seventy-five notes, ranging in amounts from $500 to $12,000; that the average amount borrowed, or renewed, each year amounted to about $20,000, or an aggregate of approximately $90,000; that during said period they had also endorsed notes at the bank for other parties to the amount possibly of from $65,000 to $75,000; that during the time they had deposited with said bank from time to time collateral notes ranging in amounts from fifteen to twenty thousand dollars; that at all times during said period there was an excess of collateral notes, in excess of the amounts defendants were indebted to said bank; that at various times during said period collaterals so deposited were realized upon by said bank, and the amounts collected thereon were applied to the payment of the various notes and interest executed by defendants; that it is impossible for defendants to state, owing to the large number of transactions between the parties, the calculations of interest of the various notes, the various off-sets and appropriations of collateral to the various notes, just what amount is now due, if any, by said defendants upon the notes sued upon herein."

In that case we said: "The transfer to equity was properly denied. No equitable defense was pleaded in the answer, or set up in the motion to transfer. It is a mere invitation to have an accounting in order to ascer-

tain whether or not the defendants have a defense. There is nothing set forth, either in the answer or the motion, but what could be ascertained in a court of law without the interposition of equity."

There was much stronger reason for transferring to equity in that case than there is in this, because in that case it was alleged that it was impossible for defendants, owing to the large number of transactions between the parties, to make an accurate statement of the amount due upon the notes sued upon, if any, by reason of the fact that the evidence upon which they relied was in possession of the opposite party. But here the pleadings and exhibits show that the parties to the contract, which was made exhibit, had an accurate guide in the contract itself for stating the account. There was no complication or difficulty in the matter of accounting. The question at issue between the parties, as shown by their pleadings, and their exhibits, was as to whether or not the parties respectively had performed the obligations of the contract.

Counsel for petitioner, in their brief, state: "We know that in this case petitioner made up its statement from the counting, measuring, etc., according to the rule fixed by the contract from its different graders or as made by its different graders. We presume that is the way Purifoy made up his statement also. So it will be necessary for the parties, on the trial of this case, to bring their graders before the court, and let them show the court by their testimony, and by their original figures made and entered at the time the grading was done, and how, under the rule fixed by the contract, they determined the grade and class and therefore the price of the staves."

Counsel are correct in their conclusion, but it only shows that the question at issue between the parties was not so much a matter of account as it was whether the parties had carried out the terms of the contract, that is, as to whether the plaintiff had delivered the staves of the kind, grade, number and price alleged in the com-

plaint. And whether or not, on the other branch of the case, the defendant had breached its contract by failing to furnish plaintiff the bucker specified therein according to the terms of the contract, and whether plaintiff had furnished the staves that he alleged he had furnished to be bucked. In other words, whether the defendant had breached its contract in that particular and damaged plaintiff in the sum of $430 as alleged.

There is certainly in all this no question of long, complicated, mutual, running accounts, as petitioner, the defendant below, alleged in its motion to transfer. It was peculiarly within the province of a jury to determine the questions raised by the pleadings on that issue, and there is nothing to impeach the statement made by the respondent, that counsel for petitioner on the argument of the motion to transfer virtually admitted that all staves had been disposed of by defendant in the market, and no grading or measuring thereof could be had by any order of the chancery court. Then there is nothing pertaining to the issue as to whether plaintiff had furnished the staves according to the terms of the contract, and whether the defendant had paid him for the same, that was properly a matter within the jurisdiction of the chancery court. But, on the contrary, it was peculiarly a question for the law court and for the jury, under the evidence that might be adduced affecting that issue.

There is nothing, also, to impeach the statements in the response in regard to the accounting, that the admissions made as to the items of the account being correct, except three or four, reduced this issue to a very simple proposition or question of fact to be determined by the evidence *pro* and *con,* without complication. The same with reference to the items of expense incurred by the defendant (petitioner) after it took possession of the staves, in preparing the same for market; that plaintiff admitted that each of these items had been expended by the defendant, the petitioner, but simply denied that any of them were chargeable to plaintiff's account. This

presented also a simple question of law, depending upon the construction of the contract, and was proper for the law court to pass upon.

We are of the opinion that the chancery court was correct in its conclusion that petitioner had a full, complete and adequate remedy at law, and that it was correct in not assuming jurisdiction to try the cause and in transferring the same to the law court.

A mere matter of accounting is not sufficient to give equity jurisdiction. The case must be one where, on account of the complicated nature of the accounts, it would be most difficult, for a jury to determine the issues of fact involved before the chancery court should take jurisdiction. Where it is merely a matter of proof and calculation, with no special intricacies involved, but a simple suit on contract, the chancery court will not take jurisdiction. *Terrell* v. *Southern Ry. Co.,* 20 Am. & Eng. Ann. Cases, 901; *Randolph* v. *Tandy,* 98 Fed. Rep. 939; *Amr. Spirits Mfg. Co.* v. *Easton,* 120 Fed. 440.

As was said by Chief Justice Marshall, in *Fowle* v. *Lawrason,* 8 L. Ed. U. S. Sup. Ct., p. 495: "It can not be admitted that a court of chancery may take cognizance of every * * * contract expressed or implied consisting of various items where definite sums of money have become due, and different payments have been made. * * * It may be safely affirmed that a court of chancery can not draw to itself every action between individuals in which an account is to be adjusted."

The petition for mandamus is therefore denied.

POINDEXTER v. STATE.

Opinion delivered July 14, 1913.

1. CONTEMPT—INFORMATION—SUFFICIENCY.—An information for contempt of court committed out of the presence of the court, is sufficient if made by the prosecuting attorney under his official oath, even though not specially verified by him. (Page 187.)

2. CONTEMPT—CITATION—SUFFICIENCY.—Where a citation for contempt is ordered to be entered upon the record, and embodies the infor-

mation against the contemnor, the accused is given sufficient notice of the offense with which he is charged. (Page 188.)

3. CONTEMPT—APPEARANCE—DEFECTIVE SERVICE—WAIVER.—When defendants cited for contempt, without objection entered their appearance, they will not be heard later to complain of defective service. (Page 188.)

4. CONTEMPT—WHAT CONSTITUTES—SUFFICIENCY OF EVIDENCE.—Evidence that defendant, an attorney in the case, invited a juror and deputy sheriff into his room and gave them a drink of whiskey, *held* sufficient to warrant a conviction of defendants, the attorney, juror and deputy sheriff for contempt of court; but while the room was shared by another defendant, another attorney in the case, who was no party to the invitation or act, the evidence *held* insufficient to warrant his conviction for contempt of court, although he did not report the transaction to the court. (Page 190.)

5. CONTEMPT—PUNISHMENT.—Although defendants are properly convicted of contempt, the absence of an intentional wrongdoing will make a punishment by fine alone, sufficient. (Page 193.)

Appeal from Lawrence Circuit Court; *R. E. Jeffery*, Judge; reversed as to Poindexter, modified and affirmed as to other defendants.

STATEMENT BY THE COURT.

On March 11, 1913, one Benningfield was being tried in the circuit court of Lawrence County on an indictment charging him with murder in the first degree. The attorneys present representing the defendant were L. B. Poindexter and Oscar Blackford. L. C. Going, one of the attorneys for the defendant, was not present while the jury was being selected. He arrived at Walnut Ridge about 2 o'clock Thursday morning, March 13, 1913. He found all the rooms of the Rhea Hotel occupied, and there was no other hotel in town. He was assigned to the room in the Rhea Hotel occupied by Poindexter, associate counsel representing the defendant. He continued to occupy this room with Poindexter until the trial of Benningfield was over. When Going arrived the jury had been empanelled and put in charge of a special officer. The jurors were instructed, among other things, to remain together during the recess of the court, and to let their conduct be, as it had been in the past, free

from any sort of criticism, not to separate from each other unless accompanied by the bailiff, stay as nearly as they could separated from crowds, not to permit any one to talk to them about the case or talk in their presence or hearing about it, and not to receive any information as to the merits of the case from any source whatever. The jurors, in the instructions, were impressed with the importance of the case, and their duties, and of the necessity of not permitting any one to approach them concerning it.

Going did not know, at that time, the juror, Moseley, and the bailiff, Freer. On Thursday he cross examined the witnesses for the State, but gave no attention to the *personnel* of the jury. During the recess of the court at the noon hour that day Smith, one of the attorneys for the State, and several others drank with Going in room No. 25, occupied by him and Poindexter. After court adjourned in the afternoon of that day, Moseley, accompanied by Freer, the bailiff, started down to the office of the hotel to get a cigar and at the head of the stairs met Going, and some one remarked that he would like to have a drink of whiskey, and Going said that he had some whiskey in his room. Thereupon several persons, including Moseley and Freer, went to room No. 25 with Going and took a drink. Moseley and Freer immediately left the room after getting the drink. Going did not at that time know Moseley and Freer, and said he did not know that one was a juror and the other a bailiff, until the bailiff told Going that Moseley was a juror, whereupon Going stated that he might have said something about the case, not knowing Moseley and the bailiff, and Freer replied that he would not have permitted anything to be said about the case. The case was not discussed. Poindexter was not in the room during this occurrence.

The next day, Friday, March 14, Going was about half through with his argument for the defense when the court took a recess for the noon hour, giving cautionary instructions to the jury and the bailiff, as above stated.

Going and Poindexter went to their room. Going took a drink of whiskey, leaving the bottle on the table in the room. He laid down across the bed, resting and thinking about the remaining portion of his argument to be resumed at the afternoon session of the court. Poindexter was making his toilet and preparing for the noon meal. A knock at this juncture was heard at the closed door and one of them said, "Come in;" Moseley and Freer went in. Moseley remarked that if there was any whiskey in the room he was going to have it. He picked up the bottle of whiskey, and stated that "a man don't have to give a man whiskey; when you find it drink it." Some one spoke about that time and said, "You boys better shut that door." One of them closed the door. Moseley took a drink, turned to the hydrant for water, and went out. The case was not discussed. Neither Going nor Poindexter knew who was knocking at the door when one of them said, "Come in."

Moseley explained his conduct by saying he was feeling bad and wanted a drink of whiskey. He told the bailiff he "had to have it; he was tired and worn out, and was not used to being penned up like cattle." He went to the room of his own volition. Neither Poindexter nor Going had any knowledge that he was going there at that time. Moseley would not have gone to the room without the bailiff. He was in the custody of the bailiff both times that he got a drink. He had been admonished by the court not to leave the rest of the jury except with the bailiff, and when the bailiff went with him he didn't feel that there was any impropriety in taking a drink in the presence of the bailiff. He had not been admonished by the court not to take a drink. Even if an opportunity had been afforded him he would not have discussed the case nor permitted any one to discuss it in his presence.

Moseley and another juror voted for manslaughter; eight of the jurors stood for murder in the first degree, and two for murder in the second degree. There was a hung jury, and a mistrial of the case.

The prosecuting attorney filed his information, on

his official oath, before the judge of the Lawrence Circuit Court, accusing the petitioners, Poindexter, Going, Moseley and Freer, of contempt of court, which, among other things, alleged that "after the jury in the Benningfield case had been empanelled and had been put in charge of a bailiff to be kept together, and had been instructed to permit no one to talk to them and not to talk to any one themselves with reference to the case, and to prevent all improper influences being brought upon them, J. B. Freer, as the bailiff in charge of said jury, took one J. W. Moseley, a member of said jury, to the private room of said Poindexter and Going, attorneys of record for the defendant, where the said Moseley was given whiskey to drink in an attempt to improperly influence and corrupt the said J. W. Moseley and to have him return a verdict for defendant in the cause; that Moseley, as the juror, did unlawfully and corruptly and contemptuously go to the room of the said Poindexter and Going, the said attorneys, and there partake of whiskey in violation of the court's orders and his duty as a juror in said cause.

"That the said Freer, in violation of the court's instructions, corruptly and contemptuously took the said juror Moseley to the room of the said Going and Poindexter for the purpose of having him given whiskey and otherwise to act improperly as a juror in the said cause.

"That each of the defendants corruptly and contemptuously violated the instructions and orders of the court given to said Freer as bailiff, and to the jury of which the said Moseley was a member, which instructions were given in the presence and with the knowledge of said defendants Poindexter and Going, and Freer and Moseley.

"That the said room referred to as the room of Poindexter and Going was a room in the Rhea Hotel, in the town of Walnut Ridge, Arkansas."

Upon this information the judge made the following order:

"It is therefore ordered that the clerk of this court issue a citation against the said Freer, Moseley, Poindexter and Going, commanding them to appear and show cause on the 28th day of March, 1913, in this court, why they should not be dealt with for said contempt."

The citation, by order of the court, was entered upon the record.

The citation was served upon Moseley on the 27th of March, and upon Freer on March 28, but was not served upon Poindexter or Going until after the return day, but was served upon each of them on March 29.

On the 2d of April, at the same term of court, the information was read by the prosecuting attorney, and the petitioners demurred thereto, generally, for the reason that it did not state a cause of action for contempt, and, specifically, for the reason that it was not verified by oath, and not supported by affidavit. The demurrer was overruled.

The evidence was heard, developing the facts substantially as above set forth, and the court entered up a fine of $50 against each of the petitioners, and adjudged that they be imprisoned in the county jail for five days.

The petitioners and appellants filed a motion for a new trial, which was overruled, and they have duly prosecuted their appeal to this court. They, also, have brought up the record for review by *certiorari.*

H. L. Ponder and *Rose, Hemingway, Cantrell & Loughborough,* for appellant Poindexter.

It is impossible to find anything in this appellant's conduct that is in the least censurable. There is nothing on which to base a finding that he was in contempt of court. 134 Mo. App. 55, 114 S. W. 538.

If there is a duty resting on an attorney when he learns of an impropriety on the part of a juror, or other officer of the court, to make report of the fact, it is a mere matter of ethics; not a requirement of the law. Mere failure to report one's knowledge of a crime, is not a criminal offense. 12 Cyc. 193; 1 Am. & Eng. Enc. of L. 267; 3 Cox, C. C. 597; 26 Gratt. (Va.), 956, And we

are unable to find any authority for holding that the failure to report misconduct affecting the court's jurisdiction constitutes a contempt.

A. S. Irby, for appellant Moseley.

The judgment should be quashed because:

1. The citation was not issued by the court, but recites that information was "filed before *me* as judge of said court," and was signed by the judge. There is no order of the *court* for such citation. 9 Ark. 259.

2. The information does not show that the offense was committed within the jurisdiction of the court, but only shows that defendants, Moseley and Freer, visited the private room of Poindexter and Going in the Rhea Hotel, without alleging where that hotel was. 57 Am. St. Rep. 568; 22 Cyc. 278, and cases cited.

3. The information was not sworn to nor based upon an affidavit, whereas it should have been verified by the oath of the prosecuting attorney, or been based upon an affidavit. 1 Ark. 279; 38 Ark. 521; Kirby's Dig., § 1613; 41 Ark. 403; *Id.* 488; 47 Ark. 243; 89 Ark. 72; 102 Ark. 122; 62 N. E. (Ind.), 625; 87 S. W. (Mo.), 503; 83 S. W. (Mo.), 1082; 28 Pac. (Col.), 961; 14 N. W. (Neb.), 143; 85 N. E. (Ind.), 356.

4. The information did not state facts sufficient to constitute a contempt on the part of appellant, Moseley. The office of the citation is not to contain the charge, but to bring the parties before the court to answer the charge contained in the information. There was no allegation in the information that he partook of whiskey in the room occupied by Poindexter and Going, and that recital in the citation was not authorized. *Supra;* Art. 7, § 26, Const. 1874; Kirby's Dig., § 720; 4 Ark. 630; 9 Ark. 259; 14 Ark. 538; *Id.* 544; 16 Ark. 384; 35 Ark. 118; *Id.* 458; 73 Ark. 358; 80 Ark. 579; 87 Ark. 47; 89 Ark. 76; 93 Ark. 307; 94 Ark. 558; 102 Ark. 122; 105 Ark. 190; 57 Am. St. Rep. 568; 81 Pac. 409.

5. The testimony does not support the judgment of the court. 9 Cyc. 57; 56 N. Y. St. 779; 38 Fed. 482; 74 Ia. 585.

S. D. Campbell, for appellant Going.

There is a distinction to be observed between a contempt committed in the *presence of the court,* or by disobeying or obstructing the court's process and orders, which may be punished summarily, and a contempt committed otherwise, where a citation must be issued and served, appearance had in obedience thereto, a trial and a judgment upon evidence introduced and not based upon observation of the court itself. Art. 7, § 4, Const. 1874; *Id.* § 26; Kirby's Dig., ch. 28, § § 720, 721, 722, 723; *Id.* ch. 42, § § 1189, 1190; *Id.* § § 2612, 2613; 9 Ark. 259; 14 Ark. 538; 78 Ark. 262; 14 Ark. 544; 35 Ark. 458.

The evidence fails to show any contempt upon the part of either Going or Poindexter, in that it does not show on their part any disrespectful conduct towards the court or disobedience of any orders of the court, or instructions given to the jury.

If there was anything subject to criticism on their part, it was effectually purged of any contempt by their disclaimer of any intention to interfere in any manner with the proper administration of justice or to impede the progress of the trial. 14 Ark. 544; 16 Ark. 384; 71 Ark. 333.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee.

1. The citation was issued by the court, and not by the judge, as appears by the face of the citation itself, the same being a certified copy of an order of court, entered at length on the record, which concluded with the direction, "Copy of this order duly certified by the clerk, shall serve as a citation here. * * *"

2. The information was sufficient, being filed by the prosecuting attorney, *upon his official oath,* charging a contempt of court, etc. Kirby's Dig., § 722; 89 Ark. 72, 76; *Id.* 77; 9 Ark. 259; 78 Mich. 358, 367; 177 Mo. 229; 74 N. E. (Mass.) 677, 679; 69 L. R. A. (Ore.), 466, 472.

Appellants have not raised this question in the proper manner. They demurred to the information, and

thereby entered their appearance. 35 Ark. 276. They should have moved to quash or to strike, appearing only for the purposes of the motion and not entering an appearance generally. 14 Ark. 625; 24 Ark. 151; 30 Ark. 547; 81 S. W. (Mo.) 430; 87 S. W. (Mo.) 527.

3. This was a constructive criminal contempt and the court had power to proceed on its own motion. 65 Ind. 504; 117 Fed. 448; 114 Ill. App. 323; 102 Ark. 122, 128.

4. The information was sufficient to show that the offense was committed within the jurisdiction of the court, specifically stating that it was committed in the Rhea Hotel, Walnut Ridge, Arkansas. The court will take judicial knowledge that Walnut Ridge is in Lawrence County. 90 Ark. 596.

5. The information states facts sufficient to constitute a contempt on the part of Moseley. 129 N. W. (Minn.) 583, 584; 35 Ark. 118, 121.

6. The evidence is sufficient to show a contempt on the part of Poindexter and Going; and the disclaimer is not sufficient to purge the contempt. 44 L. R. A. (Mass.) 159, 162; 1 Ark. 265, 266.

WOOD, J., (after stating the facts). As we said in Ex parte *Winn,* 105 Ark. 190, "No question is raised here as to the form in which a review by this court is sought. Therefore, we pretermit any discussion of that question, as the case may be treated as being here either on appeal or on writ of *certiorari.*"

The information under the official oath of the prosecuting attorney and the citation directed by the judge to be issued by the clerk, setting forth the information showing the grounds upon which the petitioners were cited to appear and show cause why they should not be dealt with for contempt, were sufficient to give the court jurisdiction. The information made by the prosecuting attorney under his official oath was sufficient, even though not specially verified by him, to meet the requirements of the law, as an accusation setting forth the offense with which the petitioners were charged. The citation

alone, embodying the information which the court ordered to be entered upon its record, was sufficient to meet the requirements of the law, as announced by the court in *CarlLee* v. *State,* 102 Ark. 122, to give the accused petitioners information of the offense with which they were charged.

The citation was duly served upon the petitioners Moseley and Freer before the return day thereof, and although the appellants Poindexter and Going were not served before the return day, they were served before the cause was heard. All the petitioners appeared and made no objection to the service. They therefore can not now complain that they were not duly served with process.

It is unnecessary to determine as to whether the information and citation stated facts sufficient to constitute a contempt of court, for the whole case was developed on evidence taken before the court, and the question now is as to whether or not the evidence was sufficient to warrant the court in finding the petitioners guilty of contempt.

Treating the testimony bearing upon the case of each petitioner separately, we are of the opinion that there was no evidence to warrant the court in adjudging Poindexter guilty of contempt. There was no testimony to warrant the inference that he was instrumental in inviting the bailiff and the juror to the room he occupied for the purpose of furnishing liquor to influence the juror in rendering his verdict. His generosity and courtesy in sharing his room, in an emergency, with associate counsel made him the innocent victim of the unfortunate circumstances, which afterwards developed and over which he had no control, that doubtless caused the trial judge to conclude that he was concerned, or at least acquiesced, in the improper conduct of the other petitioners.

Poindexter didn't know that Going had a bottle of liquor when he consented to share the room with him. He didn't know that Going had invited any one to go

to his room for the purpose of drinking liquor, much less the bailiff and the juror. When the bailiff and the juror knocked at the door of Poindexter's room and were invited to come in he didn't know before their entrance who it was that knocked nor what their purpose was. The liquor didn't belong to him. It was brought to the room without his knowledge. He didn't ask them to take a drink, but simply continued making his toilet, as he was doing at the time they entered the room. Instead of inviting the bailiff and the juror to take a drink of liquor, he states that he protested, saying, "You ought not to come here; you are going to get us all into trouble."

Poindexter had never taken a drink of liquor in his life and didn't approve of the use of it by others. He had nothing to do whatever with the episode and should not be censured and held for contempt merely because he failed to exclude the bailiff and the juror from his room; nor should he be held for contempt because he failed to report the matter to the circuit judge.

The court, from the questions propounded to Poindexter, seems to have considered that it was the duty of Poindexter to have called the matter to his attention as soon as it occurred, but we do not agree with the court, and are of the opinion that Poindexter gives a perfectly reasonable and plausible explanation of why he did not do so, which should have been accepted by the court.

Poindexter testified that had he known, when the door was closed and the knocking was heard at the door, that it was the bailiff and one of the jurors, he would not have said "come in," and "he would not have stayed in the room if he had had time to consider the matter, but it was one of those things that comes so suddenly that a person does not have time to make up his mind as to what is best to do." Freer was not a friend of Poindexter, and, while the latter fully appreciated the fact that it was improper for Freer and the juror to be in his room under the circumstances, yet he did not feel called upon to give publicity to the matter because he was in no way responsible for the unfortunate and embarrassing

situation, and doubtless felt that if he had reported the matter to the court it might have prejudiced the juror against him, and in some way have jeopardized the interest of his client.

In our opinion the testimony thoroughly exonorates Poindexter from any contemptuous conduct, and the court erred in not so holding.

The cases of Going, Freer and Moseley are different from Poindexter's. The testimony of the bailiff, Freer, and the juror, Moseley, shows that on the evening after the arrival of Going, they met him at the head of the stairs in the hotel, and he invited them to his room to take a drink of whiskey. Going testified that he wouldn't invite a juror to his room and would not give him a drink with a view of influencing him, and that he "did not know by what means Freer or Moseley knew that there was whiskey in his room, unless one of them spoke to him and he, not knowing that the bailiff or juror was connected with the court, replied that he had some whiskey." Going does not deny that he extended to Freer and Moseley an invitation to take a drink of whiskey in his room. He only says that he did not know that the one was the bailiff, and the other a juror. He says, at that time, they were strangers to him. So the testimony shows that he met these men, whom he did not know personally, and of whose official character he was not then advised, and invited them to his room to take a drink of whiskey, without first taking the precaution to inquire whether either one had any connection with the trial then in progress. Yet he knew the crowded condition of the hotel, and must have known that the jury in charge of the bailiff was being entertained there. On the second occasion, when the juror and the bailiff went to his room on their own motion to get a drink of whiskey, he did know of their relation to the trial, yet he did not admonish them that it would be improper, on account of the connection they all had with the trial, and because of the court's instructions, for them, with or without his invitation, to drink of his liquor in his room. In expla-

nation of his conduct on this occasion, he says: "I would not knowingly permit a juror to come to my room, but when you have got a man's life on your hands, and a juror comes to your room, the question of what you would do, or wouldn't do, is a proposition that no man can say until they go through that very experience."

Now, when Senator Going left the Senate to go to the dry town of Walnut Ridge to serve as lawyer in the defense of a client who was on trial for murder, he equipped himself with what he termed a "vial" of liquor, and being a vial it was presumably for his own use. But on the evening after his arrival we find him prepared from that "little bottle of medicine" "to give strong drink unto him that is ready to perish and wine to those that be of heavy hearts." Both the bailiff and the juror Moseley seem to have been in that condition. For the bailiff, after he and the juror were invited, though protesting that the juror "shouldn't go," that it was "shaky" for him to do so, nevertheless permitted him to go, and went with him, and took a drink himself from Going's vial. The juror who "never refused a drink" when asked to take one, and who took it when he found it whether asked or not, said that he "felt bad, he was tired and worn out, was not used to being penned up like cattle" and "had to have a drink," and was going after it whether the bailiff went with him or not. It should be here remarked that Going's vial contained enough liquor, as shown by his own testimony, to furnish a drink "to several persons" on two occasions, besides the bailiff and juror.

So here we have the spectacle of one of the leading lawyers for the defense, in his private room, giving liquor to one of the jurors and also to the bailiff having the jury in charge. The bailiff was shown to be in sympathy with the prosecution, and it was believed that the juror Moseley at that time was also unfavorable to the defendant. But there was no verdict, and after the mistrial it was found that juror Moseley was one of two who voted for a verdict of manslaughter, while eight were for mur-

der in the first degree, and two for murder in the second degree. The defendant, on a second trial, was convicted of murder in the second degree and sentenced to twenty years in the penitentiary.

It occurs to us that the maxim *ignorantia legis neminem excusat* applies with peculiar force to one who at the time of his alleged offense was not only a lawyer, but also one of our lawmakers. He should be held to know the law and also the proprieties of professional conduct, and the rules of court that must obtain in the orderly administration of the law. So far as the bailiff and the juror are concerned, they were under the positive orders of the court "to stay as nearly as you can separated from the crowds around the hotel" and "to let your conduct be free from any sort of criticism." Their conduct therefore can only be explained upon the theory that their appetite got control over their judgment, under the insidious influence of the bewitching announcement by Going that the whiskey they were invited to drink was "sixteen or twenty years old," and when they took one drink they found it "mighty fine stuff," and "had to have" another.

Courts were created for the purpose of protecting life and property, and preserving all the sacred rights vouchsafed by the Constitution and statutes. The happiness and well-being of society and the perpetuity of our institutions depend upon the integrity, independence, conservatism and courage of the courts in upholding the majesty of the law. To carry out the wise purposes of their creation they must always maintain their own dignity and enforce obedience to their authority. The jury through all the ages since Magna Charta has been retained as an essential part of the judicial system. It is impossible to keep the fountains of justice clean and pure unless the jury is free from contaminating influences. Strong drink therefore should be neither for judges nor jurors, "lest they drink and forget the law, and pervert righteous judgment."

What shall the penalty be? The parties have dis-

claimed any intentional wrong-doing, and we have reached the conclusion that such was the case. Nevertheless, the conduct under review was well calculated in the eyes of the public to bring the law, and the tribunal charged with its enforcement in that jurisdiction into contempt. Hence the trial court was correct in calling petitioners Going, Freer and Moseley to account, and in rebuking and punishing them for contempt. But as they sought in every way to purge themselves of intentional disrespect for the court and testified that nothing was said concerning the merits of the case, we are of the opinion that justice will be done, and the dignity and authority of the court vindicated, when the fine imposed is paid, without the jail sentence, of which petitioners should be relieved. It is so ordered, and the judgment otherwise affirmed.

CAPPS v. STATE.

Opinion delivered July 14, 1913.

1. NEW TRIAL—TESTIMONY OF JUROR.—Under Kirby's Digest, § 2423, providing that "a juror can not be examined to establish a ground for a new trial, except it be to establish as a ground for a new trial that the verdict was made by lot," testimony of a juror that he and other jurors read articles in newspapers concerning the trial, is not competent. (Page 197.)
2. TRIAL—MISCONDUCT OF JUROR.—It is improper for a juror to discuss a cause which he is trying, or to receive any information about it, except in open court, and in the manner provided by law. (Page 199.)
3. TRIAL—MISCONDUCT OF JUROR—READING NEWSPAPER ACCOUNTS OF TRIAL.—While jurors should never read newspaper accounts of the progress of a trial, yet the mere reading of a newspaper account of a trial does not necessarily call for a reversal of a case, if the article contained nothing of an unfair or prejudicial character, and gave no intimation to the jury of the effect of any evidence or the weight given it by the public. (Page 199.)
4. TRIAL—MISCONDUCT OF JURY—READING NEWSPAPER ARTICLES.—Where in a trial for homicide, the jury read newspaper articles which were not a mere narrative of what had occurred within the view of the jury, but which would convey to the jury the idea that

public sentiment had crystalized into the conviction that the defendant was guilty, the judgment of conviction will be reversed. (Page 203.)

Appeal from Sebastian Circuit Court, Fort Smith District; *Daniel Hon,* Judge; reversed.

Jesse A. Harp and *G. W. Dodge,* for appellant.

1. The misconduct of the jury in mingling with other guests of the hotel where they stayed, and in reading in both of the daily papers the sensational accounts of the case therein contained, is alone sufficient to reverse this case. The burden was on the State to prove that no prejudice resulted to the defendant. 44 Ark. 120.

Where a defendant in a criminal case has been prejudiced by the reading of newspapers by the jury, the verdict is vitiated. 42 Am. St. Rep. 102; 37 Pac. 207; 146 Cal. 561; 80 Pac. 681; 129 Ga. 425; 59 S. E. 249; 12 Ann. Cases, 176; 92 Ia. 455; 61 N. W. 179; 124 Ia. 147; 111 N. W. 443; 71 Miss. 82; 14 So. 526; 9 Mont. 508; 24 Pac. 213; 9 Lea, 440; 20 W. Va. 713; 43 Am. Rep. 799; 105 Fed. 371.

2. The verdict is not sustained by the evidence.

3. The verdict is defective and wholly insufficient to support a judgment of conviction. Kirby's Dig., § 2409; 26 Ark. 325; 2 Bishop on Crim. Proc., § 565; 7 Ia. 236; 11 Ala. 618; 1 Morris, 476; 7 Vt. 259; 3 O. St. 89; 4 Tex. 410; 12 Md. 514; 11 Gray, 438; *Id.* 8; 12 Allen, 170; 26 Ark. 333; 34 Ark. 649; 67 Ark. 27; Kerr's Law of Homicide, § 542; 58 Ark. 233; 71 Ark. 100; 57 Ark. 267; 58 S. W. (Ark.) 350; 143 S. W. 935; 94 Ark. 548.

4. The court's action in refusing to grant a new trial on the ground of newly discovered evidence, consisting of a confession by Bertha Capps that she had sworn falsely in material matters at the trial of the defendant, was manifest error. 44 Tex. 642; 1 Ben. (U. S.) 145.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee.

1. The affidavit of the foreman of the jury, touching the alleged misconduct of the jury, was inadmissible.

Kirby's Dig., § 2423; 29 Ark. 293; 59 Ark. 132, 140; 67 Ark. 266, 273. Inasmuch as the trial judge heard the testimony on this point, and was in a better position to judge of the truth of the charge of misconduct, than is this court, his action in overruling appellant's objections will not be disturbed unless there has been a manifest abuse of discretion. 40 Ark. 454, 469.

2. The verdict is sufficient to sustain the conviction because (1) the court instructed the jury that if they found the defendant guilty of murder in the first degree to return a verdict in the form which they adopted. 109 N. W. (Ia.) 1006. (2) This rule concerning the form of verdict in murder cases was adopted in an early case in this State. 26 Ark. 325. See also 7 Ia. 236; 71 Ark. 100; *State* v. *Wiese,* 4 N. W. (Ia.) 827, 828, and cases cited.

3. Where newly discovered evidence is merely cumulative or contradictory in its nature, there is no ground for a new trial. 66 Ark. 523; 69 Ark. 545; 72 Ark. 404, and cases cited.

SMITH, J. The appellant was indicted for the crime of murder in the first degree, alleged to have been committed in the Greenwood District of Sebastian County, after premeditation and deliberation, by tying Rose Capps and Priscilla Capps in the bed, upon which they slept, and by then and there perpetrating the crime of arson by setting fire to and burning a certain house which they occupied, and which said house was under the control of the said Marion Capps, and thereby wilfully and feloniously caused the death of the said Rose Capps and Priscilla Capps by then and there causing them to be burned to death. The venue was changed to the Fort Smith District, and, upon a trial there, appellant was found guilty and appeals to this court from the judgment sentencing him to hang. A number of exceptions were saved at the trial and are assigned here as error calling for the reversal of the case. Among other grounds upon which a reversal is asked are the discovery of new evidence and the insufficiency of the evidence, but in view

of the fact that the case will be reversed for another reason, we do not discuss those assignments of error. No exceptions were saved to any of the instructions, and, as the other errors complained of are not likely to occur at another trial, we discuss only the error, which in our judgment calls for the reversal of the case, and this error is the misconduct of the jury in reading, and in being permitted to read, newspaper articles relating to the trial.

It was also objected that the verdict of the jury was insufficient to support a judgment imposing the death sentence for the reason that it did not declare the degree of the homicide of which the defendant was guilty. Section 2409 of Kirby's Digest reads as follows:

"The jury shall, in all cases of murder, on conviction of the accused, find by their verdict whether he be guilty of murder in the first or second degree; but if the accused confess his guilt, the court shall impanel a jury and examine testimony, and the degree of crime shall be found by such jury."

The judge in his charge to the jury gave them the following directions:

"Gentlemen: If you find the defendant guilty of murder in the first degree, the crime with which he is charged in the indictment, write your verdict, 'We, the jury, find the defendant guilty as charged in the indictment.'

"If you find him guilty of murder in the second degree, write your verdict, 'We, the jury, find the defendant guilty of murder in the second degree, and assess his punishment at a term in the State penitentiary of not less than five nor more than twenty-one years, the time to be fixed by you, not less than five nor more than twenty-one years.'

"If you find the defendant not guilty, write your verdict, 'We, the jury, find the defendant not guilty.'

"If you find him not guilty on the ground of insanity, state that fact in your verdict."

The jury returned the following verdict: "We, the

jury, find the defendant guilty as charged in the indictment." It is contended that, although this verdict, read by itself, does not state the degree of the homicide, it is yet made definite and certain by reference to the charge of the court; that the verdict returned employed exactly the language which the court directed to be used in the event appellant was found guilty of murder in the first degree. The courts are divided on the question of the sufficiency of such verdicts, and eminent authority could be cited upon both sides of the question of the sufficiency of this verdict. Unquestionably the verdict would be insufficient except by reference to the charge of the court, but, as we are reversing the case upon another ground, we pretermit any discussion of its sufficiency here as that question is not likely to arise upon another trial.

The newspaper articles complained of were published in the Fort Smith Times-Record, and the Southwest American, daily papers published in that city, and each was shown to have had a large circulation. The foreman of the jury testified upon the hearing of the motion for a new trial that he and other jurors read these articles. But this evidence was not competent for that purpose and would be insufficient to support a finding that members of the jury had read these articles, because jurors are not thus allowed to impeach their verdict. Section 2423 of Kirby's Digest; *Wilder* v. *State,* 29 Ark. 293. *Smith* v. *State,* 59 Ark. 132; *Hampton* v. *State,* 67 Ark. 266. But the finding that the papers had been read by the jury did not depend alone upon the affidavit of the jurors, as the officer in charge of the jury and the proprietor of the hotel at which the jury was being entertained testified that the jurors bought these papers and some of the jurors read them, and that other jurors had access to the daily papers belonging to the hotel and read them as other guests did. These articles were very lengthy, extending over several columns of each of these papers, and we will not set them out, *in extenso,* but copy the following excerpts from them:

(Fort Smith Times-Record):

"HEARS HIS CHILDREN TELL HOW HE TRIED TO BURN THEM TO DEATH IN THEIR BEDS.

"Calmly and dispassionately Bertha and Ellis Capps told the jury in the circuit court this morning a story that, if not broken down, will send their father, Marion Capps, to the electric chair, that mode of capital punishment having been substituted by the present legislature for hanging.

"THE FLAME-SCARRED BROTHER.

"Ellis Capps, aged fourteen years, bore plainly the evidence of his close call from death in the flames in scars that disfigured his forehead and hands and mutilated one ear. His testimony did not materially differ from that given by his sister.

"NEIGHBOR TESTIFIED TO ROPE—CAPPS FEARED MOB.

"Wiggington says Capps expresses desire for officer to make haste to get him to a place of safety, as it was horrible affair and was afraid neighbors do him bodily harm."

And the following excerpts are taken from the Southwest American:

"Children testify that father murders three by firing home, other witnesses for the State told of finding ashes held in perfect form of charred rope, across the breast of the children who met death in the house."

"Judge Harp was scored by the court by the non-arrival of a witness from Jenny Lind, whose absence caused a halt in the case. Shortly afterward, when counsel attempted to place on stand a witness who had been given the privilege of court room throughout hearing, Judge Hon again grew warm in his remarks to Judge Harp, and said condemned counsel's action in case of missing witness as well as in other case."

"ON CROSS EXAMINATION WIGGINGTON.

"Said he saw big oil can in the ruins. The top dented, no flames issuing from the holes. The prosecution contends that this proves the can had been emptied

of oil and that there was no explosion. Had there been an explosion the State asserts the can would have been torn and battered."

"Every one of the three witnesses who testified at the morning session gave startling testimony.

"In fact their stories constitute a series of sensations. Hardly had the audience recovered from the surprising recital of fifteen-year-old Bertha Capps, than Ellis, aged fourteen, droopy-eyed and weary, his hands and face disfigured by the ravages of the fire and standing as mute evidence of the child's horrible experience, startled the spectators with his testimony. The story of the children corroborated in detail, but with one or two minor exceptions, both related their testimony in a straightforward manner and every neck in the room was stretched so that not a word would escape the listener.

"Their testimony was delivered without emotion, except toward the closing part of the girl's cross examination when her answers became haughty and snappy. She finally broke into tears as she dramatically exclaimed, after she had given shocking testimony, that 'I would tell the same story if I was on my dying bed.'

"Despite the insistent and repeated efforts of counsel for the defense to shake stories of the children the youthful witness remained firm. Said father read them twentieth chapter of St. John from the Bible. She did not know that the subject dealt with the resurrection."

It is always improper for a juror to discuss a cause, which he is trying as a juror, or to receive any information about it except in open court and in the manner provided by the law. Otherwise some juror might be subjected to some influence, which would control his judgment, something might be communicated to him which would be susceptible of some simple explanation which could not be made because of the ignorance of the influence to which the juror had been subjected. But while jurors should never read the newspaper accounts of the progress of the trial for fear they might be influenced by something which was not in evidence and which had

not occurred in the view of the jury, yet the mere reading of a newspaper account of a trial does not necessarily call for the reversal of the case, if the article contained nothing of an unfair or prejudicial character and gave no intimation to the jury of the effect of any evidence, or the weight given to it by the public. *People* v. *Leary,* 105 Cal. 486, 39 Pac. 24; *People* v. *Gafney,* 1 Sheld. 304, note 6, 50 N. Y. 416; *Commonwealth* v. *Fisher,* 134 Am. Stat. Reports, 1056. A leading case upon the subject of newspapers read by the jurors engaged in a trial, and the effect of such conduct upon the part of the jurors, is the case of *Styles* v. *State,* 12 Am. & Eng. Ann. Cases, 176, 129 Ga. 425, and in this case Justice Atkinson, speaking for the court, said: "The State is jealous of the rights and liberties of its people. When one of its citizens is accused of crime, it throws around him all safeguards possible in order to procure for him a fair and impartial trial. It requires the officer who has charge of the particular jury to swear in substance in open court to take them to the jury room and there keep them safe, and not to communicate with them himself or suffer any one else to communicate with them, unless by leave of the court. The law contemplates when a jury is selected and sworn to try a citizen for felony they shall be entirely separate from the world and that no communication whatever shall be had with them from the beginning of the trial until the verdict is reached, unless by leave of the court. It contemplates that no outside influence shall be brought to bear on the minds of the jury, and that nothing shall occur outside of the trial which shall disturb their minds in any way; that the minds of the jury shall be entirely occupied with the consideration of the case which they are sworn to try." It will be observed that the oath taken by the officer in charge of the jury in that State is very similar to the oath which the court administers to the officer in charge of the jury, upon each adjournment of the court, in this State. Section 2390, Kirby's Digest. And the court there further said: "When a juror enters upon the trial of a crimi-

nal case, the law contemplates his withdrawal from the public and makes no provision for addresses to him from outside sources, for his entertainment or otherwise, which are calculated directly or indirectly to excite any passions or emotions with respect to the matter upon which he is to sit in judgment. Perfect impartiality in the juror is the object of the law. Anything not legitimate, arising out of the trial of the case which tends to destroy the impartiality of the juror, should be discountenanced." And in the same opinion the following language was quoted with approval from the case of *Cartwright* v. *State,* 71 Miss. 82, 14 Southern, 526: "That this method of communicating to and impressing upon the jury, or any member of it, the opinion of others is open to the same condemnation which would be visited upon oral expression of opinion touching a defendant injected into the body of the jury by some designing intermeddler. The widely read and influential daily journal, speaking for, as well as to the public, reflecting public sentiment as well as making it, must be held to be much more powerful in influencing the average man than any expression of opinion by a single private individual." And in the note to this Style case, *supra,* the following language is quoted from the case of *State* v. *Caine,* 134 Iowa, page 147, 111 N. W. 443:

"The accounts were written in a somewhat sensational manner, though not perhaps objectionable as news intended for the general public. They were not confined to verbatim reports of the testimony of the witnesses, but to a large extent consisted of condensed accounts of what was testified to by the witnesses, and statements of the facts involved, some of them not shown by any evidence in the case. However fair these accounts may have been, and for the most part they were unobjectionable as a current report of the proceedings, they were communications with reference to the case which the jurors should not have received. The only discussions of the evidence which the jurors should have an opportunity to consider, before they are secluded for

deliberation on their verdict, are discussions in open court by the attorneys of each party in the presence of those for the other, in which errors of statement may be corrected and improper inferences may be controverted. The jurors should not subject themselves to the danger of misconception and error which must exist if outside persons without the checks incident to an orderly trial and discussion in court are allowed to sum up the evidence, emphasize its particular features, and suggest the conclusions to be drawn therefrom."

It will be observed that the language employed in the first quoted newspaper article is not a verbatim report of the evidence of any witness, but is a statement in narrative form of the reporter's understanding of it. It will be observed, too, that it communicates to the jury the paper's estimate of its sufficiency for the article in the Times-Record contains the statement that the evidence if not broken down would send the appellant to the electric chair, and also states the opinion that the evidence of Ellis Capps, a son of appellant, did not materially differ from that given by his sister, although the defense contended that neither the boy nor the girl should be believed because of inconsistencies in their statements and contradiction contained therein. The article in the Southwest American is open to substantially the same objections, and calls especial attention to a circumstance in proof which was regarded by the State as highly significant, and that is that the can, which had contained the oil, supposed to have been used in saturating the bed upon which the children had been sleeping, had not exploded, and that, therefore, the oil had been poured out of the can before the fire occurred. The article in the American also advised the jury that the public was startled by the sensational character of the evidence and that the appearance of the boy bore mute evidence of his horrible experience and the consequent truthfulness of his story. It also stated that the evidence of the daughter was given without emotion, except towards the closing part she became haughty and snappy, while the theory

of the defense was that the girl entertained great animosity towards her father and had made many conflicting statements. The American's article also contained the statement that counsel for the defense had been unsuccessful in their attempt to shake the story of the children, but that they had remained firm in them, the inference necessarily being that they were therefore true.

We believe these articles were prejudicial because they were not a mere narration of the evidence connected with the trial which had occurred within the view of the jury and that their necessary effect was to convey to the jury the information that public sentiment had crystallized into the conviction that appellant was guilty of the horrible crime of which he was charged; that his children had stood the ordeal of a searching cross examination and yet remained firm because, as intimated by the papers, their story was true. These were improper influences, and we can not know what effect they may have had upon the minds of the jury, and no attempt was made to show that the jury was not influenced thereby, and we, therefore, reverse this judgment and remand the cause for a new trial.

McCULLOCH, C. J., (dissenting). The testimony in this case is not as strong as is desirable in order to warrant a conviction for a capital crime, but it is undoubtedly sufficient, from a legal standpoint, to justify this court in upholding the verdict of the jury. There are some unsatisfactory features in the evidence, but the jury had the witnesses before them, particularly the testimony of the children of the accused, and a case was made out sufficient to uphold the verdict.

I can not agree to a reversal of the case upon the grounds stated by the court, for I have an abiding conviction that the record is free from any prejudicial error.

It is a sound doctrine, and one supported by authority, that, where the jury in a capital case is kept together, the fact that they read newspaper articles of an inflammatory nature is sufficient to raise a presumption

of prejudicial effect and that the burden rests upon the State to remove that presumption. However, we have the newspaper articles before us which are said to have been read by some of the jurors, and, in my judgment, there is nothing in them that is calculated to prejudice appellant's rights in the minds of those jurors. There is nothing of an inflammatory or sensational character in the articles. They only pretend to relate to events of the trial—events which occurred in the presence of the jury—and do not pretend to convey the outside sentiment or the opinion of the editor concerning the weight of the evidence. It is true that one of the articles speaks of the two children giving testimony which if not broken down would send their father to the electric chair, but the tone of the article evinces clearly the intention of the writer merely to relate the substance of the testimony, and not to express an opinion as to its weight. I think we ought to attribute to the jurors a fair degree of intelligence and presume that they are not mere puppets to be influenced by every flying rumor. They are supposed to be fair-minded men, who will be guided by the testimony adduced upon the witness stand and instructions of law given by the court, and not by mere expressions of others.

As before stated, I do not mean to say that a highly inflammatory newspaper article which purports to express public sentiment or which is calculated to convey to the minds of the jury the idea that it represents public sentiment, would not be held to be prejudicial in the absence of a counter showing on the part of the State sufficient to rebut the presumption. These articles are not of that character, however, and it seems to me that they are not sufficient to raise any presumption that the jurors were influenced by them.

Now, as to the form of the verdict: The court has not passed upon that question, but in order to justify my conclusion that the case ought to be affirmed it is proper for me to say something on that subject. It is true the statute, in terms, declares that "the jury shall,

in all cases of murder, on conviction of the accused, find by their verdict whether he be guilty of murder in the first or second degree." Kirby's Digest, § 2409. When the verdict in this case is read in the light of the other parts of the record, it is perfectly clear that the jury have complied with the statute and have by their verdict declared the defendant to be guilty of murder in the first degree. The whole record, including the court's charge, may be considered in interpreting the verdict of the jury, and if, from the whole, it can be ascertained to a certainty what the jury meant, then the verdict is sufficient. *Strawn* v. *State,* 14 Ark. 549; *Fagg* v. *State,* 50 Ark. 506; *Blackshare* v. *State,* 94 Ark. 548.

"Whatever conveys the idea to the common understanding will suffice," says Mr. Bishop on that subject, "and all fair intendments will be made to support it." 1 Bishop, Criminal Procedure, § 1004, sub. 5; § 1005a.

In *Fagg* v. *State, supra,* Chief Justice COCKRILL, speaking of a verdict for manslaughter which failed to specify the time, said:

"Viewing the verdict in this case in the light of the evidence and the court's charge, the conclusion is reasonable, if not irresistible, that the jury intended a conviction of voluntary manslaughter. The court had charged them specifically upon that offense, and had made no mention of involuntary manslaughter. If they knew there was such a grade of homicide, it is not probable that they understood that the defendant could be convicted of it in this prosecution."

In the present case the court specifically charged the jury as to the form of the verdict and told them that if they found the defendant guilty of murder in the first degree, the form of their verdict should be, "We, the jury, find the defendant guilty as charged in the indictment." In response to that instruction the jury adopted the precise form laid down by the court. It is very clear, therefore, what the jury meant when we look to the whole record, and the requirement of the statute is fully met.

I think the judgment in this case should be affirmed, and I, therefore, dissent from the conclusion reached by the majority.

MIDLAND VALLEY RAILROAD COMPANY v. ENNIS.

Opinion delivered July 14, 1913.

1. MASTER AND SERVANT—DEATH OF SERVANT—LIABILITY—SUFFICIENCY OF EVIDENCE.—Where a servant of a railroad company is killed by the railroad, in an action against the railroad company by the administrator of deceased, the evidence *held* insufficient to warrant a verdict in favor of the administrator. (Page 210.)
2. DEPOSITIONS—WITNESS PRESENT AT TRIAL.—Under Kirby's Digest, § 3157, fourth subdivision, the deposition of a witness is properly excluded when the witness himself is present at the trial, by the procurement of the party offering to introduce the deposition. (Page 213.)
3. WITNESSES—IMPEACHMENT—CONTRADICTORY DEPOSITION.—A witness who has testified orally may be impeached by the introduction of his testimony taken on deposition, contradicting his oral testimony, although such deposition is inadmissible as substantive testimony. Kirby's Digest, § 3137. (Page 213.)
4. ACTIONS—JOINDER—ACTION FOR WRONGFUL KILLING OF SERVANT.—Actions for wrongful death are separate and distinct under the State and Federal laws, but, under Kirby's Digest, § 6079, subdivision 6, the same may be joined in the same complaint. (Page 217.)
5. PLEADING—AMENDMENTS TO COMPLAINT.—Under Kirby's Digest, § 6145, the trial court may in its discretion, before the commencement of the trial, allow a complaint to be amended so as to change the cause of action to another cause of action, which might have been joined in the same action; and at any time during the progress of the trial may permit an amendment which does not substantially change the claim, so as to conform to the facts proved. The only limitation is, that after the proof is introduced, the pleadings can not be amended so as to substantially change the cause of action. (Page 218.)

Appeal from Sebastian Circuit Court, Fort Smith District; *Daniel Hon,* Judge; reversed.

Edgar A. de Meules and *Sol H. Kauffman,* for appellant; *J. W. McLoud,* of counsel.

1. A plaintiff can not impeach his own witness by proof of prior contradictory statements without first

showing that he had been entrapped by the witness or that his testimony amounts to a surprise. 40 Cyc. 2559; 50 Cent. Dig., Witnesses, § 1214; 7 Enc. of Ev. 31; Greenleaf on Ev. (16 ed.), § 444; 154 U. S. 134, 38 L. Ed. 936; 99 Wis. 639, 75 N. W. 416; 2 Okla. Cr. 362, 102 Pac. 57; 93 Pac. 1049; 153 Cal. 652, 96 Pac. 266; 34 Fla. 185; 15 So. 904; 20 Mont. 574, 52 Pac. 611; 110 S. W. (Tex.) 1013; 103 S. W. (Tex.) 911; 60 S. W. (Tex.) 881; 45 S. W. 808; 45 Fla. 8; 92 Ark. 237, 122 S. W. 506; 59 Miss. 243; 116 La. 36, 40 So. 524; 111 Pac. (Okla.) 679, 140 A. St. Rep. 668, 31 L. R. A. (N. S.) 1166. There can be no claim of surprise where a party places a witness upon the stand with notice that the witness will testify adversely to him; and the practice of questioning one's own witness for the sole purpose of impeaching him is not permissible, *supra;* 115 Cal. 50, 46 Pac. 863; 89 Pac. 757; 9 Idaho 35, 71 Pac. 608.

The error of this method of procedure is so substantially prejudicial, that it is not cured by the giving of an instruction to the jury at defendant's request to the effect that proof of prior inconsistent and contradictory statements does not tend to establish the truth of the matter set forth in said statements. 70 Miss. 742, 12 So. 852; 100 S. W. (Tex.) 927; *Id.* 770; 92 S. W. (Tex.) 1093.

Admission of proof of prior contradictory statements was further erroneous for the reason that the witness had not testified prejudicially to the plaintiff at the time of his impeachment. 40 Cyc. 2696; 10 Enc. Pl. & Pr. 320; 7 Enc. of Ev. 31-35; 34 Fla. 185, 15 So. 904; 65 W. Va. 375, 64 S. E. 260; 18 Ore. 307, 22 Pac. 1064; 29 Ore. 85, 43 Pac. 947; 24 S. W. 904; 46 Fla. 166; 49 Cal. 384; 141 Cal. 529; 153 Cal. 652; 94 Cal. 550; 110 S. W. 1013.

2. The court erred in refusing a peremptory instruction in favor of the defendant.

The verdict of the jury is not supported by sufficient evidence. There is no evidence whatever that he was caught between the ties, or that he was

caught in any manner and was unable to extricate himself. 115 S. W. 890; 76 Ark. 436; 181 Fed. 91; 98 Tex. 451; 126 Pac. 760; 139 N. C. 273; 56 Ill. App. 578; 89 S. W. 810; 103 Va. 64; 157 N. W. 244; 93 S. W. 868; 28 Ky. Law Rep. 989; 75 Md. 38; 75 Md. 38; 23 Atl. 65; 81 Atl. 267; 79 Ark. 437; 73 Tex. 304; 47 Minn. 384; 131 N. Y. 671; 97 Pa. 450; 159 Mass. 589; 150 S. W. (Ark.) 572; 179 U. S. 658; 222 Mo. 488; 72 S. C. 398; 140 S. W. 579.

It is apparent that appellee relied in the lower court upon the prior contradictory statements of the witness Young to make out his case. It is elementary law of evidence that proof of prior inconsistent statements of a witness can be introduced and considered only for the purpose of impeachment, and not as substantive evidence of the truth of the matter stated. 40 Cyc. 2764; 7 Enc. of Ev. 249; 50 Am. Dig., Cent. Ed., 1655; Wigmore on Ev. § 106; 132 Mo. 363; 80 Ky. 507; 34 Fla. 185; 123 Cal. 374; 100 S. W. 770; 111 Pac. (Okla.) 679; 75 N. H. 23; 67 Ark. 594; 18 S. W. (Ark.) 172; 72 Ark. 582; 73 Ark. 484.

The peremptory instruction should have been given for the further reason that the cause of action alleged was not proved. The allegations of the complaint bring this case within the operation of the Federal Employers' Liability Act, which is paramount and exclusive. Thornton, Fed. Employers' Liability Act, § 40, p. 223; *Id.* p. 424; *Id.* 444; 175 Fed. 506; 173 Fed. 527; 184 Fed. 828; 140 S. W. (Ark.) 579; 33 S. C. Rep. (U. S.) 135; *Id.* 192; 167 Fed. 660; 233 U. S. 1; 200 Fed. 44. The laws of the State of Oklahoma, therefore, in so far as they covered the same subject, were superseded by the Federal act, and the plaintiff must recover under that act or not at all. So long as the complaint shows that the Federal statute was applicable, it was the sole measure and source of the plaintiff's right of action. 167 Fed. 660; 158 U. S. 285, 29 L. Ed. 983; Thornton, Fed. Employers' Liability Act, § 19, p. 35; 197 Fed. 537; *Id.* 578; *Id.* 579; *Id.* 580; 153 S. W. 163; 148 S. W. (Mo.) 1011.

There was no attempt made nor any request to amend the complaint so as to base a right of action upon the laws of Oklahoma. Even if an amendment had been offered it would have been the duty of the court to refuse it, because a new cause of action can not be introduced by way of amendment. 70 Ark. 319; 75 Ark. 465; 83 Ga. 441; *Id.* 659; 113 Ga. 15; 78 Atl. 34; 158 U. S. 285, 39 L. Ed. 983.

Hill, Brizzolara & Fitzhugh, for appellant; *Cunningham & Berry,* of counsel.

1. The parties having elected to try upon one issue in the lower court, the defendant will not be permitted to try it upon a different issue on appeal. 64 Ark. 305.

On the point that there had been no amendment nor request to amend the complaint, it is enough to say that there could be no more effective way of amending the complaint than by requesting and having the trial court to give an instruction that a certain allegation was withdrawn. The court's discretion and authority in the matter is clear. Kirby's Dig., § § 6140, 6141, 6142, 6145; 42 Ark. 57; 94 Ark. 365.

2. It was error to exclude the deposition of the witness Young at the time it was offered by plaintiff. Kirby's Dig., § 3157; 49 S. W. 791; 23 S. E. 207; 17 Ill. 406; *Id.* 571; 11 Humph. (Tenn.) 90. If it was error to exclude this deposition, it was induced by appellant, of which it can not complain; and it can not complain of the subsequent error, if it was error, in permitting it to be used to contradict the witnesses.

The statement given by Young to Mr. Green, the claim agent, on the next day after the accident, was identified by him as containing the absolute facts so far as he knew them. It is not mere contradiction of the witness, but is affirmative testimony of itself, tending to prove the facts therein stated. 1 Greenleaf on Ev. (16 ed.), § § 436-439; 63 Ark. 187.

The rule formulated under section 3157, Kirby's Digest, is not limited to cases where the party seeking

the contradiction of a witness must show that he was entrapped or his testimony amounts to a surprise. The statute is broad and was passed to destroy the rule of evidence appellant contends for. 2 Wigmore on Ev., § 896; *Id.* § 904; 1 Greenleaf on Ev. (2 ed.), § 444.

3. A peremptory instruction to find for the defendant was properly refused, because, leaving the testimony of Young entirely out of it, there is sufficient evidence in the record to go to the jury, and to sustain a finding that defendant came to his death from one of the causes alleged in the complaint. *St. Louis, I. M. & S. Ry. Co.* v. *Hempfling,* 107 Ark. 476.

McCULLOCH, C. J. Appellee's intestate, H. J. Caver, was employed by appellant in the capacity of a brakeman, and while working as such was killed at Nelogany, Oklahoma, on October 16, 1911, being engaged at the time in switching freight cars from appellant's road to the tracks of a connecting carrier, the Missouri, Kansas & Texas Railroad Company.

This is an action by appellee as administrator of the estate to recover damages on account of the suffering alleged to have been endured by deceased as a result of the injury, and the loss of contributions to the widow as next of kin.

An appeal has been prosecuted from a judgment in appellee's favor.

There are numerous assignments of error, the most important of which is that the evidence is not sufficient to sustain the verdict.

We have reached the conclusion that the evidence is not sufficient, and the case will be reversed on that ground, so that it will not be necessary to discuss all of the assignments. Only those will be mentioned which will necessarily arise in further proceedings in the case when remanded to the circuit court for a new trial.

The freight train on which Caver was serving as brakeman reached the station of Nelagony at night, and contained several cars which were to be switched over to the tracks of the connecting carrier for delivery to the

latter. Appellant's main track runs east and west, and there is a track south of the station called the delivery track connecting the two roads. Between the delivery track and the station house is a track called the house track, which runs parallel with the delivery track and is connected with it by a switch. It was at this switch that Caver was killed by the moving cars which were being switched over to the line of the connecting carrier. For a short space near the switch the ties were laid irregularly, in some instances wide apart at one end and close together at the other, thus forming angles, and the roadbed was very rough from the frog for a distance something over twelve feet, where there was a gully which ran across the roadbed. The gully was about fifteen inches deep from the top of the ties to the bottom of the gully. Grass and weeds were growing between the ties, which covered the surface of the ground so that the condition could not be easily discovered.

The injury occurred on a dark night, and the proof shows that Caver had previously made three trips on this run as brakeman.

It is also alleged that the frog of the switch was not properly blocked or that the block had been permitted to get out of repair. There is some testimony to the effect that the block in the frog had become worn to about half of the ordinary thickness.

After the train came into the station, Caver, in the discharge of his duties, cut the caboose off from the train and spotted it on the main line, and lined up the main track switch, which was east of the station house, the train having come from the west. He then went to the switch where it connects with the transfer track, and, after throwing the switch, gave a back-up signal, which brought the engine with the cars to be transferred backing in on the track on the way to the line of the connecting carrier. It was his duty to go with the cars until they got on the track of the connecting carrier.

Caver was killed by being run over by the freight cars at the switch which connected the two sidetracks.

None of the trainmen were looking at him at the time the train ran over him, and could give no account as to how he came to be struck by the train or got under the car, though they saw him a few moments before when he lined up the switch so as to let the cars back in from the main track. Some one gave a lantern stop signal about the time that he was run over, and this signal was supposed to have been given by him, though it was not certain from the testimony whether he gave it or not. He was heard by a witness to cry out when the train struck him. The train was running very slowly, about four miles an hour according to the testimony, and was stopped in a very few feet after the signal was given. The conductor was the first one to get to the place, and he found Caver with his body between the rails and both feet extended over the outside of the track. He was right at the frog of the switch, and blood and crushed bone were found on the rails at that place. There was no evidence, as far as the record discloses, of the body being dragged along with the moving train. He died immediately after being extricated from beneath the car.

The only person who claims to be an eye-witness was a man named Young, who before the trial gave several conflicting statements, and also gave his deposition, which was in conflict with his testimony detailed on the witness stand. This man was not an employee, but was stealing a ride on a freight train of the Missouri, Kansas & Texas Railway Company. He claims to have been near the spot attending to a call of nature when Caver's injury and death occurred. The witness was found in Kansas City, and appellee took his deposition for use at the trial, but the witness was present at the trial by procurement of appellant, and the court refused to permit appellee to read the deposition and required him to introduce the witness in person. This was done over appellee's objection, who insisted upon the right to introduce the deposition.

We are of the opinion that the court was correct in

its ruling in this respect. The authorities cited in appellant's brief sustain the ruling.

The statute on the subject is explicit and provides that depositions may be used on the trial "where the witness resides thirty or more miles from the place where the court sits in which the action is pending, unless the witness is in attendance on the court." Kirby's Digest, § 3157 (4 subdiv).

In the deposition the witness gave testimony which tended to support the contention of appellee that Caver stepped into the ditch and fell and was unable to extricate himself before he was struck by the moving freight car.

His testimony as given on the witness stand was, however, altogether different, and failed to add anything to the strength of appellee's case. In fact, he testified that he saw Caver start across the track right at the frog of the switch and immediately in front of the moving train. His testimony made a clear case of injury on account of his own negligence in stepping immediately in front of the moving train.

The court allowed appellee to introduce the deposition and other statements made by the witness in contradiction of his testimony, but held that it was inadmissible as substantive testimony.

The court was correct in that ruling, for there was enough to show surprise on account of the previous contradictory statement and the testimony given on the witness stand was damaging to appellee's case, which gave appellee the right to impeach him by proof of contradictory statements. Kirby's Digest, § 3137.

The witness signed a written statement at the instance of the claim agent of the railroad company the next morning after the injury occurred, and that statement corroborates the statement in his deposition and contradicts the statement of the witness given at the trial.

Learned counsel for appellee insist that the witness, in the course of his testimony, verified the statement

given to the claim agent by stating that whatever he said at that time was true. Counsel argue this as being admissible under the rule of evidence which allows a witness who has no present recollection of the fact to testify as to the correctness of a contemporaneous memorandum made by him or made in his presence.

The rule of evidence contended for by counsel for appellee is correct and has been approved by this court. *St. Louis Southwestern Ry. Co.* v. *White Sewing Machine Co.*, 78 Ark. 1. But we are of the opinion that it has no application to this case, for the reason that a careful analysis of the testimony of the witness shows that he did not testify that the former statement favorable to appellee's cause of action was true. There are some expressions in his testimony which might be so construed, but when taken all together his examination shows distinctly a repudiation of the truth of the former statement and the assertion that the facts related on the witness stand concerning the manner in which the injury occurred was a correct statement.

We think that the court was correct in limiting the former statements to the purposes of contradiction only, and not allowing it to go to the jury as substantive evidence.

Without substantive force being given to the testimony of witness Young, the evidence is insufficient to show that the injury to Caver resulted from the insecure condition of the track.

The theory of appellee is that Caver stepped into the gully, which was about twelve feet from the frog, and was dragged that distance and run over.

Leaving out the testimony of Young, we find no testimony at all which would warrant the jury in finding that he stepped into the gully or between the uneven ties, and on that account was thrown down and run over.

The evidence tends to show, as before stated, that he fell under the cars right at the frog, and was run over. It is purely a matter of conjecture how he came to fall under the cars. Juries are not permitted to rest a ver-

dict purely upon speculation, but there must be testimony which warrants a finding of the essential facts or which would warrant a reasonable inference of the existence of those facts. Language used by this court in the case of *Walker* v. *Louis Werner Sawmill Co.,* 76 Ark. 436, is peculiarly applicable. It was there said:

"We know that his injury was caused by his falling, but no one can say from the evidence what was the cause of his falling. * * * For aught that the proof shows to the contrary, appellant's fall may have been the result of accidental misstep, not caused by any of the things charged as negligence in the company. * * * The whole matter was left to conjecture, and in such case the inference from the undisputed evidence most favorable to appellee must be taken, for appellant has the burden."

To the same effect see the recent case of *Denton* v. *Mammoth Spring Electric Light & Power Co.,* 105 Ark. 161, 150 S. W. 572.

The late Justice Brewer, in the case of *Patton* v. *Texas & Pacific Ry. Co.,* 179 U. S. 658, speaking for the Supreme Court of the United States, said:

"It is not sufficient for the employee to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of a half dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion."

Learned counsel for appellee rely, in support of their contention that the evidence was sufficient, upon the recent case of *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Hempfling,* 107 Ark. 476, and the case of *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Owens,* 103 Ark. 61.

In those cases the rule just stated was clearly recog-

nized; but another rule, equally reasonable and well settled, was stated to the effect that, where it is not purely a matter of conjecture, even though the injury might have occurred in different ways, it should be left to the jury to draw the reasonable inference from the testimony as to the manner in which it occurred. While the jury could not indulge in pure conjecture, they could determine the weight of the circumstances and determine what inference should be drawn therefrom. In both of those cases we reached the conclusion that the circumstances were such that, while the cause of the injury was not free from doubt, they were sufficient to warrant the jury in drawing the inference that the injury resulted from the negligent acts of the railroad companies.

In the present case, however, we are unable to discover any evidence which would warrant the jury in drawing an inference as to the cause of deceased falling under the car. The jury had no right to assume, in the absence of testimony, that he stepped into the hole and was unable to extricate himself before the car struck him. There is no evidence that he fell into the hole or got into the defective part of the track. The evidence does not show when he fell under the car. Nor is there any evidence that he got his foot hung in the frog, and for that reason was run over by the train.

We repeat that it was purely a matter of conjecture, and that the evidence is entirely insufficient to warrant the verdict of the jury.

There is one other question which, in view of the fact that the case may be tried again, we deem it proper to discuss.

It is alleged in the complaint that appellant is an interstate carrier, engaged in interstate commerce, and that Caver was engaged in handling interstate cars at the time he received his injury.

This brought the case within the terms of the Employer's Liability Act of Congress, and characterized it as an action to recover under that statute.

In the answer, appellant denied that Caver was engaged in interstate commerce, and the proof fails to sustain the allegation of the complaint in that regard. Appellee's counsel concede that there is no proof that deceased was engaged in interstate commerce at the time.

When the court came to instruct the jury, appellant asked for a peremptory instruction to the jury on the ground that appellee had alleged, but failed to prove, that deceased was engaged in interstate commerce. This was the first time during the trial that appellant had raised that question.

It is insisted now, that, appellee having sued under the Employer's Liability Act, he can not recover in this action under the laws of the State of Oklahoma for an injury which occurred while deceased was engaged in intrastate commerce.

Facts which give the right to recover under the State law, and those which give the right to recover under the Federal statutes, constitute separate and distinct causes of action, for the Federal statute is exclusive where the incident is embraced within interstate commerce service, and does not apply where it is in intrastate service.

The two causes of action may, however, be joined in the same complaint. Kirby's Digest, § 6079 (subdiv. 6).

There can not, however, be a recovery upon a cause of action other than that stated in the pleadings and upon which the issue is joined. *Patrick* v. *Whitely,* 75 Ark. 465; *St. Louis, San Francisco & Texas Ry. Co.* v. *Seale,* 229 U. S. 156.

A change in the cause of action may, however, be waived. *Sarber* v. *McConnell,* 64 Ark. 450.

Our statute on the subject of amendment of pleadings is very liberal, and provides that "the court may, at any time, in furtherance of justice, and on such terms as may be proper, amend any pleadings or proceedings by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations

material to the case; or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved." Kirby's Digest, § 6145.

Under this section the court may, in its discretion, before the commencement of the trial, allow a complaint to be amended so as to change the cause of action to another one which might have been joined in the same action; and at any time during the progress of the trial may permit an amendment which does not change substantially the claim, so as to conform to the facts proved. The only limitation in the statute is that, after the proof is introduced, the pleadings can not be amended so as to substantially change the cause of action.

It is unnecessary to determine now, in view of the fact that the case is to be reversed on another ground, whether appellant waived the change in the cause of action, or whether the error in allowing the change was prejudicial so as to call for reversal of the case. On the remand of the cause the appellee can, if so advised, amend the pleadings so as to state a cause of action based upon intrastate service of the deceased, and thus make out a right of action under the State law.

There are other questions presented now which, in view of the reversal of the case on other grounds, we do not deem it necessary to discuss. These questions will probably not arise again in this case.

On account of the insufficiency of the evidence, the judgment is reversed and the cause is remanded for a new trial.

ARKANSAS MIDLAND RAILROAD COMPANY v. PREMIER COTTON MILLS.

Opinion delivered June 23, 1913.

1. CARRIERS—DELIVERY OF GOODS—CUSTOM AND USAGE.—The custom of a carrier as to delivery based on a well established usage at the place of delivery becomes a part of the contract between a carrier and the shipper, and governs as to the place, time and mode of making the delivery of goods shipped. (Page 222.)

2. CARRIERS—DELIVERY OF GOODS—CUSTOM AND USAGE.—Where cotton was consigned to plaintiff, and the cars containing the same had arrived at their destination, it will he held that the cotton was not delivered to plaintiff, when it was not actually delivered according to the custom existing between the parties at the place of delivery. (Page 222.)

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

STATEMENT BY THE COURT.

Appellee sued appellants for the loss of a shipment of cotton consigned to it at Barton, Ark., and which was destroyed by fire while in the cars upon the sidetrack at the station. The proof showed that the cars which the cotton was in at the time it was destroyed were on a sidetrack adjoining the depot on the north side of the main line of appellants' road at that place. The plant of appellee was situated on the south side of the main track, and there was a private switch from the south side of appellants' main line to appellee's plant. This private switch was maintained by appellants, and was used exclusively for receiving and delivering carload shipments of cotton and other supplies used by appellee. The manager of appellee's mill was the station agent of the railroad company at Barton. The same person was also the assistant to the station agent and assistant to the manager of the mill. The bill of lading in question in this case was for ninety-four bales of cotton consigned to appellee at Barton, and it contained the clause as follows:

"2. Notice.—This contract is accomplished, and the liabilities of the companies as common carriers thereunder terminates on the arrival of the cotton at the station or depot of delivery, and it is understood and agreed that the companies will be liable as warehousemen only thereafter."

Appellee had a shed back of its mill on the private spur track. It was the custom of the railroad company to deliver carload shipments on the spur track at the shed, and appellee would unload the shipment from the

cars into the shed. The private track was within the yard limits of the station. The conductor of appellant's local freight train had exclusive charge of the switching at this station. When the cars arrived at the station and were placed on the sidetrack, appellee's agent requested the conductor to spot the cars at the usual place next to the shed. The conductor several times promised to do this, but neglected to do it on account of the press of other duties. After the cars had been on the sidetrack for about nine days, the conductor was again requested to spot the cars, and promised to do so the next morning. Appellee needed cotton in its mill and unloaded part of it from the cars where they stood for immediate use. That night a fire occurred and the remaining cotton was destroyed by the fire. Appellee had already gotten out as much of the cotton as it needed for immediate use, and did not intend to unload any more of the cotton until the cars were spotted at the shed. Appellee's agent had paid the freight and signed a receipt for the cotton before the fire occurred, but the testimony shows that it was the custom of appellee to sign a receipt for shipments weekly and to pay the freight therefor whether the goods had been received or not. This was an established custom, and was acquiesced in by the railroad company. Forty-six bales of cotton, valued at $2,764.91, were destroyed by the fire, and the jury returned a verdict for appellee for that amount.

From the judgment rendered, appellants have duly prosecuted an appeal to this court.

E. B. Kinsworthy, P. R. Andrews and *W. G. Riddick,* for appellant.

1. Neither the express nor the implied obligations of a bill of lading can be varied by parol. Hutchinson on Carriers, (3 ed.) § § 167, 168; *Id.* 310; 93 Ark. 537; 128 Ala. 167; 4 L. R. A. 244; 119 Pa. St. 24; 72 N. Y. 615; 30 Ala. 608; 13 L. R. A. 262; 115 Mass. 536; 6 Cyc. 466; 36 O. St. 453; 31 Me. 228; 80 Ala. 5; 66 Tex. 292.

2. A carrier's liability as such terminates upon the arrival of the goods at the designated place of delivery,

allowing a reasonable time after notice of the arrival for the consignee to receive and take possession of the goods; and after the lapse of such reasonable time, the carrier is liable as a warehouseman only. 100 Ark. 37; 77 Ark. 482; 60 Ark. 375; 2 Hutchinson on Carriers, § 685, p. 765; *Id.* § 694, p. 774. As a warehouseman, a carrier is liable only for the results of its negligence, the burden of proving which is on the party alleging it. There would be no presumption of negligence arising from the destruction of the goods by fire or otherwise. 60 Ark. 375; 52 Ark. 26; 64 Ark. 115; 97 Ark. 287.

3. The evidence fails to establish the custom respecting the delivery of carload freight.

Moore, Vineyard & Satterfield, for appellant.

"The liability of the common carrier ceases with the delivery of the goods at the point of destination according to the direction of the shipper, or *according to the usage and custom of the delivery at such place of destination.*" 100 Ark. 37, 42; Hutchinson on Carriers, (3 ed.), §§ 664, 710, 711; 6 Cyc. 465 "f;" 40 L. R. A. (N. S.) 73.

HART, J., (after stating the facts). It is contended by counsel for appellant that the bill of lading was the contract of shipment between the parties to this suit, and that parol evidence to show a custom of delivering the carload shipments at a designated place next to the sheds of appellee was incompetent because it tended to vary or contradict the written instrument. In the case of *Arkadelphia Milling Co.* v. *Smoker Mdse. Co.,* 100 Ark. 37, the court said:

"The liability of the common carrier ceases with delivery of the goods at the point of destination according to the directions of the shipper, or according to the usage and custom of the trade at such place of destination."

Barton was a small station on appellant's line of railroad. It had no warehouse in which to store freight. It had a small platform on which it delivered small lots of freight. Appellee was the principal shipper at that point, and appellants had built a private spur track run-

ning next to the sheds at the rear of appellee's mill, and this spur track was for the exclusive use of appellee. The testimony shows that it was the custom of appellant to deliver carload shipments to appellee by spotting the cars on this spur track next to appellee's shed. This was an established custom, recognized both by appellants and appellee. The place of unloading was within the limit of the station grounds at Barton, and the proof of these facts did not tend to vary or contradict the bill of lading, and was not, therefore, incompetent. A general custom of the business or a well established usage at the place of delivery becomes a part of the contract and governs as to the place, time and mode of making the delivery. Elliott on Railroads, (2 ed.), vol. 2, § 710.

It is next contended by counsel for appellants that they had delivered the cotton to appellee, and that they were no longer liable as carrier when the cotton was destroyed by fire. We can not agree with them in this contention. This case is not like the case of *Rothchild Brothers* v. *Northern Pacific Railway Co.*, 68 Wash. 527, 40 L. R. A. (N. S.) 773, 123 Pac. 1011. There, not only had the bill of lading been surrendered, but the car had been spotted on the delivery track before the fire occurred. Here the car had not been spotted at the place where appellee had requested the cotton to be delivered, but, on the contrary, appellants' agents had agreed to place it there on the next day according to the existing custom. Appellee had not received the cotton, but had gone into the car only for the purpose of taking out cotton for its immediate use, and it was understood that the remaining cotton should be spotted on the track next to its shed before it would be unloaded. This was in accordance with the established usage between the parties. There was also a definite and recognized custom between appellants and appellee that weekly payments of freight would be made and receipts given for the goods, whether they had arrived or not, and in conformity with this custom between appellants and appellee, the payment of freight was

made and the receipt for the cotton signed. Under these circumstances, it can not be said, that appellants had delivered the cotton to appellee, and that it had accepted it.

The case was submitted to the jury under proper instructions, and the judgment will be affirmed.

GRIFFITH v. AYER-LORD TIE COMPANY.

Opinion delivered July 7, 1913.

1. CONVERSION—COMPLAINT—SUFFICIENCY.—A complaint in an action for damages for conversion, which alleges that plaintiff bought the timber on certain lands for one L., retaining a lien on the timber, L. being required to sell all of the same to plaintiff, and that L. sold the said timber to defendant, and that defendant converted it to his own use, is sufficient to state a cause of action against defendant for conversion. (Page 229.)
2. DEEDS—TIMBER DEEDS.—Where a deed to plaintiff conveying timber shows on its face that the timber was "sold and conveyed" to plaintiff, the instrument will be held to be a deed, and not a mortgage. (Page 230.)
3. DEEDS—TIMBER DEEDS—REQUISITES.—Timber, until severed from the soil, is real estate, and in order to convey the legal title thereto it is absolutely necessary that somewhere in the instrument there should be words expressing the fact of a sale or transfer of the title; that is the words "grant, bargain and sell," or words of similar purport. (Kirby's Digest, § 731. (Page 230.)
4. TIMBER—TIMBER DEEDS—MODE OF TRANSFER—RECITALS—SURPLUSAGE.—The transfer of growing timber must be by deed, and where plaintiff purchased timber, and the deed to plaintiff contained apt language to convey the title to plaintiff, a recital in the deed that one L. was the absolute owner of the timber is surplusage. (Page 230.)
5. CONVERSION—INNOCENT PURCHASER—DAMAGES—INCREASE IN VALUE.—Where one L. wrongfully cut timber and removed it from plaintiff's land and sold it to defendant, although defendant purchased the same innocently, he is liable to the owners for the value of the timber and 6 per cent interest from the date of the conversion, and when the same is made into crossties by L., defendant is not entitled to a deduction on account of the increase in value because of the work and labor of L. (Page 230.)

Appeal from White Circuit Court; *Eugene Lankford,* Judge; affirmed.

STATEMENT BY THE COURT.

On the 8th day of May, 1906, L. P. Coleman, who was the owner of a certain tract of timber land in White County, together with his wife, executed the following instrument:

"Timber Deed.

"Know All Men by These Presents:

"That the undersigned, L. P. Coleman, of the county of Pulaski, in the State of Arkansas, by the written direction of J. S. Leffler, found on the reverse side hereof and signed by J. S. Leffler, and in consideration of the sum of fifteen hundred ($1,500) dollars to me paid by Ayer-Lord Tie Company, a corporation of the city of Chicago in the State of Illinois, the receipt and payment whereof are hereby acknowledged have sold and conveyed and by these presents do sell and convey unto the said Ayer-Lord Tie Company, as per directions and agreement on the reverse side hereof, all of the white oak timber of every character, species and kind suitable for railroad purposes, standing or being on the following described lands, situated in the county of Desha in the State of Arkansas, towit: Eight hundred acres of timber lying on Oak Log Bayou, described as follows: All of section 17, township 9 south, range 3 west, east half of east half, section 18, township 9 south, range 3 west. This deed conveys only the white oak timber and its species, and no other.

"Together with the free and unobstructed right to said Ayer-Lord Tie Company, its agents, servants and employees, and its successors and assigns, at any and all times from the date hereof until the eighth (8th) day of May, 1908, to go to and from, on and over, said lands, and other lands of grantor necessary, for the purpose of cutting, working and removing said timber on and from said lands; and on and after said last mentioned day, the right of the said Ayer-Lord Tie Company, its agents, servants and employees and its successors and assigns, to go and be upon said lands shall cease and determine, except as to any and all timber that has been cut down, then

remaining on said land; and as to such timber and any ties made and then being on said land said company is to have the further period of one year in which to remove same and no longer, unless by further agreement the time is again extended, all of which is granted for the consideration herein expressed. All tops, laps, slabs and juggles remaining thereon when the Ayer-Lord Tie Company's full time herein and thereunder has expired are to be and remain the property of the grantor. No further identification than that given shall be necessary to give to the timber herein the character of personal property.

"To make the conveyance effective, the undersigned declare and guarantee that there is no encumbrance or claim of any kind whatever upon or against said lands or timber that will interfere with the right of the Ayer-Lord Tie Company, its agents, servants and employees, to cut and remove said timber from said lands as hereinbefore provided, and further warrant and agree to defend the title to said land and timber against any and all adverse claimants.

And I, Nettie B. Coleman, wife of the said L. P. Coleman, for and in consideration of said sum of money, do hereby release and relinquish unto said Ayer-Lord Tie Company all my rights to dower in and to said timber.

"In testimony whereof, we have hereunto set our hands and seals this 8th day of May, 1906.

"Witness: G. D. Henderson,

"Witness: E. B. Kinsworthy.

"L. P. Coleman. (Seal)

"Nettie B. Coleman. (Seal.)"

On the back thereof is the following:

"State of Arkansas, County of....., town of....., this..... day of ....., L. P. Coleman, Esq.

"Having this day and date purchased from you the within described timber, and now being the owner thereof, I direct you to execute unto the Ayer-Lord Tie

Company a bill of sale therefor, my agreement with it concerning same being found herein.

"The within bill of sale from L. P. Coleman to Ayer-Lord Tie Company was procured at my instance and for my benefit.

"Said Ayer-Lord Tie Company having paid $1,500, the consideration named, said bill of sale is made in their name to create a lien to secure them for said advancement of the purchase price and sums advanced from time to time to pay for making and hauling, or any sums standing against me.

"In consideration of the above payment and the advancement by said company, it is especially understood and agreed that I assume all loss and litigation, from the working of said timber, being the absolute owner thereof, subject to the lien created in the company's favor by the execution of the within bill of sale.

"And the said Ayer-Lord Tie Company shall have the right at any time the work is not progressing satisfactorily to it, to take charge of and work the timber for my account. In consideration of the advancements by said company herein named, ... agree to work all of said timber embraced in this bill of sale into railroad crossties to the full satisfaction of the Ayer-Lord Tie Company, the opinion of the company's superintendent to be final thereon; and further agree to sell no ties or timber from the within described timber to any one except the Ayer-Lord Tie Company, without written consent signed by the president and manager of said company; but agree to deliver all of said ties to said company as per contract made with it on the..... day of.....

"Witness our hands and seals this the 19th day of May, 1906.

(Signed) "J. S. Leffler.

"We agree to release said lien when above conditions have been complied with.

"Ayer-Lord Tie Company."

The instrument was duly acknowledged by Coleman and his wife on the 8th of May, 1906, and was recorded on the 22d day of May, 1906.

This suit was instituted by appellee against the appellant in the White Chancery Court. The complaint, after alleging that appellant was duly incorporated and authorized to do business in Arkansas, averred that it was engaged in the general tie business in Arkansas; that on the 6th day of May, 1906, it purchased all of the white oak timber and its species suitable for railroad purposes on a certain tract of land, describing it, from L. P. Coleman and his wife, for which it paid the sum of $1,500. It alleged that its purchase was made under a deed (which has already been set out), and that the plaintiff had a lien upon all the timber for the purchase price thereof, and for all sums advanced from time to time to pay for the making and hauling of ties, or any sums standing at any time against J. S. Leffler, the party for whose account the timber was purchased. That by reason of this timber deed, the plaintiff became the owner of said timber, it being a lienor and having a lien upon the said timber until all the purchase price and all advances which plaintiff made to J. S. Leffler were fully paid. That during the months of January, February, March and April, 1908, before plaintiff's time expired in which to cut and remove said timber from said land, and before J. S. Leffler had paid the plaintiff the purchase price of the timber and advances made to him by the plaintiff, Leffler sold the timber to W. E. Wofford, who cut the timber, or a portion of the same, and manufactured the same into crossties without the written consent of the plaintiff.

That the ties were sold to Geo. C. Griffith, the defendant; that the crossties so wrongfully appropriated by the defendant were worth $460.39. That at the time the crossties were converted by defendant to his own use, and ever since that time, Leffler was largely indebted to the plaintiff for the purchase money of said timber, crossties and advances made to him by the plaintiff.

That the defendant and Leffler and W. E. Wofford had no right or authority to take the plaintiff's property and appropriate the same to their own use without paying the plaintiff for the same. That the defendants, without the knowledge or consent of the plaintiff, took said railroad crossties which came from the land to the number of 1398, of the value of $460.39, and appropriated the same to their own use, to the damage of the plaintiff in that sum.

The prayer was for judgment against the defendants "in the sum of $460.39, the value of said railroad crossties, which crossties were covered by the lien of the plaintiff at the time the defendants wrongfully appropriated said crossties to their own use, and for costs, and for all other orders and decrees to which it is in equity entitled."

The defendant filed his answer, motion to transfer to the circuit court, and his demurrer. The motion to transfer to the circuit court was sustained, and at the July term of the circuit court, the demurrer was overruled.

The answer contained a denial of all of the allegations of the complaint.

The testimony in the case tended to prove that the defendant bought the crossties in controversy from those who had obtained same from Leffler, and that he was an innocent purchaser thereof, not knowing that the plaintiff, Ayer-Lord Tie Company, had any interest therein.

The testimony on behalf of the plaintiff tended to prove that Leffler had not paid the amount of the purchase price of the timber, and that in addition to this he was largely indebted to the plaintiff for money advanced to him to pay for the making and hauling of the ties.

The case was presented to the jury on the theory that Leffler and Wofford were not the owners of the crossties, and that they were trespassers in removing and selling the same to the defendant; and the court refused to present appellant's theory that, under the in-

strument exhibited with the complaint, and in evidence before the jury, Leffler was the owner of the timber, and that the defendant was an innocent purchaser thereof.

There was a verdict in favor of the plaintiff for $415.51, and from a judgment rendered in its favor for that sum this appeal has been duly prosecuted.

S. Brundidge, for appellant.

Thomas & Lee, for appellee.

WOOD, J., (after stating the facts). The rights of the respective parties to this controversy can only be determined by the construction of the instrument designated as a "timber deed" and set out in the statement, under which the appellee claims that it was the owner of the crossties, and that same had been sold and wrongfully converted by Leffler.

The appellant denied the title of the appellee to the ties in controversy, and contended that he was an innocent purchaser thereof for value. A proper construction of the instrument will determine all the questions in controversy.

The complaint, while loosely drawn, was not fatally defective on demurrer, and was sufficient to state a cause of action as for conversion of the crossties, for the value of which appellee sued. The defects in it should have been reached by a motion to make more definite and certain rather than by demurrer.

The correctness of the judgment turns upon the question of whether or not the instrument in evidence was a deed to appellee, creating an absolute title in it to the crossties in controversy, or whether or not it was intended as a deed to Leffler with a mortgage back to appellee creating a lien in its favor for the purchase money advanced to pay for the timber, and also the amounts advanced to Leffler to pay for the manufacturing of the same into crossties.

Construing the whole instrument, we are of the opinion that it was a deed conveying the absolute title to the timber in controversy to the appellee. The words by which the title is conveyed are in the face of the deed,

and they show that the grantor had "sold and conveyed unto said Ayer-Lord Tie Company all of the white oak timber," etc. These words undoubtedly conveyed the legal title. There are no words in the instrument anywhere conveying the timber to Leffler. The words endorsed on the back of it, to the effect that Leffler "was the absolute owner," are not words of conveyance, and these words have no effect whatever to place the title in him. The timber, until the same was severed from the soil, was real estate, and, in order to convey to Leffler the legal title thereto, it was absolutely necessary that somewhere in the instrument there should be words expressing the fact of a sale or transfer of the title to him; that is, the words "grant, bargain and sell," or words of the same purport. Kirby's Digest, § 731.

The transfer of the timber growing on the land must be by deed. Any other attempted mode of transfer would be within the statute of fraud and void.

The words on the face of the deed, "by the written direction of J. S. Leffler," and "as per directions and agreement on the reverse side hereof," are surplusage and could not operate under the statute to make the other words of conveyance applicable to a transfer of title to Leffler.

The language, also, "Having this day and date purchased from you the within described timber, and now being the owner thereof," could not operate under the statute to convey to Leffler the title to the timber.

So as between the parties to this suit, the appellant and the appellee, the instrument under consideration must be held to be a deed conveying the absolute title to the timber to the appellee. It follows, therefore, that the court was correct in instructing the jury that if Leffler cut and removed the ties from the land in controversy, without the consent of the plaintiff, that Leffler and Wofford would be wrongdoers and trespassers; and, although the defendant, appellant here, innocently purchased said crossties from such trespassers, he would still be liable to the owners for their value, with 6 per cent interest

from the date of the conversion, without deduction on account of the increase in value by the work and labor of such trespassers or wrongdoers.

The court did not err in telling the jury, as a matter of law, that appellee was the owner of the ties, for that was the proper construction to give the deed under which appellee claimed title. According to the construction given the instrument under consideration, it follows that there was no error in any of the rulings of the court in refusing and giving of instructions. The case was one to be tried in a law court, and the record is free from any error prejudicial to appellant. The judgment is therefore affirmed.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY v. HYDRICK.

Opinion delivered July 7, 1913.

1. EVIDENCE—PROOF OF PHYSICIAN'S BILLS.—In an action against a railroad company for damages for personal injury, it is competent to prove the amounts of physician's bills by identifying the same by witnesses and introducing the bills in evidence. (Page 238.)
2. DAMAGES—PERSONAL INJURY—MEASURE OF.—In an action for damages against a railroad company for an injury resulting in the loss of plaintiff's leg, in the absence of a specific objection to the same, it is not reversible error to instruct the jury as to the amount of damages recoverable, that they may award damages to compensate plaintiff for pain, suffering, and for personal disfigurement on account of the injury, and a reasonable sum to pay for medicine and medical treatment. (Page 241.)
3. INSTRUCTIONS—BASIS OF VERDICT—PRACTICE.—While it is better form and better practice for the court to tell the jury that its findings on every issue of fact in a case must be based upon the evidence, yet when it is plain from the charge of the court, taken as a whole, that the jury were told that their findings must be based upon the evidence, the jury could not be misled or feel authorized to make a finding that was not based upon the evidence because some separate or particular instruction omitted this precaution. (Page 239.)
4. DAMAGES—PERSONAL INJURIES.—In an action for damages against a railroad company for injuries to plaintiff resulting in the necessity of amputating plaintiff's leg, where the court charged the

jury that damages were recoverable for personal disfigurement, and gave no instruction permitting damages for loss of time, it was not error to refuse appellant's prayer for an instructions that there could be no recovery for loss of time or any incapacity to labor. (Page 241.)

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

STATEMENT BY THE COURT.

On May 17, 1912, I. P. Hydrick was a passenger on appellant's train from Newport to Swifton, Arkansas. After the train whistled for Swifton the name of the station, "Swifton," was announced, and when the train stopped Hydrick left his seat to debark from the train, and when he got on the platform of the car the train pulled up with a jerk and Hydrick fell off. The train first stopped, then pulled up with a jerk, throwing Hydrick "about middleways of the depot." Hydrick's leg was so badly injured that it had to be amputated. He remained in bed on account of the injury about two months. Besides the injury to his leg, he was injured in the left foot and about his stomach. His appearance, a short time after the injury, indicated that he had suffered quite a loss of blood; he was quite thin; looked bad, and from his appearance showed that he had endured a great deal of pain.

He instituted this suit against the appellant, alleging that he was a passenger, and when appellant's train stopped at Swifton, his destination, he undertook to alight, and that appellant's servants suddenly jerked the train forward, producing the injury of which he complained.

The defendant answered, denying the allegations of the complaint and setting up affirmatively the defenses of contributory negligence and assumed risk.

The above are the facts in regard to the negligence of appellant and the injuries received by appellee.

Willie Hydrick testified that the doctor's bill of Doctor Willis for attending his father was $221. He said

that Doctor Willis presented his bill and it was something over $200. Appellee's counsel presented the bill to the witness and witness identified it as Dr. L. E. Willis' bill for medical and surgical attention. Counsel then offered the bill in evidence. The appellant objected. Witness was asked how much the bill showed, and answered $221.

V. G. Richardson, a witness for appellee, testified that he saw a statement from Doctor Justis to Ison Hydrick for services, which the doctor wrote in his presence and handed to witness. Witness identified the statement, and read the same to the jury, as follows:

"Swifton, Ark., Nov. 5, 1912.

"Mr. Ison Hydrick, Newport, Ark., in account with Dr. S. Justis. For services rendered in amputation of leg, $25. Dr. S. Justis."

The court overruled the objection to the above testimony and appellant saved its exceptions.

During the taking of the testimony Hydrick, the plaintiff, was assisted by one of his attorneys to the witness stand in the presence of the jury, and after he was identified as the plaintiff in the case, the defendant objected to his testifying in the case.

The court sent the jury out of the room, and, after investigation, determined that the plaintiff was not a competent witness in his own behalf. When the jury returned into court the plaintiff was not again offered as a witness. No ruling of the court was made as to whether or not plaintiff was a competent witness, counsel for the plaintiff not insisting upon his testifying.

One of the attorneys for the plaintiff, in his argument to the jury, stated that the jury should consider the loss of his limb and the personal disfigurement that will attend him through life. Defendant's counsel objected to the remarks and asked the court to insturct the jury that the same were improper. The court declined to so instruct the jury, and defendant excepted, whereupon the attorney stated further, "If they (defendant) wanted to object they ought not to have cut his leg off," and as to

the latter statement, upon the objection of the defendant, the court stated that that was an improper statement and ought not to influence the jury in the case.

Another one of the attorneys for the plaintiff, in the course of his argument, stated: "The court tells you to bring in a verdict for the pain he has suffered; and not only that, but for the loss of the limb." Whereupon the defendant objected, and the court overruled the objection and declined to instruct the jury that this was improper argument, and exceptions were saved; but the court stated to the jury, "Not for the loss of the leg; the disfigurement of the body." Whereupon said attorney continued: "If that is not the loss of it I don't know; you will find how he is disfigured by getting his leg cut off, and it is gone." Whereupon defendant objected to this statement, which objection was overruled by the court, and the court declined to instruct the jury that this was improper argument, and exceptions were saved.

Continuing, the attorney stated: "Don't bring him in a six-bit verdict; don't turn the railroad loose for mangling this man; don't let him go through the balance of his life an object of pity and charity, but bring him in a substantial verdict; a verdict that you would like to have brought in for you if you had lost a limb; one you would believe to be just to you if you were in that attitude.

"Bring in such a verdict as you believe this man is entitled to and don't be sparing with it; base it on the word 'just' and don't base it on the word 'unjust.' "

The defendant objected to these statements and requested the court to instruct the jury that the same were improper argument. The court overruled the objection, and declined to so instruct, to which exceptions were duly saved.

Another one of the attorneys for appellee, in his closing argument, stated: "Put yourself in the place of the railroad; if you were carrying on a business and you had some man employed and by reason of his care-

lessness and negligence you had to pay damages, would you keep him in your employment a moment? You wouldn't. No reasonable man would do it. If railroad companies are not individuals, they are controlled by individuals, and they would act as men would act, and they don't and ought not to keep men in their employ that would do negligent things for which they had to pay damages. That is the reason we are entitled to damages."

"I am appealing to you as reasonable men. I know my Brother Campbell (defendant's attorney) wouldn't want this case reasoned out. I am reasoning this case. I am giving you my reasons for my contentions in this matter. If these railroad men were to come and say they were negligent, their employer would have to pay damages, and, of course, their employer would hold them responsible. Of course, they are excusing themselves. Whenever one does a thing that injures another, he always tries to excuse himself and throw it on the other fellow.

"Doctor Willis' bill was $221; Doctor Justis' bill for assisting in the amputation of the foot was $25; that is $246; and there is $3 for medicine that we can account for; that is $249 actual expenses.

"Put that onto what you say a man ought to have that has lost his foot by reason of the negligence of somebody else; that suffers pain in the loss of that foot, the mashing of the other, the wounding of the stomach; still suffers pain; and say what would you have it done to you for, what would you want, and then fix his damages in accordance with that."

Defendant objected to each of the above statements and requested the court to instruct the jury that same were improper, but the court overruled the objections, declined to so instruct, and the defendant duly excepted.

At the request of the plaintiff the court granted the following prayer:

"6. If you find for the plaintiff, when you come to fix the amount of damages he should recover in this case,

you will give him such sum of money as you may believe will compensate him for such pain as he has suffered on account of the injury; such further sum as you believe will compensate him for his personal disfigurement, occasioned by the injury; and give him such other sum of money as may reasonably be necessary to pay for the medicine and medical treatment he has been required to have on account of the injuries received."

The appellant duly excepted to the ruling of the court in granting this prayer.

The following prayer was presented by the appellant, which the court refused, and to which appellant duly excepted, towit:

"10. If you should find for the plaintiff, there could be no recovery for any loss of time or any incapacity to labor. That is not to be considered by you."

The jury returned a verdict for plaintiff in the sum of $7,749. Judgment was entered for that sum, and this appeal has been duly prosecuted.

E. B. Kinsworthy, Campbell & Suits and *T. D. Crawford,* for appellant.

1. It was error to permit the witnesses, Hydrick and Richardson, to testify with reference to the bills of Doctors Willis and Justis. Kirby's Digest, § 3151, does not apply in a suit of this kind where the amount of the account is a collateral matter, but, if applicable, it was not complied with, as the accounts were not verified.

The mere production of an account does not establish its correctness, and the defendant need not offer evidence in defense until some testimony is produced by the plaintiff tending to show the correctness of the account. 64 Ala. 240.

2. Instruction 6 was erroneous in that it did not limit the jury to the testimony in forming their belief as to the amount of damages. 105 Ark. 205.

3. The cause should be reversed for improper argument and misconduct of counsel for plaintiff and because the verdict was excessive. "Loss of time" was not an element of damage, plaintiff being at the time of

the trial a convicted felon under sentence of eleven years in the penitentiary, which was well known to his counsel. It was improper to make profert of him by assisting him to the witness stand in the presence of the jury. The element of personal disfigurement, while proper under ordinary circumstances, was not a proper element of damages in this case, and should not have been included in instruction 6.

If all the objections to the improper argument of counsel had been sustained, and timely admonition and rebuke of counsel had been administered by the court, yet the prejudicial effect could not have been removed. 58 Ark. 483; 70 Ark. 305.

Stuckey & Stuckey and *Ira J. Mack,* for appellee; *Hal L. Norwood,* of counsel.

1. Appellee was immediately withdrawn from the witness stand upon objection to his competency being sustained, and no objection was made nor ruling asked for or given as to the alleged "profert" of the witness. Because he was under sentence is no reason why he was barred from sitting in the presence of the jury. Objectionable matter is waived unless objection is made at the time and pressed to a ruling and properly preserved in the motion for a new trial. 85 Ark. 488; 97 Ark. 632, and cases there cited.

2. Instruction 6 is correct. It was not necessary to repeat the words "from the evidence" to the jury, who had taken the oath prescribed by law, and knew not only from that but also from the instructions given, taken as a whole, that their finding must be based upon the evidence. Kirby's Dig., § 4530; 69 Ark. 636; 48 Ark. 344; 37 Ark. 522; 83 Ark. 437; 2 Thompson on Trials, (2 ed.), § 2318; 70 Md. 328; 76 Mo. 408; 104 Ind. 429; 72 Ind. 202-3; 77 Ill. 312; 78 Ill. 302; 174 Ill. 560; 64 Ark. 251; 100 Ark. 107; 97 Ark. 358; 93 Ark. 140.

Personal disfigurement was a proper element of damages. 69 Ark. 636; 65 Ark. 626; 83 Ark. 437; 60 Ark. 485; 13 Cyc. 43. And the fact that plaintiff was under sentence to the penitentiary would not detract from this

right to recover for pain and disfigurement. Art. 2, § 17, Const. Ark.

3. Appellant's contention that the cause should be reversed for misconduct of counsel is not tenable. The trial court had the opportunity to see and hear all that was done and said, and the wide discretion inherent in that court in such cases ought not to be interfered with by this court in this case. 100 Ark. 442; 95 Ark. 238; 97 Ark. 86; 100 Ark. 124.

WOOD, J., (after stating the facts). There was no error in the ruling of the court in permitting the testimony in regard to the amount of the doctor's bills. The testimony was not hearsay, but was original evidence. One witness saw the doctor present his bill for his services. He saw what the amount was and saw the itemized bill, and there was no objection made to it by the appellee, to whom it was presented and for whom the services were rendered.

Another witness testified that he saw the statement rendered to Hydrick by Doctor Justis for the amount of his services. The witness says the statement was rendered to Hydrick at the request of the witness. The testimony was competent as tending to show the amount the physicians charged for their services, and the amount that appellee would have to pay for same.

The fact that the doctors rendered the accounts to the appellee, and that he acquiesced in the amounts thereof tends to establish the fact that appellee was indebted to the physicians for professional services in the sum of $246. *Brown* v. *Brown,* 16 Ark. 202. See also *Hamilton-Brown Shoe Co.* v. *Choctaw Mercantile Co.,* 80 Ark. 440.

There was no prejudicial error in the ruling of the court in granting appellee's prayer for instruction No. 6. While this court, in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Steed,* 105 Ark. 205, criticised a similar prayer because it did not tell the jury in specific terms that their finding as to the amount of damages must be based on

the evidence, yet the court did not hold that the giving of the instruction in that case was reversible error.

In *Railway Company* v. *Cantrell,* 37 Ark. 522, this court, in commenting upon a similar instruction, said that it was "clearly correct." While such an instruction is not to be commended in form, and is open to the objection mentioned in recent cases, yet, unless the attention of the court is specifically called to it, and the court refuses to make the correction, it can not be held that such an instruction is reversible error, and this court has not as yet reversed a case for a failure to qualify the instruction in the particular mentioned, although instructions in practically the same form as the one under consideration have often appeared in cases passed upon by this court. See *L. R., M. R. & T. Ry. Co.* v. *Leverett,* 48 Ark. 344; *St. Louis, I. M. & S. Ry. Co.* v. *Price,* 83 Ark. 437; *St. Louis, I. M. & S. Ry. Co.* v. *Dallas,* 93 Ark. 214.

While it is always better form, and the better practice, for the court to tell the jury that its findings on every issue of fact in the case must be based upon the evidence, yet where it is plain from the charge of the court, taken as a whole, that the jury were told that their findings must be based upon the evidence, the jury could not be misled nor feel authorized to make a finding that was not based upon the evidence because some separate or particular instruction omitted this precaution. The jury were sworn, in the first instance, to try the case and a true verdict render according to the law and the evidence. That being true, it is not likely that any man of sufficient intelligence to be a competent juror would feel authorized to wander beyond the evidence to find matters upon which to predicate his findings in the case. The conscientious juror would necessarily feel restrained by his oath to base his findings upon the evidence.

In several other instructions which the court gave, both at the instance of the appellee and the appellant, the jury were given to understand that their findings upon the particular phases presented in each of the

prayers for instructions should be based upon the evidence; and, taking the charge as a whole, the jury could not possibly have understood that they were authorized to render any finding of fact that was not warranted by the evidence.

This court, in *McGee* v. *Smitherman,* 69 Ark. 632, in passing upon an instruction that was challenged because it did not say that the amount of compensation "should be fixed and determined from the evidence," used this language: "There is no means by which the jury could determine what would be a fair compensation for the loss sustained by the appellee, except the evidence, and it was, therefore, plainly implied, and every intelligent juror is presumed to have understood that the jury were to be governed by the evidence."

Mr. Thompson says that "juries are supposed to have some small trace of sense; there is a presumption that they are to find from the evidence, and, accordingly, it is not necessary to repeat this expression at every turn in the charge."

In other instructions in the case the court indicated to the jury that their findings must be based upon "a preponderance of the evidence," and this was sufficient to prevent the possibility of their going outside of the evidence in making their verdict.

Appellant contends that personal disfigurement was not an element of damages in the case, for the reason that plaintiff was a convicted felon, and sentenced to confinement in the penitentiary for eleven years, and further objects to instruction No. 6 on that ground.

A man does not cease to be a human being because he is convicted and is imprisoned in the State penitentiary. He does not thereby necessarily lose all sense of pride and pleasure in the perfection of his physical organism. Although occupying a felon's cell, he may experience as great mental anguish over the dismemberment of his body and consequent disfigurement of his person as if he were a free man, and the law is not so inhuman as to deny him compensation in damages

against any one who may have negligently inflicted an injury upon him. The law makes no exceptions in such cases, against those convicted of and imprisoned for crime.

The court, in its sixth instruction, enumerated the elements of damage which the jury were entitled to consider, under the pleadings and evidence in the case, and the loss of earning power was not mentioned as one of these elements of damage. This charge of the court was the guide to the jury; and the remarks by counsel concerning the loss of appellee's leg must have had reference to his personal disfigurement. Indeed, the court so limited it, in response to the objection of appellant to such remarks. There was therefore no prejudicial error in the court's refusing appellant's prayer for instruction No. 10. The court having affirmatively told the jury in instruction No. 6 what elements of damage should be considered, it was not necessary to further instruct them that certain elements were not to be considered. Besides, as we have shown, the court, by its remarks, in effect, instructed the jury that there could be no recovery for loss of time or incapacity to labor. It must have been clear to the jury, from the court's remarks and his formal charge in the sixth instruction, that the loss of the leg could only be considered as an element of damage in the way of personal disfigurement.

The other remarks of counsel did not transcend the bounds of legitimate argument.

The pain and suffering and the mental agony which plaintiff has endured, and must continue to endure, by reason of the injuries he has received, as shown by the evidence, convinces us that the amount of the verdict is not excessive.

The record is free from prejudicial error, and the judgment must therefore be affirmed.

EXCHANGE NATIONAL BANK v. CHAPLINE.

Opinion delivered June 23, 1913.

1. BILLS AND NOTES—NEGOTIABLE NOTE.—A note made by the directors to a bank, in which it is recited that the same is given to make up the shortage of the cashier, and providing that the makers shall be reimbursed out of any of the missing assets which shall be discovered, is non-negotiable, and a holder, although he takes before maturity, takes subject to all equities and defenses available between the original parties. (Page 248.)
2. BILLS AND NOTES—PAYMENT BY JOINT MAKER—EFFECT.—Where one of the joint makers of a note pays the same, the note is extinguished except for the purpose of contribution from the co-makers to the party paying it. (Page 248.)
3. BILLS AND NOTES—ENDORSEMENT—LIABILITY OF ENDORSER.—Where a note is made to a bank by its directors, to cover the shortage of its cashier, and the same in endorsed by the cashier, upon the sole direction of the president, who is one of the directors, for the purpose of enabling the president to hold the other makers to contribution, the endorsement is for accommodation merely, and does not operate to make the bank liable to one with knowledge of the fact, and the endorsement carries with it no guarantee of payment. (Page 249.)
4. BILLS ANL NOTES—NON-NEGOTIABLE NOTE—LIABILITY OF ENDORSER.—Where the payee of a non-negotiable note endorses the same, the endorser is not liable thereon, unless the assignment is made in a form from which an intention to guarantee the payment of the note may be inferred, or induces the assignee to take it by an agreement, express or implied, to that effect. (Page 249.)

Appeal from Lonoke Chancery Court; *John E. Martineau,* Chancellor; affirmed.

STATEMENT BY THE COURT.

The Merchants & Planters Bank, in a suit brought by T. B. Goldsby and other stockholders, was by the Lonoke Chancery Court placed in the hands of George M. Chapline, receiver, on December 15, 1911. On the 23d of April, 1912, the Exchange National Bank, a creditor of the Merchants & Planters Bank, filed an intervention, which alleged various transactions with that bank and the following among others: That on December 11, 1909, R. E. Eagle, S. B. Allen, Frank Barton, T. B. Goldsby and J. S. Swaim had executed their joint and several

promissory note to the Merchants & Planters Bank for $13,848.12, due and payable on or before January 1, 1912, with interest from date until paid at the rate of 6 per cent per annum, which note was endorsed by the Merchants & Planters Bank and acquired by appellant for value before maturity.

This litigation grows out of the execution of that note and its transfer to appellant. It appears that on or about December 9, 1909, the officers and directors of the Merchants & Planters Bank were informed by Mr. Frank Wittenberg, who had been employed to audit the books of that institution, that its cashier, J. C. Goodrum, Jr., was short in his accounts with the bank in the sum of $13,848.12. The president of that bank, R. E. L. Eagle, immediately called a meeting of the directors and it was agreed by them that they would make good the shortage to the bank at once. The cashier denied that he was short in that sum, or any other, but agreed to and did convey all his real estate to W. P. Fletcher to hold in trust, with the understanding that if upon further investigation of the books of the bank a shortage was found that the property should be conveyed to the directors of the bank, who had made good the shortage to the bank. On the 11th of December, 1909, the directors of the bank executed the following note to the Merchants & Planters Bank:

"$13,848.12. No.....

"England, Ark., December 11, 1909.

"On or before January 1, 1912, we promise to pay the Merchants & Planters Bank, thirteen thousand eight hundred and forty-eight dollars and 12/100 at the rate of 6 per cent per annum from date until paid.

"R. E. L. Eagle.
"S. B. Allen.
"T. B. Goldsby.
"Frank Barton.
"J. Swaim.

"It is hereby agreed and understood that this note is given to the above bank, for difference in the assets

and liabilities as shown upon their books on December, 1909, which discrepancy or difference occurred while the records and the assets of the bank were in the custody of J. C. Goodrum, Jr., cashier.

"It is further agreed and understood that should any of the missing assets be recovered, that the makers of the above note shall be paid the cash value of what is recovered, in proportion to the amount each may pay, or be liable for upon above note."

This note was never turned over to the Merchants & Planters Bank and there was no record of it whatever on its books. The bank auditor declined to accept this note in satisfaction of the shortage, and refused to certify that it had been made good until the amount thereof had been deposited in the bank. R. E. L. Eagle was not only the president of the bank, but he appears to have been one of the principal owners of its stock and to have largely dictated its policy and directed its management. At that time he was regarded as a man of large wealth and was extensively engaged in business at England, Ark., which he was conducting under the name of Eagle & Co. When the examiner declined to accept the directors' note in satisfaction of the cashier's shortage, Eagle executed the following check:

"England, Ark., December 13, 1909.

"Merchants & Planters Bank:

"Pay to the order of M. & P. Bank $13,848.12, thirteen thousand eight hundred and forty-eight 12/100 dollars. For note by directors to make good Goodrum shortage on bank books.

"Eagle & Co."

On the evening of the same day Eagle executed this check, he presented to the acting cashier, R. L. Buffalo, the directors' note to the bank with the request that he endorse same.

The evidence shows that this was the first knowledge Buffalo had of the existence of this note, but he endorsed the same at the request of Eagle, who explained to him that he desired this done in order that

he might recover from the makers of the note or at least some of them, their *pro rata* share of the amount he had paid out in the event Goodrum's property was not sufficient to cover the shortage. On this same day Eagle, as president of the bank, issued a notice which he sent to the customers and stockholders of the bank and had published in which the statement was contained that "The directors of the bank have made good the shortage out of their personal funds for the full amount of the assets that are missing," and concluded with the statement that "We hope Mr. Goodrum may locate and deliver to the bank the missing assets. If he does, those who paid the shortage to the bank will have their money refunded." Eagle testified that he suspected the existence of this shortage before it was announced by the bank auditor and had conferred with H. C. Rather, the cashier of appellant bank, before the employment of this auditor, and that the examination of the books was made at Mr. Rather's suggestion. Two days after the execution of the directors' note for the amount of the shortage, Eagle & Co. negotiated a loan from appellant for that exact amount and pledged with appellant as collateral security the note which he and the other directors of the Merchants & Planters Bank had executed to that bank, together with a number of the individual notes of Eagle & Co. Eagle conferred with the cashier of appellant bank and represented to him that he and the other directors desired to make good the shortage of the cashier of their bank, so that the bank could continue in business and the depositors would not become frightened; that the directors were responsible for the shortage and would make it good, and for that purpose wanted to borrow that amount of money. Mr. Rather conferred with the discount board of his bank, and, after having done so, wrote out a note and had it signed by Eagle & Co. and took from Eagle the directors' note as collateral, and in addition also took as collateral certain notes of Eagle & Co., amounting to something over $4,000. There-

upon Eagle drew a draft on appellant bank in favor of the Merchants & Planters Bank as follows:

"$13,848.12. England, Ark., December 14, 1909.

"Demand pay to the order of M. & P. Bank thirteen thousand eight hundred and forty-eight and 12/100 dollars, value received, and charge the same to the account of Eagle & Co.

"To Ex. Nat. Bank, Little Rock, Ark."

And this draft was credited to the account of Eagle & Co. on the books of the Merchants & Planters Bank.

At the time of these transactions neither Eagle nor the Merchants & Planters Bank owed appellant anything, and both were regarded by appellants as being perfectly solvent and good for any reasonable line of credit. When Eagle & Co.'s note to appellant became due, he gave it a check on one bank for $7,000 and a check on another bank for $48.12, and executed a new note for $6,000 to appellant, which continued to hold the directors' note as collateral. From then on Eagle & Co. continued to do an increasing amount of business with appellant, and made payments and executed new notes as old ones would mature, until he failed in business, when his indebtedness to appellant amounted to $31,982.34. Later, too, the Merchants & Planters Bank became indebted to appellant, and at the time of the appointment of the receiver to take charge of its assets it was indebted to appellant in a large sum of money.

The evidence upon the part of the directors of the Merchants & Planters Bank is to the effect that Eagle told them he desired the execution of this note that he might be able to hold Goodrum's property for his shortage, and that he personally would make good and be responsible for any deficit after Goodrum's property had been sold; and the proof is that the directors knew nothing of the loan to Eagle & Co. by appellant bank and the use of their note as collateral, and one of the directors testified Eagle told him the note had been destroyed and other directors testified Eagle gave them an obligation

in writing to not hold them for any liability upon the note.

The court made a finding upon other transactions between the two banks which is not questioned, but also found "that the Exchange National Bank is not entitled to recover against the receiver of the Merchants & Planters, or to have paid out of the assets in the hands of the receiver, the note for $13,848.12, executed by the directors of the Merchants & Planters Bank and by it endorsed in blank and pledged by Eagle & Co. with the Exchange National Bank as collateral security for a like amount borrowed by Eagle & Co. from the Exchange National Bank of December 14, 1909."

James B. Gray, for appellee.

1. The note executed by the directors to cover the Goodrum shortage was non-negotiable, and a holder before maturity would take subject to all defenses and equities which were available between the original parties. Payment by one of the makers would have the effect to keep the note alive in his hands as evidence of his right to contribution from his comakers. This right may be transferred to a purchaser for value. 2 Daniel on Neg. Instruments, § 1236, and cases cited.

The endorsement in blank by the acting cashier only operated to transfer the legal and equitable title, and carried with it no guaranty of payment. 4 Am. & Eng. Enc. of L. (2 ed.) 479; 103 Cal. 319; 52 Mich. 525; 152 Pa. St. 598; 1 Am. Lead. Cases, 302.

2. If the assistant cashier intended to endorse the note to Eagle & Co. it was an accommodation endorsement for which the Merchants & Planters Bank, a corporation, could not be held liable. Kirby's Dig., § 839; *Id.,* § 830; 95 Ark. 368; 9 L. R. A. (N. S.) 192, notes; 2 *Id.* 525, notes; 116 N. Y. 281, 22 N. E. 567; 90 N. Y. Supp. 355.

Moore, Smith & Moore, for appellant.

1. If the loan of appellant was made for the use and benefit of the Merchants & Planters Bank, the latter

is liable to appellant in an action for money had and received, although the note is non-negotiable. The note was, nevertheless, assignable by endorsement of the payee in blank so as to authorize the endorsee to sue upon it in his own name. Eagle's direction to the cashier to endorse the note was evidently for the purpose of transferring to appellant the obligation of the Merchants & Planters Bank to repay the money had and received from appellant. Obtaining the loan upon the note to restore the bank's capital furnished the benefit and consideration to the endorser. 95 Ark. 368.

2. If Eagle became the purchaser of the directors' note, appellant, as pledgee of the note, could maintain an action against the Merchants & Planters Bank as upon an original promise, or as a guarantor. 3 Mass. 274; 13 Metc. (Mass.) 262; 8 Wend. (N. Y.) 403; 68 N. W. (Ia.) 579; 6 Ia. 216.

SMITH, J., (after stating the facts). There is no doubt that the loan made by appellant was to Eagle & Co. and not to the Merchants & Planters Bank, and it is equally as certain that Eagle deposited the note of himself and the other directors as collateral security for this individual loan made to him. But this was a non-negotiable instrument, and, as such, a holder who took it even before maturity took it subject to all defenses and equities which were available between the original parties. Am. & Eng. Enc. Law (2 ed.) vol. 4, p. 133; *Wettlaufer* v. *Baxter,* 26 L. R. A. (N. S.) 804.

The interest of the appellant therefore was the same as that of Eagle, and the note was subject to any defense against it which would have been available against him. As a joint maker of this note, it was Eagle's duty to pay it, and, having paid it, it could be kept alive only for the purpose of contribution from his comakers. The consideration for this note was the satisfaction of the cashier's shortage, and this was paid to the Merchants & Planters Bank with Eagle's individual check, when the bank auditor refused to accept the note as payment.

A joint note is extinguished by an assignment to

one of the makers on payment by him, leaving him a right of action against the others for contribution. 7 Cyc., note 16, p. 789; *Stevens* v. *Hannan,* 49 N. W. 874; Daniels on Negotiable Instruments, vol. 2, par. 1236.

The evidence of Buffalo, the cashier of the Merchants & Planters Bank, was that when Eagle paid the shortage by a check for its amount against his individual account, Buffalo knew nothing of this note and never had it in his possession, and no record thereof was ever made on the books of his bank, and later in the day, after Eagle's check had been paid, Eagle brought the note into the bank and directed Buffalo to endorse the bank's name thereon in order that he (Eagle) might hold one or two of the directors liable to him for their *pro rata part* of any sum he might finally fail to realize from Goodrum's property; and no authority for this endorsement was given him except Eagle's direction above stated. This transaction amounted to a mere accommodation endorsement, and under the circumstances here stated did not operate to make the bank liable to one charged with notice of that fact. *Simmons National Bank* v. *Dilley Foundry Co.,* 95 Ark. 368; *Cook* v. *Tubbing & Webbing Co.,* 9 L. R. A. (N. S.) 193.

Whatever may have been the representations of Eagle to the appellant, or whatever may have been its expectation flowing therefrom, the fact remains that the note under consideration is non-negotiable, and while the endorsement by the cashier of the bank to which it was payable was a transfer of it, yet such transfer carried with it no guaranty of its payment, for such is the law, unless the assignor makes the assignment in a form from which an intention to guarantee the payment of the instrument may be inferred, or induces the assignee to take it by an agreement, express or implied, to that effect. 4 Am. & Eng. Enc. Law (2 ed.) 479, and cases cited.

Upon the whole case, we think the chancellor's finding is not contrary to the preponderance of the evidence, and the decree of that court is accordingly affirmed.

KIRBY, J., dissents.

WALLS v. BRUNDIDGE.

Opinion delivered July 11, 1913.

1. ELECTIONS—RIGHT TO VOTE—POLITICAL RIGHT.—The right of a citizen to vote and to be voted for at an election, or to be a candidate for or to be elected to an office, is a political right and not a civil or property right. (Page 257.)

2. ELECTIONS—CONTESTS—JURISDICTION OF CHANCERY COURTS.—The trial of election contests and the adjudication of political rights, and the protection of persons in their enjoyment, were not matters of cognizance by courts of equity at the time of the adoption of the Constitution of 1874, and courts of equity were given no jurisdiction of election contests by the Constitution. (Page 258.)

3. ELECTION CONTESTS—RIGHTS OF CONTESTANT.—The provision in Act 371 of the Acts of 1911, providing that "Nothing in this act shall be so construed as to prevent a person from pursuing any remedy he may have in any of the courts of this State," in a contested election case, does not confer any right upon the contestant that he did not already have, under the law before the passage of the act. (Page 262.)

4. ELECTIONS—JURISDICTION OF CHANCERY COURT—CONTESTS—RIGHTS OF CONTESTANT.—Under the Constitution the chancery court is without power to hear election contests, and such right is not given by Act 371, Acts of 1911, which expressly provides tribunals of the political party for the determination of contests in primary elections, and provides that their determination shall be final. (Page 263.)

5. ELECTIONS—PRIMARY ELECTIONS—CONTESTS—POLITICAL ORGANIZATIONS—JURISDICTION OF CHANCERY COURT.—Since a political organization is an unincorporated, voluntary association, involving no rights of property or personal liberty, a court of equity has no jurisdiction to interfere by injunction to control its actions, or those of its officers. (Page 263.)

6. EQUITY JURISDICTION—PRIMARY ELECTION CONTEST—INJUNCTION.—An injunction will not lie to determine questions of appointment to public office and the title thereto, since they are purely legal matters and cognizable only in courts of law (Page 263.)

7. EQUITY JURISDICTION—PRIMARY ELECTION CONTEST—ACTS OF ELECTION OFFICERS.—A court of equity will not interfere by injunction to prevent election officers or canvassing officers from doing their duty as required by law, nor prevent them from canvassing votes in a certain way. (Page 264.)

8. POLITICAL PARTIES—PRIMARY ELECTION CONTESTS—ACTS OF POLITICAL TRIBUNALS—FINALITY—REVIEW.—The Democratic party, as well as the Legislature of the State, having provided a tribunal for hear-

ing the contests of the primary elections of the party, the decision of such tribunal is final and can not be reviewed by the courts. (Page 264.)

9. PRIMARY ELECTION CONTESTS—ACTION OF POLITICAL TRIBUNAL—FINALITY—JURISDICTION OF EQUITY TO REVIEW.—In a contest over the result of a primary election, where the tribunal of the political party, under its rules, and under the statute, determined the contest and declared the result, a court of equity, upon application of a contestant, is without jurisdiction to issue an injunction to compel the policital tribunal to hear the contest in the first instance, and such court of equity is without jurisdiction to review the findings of the party tribunal and declare the result of the election in accordance with the court's view of the rights of the parties. (Page 266.)

Appeal from Pulaski Chancery Court; *John E. Martineau,* Chancellor; reversed.

STATEMENT BY THE COURT.

There being a vacancy in the office of Governor of the State of Arkansas, and a special election having been called to fill same by Acting Governor J. M. Futrell, as required by the Constitution, fixing the date thereof as July 23, 1913, the Democratic party, through its central committee, called a primary election for making the nomination of a candidate for the office, fixing the date of such election June 21, 1913. It also fixed June 30 thereafter as the date upon which the central committee should meet for canvassing the returns of the election and certification of the nominee. The appellee gave notice that he would contest the election before the central committee at its meeting to canvass the returns and the nomination of his opponent, Judge Hays, under the provisions of Act 371 of the Acts of 1911.

Fearing that the committee might not hear the contest, he also procured a mandatory injunction from the Pulaski Chancery Court, directing the said committee to proceed and hear his contest upon its meeting to ascertain and announce the result of the primary election and certify the nominee, which injunction was read to the committee upon its meeting upon the said 30th day of June.

At the meeting of the committee after three days' hearing of the contest, it determined from the evidence before it and from such investigation as it had had opportunity to make, within the time limited for the hearing thereof and thereafter certifying the nominee to the Secretary of State within the time prescribed by law, that there was no proof to sustain the allegations of fraud made by the contestant and that the returns showed that Judge Hays had received 861 votes more than his opponent, the appellee, and declared him the nominee of the party and certified his nomination to the Secretary of State on July 2, 1913.

Thereupon, appellee filed a supplemental complaint in the chancery court, alleging that the committee had violated the preliminary injunction, had not granted him a hearing of the contest, had not heard the same as required by law, "but had only conducted a feigned and pretended hearing, had made no investigation of the fraud alleged to have been perpetrated in the contest filed, had refused to allow appellee a reasonable time in which to produce his evidence and arbitrarily and oppressively violated appellee's rights and fraudulently certified the name of George W. Hays, contestee, before said committee to Earle Hodges, the Secretary of State, as the Democratic nominee." That said Secretary of State, unless restrained from so doing, will certify the name of said contestee, George W. Hays, to the various county election commissioners as the Democratic nominee for Governor, and "that if same be done, contestee will be deprived of all rights under the law as contestant of said election, and that said certification if allowed to proceed will operate and amount to an absolute denial to him of the right to proceed with his contest as allowed by law, and the decretal order of the court, and will result in rendering absolutely nugatory and of no effect whatever, said decretal order of the court, and that it is his intention to further prosecute the said contest before the proper tribunal to a final determination in the forum as provided by law. Prays that Earle Hodges, Secretary

of State, be made a party, and that a restraining order issue preventing his certifying to the county boards of election commissioners the name of George W. Hays as the nominee, and that upon a final hearing that the restraining order be made permanent."

The appellants answered, admitting that the Democratic State Central Committee is a body especially created by statute for the purpose of hearing contests and certifying nominees of the party; that it met on June 30, 1913, in accordance with its rules adopted prior thereto; that it heard and considered all the evidence presented by the contestant, allowing him all the time possible in which to present his contest, and permit the committee to ascertain and determine the result of the election and certify the name of the nominee to the Secretary of State twenty days before the date fixed for the election, July 23, 1913, as required by law. That after hearing all the evidence and argument of counsel, and acting as they believed, in compliance with the injunction and in full compliance with their duty under the law, found that the allegations of fraud were not sustained, were without foundation and dismissed his petition for want of proof. That it further found that George W. Hays had received a majority of all the votes cast in the primary election and was entitled to a certificate as nominee of the Democratic party and directed its chairman and secretary to certify his name to the Secretary of State as such Democratic nominee for the office of Governor. It also alleged that the law requires the Secretary of State to certify out the said nomination to the boards of election commissioners of the counties eighteen days before the election, and prayed that the temporary injunction be dissolved and a perpetual injunction be denied.

The chancellor granted the relief prayed for and enjoined the Secretary of State from certifying out the nomination made and returned to him by the said Democratic Central Committee, and from the decree this appeal comes.

Gaughan & Sifford and *Coleman & Gantt,* for appellants.

In the absence of a statute giving them jurisdiction, the courts have no power to interfere with the judgments of committees and tribunals of established political parties in matters involving party government, discipline or the nomination of candidates. 15 Cyc. 330-332; 67 N. W. (Neb.) 755, 757; 76 N. W. (Mich.) 914; 112 N. W. (Mich.) 1071.

A court of equity has no power to try contested elections or title to office, and such court has never exercised that power except in cases where it has been conferred by express enactment or by necessary implication therefrom. 15 Cyc. 397; 78 Ill. 237; 151 Ill. 41, 25 L. R. A. 143; 69 Fed. 852, 30 L. R. A. 90; 189 U. S. 475, 47 L. Ed. 909. The Constitution of the State empowers the Legislature to create chancery courts and vest them with jurisdiction in matters of equity, and the Legislature can give to such courts jurisdiction only in matters of equity. Election contests for nominations are not matters of equity, and have never been so considered. 80 Ark. 145; 15 Cyc. 331; 5 Pomeroy Eq. Jur. 324, 331-4; 123 N. Y. 609; 25 N. E. 1057. "No principle of the law of injunction is better settled than that injunction does not lie to determine questions of appointment to public office and the title thereto, as they are of a purely legal nature and cognizable only in courts of law." 5 L. R. A. (W. Va.) 334; 3 L. R. A. (W. Va.) 954; 17 O. St. 201; 6 Am. & Eng. Enc. of L. 392; 69 Ark. 606, 611; 122 S. W. (Tenn.) 979; 43 Ark. 63; 84 Ark. 540; 38 Pac. 468; 90 Pac. 1034; 99 N. W. (Neb.) 681; 70 Pac. (Mont.) 519, 523.

C. D. James, T. J. Gaughan, W. F. Coleman and *J. H. Carmichael,* for appellants.

1. Act 371 of the Acts of the Legislature of 1911, which attempts to provide for the manner of holding a primary election in the State of Arkansas, is unconstitutional and void. 80 Ark. 145. When the Constitution has spoken on any particular subject, and has included one thing of a kind, it excludes all others, under the prin-

ciple "*expressio unius est exclusio alterius.*" *Id.* 145, 150; Broom's Legal Maxims 480, 489; 9 Cyc. 584; 19 Cyc. 23, 27; 1 Ark. 283; *Id.* 513; 20 Ark. 410; 27 Ark. 479; 43 Ark. 676; 35 Ark. 457; 49 Ark. 231; 60 Ark. 95; 51 Ark. 534; 3 Words and Phrases 2330, "Election;" Bouvier; Anderson.

2. The chancery court was clearly without power to hear and determine this controversy for the reason above stated, and for the further reason that, if the act is held to be constitutional, it has provided a tribunal for the hearing of such controversy whose decision is final and from which there is no appeal to the courts. If this tribunal is a court, it is of concurrent jurisdiction with the chancery court, and obtained jurisdiction first.

If the State Central Committee is an inferior tribunal to the courts, then the circuit court, and not the chancery court, has jurisdiction, because, in this State, all jurisdiction not specifically vested in some other court, is vested in the circuit court. See Kirby's Dig., § 1315. This controversy falls squarely within the doctrine announced by the court in the bridge district cases. 96 Ark. 424; 106 Ark. 151.

Hal L. Norwood and *J. M. Stayton,* for appellee.

1. The act is constitutional. In none of the States where are found the opinions relied on by appellants is there a law such as ours. 74 Pac. (Col.) 896; 62 Atl. (Md.) 249; 89 N. W. (Minn.) 1126; 56 Atl. (N. J.) 1; 51 N. E. (O.) 150; 66 Pac. (Ore.) 714; 92 N. W. 4.

2. Under the allegations set forth in the original complaint, there was jurisdiction in the chancery court to issue a mandatory injunction to compel the State Central Committee of the party to hear the contest filed by the appellee. 87 S. W. (Ky.) 786; *Id.* 805; 89 S. W. 1; 75 S. W. 1082; 120 S. W. 343; 84 S. W. 767; 100 N. W. 925; 121 S. W. 468; 31 S. W. 290; 97 Pac. 396; 71 S. W. 892; 86 S. W. 697.

The holding in *Hester* v. *Bourland,* 80 Ark. 145, was merely that the Legislature had no power to vest in a court of chancery jurisdiction to hear election contests,

whereas, that is not the object of this suit, but the aid of the chancery court is sought only to compel the granting to appellee of a right which is conferred upon him by statute.

3. It appearing by the supplemental complaint filed that the State Central Committee did not obey the court's mandatory process, but only made a feigned and pretended investigation, arbitrarily refused to produce evidence which appellee had requested to be brought before it, and failed to hear the contest, it was within the power of the chancery court to order the State Central Committee to proceed with the contest in order to preserve the rights of the appellee, and, pending the hearing of such contest, to grant an injunction restraining the Secretary of State from certifying out the purported nomination to the county boards of election commissioners. Where chancery has rightfully assumed jurisdiction of the parties and subject-matter for certain purposes, it will grant complete relief without remitting the parties to an action at law for further relief. 75 Ark. 52; 77 Ark. 570. Where a party has put himself upon the merits without objection to the jurisdiction of equity, he can not object at the hearing, nor on appeal, unless the court is wholly incompetent to grant relief. 14 Ark. 345; 17 Ark. 340; 18 Ark. 583; 13 Ark. 193; 15 Ark. 307; 30 Ark. 89, 91. See also, on the question of jurisdiction, and power to grant the mandatory injunctions, 62 Pac. 664; 87 S. W. 787; 77 Ark. 555; 23 Am. & Eng. Enc. of L. (2 ed.) 372; 19 *Id.* (2 ed.) 737-739; 62 Atl. (Pa.) 258; 76 N. W. (Minn.) 285; 91 N. W. 950. The failure alone on the part of the committee to send for the ballots and to recount the same in the counties where the contestant alleged fraud had been perpetrated, was a failure to hear the contest. 59 So. 71; 58 So. 582; 57 So. 272.

If appellant's construction of section 6 of the act of 1911 (Act 371) is correct, the law gives no relief to a candidate who alleges fraud. The courts are under the

duty to give such construction to the law as to make it effectual. 134 N. Y. 374.

The law should and does throw around a candidate for nomination for an office the same rights as if he were a candidate in the general election, and for every wrong against such a candidate there is a remedy. 135 N. Y. S. 187.

4. An application for mandamus would have afforded no remedy whatever. Had appellee made an application for a writ of mandamus, the thing that it was necessary to prevent would have been accomplished before he could have complied with the requirements of the statute governing applications for mandamus. 84 S. W. 767.

KIRBY, J., (after stating the facts). It is insisted that the chancery court was without jurisdiction to issue an injunction against the Secretary of State to prevent him from certifying the name of the candidate as the nominee of the party, that had been furnished him for that purpose by the executive committee of the Democratic party in accordance with the requirements of law; its action in so doing being in effect a trial of the election contest and an attempted review of the State Democratic Central Committee, a tribunal provided by law for the trial of such contests and the certification of the nominee, and a substitution of the judgment of the chancellor for that of the committee.

The recognized and established distinctions between equity and common law jurisdictions are observed in this State. The Constitution vests the judicial power of the State in certain courts, giving to the circuit courts jurisdiction in all civil and criminal cases, the exclusive jurisdiction of which is not vested in some other court provided for by it, and it also provides that the General Assembly may establish separate courts of chancery, and until it shall deem it expedient to do so, the "circuit court shall have jurisdiction in matters of equity." Article 7, sections 1, 11 and 15, Constitution 1874.

It is well also to bear in mind that the right of a

citizen to vote and to be voted for at an election, or to be a candidate for or to be elected to an office is a political right in contradistinction to a civil or property right. *Gladish* v. *Lovewell,* 95 Ark. 621; *Fletcher* v. *Tuttle,* 151 Ill. 41; 37 N. E. 683; 25 L. R. A. 143; 10 Am. St. Rep. 220; In re *Sawyer,* 124 U. S. 200; *Giles* v. *Harris,* 189 U. S. 475; *Green* v. *Mills,* 69 Fed. 857; 16 C. C. A. 552; 30 L. R. A. 90; *Winnett* v. *Adams,* 99 N. W. (Neb.) 681.

The Legislature has created separate courts of chancery, but it could only vest them with jurisdiction "in matters of equity," under authority of the Constitution, and it becomes necessary to determine whether courts of equity had jurisdiction to protect a person in the enjoyment of purely political rights at the time of the adoption of the Constitution.

In *Fletcher* v .*Tuttle, supra,* the court, passing upon a question like the one presented here, and denying the right to an injunction, said:

"The question then is, whether the assertion and protection of political rights, as judicial power is apportioned in this State between courts of law and courts of chancery, are a proper matter of chancery jurisdiction. We would not be understood as holding that political rights are not a matter of judicial solicitude and protection, and that the appropriate judicial tribunal will not, in proper cases, give them prompt and efficient protection, but we think they do not come within the proper cognizance of courts of equity * * *."

"Wherever the established distinction between equitable and common law jurisdictions is observed, as it is in this State, courts of equity have no authority or jurisdiction to interpose for the protection of rights which are merely political, and where no civil or property right is involved. In all such cases, the remedy, if there is one, must be sought in a court of law. The extraordinary jurisdiction of courts of chancery can not, therefore, be invoked to protect the right of a citizen to vote or to be voted for at an election, or his right to be a candidate for or to be elected to any office. Nor can it be invoked

for the purpose of restraining the holding of an election, or of directing or controlling the mode in which, or of determining the rules of law in pursuance of which, an election shall be held. These matters involve in themselves no property right, but pertain solely to the political administration of government. If a public officer, charged with political administration, has disobeyed or threatens to disobey the mandates of the law, whether in respect to calling or conducting an election, or otherwise, the party injured or threatened with injury in his political rights is not without remedy. But his remedy must be sought in a court of law, and not in a court of chancery."

In re *Sawyer,* 124 U. S. 200, the court said:

"The offices and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the express protection of rights of property. Political rights consist in the power to participate directly and indirectly in the establishment or management of the government. These political rights are fixed by the Constitution. Every citizen has the right to vote for public officers, and of being elected. These are political rights which the humblest citizen possesses. Civil rights are those which have no relation to the establishment, support or management of the government. They consist in the power of acquiring and enjoying property, and exercising the paternal and marital powers and the like.

In *Green* v. *Mills, supra,* Mr. Justice Fuller, delivering the opinion of the court, said:

"The jurisprudence of the United States has always recognized the distinction between common law and equity, as under the Constitution, matter of substance as well as of form and procedure. * * * It is well settled that a court of chancery is conversant only with matters of property and the maintenance of civil rights. The court has no jurisdiction in matters of a political nature nor to interfere with the duties of any department of government unless under special circumstances, and when necessary to the protection of the rights of prop-

erty, nor in matters merely criminal or merely immoral, which do not affect the rights of property."

The editor of the A. & E. Ann. Cas., in a note to the case of *U. S. Standard Voting Machine Co.* v. *Hobson,* 10 A. & E. Ann. Cas. 977, states the rule as follows:

"It seems to be the uncontroverted rule that a court of equity will not interfere to protect or to enforce a purely political right. If a political right is infringed upon, the redress must be sought in a court of common law. Otherwise, there would be an invasion of the domain of other departments of the government, and of the courts of common law." Citing cases in support thereof.

The Supreme Court of Nebraska, in *Winnett* v. *Adams, supra,* says:

"The doctrine that equity is conversant with matters only of property and the maintenance of civil rights, and will not interpose for the protection of rights which are merely political, is supported by an almost unbroken line of authorities."

It then cites the authorities, and, after stating it does not care to commit the court unqualifiedly to the doctrine that a court of equity will not, under any circumstances, interfere for the protection of political rights, continues:

"But we think it is perfectly safe to adopt the doctrine to the extent of holding that a court of equity will not undertake to supervise the acts and management of a political party for the protection of a purely political right. We do not overlook the fact that primary elections have become the subject of legislative regulation, and it may be conceded that each member of a political party has a right to a voice in such primary, and to seek nominations for public office at the hands of his party. But when he is denied these rights, or unreasonably hampered in their exercise, he must look to some other source than a court of equity for redress. To hold otherwise would establish what could not but prove a most mischievous precedent, and would be a long step in the di-

rection of making a court of equity a committee on credentials, and the final arbiter between contesting delegations in political conventions. The voters themselves are competent to deal in such matters without the guiding hand of the chancellor, and it will make for their independence, self-reliance and ability for self-government to permit them to do so. It is true they may make mistakes, but courts themselves have been known to err." See also case note to *Shoemaker* v. *City of Des Moines,* 3 L. R. A. (N. S.) 382.

From these authorities it is conclusive that the trial of election contests and the adjudication of political rights and the protection of persons in their enjoyment were not matters of cognizance by courts of equity when our Constitution was adopted, and the Legislature had power only to vest the chancery court with jurisdiction in matters of equity, and was without power to enlarge such jurisdiction beyond such matters as courts of equity at the common law exercised jurisdiction in, and such courts having no jurisdiction of election contests and the adjudication of political rights were given none by our said Constitution. Our court has recognized this fact, and in declaring an act of the Legislature attempting to give chancellors and chancery courts the right to hear primary election contests void and unconstitutional, said:

"Election contests for nomination are not matters of equity, and have never been so considered, and the act of the Legislature to vest chancery courts with jurisdiction as to them is unconstitutional and void." *Hester* v. *Bourland,* 80 Ark. 145.

"In the absence of any statute giving them jurisdiction, the courts have no power to interfere with the judgments of the committees and tribunals of established political parties in matters involving party government and discipline," or the nomination of candidates. 15 Cyc. 330.

In *Phelps* v. *Piper,* 67 N. W. 755, the Supreme Court of Nebraska said:

"Political parties are voluntary associations for political purposes. They establish their own rules. They are governed by their own usages. Voters may form them, reorganize them, and dissolve them at their will. The voters ultimately must determine every such question. The voters constituting a party are, in deed, the only body who can finally determine between contending factions or contending organizations. The question is one essentially political, and not judicial, in its character. It would be alike dangerous to the freedom of elections, the liberty of voters, and to the dignity and respect, which should be entertained for judicial tribunals, for the court to undertake, in any case, to investigate either the government, usages or doctrine of political parties, and to exclude from the official ballot the names of candidates placed in nomination by an organization which a portion, or, perhaps, a large majority, of the voters professing allegiance to the particular party believed to be the representatives of its political doctrines and its party government. We doubt even whether the Legislature has the power to confer upon the court any such authority. It is certain, however, that the Legislature has not undertaken to confer it. We shall not enlarge upon the views we have expressed. If authority were needed in their support, we think the underlying principles suggested are those which governed the court in *People* v. *District Court,* 18 Col. 26; 31 Pac. 339; *Shields* v. *Jacob,* 88 Mich. 164, 50 N. W. 105, as well as in *State* v. *Allen, supra.*" See also *Stephenson* v. *Board of Election Commissioners,* 76 N. W. (Mich.) 914; *Potter* v. *Deuel,* 112 N. W. 1071.

It is contended, however, that appellee is given the right to contest the primary election held under the provisions of Act 371 of the Acts of 1911.

It is true that act does not provide for a contest of the primary elections, but it provides tribunals for the hearing of such contests; in the first instance, the Democratic Central Committee, with the right of an appeal therefrom to the State convention, and provides that the

action of such tribunals shall be final. It is true that section 6 contains this provision:

"Provided, nothing in this act shall be so construed as to prevent a person from pursuing any remedy he may have in any of the courts of this State."

This provision does not attempt to confer any right upon such contestant that he did not already have under the laws of this State before the passage of the act, and unless he had such right before its passage, none is given by it.

It has been expressly held that the Legislature is absolutely without power under the provisions of our Constitution to give to the chancery court authority to hear election contests, and certainly the authority to hear such contests and adjudicate the rights of the parties can not be implied from this act that expressly provides tribunals of the party for the determination thereof, and declares that their determination shall be final.

It is suggested, however, that since the Legislature has legalized primary elections for the nomination of candidates to office and provided a tribunal for contesting such nominations that a court of equity will protect them in the rights given by the statute, and that since an equitable remedy is asked that the court may grant it, if it shall not extend to trying the contest, and declaring the nominee.

As already said, no equitable title or right is involved that can give jurisdiction to a court of equity, and inasmuch as a political organization is an unincorporated, voluntary association, in which no rights of property or liberty are involved, a court of equity has no jurisdiction to interfere by injunction to control its actions or those of its officers.

"No principle of the law of injunction is better settled than that injunction does not lie to determine questions of appointment to public office and the title thereto as they are purely legal matters and cognizable only in courts of law." *Alderson* v. *Commissioners* (W. Va.), 5 L. R. A. 334.

"A court of equity will not interfere by injunction to prevent election officers or canvassing officers from doing their duty as required by law, nor prevent them from canvassing votes in a certain way." 6 A. & E. Enc. of Law, 392.

In *Rhodes* v. *Driver,* 69 Ark. 606, this court quoted, with approval from High on Injunctions, section 1312, as follows:

"No principle of the law of injunction, and perhaps no doctrine of equity jurisprudence is more definitely fixed or more thoroughly established than that courts of equity will not interfere by injunction to determine questions concerning the appointment or election of public officers or their title to office, such questions being of a purely legal nature, and cognizable only by courts of law. A court of equity will not permit itself to be made the forum of determining the disputed questions of title to public offices, or for the trial of contested elections, but will, in all such cases, leave the claimant of the office to pursue the statutory remedy, if there be such, or the common law remedy by proceedings in the nature of a *quo warranto.*" See also *Adcock* v. *Houck* (Tenn.), 122 S. W. 979; *Williford* v. *State,* 43 Ark. 63; *Lucas* v. *Futrell,* 84 Ark. 550.

The Democratic party, as well as the Legislature of the State, has provided a tribunal for hearing the contests of the primary elections, and it having done so, the decision of such tribunal is final and can not be reviewed by the courts.

In *Shibley* v. *Fort Smith & Van Buren Bridge District,* 96 Ark. 424, the court held that the Legislature had made the power of the board dependent upon the ascertainment of the commissioners that the petition was signed by a majority in value of the property owners, and said:

"Moreover, it is a well settled principle of law that where the Legislature has erected a tribunal for the purpose of ascertaining and declaring the result of an election upon any subject, the decision of such tribunal is

conclusive and can not be reviewed by the courts." Citing, *Govan* v. *Jackson,* 32 Ark. 553; *Rice* v. *Palmer,* 78 Ark. 432.

But it is argued that fraud vitiates everything and constitutes a ground for equitable injunction, and that since the petition alleges that the committee arbitrarily and fraudulently refused to hear the contest, and fraudulently certified appellee's opponent as the nominee of the party, that the chancery court was within the doctrine announced in *Collier* v. *Board of Directors of Jefferson County Bridge District,* 106 Ark. 151, there being no tribunal provided for appellee's relief, that the court of chancery must take jurisdiction to protect his rights. The court said, there:

"If the finding must be treated as conclusive, that is the end of it, so far as the machinery of the law is concerned. For the court can not supply a provision for review where the lawmakers have said there shall be none. But it does not follow that the land owners have no remedy against fraud practiced by the board in making a false declaration of the will of a majority of the land owners of the district. Fraud vitiates any proceeding or transaction, from the judgment of the highest court of the land down to the smallest transaction between individuals, and there is a remedy to purge the fraud. The court of equity is the proper forum for such relief unless the same is otherwise provided by statute. The act creating the district makes conclusive the finding of the board of directors as to a majority petitioning for the improvement; but no intention is attributable to the lawmakers to give a conclusive effect, beyond the remedial power of the court of equity, to a false finding fraudulently announced by the board." * * *

"Fraud, which will vitiate the proceedings of the board does not mean errors of the board, either of law or fact. In order to constitute fraud, there must have been an intent not to exercise an honest judgment and make a true finding, but to disregard the facts and make a false finding. This is not alleged in the petition. Taking the

allegations as a whole, they amount only to a charge of error on the part of the board in refusing to hear and consider protests and evidence affecting the question at issue, and that the petition was not, in fact, signed by a majority of the property owners."

The law does provide an appeal from the committee's decision to the convention of the party, which, under the circumstances, the near approach of the election, and the requirements of the law that the nomination should be certified a certain time before its occurrence, prevented the calling of a convention, but, in the above case, unlike this, civil and property rights are involved, and the jurisdiction of equity will extend to their protection under such circumstances, but can not be extended to the protection of mere political rights as alleged herein.

The Democratic Central Committee had the power, under the rules and regulations of the party, and the statute, and it was its duty to hear and determine the contest, declare the result of the election, and determine the name of the candidate receiving the largest number of votes at the primary election according to the returns thereof and certify his name to the Secretary of State, to be by him certified as the candidate of the Democratic party to the various county election commissioners according to law.

This it claims to have done, and the court of equity was without jurisdiction to issue an injunction to compel it to hear the contest in the first instance, and had no power or jurisdiction to review its finding and declare the result of the election in accordance with the chancellor's views of the right thereto, and set aside the finding and judgment of the Democratic party by enjoining the Secretary of State from certifying the name of the nominee furnished him by the said committee to be certified to the election commissioners of the counties. Having assumed to exercise such authority without right, its judgment and decree is void and of no effect, and the decree is reversed, the injunction dissolved and the complaint dismissed.

McCULLOCH, C. J., does not agree to the opinion of the majority. He holds that a chancery court has jurisdiction in such cases on proper allegations of fraud. But he concurs in the judgment on other grounds, which will be stated in a separate opinion.

SMITH, J., concurs in the judgment, but does not agree to all of the opinion.

McCULLOCH, C. J. I can not agree with the views of the majority in holding that a court of equity is without jurisdiction to grant relief upon allegations of fraud on the part of the State committee in declaring the result of a contest. My opinion is that the court does have jurisdiction in such cases, and that this does not violate any of the principles laid down by the various courts in the cases cited in the opinion of the majority.

It must be conceded that courts of equity have no jurisdiction in election contests and that it would be beyond the power of the Legislature to confer any such jurisdiction. *Hester* v. *Bourland,* 80 Ark. 145. But it does not follow that a chancery court can not acquire jurisdiction upon other well established grounds of equitable interference, notwithstanding the fact that it may involve an election contest or a contest for a nomination in a primary election.

Regulation by law of nominations for office is comparatively of recent origin, and cases which hold that no court will interfere in the matter of nominations because those things depend purely upon party regulations, all antedate the enactment of statutes providing for such regulation. In many, if not all, of the States that field has been entered upon as a fit subject of regulation by law, and the courts hold that legal rights are thereunder established which the courts will protect. The cases cited on the brief establish that principle.

In the case of *State* v. *Metcalf,* 100 N. W. 923-925, the Supreme Court of South Dakota said:

"Whenever the Legislature, in its wisdom sees fit to regulate nominations and the printing of ballots by statutory enactments, the duty of interpreting such en-

actments devolves upon the courts, and they should not attempt to escape responsibility or avoid disagreeable consequences by assuming that no judicial questions are involved. The auditor's duties and the candidate's rights respecting the preparation of ballots having been defined by statute in this State, the performance of such duties and the protection of such rights no longer present merely political questions, but must be dealt with as are other legal duties and other legal rights."

In *Walling* v. *Lansdon,* 97 Pac. 396, the Supreme Court of Idaho said this:

"Every right conferred upon the voter at a primary election held under this law is a legal right, which may be protected, defended, and enforced by appropriate legal methods in the courts of this State. In determining factional disputes in a political organization, and the legality of party primaries and conventions, the courts will go as far as the law goes, and protect all legal rights conferred by law upon all persons participating therein."

In the case of *Neal* v. *Young,* 75 S. W. 1082, the Kentucky Court of Appeals said:

"Since the adoption of the official ballot system by constitutional convention, since the legislative branch of the State Government provided for the regulation of primary elections by law, questions involving the legal rights of individuals will arise for the determination of the courts. The necessity for such adjudications has been placed upon the courts by the changes which have been made by the organic and statutory law of the State. However much the courts desired to do so, they could not avoid the responsibility of deciding such questions, even if, perchance, some one should fail to discriminate between political rights and those legal rights which arise under the law, and declare the court was adjudicating purely political questions."

In *Brown* v. *Cole,* 104 N. Y. Supp. 109, it was said:

"There no longer remains any distinction, so far as enforcement is concerned, between civil and political rights of citizens; but it will be presumed that every

right recognized or conferred by statute may be enforced by a proper legal method, and that every wrong, whether civil or political, has its remedy."

Many other cases clearly announce the principle that rights of nominees and of contestants for nominations under primary election laws are such rights as the courts will take cognizance of and enforce. They are no longer treated as purely party questions which the courts refuse to take notice of.

Now, since it is seen that legal rights enforceable in the courts are involved in nominations for political offices, there is no reason why jurisdiction of courts of equity should be excluded, where there exists other independent grounds for equitable interference. The lawmakers have provided in the statute, in effect, that the acts of the committee and the State convention, on appeal, shall be final. But, if the conclusion of the committee is based upon fraud, a distinct ground for equitable interference is afforded.

In the recent case of *Collier* v. *Board of Directors of Jefferson County Bridge District,* 106 Ark. 151, after determining that a statute creating a bridge district and giving the commissioners power to decide whether or not a majority in value had signed a petition for the improvement, we said:

"But it does not follow that the land owners have no remedy against fraud practiced by the board in making a false declaration of the will of the majority of the land owners of the district. Fraud vitiates any proceeding or transaction, from the judgment of the highest court of the land down to the smallest transaction between individuals, and there is a remedy to purge the fraud. The court of equity is the proper forum for such relief unless the same is otherwise provided by statute. The act creating the district makes conclusive the finding of the board of directors as to a majority petitioning for the improvement; but no intention is attributable to the lawmakers to give a conclusive effect, beyond the reme-

dial power of the court of equity, to a false finding fraudulently announced by the board."

Why does it now follow from this decision that a court of equity has power to cancel and set aside the finding of a committee where fraud is alleged and proved in reaching the result? The same principle is involved, for here we have a case where the contestants have rights which are distinctly recognized under the statutes of the State, and even though power is given to the party machinery to determine the result, yet, upon independent grounds of equity jurisdiction a court of equity has power to set aside the fraudulent action of the committee. It is but the statement of an elemental rule to say that fraud is, and has always been, an independent ground of equity jurisdiction.

"Jurisdiction in matters of fraud," says Judge Story, "is probably coeval with the existence of the court of chancery, and it is equally probable that in the early history of that court, it was principally exercised in matters of fraud not remediable at law." 1 Story's Equity, § 185. See also, 1 Pomeroy Equity Jurisprudence (3 ed.), § 119.

Another distinct ground of equity jurisdiction is the inadequacy of all legal remedies. This is nowhere more clearly and forcibly stated than by Judge Walker in the case of *Driver* v. *Jenkins,* 30 Ark. 120, where he said:

"Here there is a right without an adequate remedy at law. It is a maxim in equity that equity will not suffer a right to be without a remedy. This maxim is the foundation of equitable jurisdiction; because that jurisdiction had its rise under the inability of common law courts to meet the requirements of justice."

In *Conway,* Ex parte, 4 Ark. 302, Mr. Justice Lacy, speaking for the court, said:

"It is no objection to the jurisdiction of a court of equity that a party has a remely at law, unless it be shown that the legal remedy is plain, direct and complete. The remedy at law, to be adequate and complete, and attain the full end and justice of the case, must reach the

whole mischief and secure the whole right of the party in a perfect manner *in praesenti* and *in futuro.*"

We have, therefore, two grounds of equity jurisdiction independent of the origin or nature of the original controversy; that is, the allegation of fraud in the rendition of the judgment of the committee, and the inadequacy of any relief at law for the wrong done. It is a mistake to say that a court of equity is denied the power to exercise this original independent jurisdiction merely because the controversy originated in a contest for a nomination for office, which is a right clearly established and recognized under the laws of this State. The judgment of the committee rises no higher than the judgment of any other court of competent jurisdiction, and it is well established that a court of equity has jurisdiction to set aside the judgment of any court for fraud where there is no legal remedy. It is putting the cart before the horse, to use a homely phrase, to deny the jurisdiction of a chancery court upon those distinct and independent grounds, namely, the allegation of fraud in the procurement of the jugment, and the inadequacy of the remedy at law, merely because an election contest or a contest over a nomination for office does not of itself afford ground for equitable interference. In other words, it is not the fact that it is an election contest, but it is the fact that a legal right is involved and fraud is alleged and there is no remedy at law which gives a court of equity jurisdiction.

I think the decision of this court in the case of *Rhodes* v. *Driver,* 69 Ark. 606, clearly recognizes that principle. The court stated with emphasis the doctrine that, "Courts of equity will not interfere by injunction to determine questions concerning the appointment or election of public officers or their title to office, such questions being of a purely legal nature," but held that, where one was enjoying the possession of office, a court of equity would, by injunction, prevent interference with his possession of the office. In that case, it was not the contest over the office which gave the court of equity

jurisdiction, but the fact that his quiet possession of the office was being invaded, which was found to be an independent ground for the exercise of jurisdiction, and its full play was not restricted because the contest was one for the possession of office. Judge BATTLE, in delivering the opinion, quoted the following from Mr. High's work on Injunctions:

"Upon the other hand, the actual incumbents of an office may be protected, pending a contest as to their title, from interference with their possession, and with the exercise of their functions. * * * And the granting of an injunction in such case in no manner determines the question of title involved, but merely goes to the protection of the present incumbents against the interference of claimants out of possession, and whose title is not yet etablished."

So, in the present case, a court of equity has no jurisdiction to enter upon an original investigation over the title to the nomination for Governor, but after the remedy at law has been exhausted and the alleged fraudulent decision has been rendered by the State committee, then the allegation of fraud and the inadequacy of any remedy at law gives the chancery court, in my opinion, complete jurisdiction to grant relief.

These views, I think, find substantial support in the authorities cited on the brief.

In *Miller* v. *Clark,* 62 Pac. 664, the Supreme Court of Kansas held that the finding of a political body on the question of nominations for State offices was conclusive, and would not be disturbed by the courts in the absence of bad faith or arbitrary conduct showing wrongful acts amounting to fraud on the part of said officers, and said:

"We do not hold, however, that if the action of the officers specially designated to pass on the merits of such a controversy was induced by bad faith, or was the result of arbitrary acts showing wrongful conduct amounting to fraud, or their findings result in personal benefit to themselves, that equity would not interpose to prevent a candidate from being thus wronged."

In the case of *Allen* v. *Burrows,* 77 Pac. 555, the same court said:

"It has often been said of special tribunals established by statute to pass upon matters expressly committed to them, that their jurisdiction is exclusive and their determination is final and that courts will not review their conclusions nor inquire by what method they were reached; but always with an express or implied reservation that the statements hold good only where the action of such tribunal is characterized by good faith, and is free from fraud, corruption and oppression."

This is directly in line with what we held in the case of *Collier* v. *Board of Directors of Jefferson County Bridge District, supra,* which, I think, is the controlling principle in this case.

In 19 American & English Encyclopedia of Law, p. 739, the following rule is laid down:

"Courts of equity have jurisdiction to prevent, by injunction, the consummation of a wilful fraud attempted to be perpetrated under the guise of exercise of discretionary powers confided by law to public officers."

I can not conceive any valid reason why the jurisdiction of a court of equity should not be invoked on one of the well established grounds for such interference, such as fraud, accident, or mistake, or the inadequacy of legal remedies, merely because the right to an office is involved or the nomination as a candidate for an office. Let us suppose that, after a primary election is over, and before the result is officially announced, the commissioners of election attempt to destroy the ballots and poll books before the result in the county can be ascertained, can it be doubted that a court of equity would have power to restrain the commissioners from doing the unlawful act, and thus prevent the obliteration of the evidences of the result of the election. Or, suppose, pending a contest in the courts over an election to office, the officers in charge of the ballots should attempt to destroy them, would a court of equity be powerless to prevent the commission of such an unlawful act which

would thus materially and irreparably affect the legal rights of the contestants? I think not.

It seems to me that the majority, in reaching their conclusion, have taken away from a contestant for a nomination the remedy for enforcement of legal rights which are conferred by the statutes of the State, for the legal remedy may be, and often is, inadequate, and if a court of equity has no power to give relief, the possessor of a legal right would, in many cases, be remediless.

If the court of equity has the power, as I think it does, to review the action of the committee on allegation of fraudulent conduct in the hearing, the court could go further and give complete relief by hearing the whole controversy, and declaring such result as the committee should have declared upon a fair hearing. This upon the principle that a court of equity, having rightfully assumed jurisdiction of the subject-matter and of the parties for certain purposes, will, incidentally, grant complete relief without remitting the parties to any other forum. *Dugan* v. *Cureton,* 1 Ark. 31; *Price* v. *State Bank,* 14 Ark. 50; *Vaughan* v. *Bowie,* 30 Ark. 278; *Estes* v. *Martin,* 34 Ark. 410; *Little Rock & Fort Smith Ry. Co.* v. *Perry,* 37 Ark. 164; *Bonner* v. *Little,* 38 Ark. 397; *McGaughey* v. *Brown,* 46 Ark. 25; *Norman* v. *Pugh,* 75 Ark. 52; *Dickinson* v. *Arkansas City Improvement Co.,* 77 Ark. 570.

But the allegations of the complaint in this case, while containing appropriate statements of fraud on the part of the committee, fail in other respects to show grounds for interposition of a court of equity. In other words, Mr. Brundidge fails to state facts which show that he now has a legal right which should be protected, and for this reason, I concur in the result reached by a majority, though not for the reasons which they have given. When this action was commenced, it was obviously too late for Mr. Brundidge to secure a hearing and have his nomination certified during the time provided by the statute. His opportunity to become the nominee for Governor had passed away, and he does not

claim in his pleadings the right to be certified as the nominee of the party. He seeks merely to prevent the certification of his opponent. In my opinion, when this point was reached, his right to question the validity of the nomination had ceased, and that he is not now in possession of any rights which a court of equity should protect.

It is suggested that he could be a candidate without having his name certified as a nominee, that the nomination by the Democratic party is a substantial thing, and that he should have the right to prevent his opponent from having that advantage in the election which is to follow. It is true that the statute provides that blank spaces shall be left on the ticket so that the voters may write the name of any person on the ticket. This does not, however, give any legal right to a candidate for office. It is a mere provision of the law for the benefit of voters, and the only legal rights conferred by the statutes of this State upon a candidate is one who is a nominee either by a political party or by petition of electors. Now that Mr. Brundidge has lost the nomination on account of the acts of the committee and the lapse of time for hearing his contest, his rights are only those which are held in common by other voters of the State, and it can not be contended that those common rights are such as a court of equity should protect. For these reasons, I concur in the judgment of the court reversing the case.

SMELTZER v. TIPPIN.

Opinion delivered June 16, 1913.

1. DAMAGES—MEASURE OF—BREACH OF CONTRACT.—The measure of damages for breach of warranty in a contract for sale of chattels is such damages as are direct and certain, or which are capable of being ascertained with a reasonable degree of certainty, and which result from the breach and which may reasonably be regarded as within the contemplation of the parties at the time of the sale as the probable consequences of the breach. (Page 279.)

2. DAMAGES—BREACH OF WARRANTY IN CONTRACT FOR SALE OF CHATTELS —MEASURE OF DAMAGES.—A. purchased strawberry plants of a certain kind from B. It required cultivation for a year before the plants would produce, but when they did produce it was found that they were strawberries of an inferior kind. *Held*, B. having warranted that the plants were the kind sold, A. is entitled to recover on the breach of warranty, and the measure of damages is the difference between the value of the crop of strawberries of the kind that was produced during the first season they bore and the crop that would have been produced under ordinary circumstances if the plants had been the plants sold as represented, together with the cost of resetting the plants, the cost of recultivation, and the cost of the new plants, A. having already paid for the plants which he set out. (Page 281.)

Appeal from Crawford Circuit Court; *Jeptha H. Evans,* Judge; reversed.

STATEMENT BY THE COURT.

The plaintiff, George T. Tippin, brought this suit against M. F. H. Smeltzer and W. A. Steel to recover damages for a breach of warranty in the sale of certain strawberry plants.

In November, 1909, the plaintiff leased from Tom Wallace for a period of eight years two hundred acres of land in Johnson County, Arkansas. A part of the lease was an old pasture with large trees but no underbrush on it. The plaintiff cleared this and decided to set it out in strawberry plants. The defendants were dealers in strawberry plants and the plaintiff went to them to purchase the plants. He told the defendants that he wished to set out twenty-five or thirty acres of land in Klondyke strawberry plants for commercial purposes. He described to defendants the character of the soil and the reason why he wanted Klondyke plants. The reason was that the Klondyke berries came in between the season of strawberries grown further south and those grown further north, and were more profitable for shipment. He gave the defendants an order for one hundred and fifty thousand plants of the Klondyke variety and also an order for some Mitchell plants. The price agreed to be paid for the plants was $2.15 per thousand. The plaintiff did not receive all the plants he or-

dered but received sufficient plants to set out about twenty-five acres. He prepared his ground and set out the plants in the spring of 1910. He cultivated them during the year 1910 and they began to bear fruit in the year 1911. Strawberry plants do not begin to bear until the second year after they are set out but require cultivation during the first year. When the plants began to bear fruit the plaintiff ascertained that they were not Klondyke berries and that they were of the variety called Aroma. The testimony on the part of the plaintiff was that the berries ripened about ten days or two weeks later than the Klondyke berries and were not profitable for shipemnt. That it was impossible to ascertain that the plants set out were not of the Klondyke variety until after the berries appeared upon the plants. That the season of 1911 was a good season for strawberries and that the Klondyke plants grown by his neighbors on similar soil produced an abundant crop of good berries.

The plaintiff also adduced evidence tending to show that if his berries had been Klondykes, and a good stand, they would have cleared him one hundred dollars per acre the first year they bore. With proper cultivation he would have cleared a like sum the second year and the third year probably seventy-five dollars per acre. That with right cultivation he would have had some berries the fourth year and would probably have realized as profits forty or fifty dollars per acre during that year. That considering the period of his lease and the life of the berries the value of his lease on the land at the time he ascertained that the plants were not Klondyke would have been three hundred or four hundred dollars per acre. That the estimated value of the lease in May, 1911, if the berries had been Klondyke berries, was between three hundred and four hundred dollars per acre. That the rental value of the land for annual crops was about five dollars per acre. That the Klondyke berry is a large, firm berry and the best marketable berry for that locality. That the berries actually

grown were of an inferior kind and quality and unprofitable for shipment. That the plaintiff shipped some of the berries and made no profit on them.

The testimony on the part of the defendants tended to show that the strawberry season of 1911 was not a good one in that locality. That it was very rainy and on that account the berries were inferior in color and quality. That the kind of berries grown by the plaintiff were as good as the Klondykes and were as valuable for shipment. Other facts will be referred to in the opinion.

The jury returned a verdict for the plaintiff and the defendants have appealed.

E. L. Matlock and *Sam R. Chew,* for appellants.

The measure of damages adopted by the trial court was erroneous.

For the measure of damages for the loss sustained or damages done to a growing crop of grass or meadow, see 59 Ark. 105. Destruction of a corn or cotton crop, 56 Ark. 612. Growing forest timber, 67 Ark. 371. Orchard of fruit trees, 89 Ark. 418; 97 Ark. 54. An immature crop, 85 Ark. 111. The principle announced in the foregoing cases should control here. Recovery for mere contingent or speculative gains or losses will not be permitted. 2 Sutherland on Damages, 430-433, and authorities cited. See further on the question of the true measure of damages, 127 N. C. 230, 52 L. R. A. 362; 52 N. E. 1083; 73 N. Y. S. 388; 34 N. Y. 634.

In any case the elements of damage must be such as were reasonably in contemplation of the parties at the time of making the contract. 2 Addison on Torts, 1187, § § 1385, 1386; 21 Ark. 431.

Webb Covington and *George O. Patterson,* for appellee.

The court gave to the jury the correct measure of damages in its instruction No. 3. The cases in 89 Ark. 418, and 97 Ark. 54, cited by appellant, correctly give the measure of damages applicable to the facts of this case, and support the trial court in the instruction given. In

other cases cited by appellants, they overlook the distinction between the measure of damages applicable in the case of seed or plants producing one crop only, and the measure applicable in the case of plants or trees where the profits are not confined to the yield or production of a single year. 95 S. W. 311; *Id.* 600, 86 S. W. 1048; 47 Am. Rep. 192; 126 S. W. 936; 140 Am. Rep. 317, 318, 319; 23 L. R. A. (N. S.) 310, and notes on pages 313, 314 and 315.

HART, J., (after stating the facts). Defendants ask for a reversal of the judgment because the court erred in the admission of evidence as to the plaintiff's damages and because the court adopted the wrong theory as to the measure of damages. The particular instruction complained of is instruction numbered 3, which reads as follows:

"If you should find that defendants sold plaintiff Klondyke strawberry plants, but delivered some other kind you should find for plaintiff. If lands set in these plants so bought and delivered were less valuable as a strawberry investment than if set to Klondyke plants, you should find for plaintiff the amount of such difference, considering the ordinary productive lifetime of the strawberry plant."

This instruction must be construed with reference to the testimony upon which it was predicated, and, when so considered, it was erroneous and prejudicial to the rights of the defendant. It will be noted from the abstract of the testimony that the court tried the case on the theory that the measure of damages was the difference in value of the lease had it been set out in Klondyke plants, and what it was set out in the kind of plants actually grown on it. This was erroneous. It is true the measure of damages for the injury or destruction of trees on land is the difference in the market value of the land immediately before and immediately after the destruction of the trees. *St. Louis, I. M. & S. Ry. Co.* v. *Ayres,* 67 Ark. 371. The reason given is that it requires several years to replace trees, and that it can only be done

at considerable expense. Neither is the measure of damages the same as that fixed by the court for the destruction of an annual crop, which is the actual value of the crop at the time of its destruction. *Railway Company* v. *Yarbrough,* 56 Ark. 612. Strawberry plants are what are commonly called perennial plants. They do not begin to bear until the second year after they are set out and require cultivation for the first year. Their life as a commercial, productive plant is variously estimated at from four to seven years by the witnesses. Some of them say they begin to decline rapidly in production after the third year. The plaintiff at the time he made the purchase of the strawberry plants informed the defendants of the particular kind he desired, of the locality and character of the soil where they were to be planted and of his purpose in setting them out. There was a warranty by the defendant that the plants were of the kind sold. In such cases the purchaser is entitled to recover from the seller damages for the breach of warranty. The general rule is that only such damages may be recovered as are direct and certain, or which are capable of being ascertained with a reasonable degree of certainty, and which result directly from the breach, and which may reasonably be regarded as within the contemplation of the parties at the time of the sale as the probable consequences of the breach. 35 Cyc. 405-6.

In the case of the *Railway Company* v. *Jones,* 59 Ark. 105, the court held:

"The damage to a meadow destroyed by fire is measured by the cost of reseeding it and its rental value from the time of its destruction until it is restored."

As we have already seen, strawberries are not like cotton and corn, which are planted, grown and harvested annually, nor are they like orchards, which are required to be set out and cultivated for several years before they bear fruit and which with proper care and cultivation last for a great number of years. Strawberry plants become productive the second year after they are set out and are only profitable commercially for a few years.

The evidence on the part of the plaintiff tended to show that it could not be ascertained that the plants set out were not of the Klondyke variety until after they bore fruit. Therefore, in the application of the principles above announced, we hold that the measure of damages in the instant case is the difference between the value of the crop of strawberries of the kind that was produced during the season of 1911 and the crop which would have been produced under ordinary circumstances if the plants had been Klondyke plants as represented, together with the cost of resetting the plants, the cost of recultivating and the cost of the new plants, the plaintiff having already paid for the plants which he set out. The testimony shows that the first year the plants are set out they require cultivation but are not productive, and for this reason the plaintiff is entitled to the cost of recultivation, as stated above. See *Depew* v. *Peck Hdw. Co.*, 105 N. Y. Supp. 390. In that case it was held that where seed, if true to name, would result in a perennial crop; that is, one lasting from year to year, the measure of damages is the fair value of the crop lost, or the crop which would have been produced under ordinary circumstances, if the seed had been as represented, together with the cost of reseeding, the cost of recultivation and the cost of new seed sown. To the same effect see 30 Am. & Eng. Enc. of Law, 219.

It follows, therefore, that for the errors in giving instruction numbered 3, quoted above, and in admitting improper evidence on the measure of damages, the judgment will be reversed, and the cause remanded for a new trial.

BRASHER *v.* TAYLOR.

Opinion delivered June 30, 1913.

1. EJECTMENT—RIGHT TO BRING ACTION.—Under Kirby's Digest, § 2754, in order to bring an action of ejectment, plaintiff must show that he has title to the premises claimed and that the defendant was in possession at the time of the commencement of the action. (Page 284.)

2. EJECTMENT—PAYMENT OF TAXES ON WILD LAND—POSSESSION.—Under Kirby's Digest, § 5057 (act of March 18, 1899) payment of taxes on wild land for seven years is equivalent to possession, and actual or pedal possession by defendant is not an indispensible prerequisite to the right of a party to bring an ejectment suit against him. (Page 284.)

3. LIMITATION OF ACTIONS—ADVERSE POSSESSION BY PAYMENT OF TAXES—COVERTURE.—The statute of limitation, Kirby's Digest, § 5057, does not run against a woman under coverture when the act was passed, and who continued under coverture until the commencement of the action. (Page 286.)

4. DEEDS—RECORD AS NOTICE.—The record of a deed which is not in the line of a party's title is not constructive notice to him, and when A., being a co-tenant of land with others, conveys all hte land to B., but B. did not go into actual possession of the same, and the other cotenants, having no knowledge of A.'s deed to B., B. did not get title to the land as against the other co-tenants. (Page 287.)

5. ADVERSE POSSESSION QUESTION FOR JURY.—Where one co-tenant conveyed all the lands to a third party without actual or constructive notice to his co-tenants, and the remaining co-tenants neglected to pay taxes on the land for a long period of time, the question of the adverse possession of the purchaser as against the co-tenants should, in an action of ejectment, brought by the co-tenants, be submitted to the jury. (Page 287.)

Appeal from Lee Circuit Court; *J. M. Jackson*, Judge; reversed.

STATEMENT BY THE COURT.

This was an action of ejectment brought by appellants against appellees on the 24th of September, 1904. The facts are as follows:

W. A. Brasher died intestate in the year 1863, owning the lands in controversy, which are situated in Lee County, Arkansas. He left surviving him as his sole heirs at law, A. W. Brasher, Rachel Brown, Melissa Long, T. J. Brasher and Mrs. A. Woolridge, who were his brothers and sisters. Rachel Brown is a married woman, having married in 1855. Melissa Long is a married woman and has been since 1872. Mrs. A. Woolridge died intestate in 1878, leaving as her sole heirs at law her two children, Byron Woolridge and Mattie Fruit. Mattie Fruit is a married woman and has been since

1878. A. W. Brasher was seventy-three years old and Byron Woolridge was forty-nine years old at the time of the institution of this suit.

The lands in controversy are wild and unimproved. They are not inclosed and are not occupied. On the 8th day of May, 1873, T. J. Brasher conveyed the lands in controversy to his wife and she conveyed the same to J. T. Robertson on the 17th day of June, 1896, and the deeds were duly recorded. Solomon Friedman obtained a judgment in the Lee Circuit Court in 1874 against T. J. Brasher, and the lands in controversy were sold under execution to Solomon Friedman, who received a sheriff's deed thereto on the 31st day of October, 1876. On the 19th day of June, 1896, Solomon Friedman conveyed said lands to J. T. Robertson, and the latter in 1904 conveyed the same to J. L. Taylor and Mrs. Elizabeth Sellers, who are the defendants in this action, and the deeds were duly filed for record. A. W. Brasher, Byron Woolridge, Mattie Fruit, Rachel Brown and Melissa Long are the plaintiffs in the action. It was agreed at the trial that the defendants and those under whom they claim title have paid the taxes on said lands from the year 1867 until the time of the institution of the suit under the claim of ownership acquired under the various conveyances above mentioned.

The circuit court declared the law to be that an action of ejectment could not be maintained by plaintiffs against defendants, and rendered judgment in favor of defendants. The plaintiffs have appealed.

Daggett & Daggett and *P. D. McCulloch,* for appellant.

1. Payments of taxes for seven years under color of title constitutes such possession as will authorize ejectment. Sedgwick & Wait, Trial of Title to Land, § § 234-6; 7 Enc. Pl. & Pr. 264; 15 *Id.* 56; 107 Mo. 360; *Id.* 1; 9 Cal. 268; 45 Cal. 235; Kirby's Dig., § 5057; 74 Ark. 302; 81 *Id.* 302; 83 *Id.* 159; 89 *Id.* 450; 94 *Id.* 128; 95 *Id.* 6; 132 Ill. 149; 166 *Id.* 25.

2. The married women were under the disability of coverture and not barred. 94 Ark. 122, 128.

3. The possession of one tenant in common is *prima facie* the possession of all and the sole enjoyment of rents etc., does not necessarily amount to a disseizin. 99 Ark. 446.

H. F. Roleson, for appellees.

1. Ejectment can not be maintained for wild and unoccupied land. The actual possession must be disturbed or interfered with. 15 Cyc. 51-53-4, 56; 41 Ark. 465; 2 Wall (U. S.) 328; 68 N. W.

2. Robertson had a recorded conveyance for the whole tract. His possession was adverse and hostile from the inception of his title. Tyler on Eject. & Adv. Enjoyment, 926-7; 1 Cyc. 1078; 57 Ark. 97.

HART, J., (after stating the facts). In several of the States, by statute, actions of ejectment may be brought against persons claiming title to or any interest in real property although not in possession. Counsel for the plaintiffs, to reverse the judgment, have cited decisions under these statutes but they have no application here. Under our statutes in order to entitle the plaintiff to recover in an action of ejectment he must show that he had title to the premises claimed and that the defendant was in possession of same at the time of the commencement of the action. Kirby's Digest, § 2745.

Again, it is contended by counsel that the plaintiffs are entitled to maintain the action because the lands are wild and unimproved and the defendants and their grantors, under color of title, have paid the taxes on the same from the year 1867 to the time of the commencement of the action in 1904. In support of this contention they rely upon the act of March 18, 1899 (section 5057, Kirby's Digest), and the decisions of this court construing the same. The act provides that unimproved and unenclosed land shall be deemed and held to be in possession of the person who pays taxes thereon if he have color of title thereto. Prior to the passage of this act, the

court held that the payment of taxes and the assertion of the exclusive right to land do not constitute possession or disseize the holder of the true title. *Brown* v. *Bocquin,* 57 Ark. 97. The question of whether or not this rule has been changed by the passage of the act of 1899, above referred to, is the most serious question of law raised by this appeal, and is one that has given us the gravest concern.

In construing the act of 1899, in the case of *Towsen* v. *Denson,* 74 Ark. 302, the court held that the payment of taxes on wild and unimproved land, under color of title, constitutes possession of each successive year in which payment is made, provided, however, that such payments be continued for at least seven years in succession and not less than three years after the passage of the act. The act has been construed in subsequent decisions of the court and it has been uniformly held that the payment of taxes for the full period of time and under the conditions in the statute is equivalent to possession. It is true that in some cases, as in *Taylor* v. *Leonard,* 94 Ark. 122, the court says that the act makes the payment of taxes under the condition named in it a constructive possession, but in doing so the court evidently is using the term "constructive possession" as distinguished from actual or pedal possession; for in several cases the court speaks of the payment of taxes for the period and under the conditions prescribed by the statute as being equivalent to possession or as being possession itself.

In actions of ejectment the plaintiff can recover only upon the strength of his own title, and not upon the weakness of his adversary's. The reason is that possession is always *prima facie* evidence of title and a party can not be deprived of his possession by any person but the rightful owner who has the right of possession. *Dawson* v. *Parham,* 47 Ark. 215. This rule has been reaffirmed in many later decisions of this court. It is equally well settled that the title to real property may be settled in an action of ejectment and where the title

is put in issue by the pleadings the verdict and judgment are final and conclusive as to the title. Since this is true, and since the court has held that payment of taxes for the time and in the manner prescribed by the act of 1899, above referred to, is equivalent to possession, there is no longer any reason for holding that actual or pedal possession by the defendant is an indispensible prerequisite to the right of the plaintiff to bring an ejectment suit against him. And we hold that the holding in *Brown* v. *Bocquin,* to the effect that the payment of taxes and the assertion of the exclusive right to land do not constitute possession, has been changed by the act of 1899 under consideration.

The plaintiffs, Mattie Fruit, Melissa Long and Rachel Brown, were married women at the time the act of March 18, 1899, was passed, and their coverture continued until the commencement of this suit, therefore, their right to recover is not barred by the statute of limitations. *Deane* v. *Moore,* 105 Ark. 309, 151 S. W. 286, and cases cited; *Taylor* v. *Leonard, supra.*

A. W. Brasher and Byron Woolridge have not been under any disability and the remaining question is whether their right of recovery is barred. The parties to this suit claim title from a common source. It is true the deed of T. J. Brasher purported to convey the entire tract of land, but as he had only an undivided one-fifth interest in the land, the effect of his deed was to convey his interest. In the case of *Singer* v. *Naron,* 99 Ark. 446, the court said:

"The reason that the possession of one tenant in common is *prima facie* the possession of all, and that the sole enjoyment of the rents and profits by him does not necessarily amount to a disseizin, is because his acts are susceptible of explanation consistent with the true title. In order, therefore, 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."

It is true that the deed of T. J. Brasher was recorded, but in accordance with the ruling in the case of *Singer* v. *Naron, supra,* the record of a deed which is not in the line of a party's title is not constructive notice to him. Actual possession of the land was not taken by defendants so as to bring them within the rule announced in *Parsons* v. *Sharpe,* 102 Ark. 611, where the court quoted with approval the following:

"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."

There is nothing in the record to show that the plaintiffs had actual knowledge that T. J. Brasher had conveyed the entire tract of land to the defendants or their predecessors in title. The fact that the plaintiffs never paid any taxes on the land and made no efforts whatever to assert their title to the land during the long period of time that the taxes were paid by the defendants and their grantors raises a strong presumption that they recognized the claim of title of the defendants and their grantors as superior to their own, or, at least, that they had abandoned any claim of their own to the land, but this is a presumption of fact and does not become a conclusive presumption of law. Therefore, we hold that under the facts as disclosed by the record the question of the adverse possession of the defendants as against the plaintiffs, A. W. Brasher and Byron Woolridge, should have been submitted to the jury. The circuit court did not attempt to pass upon this question but declared as a matter of law that an action of ejectment could not be maintained by the plaintiffs against the defendants, evidently basing his holding on the ground that because the defendants were not in actual or pedal possession of the land an action of ejectment could not be maintained against them.

It follows that the judgment must be reversed and the cause remanded for a new trial.

KIRBY, J., dissents.

McCULLOCH, C. J., disqualified and not participating.

STOUT LUMBER COMPANY *v.* WRAY.

Opinion delivered July 7, 1913.

1. MASTER AND SERVANT—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.—Appellee was employed as assistant inspector in appellant's mill, his duty being to inspect the machinery at the noon hour. In the forenoon he was called to perform the duties of an absent employee, and was injured by reason of the removal by another employee of a plank protecting the machinery at which appellee was called to work. *Held*, although appellee was an inspector, but was injured when called to perform other duties in the mill, the appellant is not entitled to a peremptory instruction in its favor, but the question of the contributory negligence of the appellee was, under the circumstances, a question for the jury. (Page 295.)
2. MASTER AND SERVANT—INJURY TO SERVANT—ASSUMED RISK.—Where appellee is employed as an inspector in appellant's mill and his duty requires him to inspect the machinery only at stated intervals, when he is called upon to perform the duties of another servant, at a time other than the time for the inspection, if he is injured by a defect in the covering of the machinery, due to negligence of another servant, he does not assume the risk created at the time of the injury by the negligence of the appellant, its agents or servants of which he did not know. (Page 296.)

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

STATEMENT BY THE COURT.

Appellee sued appellant to recover damages for personal injuries received by him while in its employment. Appellant owned and operated a sawmill at Thornton, Arkansas, and appellee worked for it in the capacity of assistant or helper to its foreman. Appellee was injured on the 17th day of February, 1912, and was at the time fifty-four years old. He had been in the employment of appellant for about twenty years and had been assistant to the foreman for about ten years prior to the time he

received his injuries. The accident occurred about 7 o'clock in the morning, and, it being cloudy and dark, the electric lights in the mill were burning. The circumstances attending the injury are as follows:

Logs were brought up from a pond and thrown on a log deck. They were then placed on the saw carriage and slabs were cut off of them by the sawyer. Then the logs and slabs together were kicked off on a live roller and carried down them to a point opposite the skidway, where the slabs would be kicked off on one side and the logs would be sent down the skidway. The slabs would then be placed on another live roller and carried off on it. The live rollers ran in a table and the cog wheels extended above and below the surface of the table and were the driving gear of the moving rollers. A plank one inch thick and eight or ten inches wide and four feet long was nailed to the table just under it to protect the man who placed the slabs on the live roller from injury by coming in contact with the cog wheels while at work. On the morning the injury occurred, the man who usually worked at this live roller table did not come and appellee in order that the sawing might not be stopped, went up to take his place until a substitute could be procured. When appellee got there he found that several slabs had been kicked off and piled up around the table. Some of them were leaning against the top of it. He began at once to pick up the slabs and place them on the live rollers to be carried away. The last one he put on was pretty heavy and he had to lean over the table to place it on the rollers. While he was leaning over the cog wheels or cog gearing caught in his pants and dragged his leg into it. He was severely injured, but, inasmuch as no question is made as to the verdict being excessive, it is not necessary to abstract the testimony showing the extent and character of his injuries.

About 5 o'clock in the evening on the day before appellee was injured, Ed Moore, who usually performed the work of placing the slabs on the live rollers, prized off the plank which had been nailed on to the table to

protect the workmen from the cog wheels and gearing. Clyde Mullins, who was an assistant inspector of the mill, was present when the plank was torn off and did not replace it or report to the foreman the fact of it being off.

James Cargyle was the foreman and appellee, S. R. Wray, was his assistant. Tom Hollingsworth and Clyde Mullins also assisted him in the work of inspecting the machinery of the mill. These four men inspected the entire machinery of the mill. It was their custom to inspect the machinery on the second floor, on which appellee was injured, during the noon hour, when the machinery was idle. Appellee testified that they inspected the machinery on this floor at noon on the day before he was injured and that the plank which protected the workman from the live gearing by which he was injured was securely nailed on to the live roller table when such inspection was made. Appellee said that during the rest of the day he worked downstairs in the machinery which ran the mill, except when he was called upstairs by signal or sent by the foreman. That his work was all downstairs throughout the day except at the noon hour, when the inspection of the machinery upstairs, where he was injured, was made. He stated that on the morning he was injured the foreman met him at the foot of the stairs and directed him to go up and take Ed Moore's place until he could get a substitute. He immediately went up and began to work placing the slabs on the live rollers until the injury occurred as above stated.

Clyde Mullins testified: I had been at work in the mill of appellant company for nearly two years when appellee was injured. I helped in the work of inspection during the noon hour when we looked over the machinery to see if there was anything which needed repairing. When we discovered any defects it was our duty to fix them. If I discovered a defect and could not fix it myself, it was my duty to report it to the foreman. I was present when Ed Moore pried off the plank which was nailed over the gearing. He did this about 5 o'clock

in the evening before appellee was injured on the next morning. I was called away about some matter and forgot all about the plank being pried off the roller casting. I forgot all about it and did not fix it myself or report it to the foreman. Appellee admitted that on three or four other occasions it had become necessary to pry off this plank and that he had nailed it back himself or caused it to be done. He said that on the morning of the injury he went to work in a hurry and did not make any special examination to see if the plank was in its place; that he had inspected it the day before at noon and that it was in its place; that the slabs were piled around the table in such a manner that he did not notice or discover that the plank was off until after the injury had occurred.

The foreman, Cargyle, testified for the appellant, and denied that he directed appellee to go up and take the place of Ed Moore in placing the slabs on the live rollers. He said it was the duty of appellee to help him look after the mill and take care of all the machinery and keep everything in repair; that it was his duty while going over the mill to look after things and repair such machinery as needed repairing. Other testimony will be referred to in the opinion.

The jury returned a verdict for appellee and the case is here on appeal.

T. D. Wynne, H. T. Harrison and *Gaughan & Sifford,* for appellant.

1. The appellant's request for a peremptory instruction should have been given, because the evidence shows that appellee, as assistant foreman and operative millwright, was charged with the express duties of inspecting and repairing the place at which he was injured, one of the principal functions of his employment being, as appears by the evidence, to inspect the machinery and to repair defects wherever found. 26 Cyc. 1252-4; 20 Am. & Eng. Enc. of L. 142; 98 Ark. 38; 93 Ark. 152; 88 Ark. 292.

2. There is no proof of negligence on the part of appellant. Negligence will not be imputed to it because of the act of one of the laborers in knocking off the plank which covered the cog gear. The act of 1907 (Castle's Supp., § 5230a), does not operate to relieve the employee of the duty to exercise ordinary care for his own safety, and contributory negligence is still a valid defense. 93 Ark. 484; 98 Ark. 522.

3. It is error to instruct the jury on issues not raised by the pleadings and of which there is no proof. Such instructions are abstract, misleading and, therefore, prejudicial. 74 Ark. 22; 88 Ark. 25.

4. If, as is clearly demonstrated by the proof, it was appellee's duty to inspect and repair the place where the accident occurred, he can not be heard to complain of appellant for injuries received in consequence of his own omission of duty, whether the exposed condition of the cog gear was created by a fellow-servant or some other agency. The court's charge with reference to the assumption of risk was wrong. 93 Ark. 15; 88 Ark. 292; 93 Ark. 489; 56 Ark. 391.

Davis & Pace, for appellee.

1. Appellant was negligent, and appellee was entitled to recover. Since the act of March 8, 1907, corporations are liable for injuries to their servants resulting from the negligence of other servants, regardless of the grade of service. 92 Ark. 503; 87 Ark. 587; 89 Ark. 522; 102 Ark. 562; 102 Ark. 625.

After being properly instructed by the court the jury found that Ed Moore, a fellow-servant, was negligent in leaving the cog gearing exposed, and this negligence was the proximate cause of the injury. 104 Ark. 59; *Id.* 105; 97 Ark. 584. Appellant is also liable because of the negligence of Clyde Mullins, one of its inspectors, whose duty it was to repair or report defective places, who saw the plank torn from its fastenings and failed to repair or report it for repairs.

2. The evidence does not sustain the claim of appellant that appellee was not in the exercise of due care, but was guilty of contributory negligence. The jury's verdict settles the point that he could not, in the exercise of ordinary care, have seen that the plank was off and the cogs exposed. Their verdict will not be disturbed if there is any substantial evidence to support it. 102 Ark. 625; 91 Ark. 86; 91 Ark. 388; 89 Ark. 522.

3. There is no error in the instructions given.

HART, J., (after stating the facts). It is first earnestly insisted by counsel for appellant that the court erred in not directing a verdict in its favor. Under the act of March 8, 1907, all corporations are made liable for injuries to their servants resulting from the negligence of other servants, regardless of the grade of service. *Soard* v. *Western Anthracite Coal & Mining Co.*, 92 Ark. 502; *Aluminum Company of North America* v. *Ramsey*, 89 Ark. 522; *St. Louis Southwestern Ry. Co.* v. *Burdg*, 93 Ark. 88.

It is well settled that the rule which imposes upon the master the duty to exercise ordinary care to provide his servant with a reasonably safe place in which to work requires the master to make reasonable inspection to see that the place of work and appliances are safe. *St. Louis, I. M. & S. R. Co.* v. *Holmes*, 88 Ark. 181. This is conceded to be the law by counsel for appellant, but they contend that under the facts as disclosed by the record the master delegated to appellee the duty to inspect its machinery and appliances and to make them safe or to report their unsafe condition to the foreman and that, therefore, the case falls within the principles of law decided in the case of *Southern Anthracite Coal Company* v. *Bowen*, 93 Ark. 140, and other cases of like character. Under the rule contended for, if it was the duty of appellee to have inspected the appliance at which he was working when he received his injuries before he went to work there, then he ought not to recover; for in that event the injury was the result of his own negligence because he admits that he did not inspect the appliance for de-

fects at the time he went to work there. We do not think the evidence as disclosed by the record bears out their contention. It is true that a part of the duties of appellee was to assist in inspecting the machinery and appliances of appellant. The mill plant of appellee had two floors and appellant was injured while working on the upper floor. The testimony shows that it was the custom of the foreman to have an inspection made of the machinery on the floor on which appellee was hurt, every day at the noon hour. The machinery was then idle and the foreman, together with appellee and two others, at that hour made an inspection of all the machinery and appliances used by appellant in operating its mill. Appellee states that such inspection was made at the noon hour on the day preceding the accident and that the plank which was nailed to the table on which ran the moving rollers was in its place and that the cog wheels which ran the moving rollers were not exposed. He says that during the rest of the day his duties kept him on the first floor of the mill and that it was not necessary for him to go on the second floor unless he was called there by signal or directed by the foreman to go there for the purpose of making repairs or doing such other work as he was required to perform. He says that he did not go on the second floor during the afternoon after the inspection just referred to had been made and that he went up there to work early in the morning at the command of his foreman. That the slabs were piled around the table in such a way as to conceal the fact that the plank had been removed and left the cog wheel exposed and that he did not notice this fact until after he was injured.

Other evidence shows that the plank was pried off about 5 o'clock in the afternoon before and that Mullins, whose duty it was to repair any defects that he might discover in the machinery or to report them to the foreman, was present and knew that the plank had been pulled off. The evidence shows that it was dangerous to work at the table where the live rollers were without

the cog wheels and gearing being guarded and that they were kept from being exposed by a plank four feet long, one inch thick and eight inches wide. Therefore, the jury might reasonably infer that the act of Mullins in not restoring the plank to its position or in reporting the fact of its being off to the foreman, was an act of negligence which would render appellant liable for any injuries caused thereby. Appellee according to his testimony was acting as a substitute for another servant at the time he was injured and was not acting in his capacity of inspector. He said that he was not required to inspect the appliances before using them when he took the place of another servant. He said that he went up there hurriedly that morning and began to place the accumulated slabs on the live rollers in order that they might be cleared out of the way so it would not become necessary to stop the machinery. That the slabs were so piled around the table that they concealed the fact that the plank had been removed and left the cog wheels exposed. Under these circumstances, we think that the contributory negligence of appellee was a question for the jury.

Counsel for appellant next insist that the court erred in giving the following instruction:

"In this case, if the injury was the result of any risk or hazard ordinarily or usually incident to the plaintiff's employment at the mill, he assumed that risk, and can not recover; but he does not assume the risk created at the time of the injury by the negligence of the defendant, its agents or servants, of which he did not know; and if his injury was the result of said negligence of the agents or servants of the defendant, then he did not assume such risk."

They contend that the instruction ignores the contention of appellant, as it was appellee's duty to discover and remedy any defect that existed in the appliances about appellant's sawmill before he began to work around the same. We do not think that it was proved that such was his duty. As we have already

seen, appellee stated that he was required only to inspect the machinery and appliances on the floor on which he was hurt at stated intervals, and testified in effect that when he was substituted for another servant he was not required to inspect the machinery or appliances before going to work at them. It is true the foreman testified that appellant's duty carried him all over the mill plant and that it was his duty, if he knew of any defect in the machinery or appliances, to repair it himself or to report the fact to the foreman. His testimony, however, does not go to the extent of showing that it was the duty of appellant to make an inspection of the machinery and appliances before he went to work at them when he was substituted for another servant. The undisputed testimony shows that the inspection of the machinery was made at regular and stated intervals and at other times appellee was employed in the work of making repairs and performing such other duties as were assigned to him by the foreman. The fact that it was his duty to repair any defect that he might discover in the course of performing his duties does not show that he would be required to inspect machinery before going to work at it as a substitute for another workman. In this view of the case it does not make any difference whether he went to work at the place where he was injured by the direction of the foreman or in the discharge of his usual and ordinary duties. We think that the undisputed testimony shows that it was not his duty to have made an inspection of the machinery where he was injured before he went to work at it in place of another servant, and that there was no error in giving the instruction.

Other assignments of error in regard to instructions given and those refused are raised by appellant's counsel in their brief and argument. We have not overlooked them, but think they are sufficiently covered by the principles of law which we have announced. We have considered the instructions given and those refused and think that the issues raised by the pleadings and the evidence were fairly covered by the instructions given, and the judgment will be affirmed.

GRANT v. LEDWIDGE.

Opinion delivered July 7, 1913.

BILLS AND NOTES.—FRAUDULENT REPRESENTATIONS—INTENT—LIABILITY.—Where appellee was induced to endorse the note of a corporation payable to appellant, upon representations of appellant, who was secretary of the corporation, as to the soundness of the condition of the corporation, which representations were false and untrue, where appellee relied upon the statements of appellant, and endorsed the note on the faith of the same, appellant can not recover from the appellee on the note, although the appellant at the time of making the statements, had no intention to mislead appellee, and had no dishonest motive.

Appeal from Pulaski Chancery Court; *John E. Martineau,* Chancellor; affirmed.

STATEMENT BY THE COURT.

Ledwidge and English were the owners of a certain mill plant near Pinnacle, Arkansas. They afterward agreed to let the appellant have an interest in the plant and to incorporate the business under the name of the English-Grant Lumber Company, entering into a contract on the 29th day of January, 1908, which recited that English and Ledwidge sold to appellant $25,000 par value, consisting of 1,000 shares at $25 per share of the capital stock of the English-Grant Lumber Company for the sum of $5,000 in cash, and that appellant had the option at the expiration of one year from the date of the contract to return to English and Ledwidge the stock and receive therefor the sum of $5,000, which he had paid, without interest. Appellant paid into the corporation the sum of $2,000 in cash and executed his note for the balance. English and Ledwidge contributed their shares of the capital stock in assets of the lumber company.

On the 8th day of May, 1908, the appellant and English and Ledwidge entered into the following contract:

"For a valuable consideration paid this day to J. B. Grant, party of the first part, by E. Y. English and Chris Ledwidge, parties of the second part, said party of the first part releases unto said parties of the second part all his right, title and interest in all the property, both

real and personal, accounts, judgments, debts, choses in action, and all monies now owing the English-Grant Lumber Company or which may become due said company at any future time; and also all the right, title and interest said party of the first part now has in the shares of said company, and rights he now has under said shares of said company.

"For and in consideration of the above, said E. Y. English and Chris Ledwidge, parties of the second part, agree to, and hereby do release said J. B. Grant, party of the first part, from any and all liability on any and all debts, accounts, notes, bonds, choses in action and judgments which the English-Grant Lumber Company now owe, or which may be contracted or entered into at any time in the future by said English-Grant Lumber Company."

There was a further provision that the parties of the second part should "assume all liability on the present and future accounts, and judgments of any kind whatsoever, and to release J. B. Grant absolutely from any and all liability on debts of any kind, for which he would be liable as a stockholder of said corporation."

There was a further provision that "the parties of the second part should defend all suits or actions which may be brought against said J. B. Grant as an officer or stockholder of said English-Grant Lumber Company, and "assume all indebtedness incurred on account of such suits, and to pay all judgments that are taken against him as an officer or stockholder of said company."

On the same day the English-Grant Lumber Company executed to J. B. Grant its promissory note for $2,000, which was endorsed by Chris Ledwidge and E. Y. English.

This suit was originally instituted in the circuit court, in the year 1909, against the English-Grant Lumber Company and Chris Ledwidge and E. Y. English. Later a receiver was appointed for the English-Grant Lumber Company and this cause was transferred to chancery. There, in an amended and substituted com-

plaint, the appellant sets out the note and contract sued on and asks for judgment for the amount of the note and also to recover the sum of $1,667.47, the amount of a judgment which the receiver of the English-Grant Lumber Company had recovered against appellant upon his unpaid subscription to the capital stock of said corporation, and also for the sum of $250 attorney's fee, which appellant had agreed to pay in the action against him by the receiver.

Appellant set up the contract and note as exhibits to his complaint. He alleged that English and Ledwidge had refused to defend the suit wherein appellant was sued for his unpaid subscription and refused to pay the judgment that had been rendered against him, thereby causing him to have to pay the sum of $250 for attorney's fees, and that he would be compelled to pay the sum of $1,667.47, the judgment that had been rendered against him in favor of the receiver.

The answer, among other things, admitted the execution of the note and contract set out in the complaint, but alleged that they were executed with the distinct understanding and agreement that the assets of the corporation were sufficient to pay all its outstanding obligations, and upon the statement by Grant that a number of bills had been paid which were not paid; that Grant had made certain statements that were not true, and that Ledwidge, relying upon these statements as to the condition of the corporation, signed said note and contract, and that the consideration for the execution of said note and contract had failed; that the English-Grant Lumber Company was placed in the hands of a receiver, and that on account thereof the defendant, Ledwidge, was compelled to pay several of the debts of the corporation out of his own personal funds.

The answer admitted the rendition of the judgment against Grant in favor of the receiver, but averred that the judgment had not been paid. The answer further alleged that the appellant, plaintiff below, was informed of the financial condition of the corporation, and that

he made misrepresentations as to its financial condition by which appellee Ledwidge was induced to execute the note and contract. The answer further denied that appellant Grant bought the stock with the understanding that it could be returned within one year, and denied that Grant tendered the return of the stock and demanded the return of the money, and denied that appellees agreed to return to Grant the money he paid for the capital stock in said corporation by note or otherwise.

The cause was heard upon the depositions of appellant and appellee, Ledwidge, and also upon their oral testimony taken before the court.

The testimony by both of the witnesses is somewhat voluminous, but we will mention in the opinion only such parts of it as we deem essential for the determination of the issues involved, omitting the testimony in detail.

The chancellor made a general finding in favor of the appellee, and dismissed appellant's complaint for want of equity, and this appeal has been duly prosecuted.

H. E. Rouse, John P. Streepey and *Edward B. Downie,* for appellant.

No fraud or misrepresentation on the part of appellant is shown in the testimony. In view of appellee's close connection with the company as president, director and manager of the financial end of the business, his accessibility to the books of the concern at all times, which he could examine whenever he saw fit, it is unbelievable that he could have been misled. But even if he had been misled, it was manifestly through his own neglect to advise himself of the facts, and he can not now complain. 89 Ark. 309-315; 13 Wallace, 379; 99 Ark. 438, 442.

As a director he is conclusively presumed to know the pecuniary condition of the company. 38 Ark. 17, 25.

Appellant's statement is undisputed that he did not make the statement himself, but only assisted English, for whose partial benefit it was being made, in making up the statement. There is no ground for rescission of a contract, without a conclusive showing that the person

who made the statement knew it was false, and made it with the intention to mislead. 97 Ark. 15.

The record will not sustain the proposition that there was a mutual mistake inducing the execution of the note and contract. It was contemplated at the time appellant went into the company that he should have the right to withdraw within one year, and the execution of the note and contract was only carrying out the initial intention of the parties. 89 Ark. 313; 71 Ark. 614; 83 Ark. 131, 133.

Bradshaw, Rhoton & Helm, for appellee.

It is immaterial what name is given to the declarations made by appellant, and the statement furnished by him to appellee, the facts are, as is shown by the proof, that they were not true. The chancellor's finding will be sustained unless clearly against the preponderance of the evidence. 89 Ark. 309.

The presumption as to appellee's knowledge of the financial condition of the company arising from his being a director in the corporation, would apply in the case of any representations he might make to any third person, but this case does not present such a situation. The means of information were not open to both parties alike, in this case. Appellant was secretary and paymaster of the corporation. He alone knew the debts that had been contracted, what debts had been paid, and whether or not there were sufficient funds in the bank to pay the outstanding checks. Moreover, appellee stated to appellant that he could not rely upon the books but must have a statement from appellant showing the financial condition of the company.

If appellant made the representations not knowing whether or not they were true, but asserted them to be true, he is just as liable as if he had made them fraudulently and with intent to mislead appellee. 97 Ark. 15; 99 Ark. 438; 82 Ark. 20; 100 Ark. 147; 47 Ark. 148.

WOOD, J., (after stating the facts). The appellant contends that the appellee, Ledwidge, is liable on the contract entered into on the 29th day of January, 1908, at the organization of the corporation, whereby it was

agreed between English and Ledwidge, parties of the first part, and J. B. Grant, party of the second part, "that the said Grant has the option at the expiration of one year from that date to return the stock in the English-Grant Lumber Company and receive therefor his said sum of $5,000 without interest."

Counsel argue that this is the contract upon which the note for $2,000 is based, and that no fraud or mistake induced its execution. No recovery can be had upon the contract of January 29, 1908, for the reason that under the terms of the contract itself appellant Grant had the option to retire one year from the date of that contract, and he could not therefore, before that time, demand of Ledwidge and English the return of the amount of money he had paid in under that contract, upon his offer to surrender the stock which he had received in the English-Grant Lumber Company.

There is no allegation and no proof that the contract of January 29, 1908, was entered into in fraud of appellant's rights, or that he was induced to enter into said contract upon fraudulent representations made by English and Ledwidge. Appellant does not seek to repudiate that contract and to rescind the same for fraud and to sue for a return of the money which he had paid into the English-Grant Lumber Company upon grounds that there had been a breach of said contract; but, on the contrary, he alleged that the contract was in existence and was the basis of the note and contract in suit. Counsel misapprehend the effect of the contract of January 29, 1908, which, as we have stated, permitted him to exercise his option to retire one year from the date of the contract, but not before that time. So the issue in this case is narrowed to whether or not the appellant has the right to recover upon the contract and note executed on May 8, 1908, as set up in his complaint.

Appellee defends on the ground that the note and contract were executed with the distinct understanding and agreement that the assets of the corporation were sufficient to pay all its outstanding obligations, and that

appellant, being informed of the financial condition of the corporation, had made misrepresentations as to its financial condition by which the appellee, Ledwidge, was induced to execute the note and contract.

Concerning the execution of this note and contract, the appellant testified substantially as follows: That he could not get along agreeably with English and Ledwidge and was to withdraw from the company under agreement. The company at that time had enough money in cash to pay him for his stock. Most of it was in notes and checks. "The notes of the Central Lumber Company," says appellant, "were to be turned over to me, and the Central Lumber Company owed the English-Grant Lumber Company $1,930 in notes and another $1,000 in cash. Chris Ledwidge was to negotiate for the money on the notes of the Central Lumber Company to pay me out. I never got the money. So they paid me that note in payment of my stock when I sold the stock to them. They gave me this note and I accepted it for fifteen days. Mr. Ledwidge said he would negotiate the note and pay me in cash for the stock. He didn't do it. Then he gave me that note, the one I am suing on. I don't remember that I made any statement to Chris Ledwidge or E. Y. English with reference to the financial condition of the English-Grant Lumber Company, because Mr. English was as familiar with the business as I was. I didn't tell them I had paid the debts of the company, and didn't tell them that there was any cash in the bank. I don't remember that I told English and Ledwidge that there was enough bills and accounts receivable to pay all the debts of the company. I won't swear to that, as I don't remember. Mr. Ledwidge knew about the business. He knew about the condition of the company. He knew through Mr. English, and sometimes he asked me about it and I gave him my knowledge. At the time I was transferring the stock Mr. English made out the statement, and he and Mr. English understood very thoroughly about it. I was with Mr. English when the statement was made. It was

presented by Mr. English. It was a statement of everything in connection with the business. It was a statement of the financial condition. I assisted Mr. English in making it up. I understood it was made up for the purpose of having this trade go through. As far as I know about it, the statement was all right, true, of course. I didn't tell Ledwidge that certain bills had been paid that had not been paid. I didn't tell him that certain checks had not been drawn on the account when as a matter of fact they had been drawn on the account of the corporation. I didn't tell Ledwidge anything with reference to the financial condition of the corporation which was not true. The note sued on here and the contract which went with it constituted our entire agreement. This instrument (referring to the statement) is a carbon copy of the original list of assets and liabilities of the English-Grant Lumber Company, which Mr. English and I prepared, and which Mr. English submitted. As far as I know, the statement attached to my deposition is true, as to the condition of the company on May 8, 1908. It was as near as I could get it. I was secretary and had charge of the books, accounts and papers of the company. I was active in the management of the affairs of the company. I understood that they were the assets and liabilities of the company on the statement Mr. English made out."

Further along in his testimony he states: "Ledwidge said he would be willing to give me back the $2,000 and let me out. I didn't say anything about the condition of the business. The statement here in evidence was not made to serve any purpose so far as my contract was concerned. It was simply taken off as a preliminary to find out how the books stood with respect to the condition of the company. I think we all thought it represented the condition of the company."

Appellee testified substantially as follows: "He (appellant) agreed to take a sixty-day note from English of the English-Grant Lumber Company. I told him 'if they can pay you in sixty days they can pay you in

fifteen or ten days.' He came back afterwards and had that note, and I said that if these statements that he had given me, the statements of the financial condition of the company and that he and English had checked up and gone over, were correct (he was secretary and knew all about the business) * * * I would endorse it. We both endorsed it, and then he got a contract from us that we would pay this, etc. In other words, if what had been given me were the facts in regard to the company I was to carry out the agreement that I made."

Again Ledwidge testifies: "That is the transaction; he sold it to the English-Grant Lumber Company and took an English-Grant Lumber Company paper for it, and I endorsed that paper upon the condition that he said the company was in. He said there was plenty there to pay everybody out, and really it looked like it was on the point of liquidation. That is what I hoped to do with it."

Again: "In order to get me to endorse the note Grant represented to me that the company was solvent and was in ample shape to pay all its debts and had plenty of assets to pay them with. It was his business to know the company's financial condition."

Again: "He (Grant) represented that there were sufficient assets of the English-Grant Lumber Company, consisting of notes and accounts, to more than pay all the liabilities of the company. He made a statement to me showing all the cash on hand, and that and the notes and accounts were sufficient to pay all of the debts of the company. I relied on the truth of his statements when I endorsed the note. I would not have done it otherwise. The statement was evidently not true."

Continuing his testimony, he says: "At the time I signed the note it was understood between Grant and myself that the assets of the company, exclusive of the mills and the timber and lands, were sufficient to pay all of the debts of the corporation, and that I would execute this short time paper so it could be paid out of the assets of the company. When Grant told me that the state-

ment he made contained all of the liabilities of the corporation, we owed for lumber something like $700, and owed the Peoples Savings Bank about $700. In other words, to make a long story short, his statement to me was not a correct statement of the condition of the company. I relied upon him for a correct statement. Upon investigation immediately afterward I found that he had omitted liabilities of the company in excess of $2,000. Mr. Grant was in active charge of the company. I had nothing whatever to do with the management of it."

Appellee further testified that he told Grant as follows: "If they (the corporation) can settle with you in sixty days they can settle with you sooner. We will just make it ten days and grind this thing right straight through. I want to look at the accounts and see if they are like you boys say they are, and if we can let Grant out and pay him off we will do it. We went over and looked at the books, and they said they were in this condition. I said 'I would like to get a statement to that effect. In the meantime make up your papers.' The next day, or whenever it was, I signed the note and the agreement, with this understanding, that there was plenty of money to pay all the debts and leave them in the clear, and we would be like we started. This was the agreement I had with him."

It will be seen from the above that the testimony of the appellee, Ledwidge, is clear and unequivocal to the effect that he executed the note and contract upon the representations of appellant and with the understanding between them that the assets of the corporation were sufficient to pay all its debts.

The testimony of the appellant, on the other hand, to say the least of it, is confused and in places apparently contradictory. For instance, in his cross examination in his deposition, speaking of the financial statement, he says: "I understood it was made for the purpose of having this trade go through." But, in his testimony given before the court, he states: "The statement here in evidence was not made to serve any pur-

pose so far as my contract was concerned." There are other apparent inconsistencies and contradictions in the testimony of appellant, but it could serve no useful purpose to point these out in detail.

We are of the opinion that the chancery court was warranted in finding that the note was endorsed and the contract executed by the appellee upon representations made by the appellant and upon an understanding with him to the effect that the assets of the corporation in excess of its liabilities were sufficient at that time to pay the note in controversy, and upon the representation made by the appellant that the statement furnished appellee reflected the true financial condition of the corporation at the time the statement was made. This finding of the chancellor was certainly not against the clear preponderance of the testimony.

True, appellant testified that Ledwidge was thoroughly familiar with the books of the company and its business, and had access to the books, but his own testimony and the testimony of the appellee shows that appellant was in charge of the books as secretary of the company and that he was in the active management of the affairs of the company. The testimony of the appellee shows that he was unwilling to sign the note and contract until the financial statement of the corporation had been furnished him, and the testimony of the appellant shows that the financial statement was made for the purpose of "having the trade go through." Appellee testified that he relied upon appellant furnishing him a correct statement, and he relied on the truth of appellant's statement concerning the financial condition; would not have endorsed the note without it.

This is not a case for the application of the doctrine of a reformation of written instruments. Therefore, what is said in *McGuigan* v. *Gaines,* 71 Ark. 614, and *Cherry* v. *Brizzolara,* 89 Ark. 309, as to the character of the proof necessary for the reformation of written instruments by parol evidence is not applicable here. This case, on the facts, is ruled by the principle announced in

the recent cases of *Hunt* v. *Davis,* 98 Ark. 44, and *Haldiman* v. *Taft,* 102 Ark. 45. In the latter case the court, speaking of certain representations made in a trade concerning the worth of certain stock, said: "If he (the seller) 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."

Appellant claims that any representations he made to appellee concerning the financial condition of the corporation could not have misled the appellee, and that appellee had no right to rely upon same, for the reason that he had the same means of information that appellant had and the same access to the books, and knew as much about the financial condition as did appellant. But the evidence does not warrant this conclusion. While appellee could have looked at the books of the corporation, he did not have charge of the books, whereas appellant did have the custody of the books and papers and was in the active management of the affairs pertaining to the oversight of the books and keeping the same in proper condition. Appellee was not negligent in his failure to consult the books of the corporation to ascertain whether or not the financial statement was true, but he had the right, under the circumstances, to rely upon the representation of the appellant that the same was true.

Appellee, by his conduct with reference to the financial statement, notified the appellant that he was relying upon his furnishing a correct statement. While there

was no legal fiduciary relation between appellant and appellee, still, under the circumstances, appellee had the right to rely upon the statement of appellant as to the financial condition of the corporation, because, according to appellee's testimony, which is not disputed, he made inquiries of appellant and gave him to understand, in effect, that he was going to rely upon the truth of the statement that appellant furnished.

Mr. Pomeroy says: "Not only where the vendor thus occupies a fiduciary position towards the purchaser, independently of the sale, but also when, in the very contract of sale itself, or in the negotiations preliminary to it, the purchaser expressly reposes a trust and confidence in the vendor, and when, from circumstances of that very transaction, or from the acts or relations of the parties in connection with it, such a trust and confidence reposed by the purchaser is necessarily implied in the contract of sale, it is the duty of the vendor to make a like disclosure, and his failure to do so is a fraudulent concealment." 2 Pom. Eq. Jur., § 904, p. 1617.

The circumstances under which English and the appellant made the statement and furnished the same to the appellee for the purpose of having him rely on the same, and to influence him to endorse the note and execute the contract, were such as to advise appellant that appellee was relying upon appellant's peculiar knowledge of the facts disclosed by the statement which appellant was furnishing "for the purpose of having the trade go through." See *Jarratt* v. *Langston,* 99 Ark. 438.

Appellant contends that the appellee is not entitled to recover because the appellant made the statement believing the same to be true. There was testimony by both appellant and appellee to the effect that the appellant believed that the statement was correct and that there was no actual intent upon his part to mislead appellee. In other words, that there was no dishonest motive upon appellant's part in making the representation contained in the statement, although same proved to be untrue. But, upon this point, Mr. Pomeroy states the

doctrine as follows: "If a statement of fact, actually untrue, is made by a person who honestly believes it to be true, but under such circumstances that the duty of knowing the truth rests upon him, which, if fulfilled, would have prevented him from making the statement, such misrepresentation may be fraudulent in equity, and the person answerable as for fraud, forgetfulness, ignorance, mistake, can not avail to overcome the pre-existing duty of knowing and telling the truth." 2 Pom. Eq. Jur., § 888, p. 1584. See also *Haldiman* v. *Taft, supra.*

The decree is correct, and it is affirmed.

EAGLE v. PETTUS.

Opinion delivered July 14, 1913.

1. SPECIFIC PERFORMANCE—CONTRACT WITH OPTION TO PURCHASE—EVIDENCE.—Evidence of an extension by parol of a written lease with an option to purchase, which has expired, in an action to enforce the same by specific performance, must be clear and unambiguous, and must be either admitted or proved with a reasonable degree of certainty. (Page 321.)
2. SPECIFIC PERFORMANCE—ABANDONMENT—EVIDENCE.—In a suit to enforce a lease with an option to purchase, the evidence held to show an abandonment or rescission of the contract, so that the tenant held as tenant and not as purchaser under the same. (Page 322.)
3. STATUTES OF FRAUD—SALE OF LAND—NATURE OF TITLE.—Where the appellee continued in possession of lands as tenant and not as purchaser, under a lease with an option to purchase, which had expired, and attempted to prove an extension of the same by parol, the appellant can not invoke the statute of frauds, because there was no equitable title in the appellee. (Page 323.)

Appeal from Lonoke Chancery Court; *John E. Martineau,* Chancellor; reversed.

STATEMENT BY THE COURT.

On the 15th of January, 1890, L. W. Monroe entered into a contract with George Pettus and Pete Pettus whereby Monroe agreed to sell a certain tract of land in Lonoke County for the consideration of $1,500, evidenced by a promissory note for that amount, with interest from maturity at 10 per cent per annum. The contract pro-

vides "that George Pettus and Pete Pettus shall pay all taxes assessed against the land each year and keep the land and premises in good repair and cultivate the same in a good and husbandman-like manner, and pay to L. W. Monroe on the 1st day of November, 1890, and each year thereafter the sum of of $150 until the year 1894, and on the 1st day of November, 1894, if the said George Pettus and Pete Pettus shall have paid on the 1st day of November of each and every year from 1890 unto the year 1894 the sum of $150 and all taxes assessed against the land, and shall on said 1st day of November, 1894, pay to said L. W. Monroe the sum of $1,500, as well as the $150 interest for 1894, then the said L. W. Monroe shall execute and deliver to George Pettus and Pete Pettus a deed conveying said land. It is the intention of L. W. Monroe to let and lease to George and Pete Pettus said land with the privilege of paying for the same and buying it in five years, and the said sum of $150 is the interest on the $1,500." If they shall fail to keep the place in repair and pay all taxes, and the sum of $150 in each and every year on the first day of November in each and every year from 1890 to 1894 inclusive, "then and in that event the obligation of said L. W. Monroe to make them a deed shall cease, and the sum of $150 a year and taxes assessed against the land, being a fair and reasonable rent for the land, the payment thereof shall be considered the rent thereof for such years as the same shall be paid."

On the 2d of May, 1912, George Pettus instituted this suit against the appellants. He set up the contract in his complaint and alleged that under the contract he was to have title when the $1,500 note was paid; that he was put in possession of the land under the contract, and has held possession thereof ever since; that when the $1,500 note came due he could not pay it, but Monroe told him he could have as long as he wished to pay it; that after he had made valuable improvements on the land and cleared up fifty acres or more and the place was bringing in a better income Monroe suggested that he

had better pay $50 on the principal every year, which he did until Monroe died; that he could have got the money to pay the debt if Monroe had demanded it, which he never did, but, on the contrary, gave him to understand that he preferred the interest; that Monroe died in 1911, and thereafter he (Pettus) tendered the heirs of Monroe, the defendants, the money due and demanded a deed, but they refused to accept the money and refused to make him a deed; that Monroe kept the account between them. Pettus alleged that he was ready to pay whatever may be found due upon the land. He asked that the court declare what was due, and that upon its payment the plaintiff be given a deed.

The defendants (appellants) answered, alleging that the plaintiff held the land under the contract until the year 1901, when he was behind in the payment of interest in the sum of $846.29; that he had paid no part of the principal; that at that time the contract of purchase was abandoned by the plaintiff without his ever having paid the balance of the interest or any part of the principal; that thereafter the plaintiff occupied the land as a tenant. They denied the other allegations of plaintiff's complaint, and alleged that the claim set forth by him was a stale demand and that it would be inequitable to permit the plaintiff to assert a claim under a contract more than twenty-two years after its execution and after the death of the party with whom it was made.

There is no dispute about the contract, and that appellee took possession under it. His testimony, in substance, is that he paid the interest every year for five years. At the expiration of five years he went to Monroe and told him if he wanted his money he could get it. Monroe said: "You need not be uneasy; all I want, George, is my money. You just go ahead, and as long as you pay me my money you will stay there, and I will never bother you."

Appellant shows that he had cleared fifty or sixty acres on the place since he had lived there. He did what little building there was, fencing and keeping the place

up. He paid $150 interest every year for thirteen years. After thirteen years Monroe said he thought appellee should pay a little more to begin paying something on the place. Monroe said $50 more paid every year on the place would make appellee more able to pay the main note when Monroe got ready. Fifty dollars more was to be paid yearly on the main debt. After that he began paying Monroe $200 every year.

Appellee went to see Monroe when in poor health and Monroe requested appellee to come around and "straighten up." He went back afterward to see him, but Monroe was not able to attend to business that day, and appellee didn't get to see him again.

There were about thirty acres cleared on the place when appellee went on it and commenced clearing it up, and he cleared up a little every year.

Appellee states that after the death of Monroe he didn't go to Monroe's son-in-law, Will Oldham, and tell him that he wanted to buy the land in controversy. He states that after Monroe's death he gave Oldham a note for the rent for 1911. "It was an interest note that I gave him." He told Mr. Monroe in the presence of his daughter, Mrs. Parker, that he would get the contract and bring it back to him for a settlement. That was the first time Monroe ever mentioned to witness about bringing up the papers and straightening up. Monroe always said, "You bring up your papers and let's straighten."

Witness had heard that somebody had bought the place. Monroe told witness as follows: "You can sell the place if you want to and all that is over what you owe me you can have."

When appellee gave the rent note to Oldham in 1911 "he didn't tell Oldham that he claimed the land as a purchase, but that was what he was doing. The note that he gave Oldham was not for rent but for interest note. It was all interest except $50 that was to be paid on the principal. Appellee testified that in the spring of 1905 he didn't enter into a contract with Monroe to lease the property for five years, and he stated that

Monroe said "I will give you five years more." Appellee stated that that was what Monroe did all the time. When he went to him and told him that he would pay it out Monroe said, "Go ahead, and I will give you five years longer." "When this was up he told me he would give me five years longer." Monroe never paid appellee for any improvements he put on the place.

One witness testified that he went to Monroe in the fall of 1909 and wanted to buy the land and Monroe told witness that he was under contract with Pettus for the land. Monroe told witness to go over to see Pettus and get him to go and make a quitclaim deed and he would turn him over all the papers he held against him. Witness went and told the negro and urged the negro to do so, but could not get him to say what he would do.

Another witness testified that he tried to buy from Monroe three acres of the place occupied by George Pettus, which joins witness on the west, for the purpose of building on it, and that Monroe informed witness that he could not give witness any satisfaction about it "because he had sold the place to George Pettus and George Pettus had been paying him up the interest very well, and that it was just the same as rent and he couldn't sell it to me." He told witness that he had sold the place to Pettus, and that there had been several men there after him for it, but he didn't have anything to do with it; that George had been paying the interest up; it was just the same as rent. He told witness that Pettus "had been keeping the interest up." He said that "George had been on the place a good while and he didn't care to dispossess George of it; there had been several there after it." Witness never named it to George Pettus. Witness stated that a month or two ago Pettus came to his house and told witness that he might be wanted as a witness. Then witness says he was at church when he and Pettus were talking. He told Pettus what Monroe had said. He said that they got to talking and witness brought up the question. He knew it was on Sunday, but couldn't tell exactly what time a day it was, whether

it was before or after dinner; it had been about two months previous to the time witness was testifying.

W. W. McCrary testified that Pettus had been one of his customers for about fifteen years. Witness paid off a number of the interest notes to Monroe. He never had any talk with Monroe in regard to it but understood from Pettus that the payments were interest on the place.

Another witness testified that in the spring of 1909 he went to Monroe to buy two acres of a piece of land that George Pettus was in possession of for a graveyard. Monroe told witness that he didn't know whether he could sell the land or not right then. The reason was that he had contracted or made a sale to George Pettus about nineteen or twenty years ago when he sold the land for $1,500, and Pettus had stayed on the land and was improving it and the land had become more valuable several years after that, and he told George that he thought he ought to pay more as he had not paid the $1,500. Monroe said he just charged him rent, and he thought it was worth more; that he would charge him $200 and call it rent, he said, on his books. Monroe told witness that he would have to get a deed from George; for witness to "go to George and get him to bring his wife up there and sign their right away."

On cross examination this witness testified:

Q. He told you to go and see George, and it would be all right if it was all right with George? A. Yes.

Q. You didn't go to see George? A. No.

Q. Why was it, after you found a way pointed out to you to get that graveyard, you abandoned the idea and never pursued it? A. To tell you the truth, he went on talking and said he would not like a graveyard on his land; he said it would ruin the sale of it.

Q. Why did he care about the sale of it, if he had already sold it? A. I don't know about that.

Several witnesses testified to the effect that Major Monroe's business was that of loaning money, selling property, renting land, etc., and that his policy was to let the debts run along as long as they were secured, if

the interest was paid. "He was satisfied with the interest being paid promptly." He didn't insist on payment of the principal when it became due if the party was paying the interest promptly.

W. P. Fletcher, a witness on behalf of appellants, testified that he had lived at Lonoke for many years, and was in the real estate business. He talked with Pettus and Monroe about the land. The way the conversation came up was this: "I said to George, 'Why don't you get Major Monroe to build you some houses? You are living here until you have just gone out of doors.' George said, 'Yes, sir; but I can't get him to do it.' I said, 'I will see him the first time I get a chance to see him about it, and see if he won't build you some improvements here.' A few days after that, I don't know how long, but it was fresh in my mind, Major Monroe and George Pettus were in my house for some reason, and I got at him at once in this language: 'Major, why don't you build this old negro some houses on your place there? He has absolutely lived there until he is just living out of doors. They have gone to nothing; they have gone to rack.' He said, 'Why, he is paying me my little rent for the place, with the understanding that he keep up the improvements himself.' This statement Major Monroe made in George's presence. This was some time in the last three years, in my office here in town. The three acres that Nelson Herron said he wanted to buy from Mr. Monroe, to build on, is half a mile away from his improvements. In the last ten years there have been no substantial or permanent improvements made on the place. When I spoke to George down at the place about the Major building him some houses and make some improvements on the place he said he had been at Major Monroe to build him some houses and make some improvements. He didn't tell me he was renting from Major Monroe."

W. K. Oldham, a son-in-law of Monroe, was administrator of the estate, and was interested in the litigation to the extent that his wife was one of the heirs. He

testified that in the spring of 1907 he was looking after the land in controversy for Major Monroe. Major Monroe told him that at one time he had sold it to George Pettus, but that the contract had already been forfeited and that George was then renting it. He said that Monroe stated that George had failed to bring his rent note, and wanted witness to see about it and to get the old contract from George, and return it with the rent note, and to have George sign the note. Witness saw Pettus, told him what Monroe wanted, and asked him to fix the rent note, or they would rent the place to somebody else. Pettus replied: "Well, now, Mr. Oldham, I have got another year's lease on that. I had it leased for five years, and I have got another year, and I thought any time would do to go to see Mr. Monroe." Pettus further stated, in regard to the old contract, that "his boy had gone away and carried it off in a trunk, and that he could not find it, and that is why he had not delivered it to Major Monroe long ago; that that contract was cancelled, and that he was renting the land from the Major."

Witness continued: "I afterward saw Monroe, and he said George had been up and given his rent note for that year." After Monroe's death, in going through his papers, witness found that Pettus had not given any rent note for 1911. Major Monroe died in March, 1911. Witness drew up a rent note for that year, and Pettus signed it, and that fall it was paid through Mr. McCrary. Along about Christmas, Pettus was over at witness's place, and said that he wanted to stay on the place where he was living and wanted to make some arrangements about buying it. When demand was made on Pettus for the rent note of 1911 he didn't claim in any way that he held the land under purchase. This witness explained that Monroe was methodical in his business methods; that he kept all of his papers in a roll-top desk or in his iron safe, and that there was an old desk there called the "secretary." In his business transactions witness never knew Monroe to keep any valuable papers in that old "secretary." Witness had been married nineteen years, and had an

intimate knowledge of Major Monroe's business transactions; was at his house often and knew where he kept his business papers.

Another witness, a grandson of Major Monroe, stated that he was assistant to the executors in getting up the inventory and papers of Major Monroe after his death. He stated that he found no live papers or valuable papers except those that were contained in the safe or roll-top desk, except two or three notes that had been turned over to lawyers for collection. He found the note and mortgage, the instruments shown here, in the old "secretary." He never saw anybody use it or go to it for anything as long as he was around his grandfather's. He found the note and contract in evidence in a pigeonhole in his old "secretary." The package was apparently very old, being yellow and filled with dust. It was wrapped in a loose bundle with some old inventories showing cotton sales and some receipted bills. The package was loosely bound. The papers in that package were dated 1891, 1892, 1893, and, as witness supposed, in 1894. Witness discovered this old contract and note in an old bundle of papers that "ran back seventeen or eighteen years." There was not a single paper of Major Monroe's estate in that old "secretary" that was a live matter, and not a mortgage or any other paper that represented an asset of his estate.

Mrs. Elcan testified that she was a daughter of Major Monroe, and kept his books for many years. She says that the books show that on the 12th day of December, 1901, there was a balance against George Pettus of $846.29. Pettus owed her father that sum on that date. That account was dropped, and a new account started in 1902 showing the transactions after December 1, 1901. The $846.29 was never carried into the account of 1902. Her father dropped it because he thought it was useless to carry it on; he didn't do anything with it. Pettus was never charged with taxes on the land after 1901. On page 159 of the ledger, there is this entry in witness's handwriting: "To rent above land for 1905, $250. Pet-

tus leased above land for five years for $250 a year, and he is to keep up the place and pay taxes."

Witness heard Pettus make the contract. She didn't remember exactly for how many years, or the land, but did remember Pettus making the contract with her father, and her father raising the rent. The memorandum on the ledger was made by witness on that book some time between January 17 and August 7, 1905. Witness stated that for a number of years prior to her father's death, George rented the land like anybody else would do. She heard him speak of leasing the land, and never heard him, in any of the conversations, claim to hold the land in any way except as a tenant. She took charge of the books about 1898, and in the fourteen years since she had never known her father to go to that old "secretary," and get a note or mortgage or any kind of paper. He kept his papers in the desk where he kept his books in his office, and in his iron safe.

Two rent notes were produced and identified by this witness, and they read as follows: "5-3-1907. On November 1, next, I promise to pay to the order of L. W. Monroe, $200 for place known as Gayner Gray place, rent for 1907."

"February 9, 1910. On November 15, next, I promise to pay to the order of L. W. Monroe the sum of $216, this being the rent for the present year of the southwest quarter of section 23, township 1 north, range 9 west."

When Pettus signed the rent note for 1911, he said nothing about claiming to own the property.

It was shown that the rent notes dated January 15, 1890, 1891, 1892, 1893 and 1894, had endorsed across each note in red ink the following: "This note is given for rent of the southwest quarter of section 23, township 1 north, range 9 west, or interest on the purchase money."

Another witness, daughter of Major Monroe, testified that in the spring of 1910, in a conversation she heard between Pettus and her father, her father told Pettus that he wanted all things settled up, and asked Pettus to bring the papers, and Pettus said, "All right,

Major, I will try to look it up." And in none of the conversations that she heard did Pettus ever claim that he was holding the place under contract. This witness also testified that her father kept no live papers in the old "secretary."

Pettus, recalled, stated that if Monroe made the statement that Fletcher testified he did, that he (Pettus) never heard it. He also denied that he spoke to Mr. Fletcher down on the place. He further stated that when he gave the rent note for 1910, Monroe never said anything about his having broken the contract, and that he wanted the land back.

The court found that there was due from Pettus on the contract, including taxes, $1,789.39, and that plaintiff, having paid said amount into court for the use and benefit of the defendants, the court decreed that the title be divested out of the heirs of L. W. Monroe, and be vested in the plaintiff.

J. H. Harrod and *M. E. Dunaway,* for appellants.

The finding and decree of the court is clearly against the preponderance of the evidence. Long before the death of Major Monroe, Pettus abandoned the contract of purchase, and continued thereafter to hold the land as tenant. The case is here for trial *de novo.* The decree should be reversed and the cause dismissed. 98 Ark. 459.

Trimble & Trimble, for appellee.

1. The evidence clearly shows that there had been a sale and purchase of the land, and afterward a waiver of forfeiture on the part of Major Monroe. It devolved upon appellants to show by a clear preponderance of the evidence that Pettus had forfeited his contract; otherwise they are precluded from enforcing the forfeiture. 1 Pomeroy, Eq. Jur., 452; 59 Ark. 405; 75 Ark. 410; 83 Ark. 524; 87 Ark. 393; 89 Ark. 204; 102 Ark. 83.

2. There was never an abandonment by Pettus. 1 Cyc. 4; *Id.* 5; 59 Mont. 558.

3. If there was a contract of lease such as is re-

ferred to by Mrs. Elcan, there was no instrument of writing from Pettus to Monroe releasing the original contract of purchase, and, Pettus, being in possession of the premises, it falls within the statute of frauds, and is not enforcible. Kirby's Dig., § 3654, subdiv. 4; Brown on Statutes of Fraud, § 229; 91 Ark. 140; Smith on Law of Fraud, § 363; 106 Ark. 332.

J. H. Harrod and *M. E. Dunaway,* in reply.

1. If plaintiff *abandoned* his contract, no proof of cancellation is required.

2. The notes given in 1907 and 1910 for rent are *written contracts of tenancy,* and comply in all respects with the requirements of the statute of frauds that the cancellation must be in writing.

WOOD, J., (after stating the facts). Appellee, by this suit, seeks specific performance of a contract for lease of land with option to purchase, which was entered into more than twenty-two years before the suit was brought, and about eighteen years after the contract had expired by its own terms. Appellee contends that at the expiration of the time for the performance of the contract, the forfeiture for a noncompliance with its terms on his part to pay the purchase money was waived, and that the contract was continued under an oral agreement with the vendor to allow appellee to remain in possession under the same terms for another five years, and at the expiration of that time that there was another waiver and a continuance of the contract for another five years, and so on until this suit was instituted, and that the time to which the contract had been extended by an oral agreement with Monroe, the owner of the land, had not expired at the time appellee instituted this suit. At the time the contract expired, appellee had not paid any of the principal of the note for the purchase money.

In *Meigs* v. *Morris,* 63 Ark. 100, we held (quoting syllabus): "In order that a court of equity may exercise its power to decree specific execution of a contract to convey land when there has been a part performance thereof, the proof of such contract must be clear and

unambiguous, and must be either admitted or proved with a reasonable degree of certainty."

The written contract between Monroe and the appellee having expired, the effort by the appellee is to extend it by parol agreement, and the rule above announced applies.

It could serve no useful purpose to discuss at length the evidence in the case. It is purely a question of fact as to whether appellee and Monroe abandoned the contract upon the failure of appellee to pay for the land, and whether, after its expiration, they agreed to enter upon a contract for leasing the lands to the appellee without an option to purchase.

We are of the opinion, after a careful consideration of the testimony, that a decided preponderance of the evidence shows that the contract giving appellee the option to purchase the land was abandoned, if not before, at least on the 12th day of December, 1901, for, on that date, it appears from the entries made in the books of Monroe by the bookkeeper, that there was a balance of $846.29 due from appellee to Monroe that was dropped from his account; that same was never paid to Monroe, or any part of it, and that after that time Pettus was never charged with any taxes on the land. It is unreasonable to conclude that Monroe would have cancelled this debt which was due him on the purchase of the land if he still intended to treat the contract for the sale of the land to appellee as in force; and the fact that after that time, no taxes were charged against him, which, under the contract, he was required to pay if the same was continued in force, shows that the contract for the sale had been abandoned. The fact, too, that there had been no improvements put upon the land by the appellee for ten years prior to the institution of the suit, tends strongly to show that appellee had abandoned his claim to ownership of the land; and the fact, established by the uncontroverted evidence, that this contract and note, yellow with age, had been relegated to the old "secretary," where none of the live and valuable notes and papers of

Monroe were kept, tends to prove that he didn't regard the original contract as any longer in force. And a circumstance which we regard as most cogent in establishing the abandonment of the original contract, and the entering upon a contract for the lease of the land by the parties thereafter, is the entry made by the bookkeeper of Monroe in his ledger between January 17 and August 7, 1905, as follows: "To rent above land for 1905, $250. Pettus leased above land for five years for $250 a year, and he is to keep up the place and pay taxes." This entry at that time shows clearly that the parties had abandoned whatever contract for sale there might have been, and had entered upon a lease for five years. Then, too, the notes that were in evidence, which were executed when the contract was entered into, under the express terms thereof, and by the endorsement thereon, showed that they were given "for rent or interest on purchase money." But such of the notes as were in evidence, that were executed after the expiration of the contract specified that they were given *"for rent,"* omitting the words, "or interest on purchase money."

The above testimony, showing circumstances about which there is no dispute, and the testimony in the nature of documentary evidence, taken in connection with the testimony of other witnesses, shows clearly that Monroe and appellee, long before Monroe's death, had treated the original contract for option to purchase as rescinded, and that appellee was holding the land as Monroe's tenant, and not as purchaser. The contract having expired without appellee's having exercised his option to purchase, as the proof shows, and appellee having thereafter continued in possession as tenant, and not as purchaser, he can not successfully invoke the statutes of fraud against appellants, for these facts show that there was no equitable title in appellee.

The decree is therefore reversed and the cause is remanded with directions to dismiss the complaint for want of equity.

HOME FIRE INSURANCE COMPANY v. WILSON.

Opinion delivered July 7, 1913.

1. TRIAL—DIRECTION OF VERDICT—MOTION BY BOTH PARTIES FOR PEREMPTORY INSTRUCTION.—When each of the parties to an action request the court to direct a verdict in his favor, and requests no other instruction, they in effect agree that the question at issue shall be decided by the court, and the court's finding has the same effect as the verdict of a jury would have had. (Page 326.)
2. APPEAL AND ERROR—REVIEW OF DIRECTED VERDICT.—In testing the correctness of the action of a trial court in directing a verdict for appellee, this court gives the evidence its highest probative value in support of the appellee's theory of the case. (Page 326.)
3. FIRE INSURANCE—VACANCY OF PREMISES—KNOWLEDGE OF AGENT.—The mere knowledge of the agent of a fire insurance company that the insured premises are vacant, and have been so for a longer period than that limited by the policy, is not a waiver of that provision of the policy, when no attempt is made to cancel it on that account. (Page 329.)
4. FIRE INSURANCE—VACANCY OF PREMISES—WAIVER.—When the local agent of a fire insurance company promises the owner to keep the premises insured, he does not waive the provision in the policy regarding liability in case of vacancy for a certain period, and his promise does not estop the insurance company from denying that a vacancy permit had been issued. (Page 329.)
5. FIRE INSURANCE—KNOWLEDGE OF AGENT—WAIVER OF PROVISIONS.—While evidence will not be received for the purpose of explaining or varying the terms of a written policy, the provisions of the policy may be and are waived if the agent has knowledge of the existence of conditions contracted against by the terms of the policy, and yet with the knowledge of their existence, issues the policy. (Page 330.)
6. FIRE INSURANCE—EXECUTORY AGREEMENT TO WAIVE PROVISIONS.—The executory agreement of the agent of a fire insurance company to waive future breaches, if such occur, is not enforceable. (Page 330.)
7. FIRE INSURANCE—PROVISION AGAINST VACANCY—WAIVER.—Where a fire insurance policy is issued and the premium is paid, and afterward the assured violates the provisions of the policy as to vacancy, creating a forfeiture, the insurance company having no knowledge of the same until after loss, does not waive the forfeiture by merely failing to return the unearned premium before suit is brought on the policy, nor is it precluded by such failure from setting up such forfeiture in defense of the suit. (Page 331.)

Appeal from Columbia Circuit Court; *George W. Hays,* Judge; reversed.

T. D. Wynne and *H. T. Harrison,* for appellant.

1. The rights of the appellees were forfeited by reason of the building being unoccupied and vacant, and remaining so for from three to five months prior to the time the fire occurred. The forfeiture became complete when the unoccupied condition of the building extended beyond a period of ten days, as provided for by the terms of the contract itself. 2 Clements, Fire Insurance, 367; 5 So. 768; 42 N. W. 630.

2. There is no merit in the contention that the forfeiture was waived by any act of the agent, Rhea. It is clear both from the language and express terms of the contract and from elementary law that he, a mere local agent, had no power or authority to waive the provisions of the policy against vacancy. 65 Kan. 373; 69 Pac. 345; 69 S. W. 42; 27 S. W. 122; 19 Cyc. 782, and foot note; 22 Pac. 1010; 7 N. Y. Supp. 589.

Appellees were bound by limitations upon the agent's authority as stipulated in the policy. 2 Clements on Fire Ins. 487, and cases cited in foot notes; 133 N. Y. 356; 54 Ark. 75; 32 S. W. 582.

There was neither an express nor implied waiver of the provisions against vacancy. It can not be said in this case that the local agent or any one representing the insurance company did any affirmative act which might have caused the insured to believe that the forfeiture would not be insisted upon. 87 Ark. 327; 86 Ala. 424. And it was not necessary to return or offer to return the unearned premium in order to plead the forfeiture as a defense. 87 Ark. 327.

C. W. McKay, for appellee.

1. Appellant's local agent at McNeil had authority to waive its right to insist upon a forfeiture of the policy on account of the vacancy clause in it. 62 Ark. 348; 63 Ark. 187; 71 Ark. 242; 88 Ark. 506.

2. Appellant's agent waived its right to insist upon a forfeiture on account of the vacancy clause in the pol-

icy. 82 Ark. 160; 123 Ala. 667; 75 Ark. 99; 88 Ark. 506; 87 Ark. 326.

SMITH, J. This suit was brought by appellees against appellant to recover $1,000 for the total destruction by fire of a dwelling house in the town of McNeil, Ark., on the night of the 28th of January, 1912, which the appellant, by its contract, agreed to pay appellees upon the destruction by fire of this building.

The appellant denied liability under this contract for the reason that the house was vacant at the time it was destroyed by fire, and had remained so for more than ten days prior to its destruction, in violation of the terms of said contract of insurance. The appellees admit that the house was vacant at the time it was destroyed by fire, and had been vacant for more than ten days prior to its destruction, but they say appellant has waived its right to insist upon a forfeiture on account of the violation of this part of the contract of insurance.

At the conclusion of the introduction of the evidence in the case, each party requested the court to give a peremptory instruction in his favor, and neither asked any instruction except that the court direct a verdict. In the case of *St. Louis S. W. Ry. Co.* v. *Mulkey,* 100 Ark. 71, it was said, to quote the syllabus of that case: "Where each of the parties to an action request the court to direct a verdict in his favor, and request no other instruction, they, in effect, agreed that the question at issue should be decided by the court, and the court's finding had the same effect as the decision of a jury would have had." The court directed the jury to return a verdict for appellees for the full amount of the policy, together with the statutory penalty of 12 per cent, and also fixed the attorney's fee at the sum of $150. The court's action in assessing the penalty and fixing the attorney's fee is not complained of except appellant says that neither should have been done, because a verdict for appellant should have been directed by the court.

In testing the correctness of the court's action in directing a verdict for the appellees, under the authority

of the Mulkey case, we give to the evidence its highest probative value in support of appellees' theory of the case. However, there are no serious conflicts in the evidence, and the facts may be stated as follows: The policy sued on was originally issued to one Ed M. Rhodes, who was then the owner of the property, but who sold and conveyed it to appellees, Wilson and Grayson. The policy was transferred to Wilson and Grayson, written consent therefor having been given by a Mr. Rhea, who was the company's agent, and endorsed upon the policy. Appellees were residents of Magnolia, while Rhea resided at McNeil, and the evidence is, that Rhea promised appellees that he would look after the insurance and keep this policy in force. They had spoken of taking out this insurance at Magnolia, where they could look after it, but Rhea agreed to keep this policy in force, and for that reason, they turned this piece of property over to him, and he agreed to look after it and to keep the insurance in force. Mr. Grayson testified as follows: "We arranged with Mr. Rhea to keep this place insured. We had the place right there, and were afraid we might overlook it, and made arrangements with him, and he said he would. We told him whatever was necessary to keep it insured, notify us and we would settle the bill." and upon his cross examination, he made the following answers:

Q. You stated in your direct examination that you had some kind of an agreement with Mr. Rhea to keep the property insured?

A. Yes, sir.

Q. What was that agreement?

A. Well, we were in there, me and Mr. Wilson, and told Mr. Rhea we had that piece of property over there, and wanted him to look after the insurance and keep that policy in force, and whatever the insurance—whatever the cost was—not to let it go out, but to notify us and we would pay it."

And he further said:

"I spoke to Mr. Rhea to do whatever was necessary to keep it in force, and we would pay the bill, and he agreed to keep this one in force, and we turned that piece of property over to him."

The testimony of Mr. Wilson was substantially to the same effect. Rhea testified on behalf of the appellees, and was asked:

Q. State to the jury whether or not you have ever been authorized to keep up the insurance on this place?

A. Well, I do not remember about the conversation, but, of course, I was supposed to do my part of it.

Q. What do you understand your part to be?

A. To do what they said to do.

The house was bought by appellees, not for their own use or occupancy, but as an investment, of which fact Rhea was apprised at the time the policy was assigned to appellees. The house was occupied at that time, but later became vacant, and had been unoccupied for from three to five months before the fire. Rhea was aware of the fact that the property was unoccupied, and had been requested by appellees to procure a tenant for the property.

The policy contained the following clause: "This entire policy, unless otherwise provided by agreement endorsed hereon, or added hereto, shall be void if the building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied, and so remain for ten days," but appellees insist that the acts, statements, and conduct of appellant's agent estop it from insisting upon a forfeiture on account of the violation of the vacancy clause of the insurance contract. In effect. its position is that the agent's promise to keep the policy in force is a waiver of the right to insist on a forfeiture on account of the violation of any condition or stipulation of the policy. That such a promise having been made in the inception of the contract, an agreement would be implied not to insist upon a forfeiture upon a ground of the existence

of which the company's agent was advised before the fire, but had made no attempt to cancel the policy.

Rhea was a local agent with authority to issue and countersign policies of insurance and to collect premiums, and had the right to issue vacancy permits which become effective when reported to and ratified by the company. But his issuance of a permit was subject to the company's approval, and if this approval was not given, the permit was annulled.

The rule is well settled that the mere knowledge of the agent that the insured property is vacant, and has been for a longer period than that limited by the policy is not a waiver of that provision of the policy where no attempt is made to cancel it on that account. 2 Clement on Fire Ins., page 389. But appellees do not base their right to recover upon that ground, their position being that their agreement with the agent is either a waiver of the provisions of the policy as a part of the contract of insurance, or, that, if not, the company is estopped to deny that a vacancy permit was, in fact, granted. It is not contended that anything was said between appellees and the agent in regard to the issuance of a vacancy permit, nor does the proof show for what length of time one might have been issued, nor whether a single permit would have been sufficient to cover the entire period of the vacancy. Appellees say that the facts stated imply an agreement upon the part of the agent to secure such a permit as may have been necessary, and estop the insurance company from denying that fact.

It can not be said that any act or declaration of the agent would make a contract of insurance between the parties other than the one evidenced by the policy assigned to appellees and sued upon by them. In the case of *Hartford Fire Ins. Co.* v. *Webster,* 69 Ill. 392, the facts were somewhat similar to those of this case, and the court there said (quoting syllabus): "What an insurance agent may say as to the effect or waiver of certain conditions in the policy of insurance while the contract is being made, can not be received to explain or

vary the effect of the written contract." But, while evidence may not be received for the purpose of explaining or varying the terms of the written policy, it is still well settled, by the decisions of this and other States, that these provisions may be waived, and are waived, if the agent has knowledge of the existence of conditions contracted against by the terms of the policy, and yet, with the knowledge of their existence, issues the policy.

But this is not the case of property being vacant at the time of the issuance of the policy, and of that vacancy being known to the agent issuing the policy, for, in such cases as stated, the authorities hold that the insurance company has waived the conditions of the policy against vacancy. Clement, on Fire Insurance, volume 1, page 418. Nor is this the case of an insured advising the company's agent of a condition which would work a forfeiture, if not waived, yet one which could and would be waived upon the doing of some act by the agent which the insured assumed, in reliance upon the agent's promise, was done or would be done, but which the agent had, in fact, failed to do, for, in such cases, the authorities hold that the agent's neglect does not invalidate the policy.

If, before the policy is issued, the agent has knowledge of some fact, circumstance or condition contracted against by the terms and provisions of the policy which he thereafter issues, such provisions of the policy are said to be waived. *New Hampshire Fire Ins. Co.* v. *Blakeley,* 97 Ark. 567; *Peoples Fire Ins. Asso.* v. *Goyne,* 79 Ark. 315. But an agent's executory agreement to waive future breaches, if any should occur, is not enforceable, for such an agreement is not a waiver of the effect of an existing condition, but is an amendment to the extent of such an agreement, of the terms of the written contract between the parties, evidenced by the policy of insurance. The understanding between appellees and Rhea, when given the highest effect of any inference that can be drawn from the conversation between them, is no more than an executory contract to keep ap-

pellees' insurance in effect, and to do whatever may be necessary for that purpose. A similar question arose in the case of *Home Fire Ins. Co.* v. *Scales,* reported in 15 Southern 134, where the proof was that a vacancy permit had been issued, but had expired, and where the court found that at the time of the fire, the house was vacant, and no permit was outstanding, waiving the vacancy, and where the insurance company's agent, who issued the first permit, testified that he would have issued another, but for the fact that he did not regard the house as vacant. Chief Justice Campbell, speaking for the court, said: "It was no part of his business, as agent for the company, to keep policies from being avoided by violations of their conditions, whatever obligations he may have assumed by his engagements to the insured, as to which engagements he could not bind the insurer. * * * If Hibler (the agent), knew the facts, and thought the house occupied, he was mistaken in his judgment of what was required to constitute occupation. Granting that his knowledge is imputed to the company, the case is not altered. Hibler may have been under obligations to Scales (the owner), and he may have disregarded it or erred in his judgment, and Scales may have cause of complaint against him, but, in all of this, Hibler was the friend and agent, if at all, of Scales, and not of the company. If Hibler, the agent, had done anything in his capacity as agent, after the house was unoccupied, to mislead the insured, the case would be different, but nothing of that sort occurred. There was silence, and that is never ground for estoppel except where it is a fraud which can not be predicated of this silence. The agent had a right to be silent, and give no notice as to the unoccupied condition of the house."

Appellees also insist that they should recover here because the unearned premium was not returned nor tendered, but this question was decided adversely to that contention in the case of *Capitol Fire Ins. Co.* v. *Shearwood,* 87 Ark. 326, where it was said: "Where a fire insurance policy is issued, and the premium is paid and

afterward the assured violates the provisions of the policy against incumbrances which creates a forfeiture, the insurer having no knowledge of the forfeiture until after the loss occurs, does not waive same by merely failing to return the premium before the suit is brought to recover the amount of the policy, nor is it precluded by such failure from setting up the forfeiture in defense to the suit."

The judgment of the court below is reversed and the cause remanded.

TURNER v. STATE.

Opinion delivered July 7, 1913.

1. CONFESSION—IMPROPER INFLUENCES—PRESUMPTION.—Where improper influences have been exerted to obtain a confession from one accused of a crime, the presumption arises that a subsequent confession of the same crime flows from that improper influence; but such presumption may be overcome by positive evidence that the subsequent confession was given free from undue influence. (Page 334.)
2. CONFESSION—EVIDENCE—PRESUMPTION.—Evidence held sufficient to overcome a presumption that a second confession flowed from the promise or advice which originally improperly induced a confession. (Page 334.)
3. LARCENY—CORPORATIONS—PROOF OF CORPORATE EXISTENCE.—In a criminal case when it is sought to prove the corporate existence of a company from which it is alleged that property has been stolen, that fact may be established by proving the general reputation of the concern doing business in the locality. (Page 335.)

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

Jobe & Montgomery, for appellant.

1. It devolved on the State to prove that the Pacific Express Company was a corporation. 58 Ark. 17; 98 Am. Dec. 121.

2. There is no testimony upon which to base a conviction. 68 Ark. 529; 85 *Id.* 360; 74 *Id.* 491.

3. Incompetent evidence was admitted as to a confession by defendant. 22 Ark. 336; 69 *Id.* 599. A confession, to be admissible, must be absolutely free and

voluntary, without any influence or promise of reward, inducement or threats. 22 Ark. 336; 19 *Id.* 160; 35 *Id.* 35; 66 *Id.* 506; 69 *Id.* 506; 69 *Id.* 599; 94 *Id.* 343; 50 *Id.* 305.

4. The admissibility of testimony is a question for the court. 28 Ark. 121; 66 *Id.* 506.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee.

1. The proof as to the Pacific Express Company being a corporation was sufficient, it being proved that it was *generally known by such name.* Only the *de facto* existence of a corporation need be shown. 3 Bish., Cr. Pr., § 752 (2); *Brown* v. *State,* 108 Ark. 336.

2. The confession of defendant was properly admitted. 74 Ark. 397; *Greenwood* v. *State,* 107 Ark. 568; 43 Ark. 367.

McCULLOCH, C. J. The defendant, Claud Turner, appeals from a conviction of the crime of grand larceny, alleged to have been committed by stealing five hats, of the value of $4.50 each, the property of the Pacific Express Company, a corporation.

Packages containing men's hats were consigned over the Pacific Express Company to Dickerson Bros., a firm of merchants at Fulton, Ark., and after the packages were unloaded at the railroad station at Fulton, and whilst still in the possession of the express company, one was broken open and several hats stolen therefrom.

Some of the hats were found in the barn where defendant kept his team, and there was proof that defendant sold hats of the description of those stolen, about the time the larceny was committed.

In addition to that, evidence was adduced to the effect that defendant confessed his guilt, and offered to enter a plea of petit larceny.

The hats were proved to be of sufficient value to make the offense grand larceny.

The testimony was abundant to sustain the conviction. The officer who arrested defendant testified that, after the arrest had been made, defendant confessed his

guilt of the crime charged, and that he (the officer) advised him that "it was the best to plead guilty and get the lowest punishment, probably a fine," or something to that effect. The witness stated that he thought the confession preceded the advice which he gave defendant, but he was not sure about that, and the court refused to allow the testimony of that witness to go to the jury.

But another witness was allowed to testify, over defendant's objection, that the latter admitted his guilt, and offered to plead guilty to petit larceny.

It is insisted that this ruling of the court was erroneous, and prejudicial.

That witness was the justice of the peace before whom defendant was taken for examination, and he testified that defendant's confession was after he had made an offer to the prosecuting attorney to plead guilty, and that officer had refused to accept the plea, and had told the defendant that he couldn't promise him anything in the way of leniency. The witness testified that, after that conversation with the prosecuting attorney, the defendant, upon being asked whether he was guilty or not guilty, entered a plea of guilty.

Counsel for defendant invoke the rule that, when improper influences have been exerted to obtain a confession from one accused of crime, the "presumption arises that a subsequent confession of the same crime flows from that influence."

That contention, it is true, involves a correct proposition of law; but it is equally well settled that such presumption "may be overcome by positive evidence that the subsequent confession was given free from undue influence." *Smith* v. *State,* 74 Ark. 397.

The testimony of the justice of the peace was, we think, sufficient to warrant the court in holding that the promise of a lower punishment had been revoked, and that the last confession was voluntarily given without any inducement or influence. All that the arresting officer had said to defendant was to advise him to "plead guilty and get the lowest punishment," but the prosecut-

ing attorney had expressly declined to extend any leniency, so that it was a question primarily for the court, and then for the jury, to determine whether the last confession was voluntarily given free from any inducement. In other words, the evidence of the justice of the peace was sufficient to overcome the presumption that the confession flowed from the original promise or advice given by the arresting officer.

The evidence sufficiently established the fact that the Pacific Express Company was a corporation as alleged in the indictment. That fact could be, and was, established by proving the general reputation of the concern doing business in the locality. *Brown* v. *State,* 108 Ark. 336.

No error was committed and the judgment is, therefore, affirmed.

LACOTTS v. LACOTTS.

Opinion delivered July 14, 1913.

1. TRUSTS—CONSTRUCTIVE TRUST—AGREEMENT TO PURCHASE—"TRUST EX MALEFICIO.—Under a promise to buy in land for the owner at a judicial sale, and hold the same in trust for him, a failure to perform the latter promise, does not create a "*trust ex maleficio,*" when there is no evidence of fraud on the part of the purchaser. (Page 337.)

2. MORTGAGES—DEED AS A MORTGAGE—ORAL EVIDENCE.—Where appellant purchased land at a judicial sale under a promise to hold the same as security for the purchase money, such transaction constitutes an equitable mortgage, and the agreement not being within the statutes of fraud may be proven by oral testimony. (Page 339.)

3. MORTGAGES—DEED ABSOLUTE ON FACE—PROOF.—In order to convert a deed absolute on its face into a mortgage, the proof must be clear, unequivocal and convincing. (Page 340.)

Appeal from Arkansas Chancery Court; *John M. Elliott,* Chancellor; reversed.

R. D. Rasco, for appellant.

1. The evidence is not sufficient to show a constructive trust. In order to graft a trust upon a valid writ-

ten instrument, the evidence must be clear, positive and convincing. 39 Cyc. 84, and notes; 44 Ark. 365; 11 Ark. 82; 4 Am. Dec. 661; 3 Kerr on Real Prop., § § 1720, 1726; 42 Am. Dec. 521; 13 *Id.* 133; 89 Ark. 182; 163 Ill. 557, 43 N. E. 170; 76 Cal. 469, 9 Am. St. Rep. 242, 18 Pac. 429; 66 Conn. 493, 34 Atl. 490.

2. Appellee does not allege in his answer, and cross complaint, and the proof does not establish, facts sufficient to constitute a trust *ex maleficio.* A mere verbal promise to convey real estate, coupled with the breach of that promise, is not sufficient to establish this kind of a trust. 101 Ark. 451; 19 Ark. 39; 73 Ark. 310, 313; 41 Ark. 393; 9 L. R. A. 287; 11 L. R. A. 381; Pomeroy, Eq. (3 ed.), § § 1053, 1054, 1055, 1056, and foot note; 39 L. R. A. (N. S.) 906.

3. When a parent causes title to real estate to be taken in the name of his child, the law presumes that he meant it as an advancement, and no trust will arise. Hence, even if appellee could show that the money which paid for the land was his, as he claims, the presumption is that he intended it as an advancement, and no trust can be declared. 10 Humph. 12; 3 Pomeroy 1039; *Id.* 1040; 41 Ark. 301; 45 Ark. 481, 482; 71 Ark. 372; 2 L. R. A. 815.

4. The agreement alleged by appellee, if made, is void as against the statute of fraud, because the same was not in writing. Kirby's Dig., § 3666; 50 Ark. 71; 41 Ark. 481; 42 Ark. 503; 57 Ark. 632; 96 Ark. 98; 68 Am. Dec. 455; 14 *Id.* 275; 95 *Id.* 685; 40 *Id.* 207; 39 Cyc. 49; 70 Ark. 145; 45 Ark. 481; 27 Am. Dec. 308.

W. N. Carpenter and *J. M. Brice,* for appellee.

McCulloch, C. J. This case involves a controversy between father and son over the title to a quarter-section of land in Arkansas County, where appellant and appellee both reside.

The tract of land was originally owned by appellee, John A. LaCotts, and was sold by a commissioner of the chancery court of Arkansas County in the year 1906, pur-

suant to a decree of that court in favor of I. C. Gibson against appellee.

Appellant purchased the land at the sale, and the commissioner conveyed it to him, the deed being approved by the court and duly recorded.

The land was adapted to the culture of rice, and appellant converted it into a rice farm, expending about $5,000 in putting down a deep well and installing machinery, erecting sheds, etc.

Appellee claims that appellant purchased the land at the sale at his (appellee's) request, and pursuant to an agreement between them to the effect that appellant would buy the land as an accommodation, for the purpose of discharging the lien of the decree, and that he would hold the title in trust for appellee and reconvey the same on repayment of the price paid. He seeks, in this proceeding, to have appellant declared to be a trustee holding the title to the land in trust for him, and the chancellor sustained his contention and rendered a decree in his favor.

The court appointed a master to ascertain the value of the improvements placed on the land by appellant, and the rents and profits which had been enjoyed by him, and decreed a lien in appellant's favor for the amount due for improvements and taxes in excess of the rents and profits. The master found that the value of the improvements placed on the land by appellant amounted to $6,714.88, and that he was entitled to recover the sum of $2,224.88, the amount over and above the rents and profits received.

The learned chancellor filed a written opinion, in which he decided that appellant should be held as a trustee on account of his own wrong. He based his conclusion on the opinion of this court in the case of *Ammonett* v. *Black,* 73 Ark. 310.

We are of the opinion, that, according to the proof adduced, this case does not contain any elements of a trust *ex maleficio,* for the reason that the proof does not

show that appellant procured the title by the commission of any fraud. Putting it in the strongest light, the testimony adduced by appellee only tends to establish a promise on the part of appellant to purchase the land and hold it for appellee, and a breach of that promise. This alone is not sufficient to establish a trust *ex maleficio*. *Spradling* v. *Spradling,* 101 Ark. 451.

Judge Riddick, in delivering the opinion of the court in *Ammonette* v. *Black, supra,* after quoting from Professor Pomeroy concerning what constitutes a trust *ex maleficio,* said:

"There must, of course, in such cases, be an element of positive fraud by means of which the legal title is wrongfully acquired, for, if there was only a mere parol promise, the statutes of fraud would apply."

Appellee testified that when the land was advertised for sale, he applied to his son, John, to see if he would buy the land in. John replied, saying that he would do so, but that his brother, George (appellant), had more money than he, and that probably he would buy the land in. Appellee testified that subsequently he saw his two sons, appellant and John, standing on the street, and when he walked up to them, John remarked that George would attend to the matter for him, meaning to buy in the land, and that in reply he merely admonished them not to neglect it.

The evidence shows that appellant, after purchasing the land, took possession of it and made valuable improvements thereon without any objection from appellee until a short time before the suit was instituted.

Appellee formerly owned several thousand acres of land, and still owns about a thousand acres. On several occasions, when tracts of land which he owned were sold under execution or other process, his son, George, purchased them at his request, and he never made any objections to his purchase of any tract except this one.

Our conclusion is, that appellee has failed to establish a state of facts which would convert appellant's acquisition of the property into a trust *ex maleficio,* and

that the decision of the chancellor was not correct in holding that such a trust had been established by the evidence.

Nor is the evidence sufficient to prove that the purchase of the land by appellant was intended as a mortgage or as security for the amount paid out in satisfaction of the decree. If the proof was sufficient to establish such agreement, no rule of evidence would be violated in admitting it for the purpose of showing that the title was acquired as security for money advanced; nor would the agreement be within the statutes of fraud, for, under those circumstances, the result would be the same as if the appellee, instead of allowing appellant to become purchaser at the commissioner's sale, in order to get title to the land as security for the money paid, had conveyed the land directly to appellant himself as security for the money advanced. In either event, the conveyance could, in equity, be shown to have been intended as a mortgage. But, in order to convert a deed absolute on its face into a mortgage, the proof must be "clear, unequivocal and convincing." *Rushton* v. *McIllvene,* 88 Ark. 299. We think the proof in this case falls far short of the degree of force necessary to show that the conveyance was intended as a mortgage. The proof in the case consists of appellee and his son, John LaCotts, on one side, and appellant, in his own behalf, on the other side. Appellee and his son, John, testified concerning the same transactions, but the fact that their testimony conflicts upon material details of the transaction leaves it far from convincing. For instance, appellee, in his account of the main transaction, states that, when he received word from his son, John, that the land was advertised for sale, the latter expressed a willingness to buy the land in himself, but suggested that appellant should do that, as he had more money, and advised that appellant be interviewed on the subject; that subsequently, he met his two sons on the street, and one of them called to him, and when he walked up to the pair, John remarked that George (appellant) said that he would at-

tend to it. Now, John testified that, when he told his father about the land being advertised for sale, his father said that he had already talked with George about it, and that he told his father that if George was willing to buy it in, to let him go ahead and do it, and that a short time thereafter he found his father and George standing on the street, and that George then told him that he need not trouble himself any more about the purchase, as he (George) would attend to it. Appellant denies that any such agreement was made, but, on the contrary, testified that his father had told him that if he cared to buy the land at the sale, he could have it just as he had done on other occasions, when he had bought in land of his father when sold under process.

Appellant's verison of the affair, as against that given by appellee and his son, John, is strengthened by the subsequent transactions between them. As before stated, appellant put valuable improvements on the land, and no objections were raised by his father. He converted the land into a rice farm, which was in the immediate neighborhood of appellee's home.

The proof shows that appellant entered into some sort of partnership arrangement with his brother, John, who agreed to pay him rent on the land, all of which goes to weaken the force of John's testimony, for he entered into such an agreement notwithstanding the fact that he claims that he knew his brother, George, did not own the land, and merely bought it in as an accommodation to his father.

Appellee admitted, on his cross examination, that he was perfectly willing for appellant and his other sons to buy this land in and take an absolute title thereto, but he says that his only objection was to appellant alone getting title to it, that he was willing to give it to all four of them, but not to any particular one of them.

The fact that appellant was permitted, without objection, to place valuable improvements on the land, and that his brother dealt with him concerning it as his own land, goes far, as before stated, to strengthen his claim

that there was no agreement that he was to acquire the title otherwise than as an absolute purchase.

We are of the opinion that upon no theory can the appellee's claim to restoration of title be sustained. The decree of the chancellor is therefore reversed, and the cause is remanded with directions to enter a decree in appellant's favor.

DAVIS v. STATE.

Opinion delivered October 6, 1913.

1. VAGRANCY—GAMING—CONSTRUCTION OF STATUTE.—Kirby's Digest, § 2068, held to apply to all persons who "go about from place to place for the purpose of gaming," whether for the purpose of participating in banking games or in other kinds of gambling. (Page 342.)
2. VAGRANCY—GAMING—SUFFICIENCY OF EVIDENCE.—Evidence held sufficient to show defendant guilty of vagrancy under Kirby's Digest, § 2068. (Page 342.)
3. VAGRANCY—GAMING—EVIDENCE OF ACTS IN OTHER COUNTIES.—Where defendant is charged with vagrancy, under Kirby's Digest, § 2068, evidence of games participated in by him in other counties is competent to show the purpose of defendant's wandering about, whether to pursue a lawful vocation or to habitually engage in the pursuit of gaming. (Page 343.)

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

Pole McPhetrige, for appellant.

1. The indictment is not sufficient. Section 2068, Kirby's Digest, contemplates and refers to banking games only. 88 Ark. 411. The conjunction "or" would not constitute the clause, "who travel about from place to place," etc., a sufficient nor independent offense. 8 Q. B. Div. 447; 10 Ia. 448; *Id.* 593; 46 Ia. 670; 138 N. Y. 151; 2 Lewis' Sutherland, Stat. Con., § 397.

There is but slight difference between section 1732, construed in *Tully* v. *State,* 88 Ark. 411, and section 2068, under which this indictment was presented. The two acts are *in pari materia,* and should be construed to-

gether. Lewis' Sutherland, Stat. Con. 845, 846, and cases cited; 60 Ark. 128.

2. It was error to admit testimony to show gambling games played in another county. 30 Ark. 41.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee.

McCULLOCH, C. J. Appellant was tried, and convicted, for the offense of vagrancy as defined by the following statute:

"All keepers or exhibitors of any gaming table, bank or other gambling device, and all persons who travel or remain in steamboats, or go about from place to place for the purpose of gaming, shall be deemed and treated as vagrants." Section 2068, Kirby's Digest.

The particular feature of the statute upon which the charge against appellant was predicated is the latter clause of the section which defines persons to be vagrants who "go about from place to place for the purpose of gaming."

The chief contention of counsel for appellant is that this language refers to banking games, and not to gaming of any other kind. The case of *Tully* v. *State,* 88 Ark. 411, is relied on, where we held that the gambling device mentioned in another section of the same statute referred to banking games.

The first clause of the section doubtless should be interpreted as referring to banking games which constitute gambling devices, but the last clause of the section is disconnected from the preceding clauses, and is broad enough to include all persons who "go about from place to place for the purpose of gaming," whether the purpose is to participate in banking games or in other kinds of gambling. Our conclusion is that this is the proper construction of the statute.

It is next contended that the testimony is not sufficient to sustain the conviction. But, after careful consideration, we are of the opinion that the evidence warranted the jury in finding that the defendant had no other means of support, and that he went about from place to

place in Polk County and other adjoining counties in that part of the State for the purpose of gambling.

One of the witnesses introduced by the State was permitted, over appellant's objection, to testify as to the amount of money he lost in one of the games in which he participated with appellant.

This was immaterial, but we are unable to see that any prejudice resulted to appellant in admitting the testimony.

The court also permitted the State to prove games participated in by appellant in other counties, and this was done over appellant's objection.

We think such testimony was competent, not for the purpose of proving the commission of the same offense in another county, but to show the purpose of his wanderings, whether to pursue a lawful avocation, or to habitually engage in the pursuit of gambling.

Judgment affirmed.

PENNY v. STATE.

Opinion delivered October 6, 1913.

1. WITNESS—INFANT—COMPETENCY.—Evidence held sufficient to show that a child of nine years possessed the necessary qualifications of a witness, and it was not error to permit him to testify. (Page 345.)
2. LARCENY—FINDING LOST ARTICLE—GUILTY MIND.—Where the finder of a lost article has the immediate means whereby he could have ascertained who was the owner thereof, and takes possession of the article with intent to appropriate it to his own use and deprive the owner of his property, he is guilty of larceny. (Page 345.)

Appeal from Greene Circuit Court; *J. F. Gautney*, Judge; affirmed.

S. R. Simpson, for appellant.

1. The court erred in permitting the child, Leslie Penny, to testify without first showing his qualification to testify. 93 Ark. 156.

2. The evidence does not sustain the verdict. 93 Ark. 479; *Id.* 482.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee.

Leslie Penny was properly qualified as a witness. 93 Ark. 156.

McCULLOCH, C. J. Appellant was convicted of the crime of grand larceny, the charge being that he found a lost pocketbook containing the sum of $22 in money, which was the property of one Elmer Walker, and feloniously appropriated it to his own use, with intent to deprive the owner thereof.

Elmer Walker is a school teacher, and lost his pocketbook, containing the amount of money mentioned above, while going along the road to the country schoolhouse where he was engaged in teaching. He didn't miss the pocketbook until some time later in the day.

The State introduced as a witness the son of appellant, a child about nine years old, who testified that his father found a pocketbook of the same description as the one that Walker lost, and that it contained money. He testified that he and his father were going along the road on a load of wood, and that his father got down and picked up a pocketbook and put it in his pocket. He said to his father at the time, "I'll bet it's Elmer Walker's; he lost it." The witness did not know at that time that Elmer Walker had lost his pocketbook, but came to that conclusion from the fact that he had seen Walker pass along the road that morning a short time before his father found the pocketbook, and had seen no one else on the road that morning. The child testified that afterward his father told him that the thing he had found and picked up was not a pocketbook, but a stub of a checkbook which he said belonged to a man in the neighborhood by the name of Cotton. It is proved that Cotton did not lose the stub of a checkbook. Appellant stated to other parties that the checkbook belonged to one Clifton; and Clifton also testified that he had not lost such a book.

Appellant did not introduce any testimony or offer to testify in his own behalf.

The principal contention on behalf of appellant is that the court erred in permitting the child to testify, who was only about nine years old. The case of *Crosby* v. *State,* 93 Ark. 156, is relied on to sustain the contention.

When the child was called upon the witness stand and asked preliminary questions, he began to cry, and the court interposed and sent the child from the room and proceeded with the examination of other witnesses. Later the child was called, and the court very carefully and patiently subjected him to an examination as to his education, degree of intelligence, and other matters necessary to qualify him as a witness. We are of the opinion that the examination does not bring the witness within the rule of disqualification laid down by this court in the Crosby case, *supra.* It is unnecessary to quote at length the questions propounded to the child or his answers thereto, and it is sufficient to say that in our opinion the examination shows that the child possessed the necessary qualifications of a witness as defined by the court in the case above referred to.

The law applicable to this case has been laid down by this court in the recent case of *Brewer* v. *State,* 93 Ark. 479, and the trial court accurately followed the law as stated by the court in that opinion. The law is stated there as follows (quoting the syllabus):

"If the finder of lost articles neither knows nor has any means of ascertaining the owner, and appropriates them to his own use, he is not guilty of larceny, whatever may be his intent at the time; if he does know, or has the immediate means of ascertaining, who the owner is, there must be a felonious intent to steal at the time of the taking, in order to constitute larceny."

The proof is sufficient to establish the fact that Walker lost a pocketbook containing the money, and that it was found by appellant in the public road, and appropriated to his own use. The proof is also sufficient to show that there were at hand immediate means of ascertaining who the owner was. The child jumped at the

conclusion that the book had been lost by Walker, and so told his father at the time he picked it up. Of course, he didn't know that it was Walker's money, but the conclusion reached was the correct one, and it afforded the finder of the pocketbook immediate means whereby he could have ascertained who was the owner. If appellant, as the finder of the pocketbook, had himself known that Walker was the only person who had recently passed along that way, and for that reason he thought that it was the property of Walker, that would have been sufficient to furnish him with knowledge as to who the owner was, so as to make him guilty of larceny if he undertook to appropriate the property to his own use. So, his receiving that information from one who was possessed of those facts, and had reason to believe that it was Walker's pocketbook, rendered him guilty of larceny if he took it in his possession with intent to appropriate it to his own use, and deprive the owner thereof of his property.

Our conclusion is that there was enough testimony to establish all the elements of the crime of larceny, and that the conviction of appellant was not without evidence legally sufficient to sustain it. It follows, therefore, that the judgment must be affirmed, and it is so ordered.

COON v. STATE.

Opinion delivered October 6, 1913.

1. LARCENY—FRAUDULENT BET—PARTING WITH POSSESSION.—Where several persons conspire to cheat a man under color of a bet, and he merely deposits his money as a stake with one of them, not meaning thereby to part with the ownership therein, the persons taking the money are guilty of larceny. (Page 353.)
2. ROBBERY—SNATCHING PROPERTY FROM ANOTHER.—Snatching property or money from the hand of another is not robbery, unless some injury is done to the person, or there is some previous struggle for the possession of the property, or some force used to obtain it. (Page 354.)

3. CRIMINAL LAW—LESSER CRIME INCLUDED IN HIGHER.—Where a defendant might have been indicted for robbery, the State has the right to elect to indict for the crime of larceny which is embraced therein, and seek a conviction for the crime of larceny, ignoring the higher offense. (Page 354.)

4. APPEAL AND ERROR—OBJECTION TO ADMISSION OF TESTIMONY—EXCEPTION, HOW SAVED.—In order to properly preserve an objection to a ruling of the court upon testimony and the exception to the ruling, the complaining party should ask for a ruling of the court upon his objection. (Page 355.)

5. APPEAL AND ERROR—PRESENCE OF SPECIAL COUNSEL IN GRAND JURY ROOM.—The presence of special counsel in the grand jury room with the prosecuting attorney or his deputy, at the request of the prosecuting attorney and for the purpose of assisting in the prosecution, does not vitiate the proceedings of the grand jury. (Page 356.)

6. EVIDENCE—CO-CONSPIRATOR.—Testimony of a co-conspirator, as to acts done by another conspirator before the consummation of the conspiracy are admissible in a trial of the latter. (Page 356.)

7. CONTINUANCE—DISCRETION OF COURT.—Refusal of trial court to grant a continuance in order that depositions might be taken or witnesses produced for the purpose of impeaching the prosecuting witness, *held* not to be an abuse of the court's discretion. (Page 357.)

8. JURIES—ADDITIONAL LIST OF NAMES—PRESENCE OF THE COURT.—Under Kirby's Digest, § § 4510 and 4511, which provides that an additional list of jurors shall be furnished by the jury commissioners, and that the list shall be opened in the presence of the court, *Held*, when the list has been once opened in the court's presence at a former trial, it may be used again at a subsequent trial at the same term. (Page 358.)

9. TRIAL—CLOSING ARGUMENT.—Kirby's Digest, § 2388, does not require that the closing argument in a criminal prosecution shall be made by the prosecuting attorney, but may be made by counsel specially engaged in the prosecution. (Page 359.)

Appeal from Garland Circuit Court; *Calvin T. Cotham,* Judge; affirmed.

C. Floyd Huff, Bradshaw, Rhoton & Helm, and *X. O. Pindall,* for appellant.

1. The indictment should have been quashed because of the presence in the grand jury room, while they were taking testimony and investigating the case, of an attorney employed by the prosecuting witness for the

purpose of prosecuting appellant. Kirby's Dig., § 2211; 7 Tex. App. 519; 126 Pa. St. 53, 12 Am. St. Rep. 894, and notes at page 900.

2. Under the evidence adduced in this case, if any crime was committed, it was the crime of robbery, and not larceny, and the court erred in refusing to instruct the jury at appellant's request, that, if they so found, they should acquit.

3. In view of the understanding of appellant's counsel that the depositions of witnesses to be used at the trial of the Ryan case could also be introduced and read in evidence in this case, and their understanding that such order had been entered of record, and so believed until after the trial of this case had begun, appellant was placed at a great disadvantage in not being permitted to introduce said depositions, and it was reversible error to refuse appellant's motion for a postponement, the same being a manifest abuse of discretion.

4. It was reversible error to allow the criminal conduct and declarations of one of the conspirators to be admitted in evidence against appellant, such conduct and declarations being after the alleged criminal enterprise was ended. *Id.* 467; 92 Ark. 592; 67 Ark. 235; 59 Ark. 430.

5. It was error to permit the paid attorney, instead of the prosecuting attorney, to close the argument on the part of the State. Kirby's Dig., § 2388.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee.

1. There was no error in overruling the motion to quash the indictment. The attorney whose presence is complained of was present with the grand jury, not only with the consent of the prosecuting attorney, but also at his request. 62 Ark. 516; 108 Ark. 89; *Timer* v. *State,* 109 Ark. 138.

2. The testimony of the witness, Fox, does not disclose any of the elements of robbery, but the taking of the money falls within the terms of the larceny statute. 61 Ark. 594, 597.

3. In the light of the evidence that counsel for the State signed no stipulation that the depositions taken in the Ryan case could be used in the other cases growing out of this transaction, including this, but announced at the time that the order to take depositions was made that the State would enter into no stipulations, and that appellant's counsel themselves announced that they desired to deal at arm's length, there was no abuse of discretion in denying the motion for a postponement. Moreover, the evidence thus sought to be introduced was merely cumulative. 94 Ark. 172; *Id.* 545, 547.

4. There was no error in admitting evidence and declarations of coconspirators. The record shows that the design of the conspirators was not ended but in process of consummation when Witt stated to Fox that appellant had just lost the $46,700. Moreover, there was no proper exception to this evidence, no objection pressed to a ruling. 74 Ark. 256; 84 Ark. 128, 130; *Easley* v. *State,* 109 Ark. 130.

5. The State was entitled to the closing argument. If the prosecuting attorney elected to have associate counsel in the prosecution to close the argument instead of doing so himself, that was a matter for him to decide, and appellant has no cause for complaint.

McCULLOCH, C. J. The grand jury of Garland County returned an indictment against appellant, charging him with the crime of grand larceny, committed by stealing, taking and carrying away $20,000 in paper money, the personal property of one Frank P. Fox, and on a trial before a jury the defendant was convicted and sentenced to the penitentiary.

The facts of the case, as adduced from the State's testimony, accepting it as true in its strongest light, are about as follows: Fox resides in the State of Indiana, and is said to be a man of considerable wealth. He had an acquaintance in that State named Worth, who was also an acquaintance of appellant. The three met in a bar room in Terre Haute, Ind., and appellant (who was introduced to Fox under the name of Ward) reported

to Fox that his brother-in-law, one Denton, was assistant manager of the Indiana Club, a gambling house in the city of Hot Springs, Arkansas; that Denton was dissatisfied with the management because he had not been paid his full share of the profits, and had arranged with the dealer of the roulette wheel to "fix" the wheel so that a player would be sure to win, and that all that was needed was some man of wealth to play the wheel and secure large winnings. He said they wanted to interest a man known to be wealthy so that his playings would appear to be in good faith. Appellant and Worth proposed to Fox that he go into the scheme as the wealthy man of the party, and that the winnings would be divided. Fox readily accepted the offer, and the trio at once departed for the field of operations at Hot Springs. When they reached the latter place, they were met at the train by a man who gave his name as Joe Denton, but whose real name was "Jimmie Johnson," and who, according to the theory of the State, was a party to the scheme to swindle Fox. Denton conducted the party up to the hotel, and, after they had registered, all of them repaired to the club rooms late in the afternoon for the purpose of practicing the fraudulent game on the roulette wheel so that when the real play came off at night they would know how to play the right numbers. The dealer of the wheel was into the scheme, and Fox and Worth were fully instructed as to what numbers to play. After the practice was over, the party went back to the hotel, and returned to the club rooms after the evening meal for the purpose of starting the play. Fox purchased $20,000 worth of chips, and gave his check on a bank in Illinois. He began playing the wheel, and in a few minutes — not over ten or fifteen minutes, according to his statement—he won $26,700, without sustaining any losses, and upon signal from Denton, quit playing, it having been understood between them that the winnings should not be too large for fear that the management would suspect the trick. This gave him chips, including his winnings and his original stake, ag-

gregating the sum of $46,700, and he started to cash the chips. When the money was being counted out to him, he asked for the return of his check, and about that time a man calling himself Wilt, and claiming to be the manager of the club, walked in and said, "What check is that? Is it an out-of-town check?" and, upon being informed that it was, said, "I thought I told you not to take any more out-of-town checks." Some argument ensued between Wilt and the party, composed of Denton, Fox, Worth and appellant, about the check being accepted contrary to the rules of the club, and Wilt proposed that he would give a due bill for the amount owing to Fox ($46,700), and pay the same as soon as the check should be paid. Fox demurred to this on the ground that it would take too long to send the check through various banks for collection, and proposed that the manager hold the check, and he keep the due bill until he could go back to Indiana and bring down $20,000 in money as an evidence of the fact that his check had been given in good faith, and would have been paid. This plan was agreed upon, and Fox made an endorsement on the back of his check, showing that the same was not to be deposited for collection. He went back to Indiana, secured the $20,000, and returned in company with Worth. When they reached Hot Springs they again repaired to the gambling room (the same parties, Fox, Worth, Denton and appellant, being present), and Fox produced the $20,000, and also presented his due bill at the same time for payment. He counted the money in the presence of Wilt, who claimed that he had followed the count, and that only $18,500 was in the roll, and he took it out of Fox's hands—"snatched it," as Fox states—and proceeded to count it himself, and after verifying the amount and finding that there was $20,000 in the roll, placed it in a drawer. Wilt then proceeded to count out the money for the purpose of cashing the due bill, but found, or pretended to find, that he was short $10,000 of enough money to pay the due bill, whereupon he offered to give his check for the $10,000, which Fox, upon the suggestion of Worth, declined

to accept for the reason that the manager had declined to accept his check. Wilt then proposed that the party wait while he sent out to the bank and got a $10,000 check cashed, and this was agreed upon. They went into an adjoining room, and spent the time of the delay in drinking wine. After they had drunk a glass or two, Denton handed the due bill to appellant and said, "You don't drink much; take this order and go in there and talk with the old man" (meaning the so-called manager, Wilt). Appellant left the room as he was bidden, and, after being absent a short time, returned hurriedly into the room, and as he came through the door, he was crying and said, "What will we do? I lost $26,000 of that money." Denton struck him a light blow, and the operator of the wheel came through about that time, and said, "You damn fool, what did you play that wheel for? I had the works in my pocket; no wonder you lost. Get out of here; we are done with you forever." Whereupon appellant left the room and was heard of no more until he was arrested in Chicago, except a brief conversation held with Fox a little while afterward at the hotel. A few minutes after appellant left, Wilt stated to Fox that appellant had lost the $46,700 playing the wheel, and another of the party verified this statement, saying that appellant had played the checks, "like money grew on trees in his part of the country." Wilt kept the $20,000 which he had taken out of the hands of Fox, and the latter left the place.

The indictment of appellant and others of the party followed.

Fox testified that he exhibited the $20,000 merely as an evidence of his good faith in giving the check for chips, and that he had no intention of parting with the title to the money.

Appellant testified in his own behalf, and corroborated Fox's statement as to most of the details of the transaction, but he testified that he took the due bill and played the amount of it off on the wheel at the suggestion of Fox and Worth. He testified that Denton told

Fox that he thought it would be a good idea, while the "old man" (Wilt) was in the room, for them to play part of the money off, and that he kept up the play too long, the inference from his statement being that this was caused by the exhilaration from the wine drinking. He said, however, that Fox was present during his play. He claimed that he had been told that the wheel would be "fixed," and that he entered into the arrangement with Fox and Worth in good faith to beat the wheel under a promise that he would be given part of the winnings.

The issue was sharply drawn in the testimony before the jury as to whether Fox delivered the money ($20,000) with intent to part with the title, and whether he consented to the last playing of the wheel when the whole of the winnings and the original stake were lost by appellant. The court submitted those questions to the jury upon proper instructions, and the issue has been settled against appellant.

The law applicable to this case is decided in the two cases of *Hindman* v. *State,* 72 Ark. 516, and *Johnson* v. *State,* 75 Ark. 427. In those cases the law was stated as follows:

"Where several persons conspire to cheat a man under color of a bet, and he simply deposits his money as a stake with one of them, not meaning thereby to part with the ownership therein, they, by taking the money committed larceny none the less, though afterward they are by fraud made to appear to win."

In the Hindman case, the indictment was for the crime of larceny, and this court reversed the judgment of conviction because the trial court gave instructions which ignored the question whether the injured party had delivered the money to the stakeholder with intention to part with the title.

In the Johnson case that issue was correctly submitted to the jury, and the judgment of conviction for the crime of larceny was affirmed.

In the present case that issue was, as before stated, correctly placed before the jury in appropriate instruc-

tions. The instructions are numerous, and need not be set forth here at length. Suffice it to say that the appellant's criticisms are unfounded. The facts of this case, if the testimony of the State's witnesses is believed, make out a case of larceny according to the rule announced in those cases.

Appellant asked several instructions telling the jury, in substance, that if the money was snatched from the hands of Fox without the latter's consent, the crime would be robbery, and not larceny, and that appellant could not be convicted under this indictment. The court refused to give those instructions, and counsel for appellant now insist that such refusal constituted error.

The court was correct in refusing the instructions, because the evidence did not make out a case of robbery, for the mere snatching of the roll of money from the hands of Fox did not, of itself, constitute the crime of robbery. "It is well established," said this court in the case of *Routt* v. *State,* 61 Ark. 594, "that the snatching of money or goods from the hand of another is not robbery, unless some injury is done to the person, or there be some previous struggle for the possession of the property, or some force used in order to obtain it."

But even if the facts of the case constituted the crime of robbery, it would have been incorrect to give an instruction to the jury that on that account the accused should be acquitted of larceny, the crime charged in the indictment. The charge of robbery includes a charge of larceny, and even though the accused be guilty of the higher offense of robbery, the State has the right to elect to indict for the crime of larceny which is embraced therein, and seek a conviction for the crime of larceny, ignoring the higher offense. *Routt* v. *State, supra.*

Error of the court is assigned in permitting the State to introduce the statement of Wilt, the so-called manager, made to Fox, a few minutes after appellant had left the gambling place, to the effect that he (appellant) had lost the $46,700 playing the wheel. It is insisted that this violated the rule of evidence that the admissions of co-

conspirators are not admissible against each other after the purpose of the conspiracy had been consummated. The alleged exception appears in the records as follows: "Q. What did you do immediately after that A. I went back into the ladies' room where the wheel was. Q. Who was in there when you got back? A. Mr. Wilt and Mr. Ryan, and I asked Mr. Wilt what—" (Mr. Rhoton: "I object to all this and save exceptions.") (Witness, continuing): "I asked Mr. Wilt what Ward had lost, and he said he lost $46,700."

In order to properly preserve an objection to a ruling of the court upon testimony and the exception to the ruling, the complaining party should ask for a ruling of the court upon his objection. It does not appear in the record that this was done, for the objection and exception were made at the same time, and no ruling was asked. The witness was permitted to continue with his statement without any ruling of the court being asked for. But even if an exception had been properly preserved, we are of the opinion that the testimony did not violate the correct rule of evidence. According to the State's theory, the scheme was to secure possession of Fox's money, and then retain possession under false pretense that it had been played off in gaming at the wheel. If this was true, the purpose of the conspiracy was not consummated until the false pretense was made to Fox which induced him not to insist on return of his money. In other words, it was a part of the conspiracy to pretend to Fox that his money had been lost in play at the wheel, and in making the alleged statement to Fox, Wilt was only carrying out a part of the plan embraced in the conspiracy. He was merely "making away with the goods," so to speak. The conversation occurred within a few minutes after appellant had left the room, and was really a part of the transaction whereby the false pretense was made to Fox. In addition to that, we are clearly of the opinion that no prejudice could have resulted to appellant from this testimony, because the alleged statement made by Wilt was precisely what appellant testified to

on the witness stand, and the two statements corroborated each other. Wilt's statement to Fox was that appellant had played the amount of the due bill, $46,700, on the wheel. Appellant testified that he surrendered the due bill for chips amounting to $46,700, and played the amount off on the wheel, and that he did that in the presence of Fox, and with the latter's consent. The difficulty with appellant's case is that the jury did not believe his statement, and came to the conclusion that his claim and that of Wilt's, as to his playing the money off at the wheel, were false, and were made merely as a pretense to Fox and an excuse for the loss of the money and the retention of the $20,000 which he had produced and exhibited to show his good faith in giving the check for the original stake. In any view of the case, therefore, this exception presents no ground for reversal.

Appellant sought to quash the indictment because counsel employed specially to assist the prosecuting attorney was in the grand jury room when witnesses were examined.

The testimony heard on the motion discloses the fact that Mr. Martin, the attorney employed by Fox to assist in the prosecution, was in the grand jury room, and conducted the examination of witnesses, and that either the prosecuting attorney, or his deputy, was present in the room during a part, if not all, the time. Mr. Martin was present in the grand jury room, and conducted the examination at the request of the prosecuting attorney. The attorney was not present, however, when the grand jury was deliberating or voting on the charge.

This, we think, brings the question within the rule announced by this court in *Bennett* v. *State,* 62 Ark. 516, and *Timer* v. *State,* 109 Ark. 138, where we held that "the presence in the grand jury room of an attorney employed by the State to assist the prosecution," was not ground for quashing the indictment. We also held, in *Richards* v. *State,* 108 Ark. 89, that the presence of a stenographer in the grand jury room at the request of

the prosecuting attorney would not vitiate the proceedings.

The only distinction between the present case and the preceding ones is that the prosecuting attorney, or his deputy, was present in the grand jury room with the special counsel in this case, but not in the preceding cases. Those cases establish the rule that if the special counsel is in the room at the request of the prosecuting attorney, and for the purpose of assisting in the prosecution, it does not vitiate the proceedings. We do not think that the rule is altered by the fact that the prosecuting attorney himself, or his deputy, also present. The rule established by the cases is that it does not offend against the statute for the prosecuting attorney to have a stenographer or attorney in the grand jury room to assist him at such times as the statute permits him to be there himself. So, it is unimportant whether the prosecuting attorney is himself present or not if the purpose of the presence of another party is such as does no violence to the spirit and meaning of the statute.

Appellant asked the postponement of the cause to enable him to take depositions of witnesses in Indiana to impeach the credibility of witness Fox, the injured party, or to give time to bring witnesses from Indiana for that purpose.

The depositions of witnesses for the purpose of impeaching Fox had been taken in another case against one Spear, and the contention of counsel for appellant in this case is that, either by agreement of counsel or an order of court at a previous term, those depositions were to be read in appellant's case. The record of the court does not show any order for the taking of depositions in this case, or that the depositions in the Spear case were to be used in this. The court heard testimony on this issue as to what the former order of the court was, and found that no such order had been made. There is much testimony to the effect that appellant's counsel, at the time the order at the preceding term was made, thought that it was to include depositions in this case, and that the

depositions taken were to be used in this case. But the order of court does not read to that effect, and, according to the preponderance of the evidence, there was no agreement of counsel covering the subject, and we can not say that the court abused its discretion in refusing to postpone the trial.

Another assignment of error is that the clerk of the court violated the terms of the statute in opening the additional jury list out of the presence of the court.

The statute governing the formation of juries, after providing for the selection by jury commissioners of the regular panels of the grand jury and petit jury, contains a further provision for the selection, at the discretion of the court, of a list of names to be used, in lieu of summoned bystanders, after the regular panel has been exhausted. The two sections of the Digest read as follows:

"The circuit courts shall have power, if they deem the same advisable, to direct the jury commissioners in addition to the regular panel, to provide a list of names not less than twenty-five, for the use of said court in all cases when the regular panel may have been exhausted in empaneling any jury, said list to be drawn in lieu of summoning bystanders.

"Said list so returned as provided in the foregoing section shall be placed in a separate box, each name having been written on a separate slip of paper, and said box shall be securely locked or sealed, and shall not be opened except under direction of, and in presence of, the court. Whenever the regular panel shall be exhausted as provided in the foregoing section, the court, instead of summoning bystanders, shall direct the clerk to draw from said box a sufficient number of names to complete the jury being empaneled, and shall hand the same to the sheriff, who shall forthwith proceed to summon said parties for service on said jury. Provided, if said list so drawn from said box shall be exhausted, the court shall order the sheriff to summon bystanders as provided by law." Sections 4510 and 4511, Kirby's Digest.

It appears in this case that such a list had been se-

lected and kept by the clerk, and had been opened in the trial of the Spear case. The statute provides only that when the list is opened it shall be done in the presence of the court, and there is no provision that after part of the list is exhausted, the remaining part shall be again sealed or locked. Moreover, it will be seen that, according to the terms of the statute, this provision is exercised at the discretion of the court, and an accused has no right to a trial before a jury selected in this manner. If no such list had been provided, or, if the list had not been kept in accordance with the terms of the statute, the jury could have been completed by summoning bystanders after exhausting the regular panel, and the fact that a list was used which had not been properly kept would not vitiate the proceedings.

The remaining assignment of error is that the court erred in permitting the argument of the case to be closed by the attorney employed in the case instead of by the prosecuting attorney. It is insisted that the statute (Kirby's Digest, § 2388) requires the prosecuting attorney himself to make the closing argument.

We do not so construe the statute, for it merely prescribes the order of the argument, and not the particular attorney who shall close. The purpose of the statute is to require the attorney for the party having the burden of proof to open and close the argument. There is nothing in it that requires the prosecuting attorney, when assisted by other counsel, to make the closing argument himself.

The record in this case is, in our opinion, free from prejudicial error, and the judgment is therefore affirmed.

HINSON v. STATE.

Opinion delivered October 6, 1913.

CRIMINAL LAW—RIGHT TO BE CONFRONTED BY WITNESSES—AGREEMENT OF COUNSEL.—Where the record does not show that counsel for defendant agreed that the written statement of a witness made before the grand jury might be read in evidence at the trial, the act

of the court in permitting the same to be read, *held* to deprive defendant of his right to be confronted with the witnesses against him, under art. 2, § 10, Const. of Ark.

Appeal from Sebastian Circuit Court, Fort Smith District; *Daniel Hon,* Judge; reversed.

STATEMENT BY THE COURT.

Len Hinson was convicted of the crime of grand larceny. The indictment charged that he did feloniously steal $80, the property of one William Gray. Gray's testimony tended to show that he met appellant at the Corner Saloon in Fort Smith. Gray had at the time $85 or $90. Appellant took Gray to a rooming house, and put him to bed. When Gray woke up he was sober, but had only eighty cents left. Gray knew that he had the money when he commenced drinking with appellant.

Another witness for the State testified that she saw appellant and a drunken man in the alley from a third story window. Appellant, while the man was down, took some money out of the man's trousers and put it in his coat pocket. He then went back of the building, looked all around, took a roll of bills out of his pocket, put some in one pocket and some in the other. Witness didn't know how many bills the appellant had. She never saw appellant nor the drunken man before that time.

The prosecuting attorney, over the objection of the appellant, was permitted to read the testimony of Mrs. Wise, taken before the grand jury, as follows: "Len Hinson brought W. Gray up to my rooming house and put Gray to bed. He came out and asked me to change $10, so as to pay the fifty cents for bed. He told me he would leave fifty cents at the cafe below. Hinson told me he had known Gray for twenty years. Said he was awful mean when he was drunk, and that I should not let him out till the next morning, as there might be trouble. When Gray woke up, he told me he had been robbed."

The prosecuting attorney showed that Mrs. Wise was out of the jurisdiction of the court.

W. H. Dunblazier, for appellant.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee.

WOOD, J. The court erred in permitting the testimony of Mrs. Wise, taken before the grand jury, to be read as evidence. The record itself does not recite that appellant consented to the reading of the testimony of the witness, Mrs. Wise, taken before the grand jury, and there is no sufficient showing of consent on the part of appellant to such proceeding in the bill of exceptions.

The court, after hearing the statements of the respective counsel, stated that it was his recollection "that there was an agreement at the last term of the court that the prosecuting attorney would be permitted to read the testimony of the witnessess; that that was the ground for granting defendant a continuance at the former term."

The statements of the respective attorneys as to the purported agreement on the part of appellant were not under oath, and, at most, on the part of the prosecuting attorney, it was but a statement of his understanding or recollection of what was said by the appellant's counsel. The appellant's counsel earnestly denies that he made such an agreement, and states affirmatively what he did agree to, which was entirely different from the understanding of the prosecuting attorney. The court adopted the understanding of the prosecuting attorney as correct, stating that it was in accord with his own understanding of the agreement.

The showing made by this record is not sufficient to deprive appellant of the right given him under the Constitution, "to be confronted with the witnesses against him." Const. of Ark., art. 2, § 10.

The testimony thus introduced on behalf of the State against the appellant was prejudicial to his rights, and the court erred in admitting it.

Other errors are complained of, which may not occur again, and we deem it therefore unnecessary to discuss them.

For the error indicated, the judgment is reversed and the cause remanded for a new trial.

MILLER v. STATE.

Opinion delivered October 6, 1913.

1. CRIMINAL LAW—INDICTMENT—ALLEGATION OF OWNERSHIP.—The allegation of onwership of land is held good where, under Kirby's Digest, § 1913, defendant is charged with having cut a gate on the land of one S., when S. was not the owner of the land, but the fence around said land, he was guilty of trespass as denounced in Kirby's Digest, § 1913. (Page 365.)
2. TRESPASS—CUTTING DOWN GATE.—Where defendant sold land to S., reserving the merchantable timber and the right to cut and remove the same, defendant had the right to go on the land for the one purpose, and when defendant broke down a gate and tore down the fence around said land, he was guilty of trespass as denounced in Kirby's Digest, § 1913. (Page 365.)

Appeal from Greene Circuit Court; *J. F. Gautney,* Judge; affirmed.

S. R. Simpson, for appellants.

The court should have sustained appellants' request for a directed verdict of acquittal. Under the evidence, they had possession of the lot where the gate was for three years after the sale of the land. The enclosure was neither the enclosure of Smith nor in his possession, the possession of the mill lot and its fences never having passed from defendant, J. C. Miller. Kirby's Dig., § 1913.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee.

1. The reservation in the deed is not of the *lot,* but only of the mill and timber and the right to remove the same.

The fence around the lot was the real protection for the crop being grown by Smith.

Appellants committed the acts which the statute was enacted to prevent, and the court properly directed a ver-

dict against them. Kirby's Dig., § 1913; 43 Ark. 284-6; 102 Ark. 170-5.

2. Smith, having rented the land from Mrs. Harrelson, was the owner thereof within the meaning of the statute. 52 Ark. 266.

WOOD, J. The appellants were convicted under the provisions of section 1913, of Kirby's Digest, which makes it a misdemeanor "to pull down or break the fence, or leave open the gate of the farm, plantation or other enclosed ground of another."

The appellant, J. C. Miller, sold some land in Greene County to J. B. Smith and Mrs. Harrelson. Miller executed separate deeds to the lands, conveying a certain tract to J. B. Smith and a certain other tract to Mrs. Harrelson, which deed contained the following reservation: "The parties of the first part reserve all the merchantable timber upon the tract of land, and shall have the privilege to cut and remove the same within three years from date. The parties of the first part also reserve the sawmill on said tract of land, and shall have three years to remove the same. It is also expressly stipulated and agreed that the parties of the first part need not deliver possession of the above described property until nine months from this date."

The proof shows, and the appellants concede, that they cut the gate to an enclosure on the land sold by appellant, J. C. Miller, to Mrs. Harrelson. Appellants contend that the lands did not belong to J. B. Smith, and inasmuch as the indictment charged that the enclosed grounds belonged to Smith, that there was a fatal variance between the indictment and the proof, but the undisputed testimony is, that J. B. Smith, at the time of the alleged trespass, had rented the land on which the alleged trespass took place from Mrs. Harrelson. Therefore, for the purpose of this indictment, the enclosed ground was the property of J. B. Smith. Appellants also testified that they had held possession of the mill lot for three years after the date of the deeds, and had possession of it when the gate was cut. They stated that they

had been hauling through the gate all the time, and at the time Smith locked the gate, appellants were hauling with from three to fifteen wagons every day.

Appellants testified that the mill remained on the enclosed lot about eighteen months after the date of the deed. They stated that there was a lot of merchantable timber in the mill lot yet to be cut, and that the mill and boiler were still there; that they did grinding for the public; that during months after the lands were sold, the gates were never shut, but were left open for the public; that appellants were cutting timber in there any time, and went into the enclosure every day for general purposes—everyday work. Appellants went through the lot when they went in the woods.

The proof on the part of the State tended to show that the fence enclosing the land where the mill was located and on which the trespass is alleged to have taken place was the protection for the crop of J. B. Smith which had not yet been harvested, and that leaving open the gate and tearing down the fence was calculated to turn stock in upon Smith's crop. Smith explained to appellants that the inside fence which separated the mill lot from the crop was weak and would not turn stock. Appellants went to the point where Smith had locked up the gate, and J. C. Miller drew his shotgun to prevent Smith or his wife from interfering, while Ben Miller, the son of J. C. cut down the gate. Later Miller hitched his horse to one of the panels of fence and dragged it open, as one of the witnesses testified he said, "for pure hellishness." This, however, was denied by Ben Miller.

The court instructed the jury to return a verdict of guilty against appellants. Appellants duly excepted to the instruction of the court. The jury returned a verdict in accord with the court's instructions. Judgment was entered against appellants for the fine imposed by the jury, and this appeal has been duly prosecuted.

The appellants testified that under their contract, they held the lot as they had before the sale, but this must be taken simply as an expression of the opinion of

the appellants as to their rights under the contract, for when the deeds are examined, it is manifest that the appellants had no right to the possession of the enclosure for any purpose, except for the purpose of cutting and removing the merchantable timber from the tract of land and also the possession of the sawmill and the right to remove the same from the land. But this reservation only gave to appellants the possession of the lot for the specific purposes named in the deed. It was a mere license to use the land for those purposes, and was not a general right of possession for all purposes in contravention of the possession of the owner. As Smith had the land rented when the alleged trespass occurred, the land, for the purpose of this indictment, must be held as belonging to him. The reservation of the merchantable timber and the privilege to cut and remove the same and also the sawmill, with the privilege of removing it within the time specified, did not give appellants a right to the use of the property for all purposes as the absolute owners thereof, and therefore appellants did not have the right to break down the fence, and to cut down and leave open the gates enclosing the premises belonging to Smith. While they had the right of ingress and egress to the enclosure for the purposes specified in the reservation of the deeds, they had no right there for any other purpose, and therefore when they left open and broke down the gate and tore down the fence to the enclosure, as the undisputed evidence shows that they did do, they were guilty of the trespass and misdemeanor denounced by the statute, and the court was correct in so telling the jury as a matter of law. The judgment is therefore affirmed.

BURROW v. STATE.

Opinion delivered October 6, 1913.

1. LARCENY—ANIMAL RUNNING AT LARGE.—An unbranded cow, although running at large, is the subject of larceny when she is a milch cow that came up at night to be milked. *Jeffries* v. *State*, 102 Ark. 373. (Page 368.)

2. CONFESSION—SUFFICIENCY—OTHER EVIDENCE.—Where the offense, with the commission of which defendant is charged, is shown to have been committed, by evidence other than defendant's confession, he may be convicted upon proof of his confession, although made out of court, and whether there is any other testimony tending to connect him with the crime or not. (Page 369.)

3. ACCOMPLICE—EFFECT OF REMAINING SILENT.—The mere fact that one remains passively silent after being informed of the commission of a crime, and without intent to shield the criminal, does not make him an accessory to the crime. (Page 370.)

4. TRIAL—ARGUMENT OF COUNSEL—OPEN AND CLOSE—OPENING ARGUMENT BY PROSECUTING ATTORNEY.—Under Kirby's Digest, § 2388, which provides that if so demanded by the adverse party the prosecuting attorney in his opening argument must fully state the grounds upon which he claims a verdict, it is reversible error for the trial court to permit the prosecuting attorney the closing argument, when he failed in his opening argument to fully state the grounds upon which he relied for a conviction. (Page 371.)

Appeal from Fulton Circuit Court; *George W. Reed,* Judge; reversed.

David L. King and *J. M. Burrow,* for appellant.

1. The proof shows that the cow was over twelve months old, was running at large on the range, and not marked nor branded. The court erred in refusing to instruct the jury to acquit appellants if they found this to be the fact. 60 Ark. 60. The court further erred in refusing to submit to the jury the question whether or not the cow was such "a live animal as is made larceny to steal," thereby invading the province of the jury. Art. 7, § 23, Const. Ark.; 52 Ark. 264; 49 Ark. 448; 43 Ark. 296; 71 Ark. 38; 74 Ark. 563; 76 Ark. 468; 77 Ark. 203; *Id.* 261; 69 Ark. 138.

In this case, unlike the Jefferies case, 102 Ark. 377, the owner of the cow testified that "she was running at large on the range," yet the court, in the Jefferies case, notwithstanding no witness testified that the animal was running at large on the range, correctly submitted that question to the jury.

The refusal to give appellant's instruction on this phase of the case had the effect to exclude a theory of the case which the evidence entitled the appellant to have

submitted to the jury. 82 Ark. 499; *Id.* 372; 93 Ark. 140; 96 Ark. 212.

2. The court's charge to the jury with reference to a confession is an abstract declaration which improperly assumes that appellant had confessed to the commission of the crime, and ignores the question of reasonable doubt as to whether such confession was made, as well as the principle of law that confessions are to be received with caution, and should be taken with all other facts and circumstances in the case. 66 Ark. 506; 71 Ark. 38; 76 Ark. 468; Kirby's Dig., § 2383. The court therefore erred in refusing to instruct the jury, as requested by appellant, that a defendant in a criminal case can not be convicted on statements made out of court, if he denies the commission of the offense in court, unless such crime is proved by other competent testimony tending to establish his guilt and connect him with the crime.

3. Under the facts shown, Mrs. Davis and Mrs. Jones were both accessories after the fact, and the court erred in refusing to give the instruction requested by appellant on the question of accessories. Kirby's Dig., § 1562; 59 Ark. 383; 50 Ark. 534; 71 Ark. 470.

4. The court committed reversible error in refusing to require the prosecuting attorney, in his opening argument, to make a fair statement of the evidence and grounds he relied upon for a conviction, and in permitting him, in his closing argument, to argue the whole of the testimony. Kirby's Dig., § 6139; *Id.* § 2388; 74 Ark. 256; *Id.* 210; 67 Ark. 127; *Id.* 365; 80 Ark. 158; 71 Ark. 415; *Id.* 403; 70 Ark. 305; 77 Ark. 238; *Id.* 19; 65 Ark. 619; 75 Ark. 577; 72 Ark. 427; 72 Ark. 139. It was also error to permit him to argue the testimony of a witness which had been excluded. 80 Ark. 167.

Wm. L. Moose, Attorney General, and *Jno. P. Streeey,* Assistant, for appellee.

1. Under the evidence, the cow was subject to larceny, and was not running at large within the meaning of the statute. 102 Ark. 373-376. The court properly re-

fused to put that question to the jury. 67 Ark. 147-154; 15 Ark. 624-654.

2. There is no error in the instructions; moreover, general exceptions to certain instructions will not be considered here if any of them are good. *Tiner* v. *State,* 109 Ark. 138.

Instruction 7, given by the court, correctly declares the rule with reference to the weight to be given by the jury to the confession. 107 Ark. 568.

3. Exceptions either to the admission or exclusion of evidence, or to the giving or refusing to give instructions, will not be considered on appeal, where such exceptions have not been preserved in the motion for new trial and the bill of exceptions. 91 Ark. 441-443, and cases cited.

WOOD, J. Appellant was convicted on an indictment charging him with the crime of maliciously killing a certain cow which it was made larceny to steal, the property of J. S. Brown, of the value of twenty-five dollars. Brown testified: "I had a cow shot about 3 or 4 o'clock on the morning of the 1st day of September, 1911. She was a big red cow about six years old, no marks or brands. She had a young calf up, and she ran out on the range and came up at night to be milked. She was worth about $25 or $30." He says, "She was running at large on the range with other cattle when she was shot."

1. The appellant asked for an instruction to the effect that if the jury found that the defendant did shoot and kill the cow of Brown, as charged in the indictment, but also found that at the time of said shooting the cow was over twelve months old, unmarked and unbranded and running at large on the range, they should find the defendant not guilty. The court refused the instruction, which the appellant assigns as error.

There was no error in the ruling of the court. The uncontradicted testimony brings this case well within the rule announced in *Jefferies* v. *State,* 102 Ark. 373-6, and shows that the cow alleged to have been killed was not running at large within the meaning of section 1898, of

Kirby's Digest. The uncontroverted evidence shows that the cow was the subject of larceny.

2. Witness, Mrs. Davis, testified that on Sunday, after she heard that the cow had been shot, Ben Jones, Arthur Burrow and Howard Sayers "came to our house, all in a buggy, and Arthur Burrow and Howard Sayers stated that they had raised hell over across the river; had shot Brown's cow and Carleton's cow, and had set Neilson's barn on fire."

Mrs. W. M. Jones testified that Arthur Burrow stated to her that "they had shot Brown's cow and Carleton's cow, and set Neilson's barn on fire."

The court gave instructions to the effect that if the defendants, or either of them, admitted that they, or either of them, shot J. S. Brown's cow, this was sufficient to convict the defendant, if other proof on the part of the State showed that the crime, as alleged in the indictment, was committed.

The defendant requested the court to instruct the jury as follows: "You are instructed that a defendant in a criminal case can not be convicted on statements alone made out of court if he denies the commission of the offense in court. Before you would be authorized to convict the defendants, or either of them, on statements made out of court, such crime must be proved by other competent testimony, which tends to establish his guilt and connect him with the commission of the crime."

This instruction the court refused. These rulings of the court are assigned as error.

Section 2383, of Kirby's Digest, provides: "A confession of a defendant, unless made in open court, will not warrant a conviction of a crime, unless accompanied with other proof that such offense was committed."

The instructions given by the court conform to this statute. There was other proof besides appellant's own confession that the offense charged had been committed. Under the above statute, where the offense charged is shown by other evidence to have been committed, then the party charged may be convicted upon proof of his

confession, although made out of court; and where the offense is shown by other evidence than that of the accused's confession out of court to have been committed, then his confession will be sufficient to warrant his conviction, whether there is any other testimony tending to connect him with the crime or not. The rulings of the court were correct. *Greenwood* v. *State,* 108 Ark. 568; *Turner* v. *State,* 109 Ark. 332.

3. Witnesses Mrs. Davis and Mrs. Jones testified that they never said anything about the appellant's confession to them until recently. Something over a year had elapsed since these confessions were made to them. One of the witnesses stated that she did not say anything about it until she went before the grand jury.

The appellant contends that this testimony shows that Mrs. Jones and Mrs. Davis were accessories after the fact. Appellant requested the court to instruct the jury that the appellant could not be convicted upon the testimony of an accomplice, unless he is corroborated by other evidence which, in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense charged, and the corroboration is not sufficient if it merely shows the commission of the offense and the circumstances thereof," which the court refused.

The court did not err in refusing to instruct the jury as requested. Under the evidence adduced, neither Mrs. Davis nor Mrs. Jones was an accomplice. In *Davis* v. *State,* 96 Ark. 7, we held, "The mere fact that one remains passively silent after being informed of a crime, and without intent to shield the criminal, does not make him an accessory to the crime."

There is no testimony to show that a failure of these witnesses to report or disclose the confession of appellant was prompted by a desire to shield him from punishment for the crime.

4. The bill of exceptions contains the following: "The attorney for the State, in opening the case, read to the jury the instructions of the court, and explained

in his way what he thought they meant. He then told the jury that he would argue the testimony after the counsel for the defendant made his argument. Thereupon, the counsel for the defendant moved the court to require the State's attorney to state to the jury the testimony and the grounds upon which he relied for a conviction. The court refused to do so, and the defendant excepted."

"After the attorney for the defense had closed his argument, the State's attorney made his closing argument, and, over the protest of the defendant, argued the testimony of all of the witnesses, including the testimony of Ambrose Henry, which the court said could not be considered. The defendant objected and asked the court to stop the said prosecuting attorney, and to instruct the jury not to consider said argument, which the court refused to do, but permitted him to proceed with the same over the objections of the defendant, to which defendant excepted."

Section 2388, of Kirby's Digest, provides: "If the case be not submitted without argument, the party having the burden of proof shall have the opening and conclusion of the argument, and if, upon the demand of the adverse party, the attorney prosecuting for the State shall refuse to open and fully state the grounds on which he claims a verdict, the party so refusing shall be refused the conclusion of the argument."

The court erred in not giving the appellant the benefit of this statute. The mere reading of the instructions by the prosecuting attorney, and "explaining in his way what they meant," was not a compliance with the statute requiring him, upon demand of the adverse party, "to open and fully state the grounds on which he claims a verdict." The burden was on the State, and it was the duty of the prosecuting attorney, representing the State, upon demand of the appellant, to open and fully state the grounds on which he claimed a verdict.

After the prosecuting attorney, upon the demand of the appellant, had failed to open and fully state the grounds upon which he claimed a verdict, the court, un-

der this statute, should have denied him the privilege of concluding the argument on behalf of the State. The statute confers upon the party having the burden of proof the privilege of concluding the argument provided he makes a "full" opening of his case. This is regarded as a very important right, so much so that to deprive one of it is prejudicial error. But the statute contemplates that the party having the burden shall not enjoy the privilege of concluding the argument without first being fair to the adverse party in making a full statement of the grounds upon which he claims a verdict against him. This is to give the adverse party the opportunity to explain away, if he can, those grounds. The statute intends, as far as possible, to give the respective parties litigant a fair opportunity to be heard in the argument of their respective contentions, and, as far as possible, not to give the one an undue advantage over the other. Hence the party having the burden of proof and the right to close the argument can not do so until he has given the adverse party an opportunity to know what his claims are by making a full opening.

In the case at bar, appellant introduced proof which, if believed by the jury, would have fully warranted them in returning a verdict of not guilty. While there was evidence amply sufficient to sustain the verdict, yet the case was one so sharply contested on the facts that it was very unfair and very prejudicial to appellant to deprive him of the benefit of the statute. To have properly conserved the rights of the appellant the court should have refused the prosecuting attorney the privilege of closing the argument when he had failed in his opening argument to state fully the grounds upon which he relied for a conviction of the defendant. The ruling of the court in this regard is error for which the judgment must be reversed and the cause remanded for a new trial.

BROWN v. STATE.

Opinion delivered October 6, 1913.

1. BOUNDARY BETWEEN STATES—CONSTITUTION.—Under the Constitution the actual physical boundary of the State of Arkansas, between Greene County, Arkansas, and Duncan County, Missouri, is the middle of the main channel of the St. Francis River. (Page 375.)
2. STATE—BOUNDARY—JURISDICTION.—A State has no inherent authority beyond its jurisdiction. (Page 375.)
3. BOUNDARIES—STATE—CONSTITUTION—LAWS OF CONGRESS.—The physical boundary of the State of Arkansas, as provided in the Constitution of Arkansas, must be construed with reference to, and in connection with, the laws of Congress, which admitted the State into the Union. (Page 376.)
4. CRIMINAL LAW—JURISDICTION—CONCURRENT JURISDICTION.—Appellant was indicted in Greene County, Arkansas, for gaming on a boat two or three hundred feet east of the middle of the main channel of the St. Francis River. *Held* under the acts of Congress admitting the States of Missouri and Arkansas into the Union, and acts of the Legislatures of Missouri and Arkansas granting to each State concurrent jurisdiction over the entire St. Francis River, that the defendant was properly indicted in Greene County, Arkansas. (Page 377.)

Appeal from Greene Circuit Court; *J. F. Gautney*, Judge; affirmed.

S. R. Simpson, for appellant.

The boundary line between the State of Arkansas and the State of Missouri separating Greene County from the State of Missouri is the middle of the main channel of the St. Francis River. Const. Ark. 1874, art. 1. The Legislature of the State of Arkansas is without authority (even though the Legislature of Missouri by a similar enactment concurs therein) to extend the criminal jurisdiction of the courts of the State over territory outside the boundaries of the State of Arkansas, and included within the boundaries of the State of Missouri. *Supra*, art. 2, § 10, Const. Ark. 1874; 30 Ark. 41; 32 Ark. 565.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee.

The acts of the two States extending their jurisdiction over the waters of the St. Francis River so as to make the same concurrent, is a valid exercise of the legislative powers of the States, in keeping with and conformity to the enabling act passed by the Congress of the United States upon the admission of Missouri into the Union. 3 U. S. Stat. at Large, 546; 105 S. W. 930-932; 85 S. W. 925; 131 Am. St. Rep. 765; 16 Am. & Eng. Ann. Cases, 1113; 65 L. R. A. 963-965; 89 Ark. 428-433; 65 Mo. App. 681-687; 85 S. W. (Mo.) 975.

HART, J. Virgil Brown prosecutes this appeal to reverse a judgment of the Greene Circuit Court for the crime of gaming. The testimony shows that the defendant was guilty of gaming in a house boat tied to a bridge across the St. Francis River, between Greene County, Arkansas, and Duncan County, Missouri. At the time the gaming took place, the house boat was two or three hundred feet east of the middle of the main channel of the St. Francis River and opposite to and in front of Greene County, Arkansas. Greene County is bounded on the east by the main channel of the St. Francis River, and the house boat, at the time the gaming took place, was between the east and west meander line of the St. Francis River, being west of the east meander line and east of the center of the main channel of the river. The sole ground upon which the defendant seeks to reverse the judgment is that the offense was not committed within the territory over which the circuit court of Greene County, Arkansas, had jurisdiction.

The enabling act under which the State of Missouri was admitted contains a proviso which reads as follows:

"*And provided also,* That the said State (Missouri) shall have concurrent jurisdiction on the river Mississippi, and every other river bordering on the said State, so far as the rivers form a common boundary to the said State; and any other State or States, now or hereafter to

be formed and bounded by the same, such rivers to be common to both. * * *"

Subsequently Congress passed an act for the admission of the State of Arkansas into the Union, which was approved June 16, 1836, and a part of section 8 of said act reads as follows:

"* * * And nothing in this act shall be construed as an assent by Congress to all or any of the propositions contained in the ordinances of the said convention of the people of Arkansas, nor to deprive the State of Arkansas of the same grants, subject to the same restrictions, which were made to the State of Missouri by virtue of an act entitled 'An act to authorize the people of the Missouri Terriory to form a Constitution and State government, and for the admission of such State into the Union, on an equal footing with the original States, and to prohibit slavery in certain Territories,' approved the 6th day of March, one thousand eight hundred and twenty."

On the 30th day of March, 1911, the General Assembly of the State of Missouri passed an act which gave Arkansas and Missouri concurrent criminal jurisdiction over the whole of the St. Francis River where it is the boundary line between the two States.

On the 8th day of March, 1911, the Legislature of the State of Arkansas extended the criminal jurisdiction of the State to the east meander line of the St. Francis River at the points where that river is the boundary line between the States of Missouri and Arkansas. The act also gave the State of Missouri concurrent jurisdiction with the State of Arkansas over the parts of said territory lying opposite them and between the lines extending and parallel to their northern and southern boundaries. General Acts of Arkansas, 1911, page 46.

It is true that under our Constitution the actual physical boundary of the State of Arkansas over the territory in question extends to the middle of the main channel of the St. Francis River, and it is a general principle of law that a State would not have any inhe-

rent authority beyond its jurisdiction. This physical boundary of the State of Arkansas, as provided in our Constitution, must be construed with reference to, and in connection with, the laws of Congress which admitted the State into the Union.

It will be noted that under the enabling act by which the State of Missouri was first admitted into the Union the Congress of the United States provided that any river bordering on said State which formed a common boundary between the State of Missouri and any other State should be common to both States. Subsequently, when Arkansas was admitted into the Union, the Congress of the United States provided that nothing in the act should be so construed as to deprive the State of Arkansas of the same grants, subject to the same restrictions, which were made to the State of Missouri by virtue of the enabling act under which it was admitted to the Union. In pursuance of the authority granted by the Congress of the United States, when the States of Missouri and of Arkansas were admitted into the Union, both of these States granted or ceded to each other concurrent jurisdiction over the St. Francis River where that river is the boundary line between the two States. Thus, it will be seen that the Congress of the United States, at the time the two States were admitted into the Union, granted to them concurrent jurisdiction over the territory in question, and subsequently the State Legislatures of the two States, by appropriate acts, have granted or ceded to each other concurrent jurisdiction over the territory in question. The acts of Congress above referred to intended to declare that, subject to other laws of the United States, transactions occurring anywhere on the St. Francis River, so far as it should form a common boundary between the States of Missouri and Arkansas, might be lawfully dealt with by the courts of either State according to its laws. The subsequent acts of the Legislatures of the State of Missouri and of Arkansas extended the limits of the sovereignty of these States to the limits which had been sanctioned

by the acts of Congress and ratified by the States passing the acts above referred to. The right of the States, under these conditions, to enforce their civil and criminal laws on the waters of the stream, has been generally declared by the courts of this country. *State* v. *Nielsen,* 51 Ore. 588, 16 A. & E. Ann. Cases, 1113, and case note; *Lemore* v. *Commonwealth,* 105 S. W. (Ky.) 930; *State* v. *Seagraves,* 85 S. W. (Mo.) 925; *Roberts* v. *Fullerton,* 65 L. R. A. 963.

In discussing concurrent State jurisdiction, and its exercise over the whole river, Mr. Rorer, in his work on Interstate Law, at page 438, said:

"The existence of concurrent jurisdiction in two States over a river that is a common boundary between them, as more particularly referred to in section 1 of this chapter, vests in each of such States, and in the courts thereof, except as to things permanent, and except as to maritime and commercial matters cognizable by the National Government and courts, jurisdiction, both civil and criminal, from shore to shore, of all matters of rightful State cognizance occurring upon such river in all parts thereof where it forms such common boundary. Such concurrent jurisdiction obviates the difficulty in judicial proceedings of ascertaining on which side of the main channel of a boundary river occurrences have transpired or crimes have been committed."

Article 2, section 10, of our Constitution provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed; and counsel for defendant claims that under this provision of our Constitution the circuit court of Greene County had no jurisdiction to try the defendant. The contention of the defendant is fully answered in the case of the *State* v. *Mullen,* 35 Iowa, 199, where the court said:

"Further it is claimed that the boundary of Lee County on the east is coextensive with that of the State, which is the middle of the main channel of the Missis-

sippi river, and that the local jurisdiction of the district court is of offenses committed in the county in which it is held, and that the district court has no jurisdiction to try an offense committed without the boundary of the county, towit: east of the middle of the main channel of the Mississippi River. If this be true, it amounts to this: That Congress has conferred upon the State, and the State, by positive statute, has assumed a jurisdiction which it has vested in no court, and for which it has provided no means of making effective. That the State possesses a jurisdiction which is vested in no department of the government is a proposition which involves a contradiction. But general jurisdiction for the trial of crimes is vested nowhere unless it be in the district court. Congress having granted to the State of Iowa jurisdiction concurrent with the State of Illinois over the Mississippi River, jurisdiction over so much of the river as lies opposite to any county on the eastern boundary of the State must attach to such county as an incident of its organization. For it is only through the medium of county organizations that this jurisdiction can be rendered availing, and it is a familiar doctrine that the grant of a right or power carries with it as an incident everything necessary to make the power or right effective."

To the same effect is *State* v. *Metcalf*, 65 Mo. App. 681; *Welsh* v. *State* (Ind.), 9 L. R. A. 664.

The judgment will be affirmed.

ARNOTT v. STATE.

Opinion delivered October 6, 1913.

1. INSTRUCTIONS—REVIEW OF THE EVIDENCE.—In giving instructions to the jury, it is not necessary that a single instruction cover all the elements in the evidence; all the instructions are to be read and construed as a whole, and are entitled to a reasonable interpretation. (Page 382.)

2. HOMICIDE — INSTRUCTIONS — SELF-DEFENSE. — Where defendant is charged with murder, two instructions are proper, which, when

read together tell the jury that defendant can not provoke deceased to strike him, and then without making any effort to abandon the difficulty, shoot the deceased while his own life was not in danger, and avail himself of the plea of self-defense. (Page 382.)

3. EVIDENCE—CREDIBILITY OF WITNESSES—PROVINCE OF JURY—INSTRUCTIONS.—The trial court may not instruct the jury as to the credit they should give the witnesses; but the court may tell the jury that it will be their duty to reconcile any conflict which they may find in the testimony so as to give credit to the whole of it, but if they can not they may credit the whole or any part of a witness' testimony, as the same shall impress their minds as being true; and in determining the truth or falsity of a witness's testimony, they may consider it with reference to all the other testimony given in the case, and that, too, whether the other testimony is contradictory or not. (Page 384.)

Appeal from Hempstead Circuit Court; *J. M. Carter,* Judge; affirmed.

STATEMENT BY THE COURT.

The defendant, Sam Arnott, was indicted by the grand jury of Clark County for murder in the first degree, charged to have been committed by shooting I. Y. Nash. A change of venue was taken to Hempstead County, and the defendant was convicted of manslaughter, his punishment being fixed at two years in the State penitentiary. From the judgment of conviction he duly prosecuted an appeal to this court.

The facts developed by the witnesses for the State are substantially as follows: The deceased, Nash, was marshal of the town of Gurdon, in Clark County, and the defendant, Arnott, was a deputy constable. About 10 o'clock in the night time in February, 1912, Nash and Arnott were seen standing on the sidewalk between the hotel and the Clark County Bank, in the town of Gurdon. They were facing each other, about one or two feet apart. Two pistol shots were fired while the parties were standing up, and a third one was fired as the parties clenched and fell in the scuffle. The shots were fired by Arnott, and two of them took effect in the body of Nash. One of the bullets took effect under the edge of the ribs on the left side, and the other entered Nash's

right breast and went straight into his body. This was the shot that caused his death. Some of the witnesses for the State testified that they did not see any licks passed and that Nash made no effort whatever to strike the defendant. Another witness for the State said that the parties commenced quarreling and that in a short time the defendant, Arnott, applied a vile epithet to Nash; that Nash then slapped Arnott a pretty hard lick on the head; that Arnott then ran backwards and repeated the same epithet; that he drew his pistol and shot Nash twice; that after the second shot was fired by Arnott, Nash grabbed him, and they both fell down on the sidewalk about the time the third shot was fired; that they did not see any pistol in Nash's hand and did not discover any when they went to the parties after they fell; that Arnott's pistol was about three or four feet from Nash's body when he fired the first shot. One of the witnesses for the State said that Nash remarked when he came up: "Doctor, he has killed me;" and that the defendant said: "I will kill that God-damned fellow." Several hours after the difficulty, on the same night, Nash died.

The defendant, Sam Arnott, testified for himself: At the time Nash was killed I was acting as deputy constable. Previous to that time Nash had threatened to kill me if I did not quit my work. On the night of the difficulty Nash met me and again told me to stay off of the streets. I replied that I had to work for a living and that I was not interfering with his business. Nash pulled my coat back, grabbed my star, and threw his gun on me. He abused me and applied all sorts of vile epithets to me; then a man came along and took hold of Nash and spoke a few words to him in a low tone of voice. I started to go home and Nash again overtook me and threatened to knock my brains out if I did not stay off the street. I turned to go home, and when I got pretty near to the division wall between the hotel and the bank I heard some one running behind me on tiptoes. I looked around, and just about that time Nash hit me

over the head with something, and I fell on an iron rod attached to the building, and my jaw struck the iron. I called for help, and Nash then kicked me in the breast with the heel of his shoe and said: "Shut up, you son-of-a-bitch; I will finish you while I have got you down." He jumped down on me, tore my button holes out, and grabbed me by the throat. He then commenced beating me over the head with his gun. He knocked two jaw teeth out and one loose and made two big knots on my head. When I fell I had my hand in my overcoat pocket and I drew my pistol and shot him. He did not turn my throat loose until after the second shot. I was choked nearly to death. Nash weighed 220 or 225 pounds. I weighed only 137 pounds and not very stout.

Other witnesses for the defendant testified that Nash had previously made threats against him, and that soon after the difficulty in question they saw blood on the side of the defendant's face and a bruise on his eye and neck.

In rebuttal, witnesses for the State testified that they did not see any blood or bruises on him.

C. C. Hamby, for appellant.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee.

HART, J., (after stating the facts). It is first contended by counsel for defendant that the court erred in giving instruction No. 9 at the request of the State. It is as follows:

"If you find from the evidence in this case beyond a reasonable doubt that the defendant, Sam Arnott, while in a dispute with the deceased, by violent and insulting language provoked the deceased to slap him in the face, and you further believe beyond a reasonable doubt that at the time he so used said language toward the deceased that he intended to provoke an assault to be made upon him by the deceased for the purpose of having an opportunity of shooting and killing deceased, and if you further find that when said language was used, the deceased slapped the defendant in the face and that

he then drew his pistol and shot the deceased, then you are told that the defendant is not entitled to any benefit under his plea of self-defense."

Counsel for defendant claim that the instruction should not have been given because it eliminates and leaves out all of the difficulty between the parties immediately before the shooting occurred; but we can not agree with them in this contention. It is not practicable that a judge should attempt to so frame each paragraph of his charge to the jury as to make it cover all the elements of the evidence, and it is not necessary that he should do so. The instructions are to be read and construed as a whole and are entitled to a reasonable interpretation. It was the theory of the defendant that the deceased began the difficulty and was the aggressor; that the defendant tried to avoid the difficulty but was followed by the deceased, who struck defendant and knocked him down and began to choke and beat him, and that the defendant, in order to save his own life, shot the deceased. This theory of the case was fully presented to the jury in instructions given at the request of counsel for defendant. In the case of *Ferguson* v. *State,* 95 Ark. 428, the court held:

"One who has provoked an attack upon himself can not be excused for killing his assailant in order to save his own life or to prevent great bodily injury until he has in good faith withdrawn from the combat as far as he can and done all in his power to avoid the danger and avert the necessity of the killing."

It can not be said that the instruction complained of is in violation of the principle of law just quoted because, just following it, the court read to the jury instruction No. 10, which is as follows:

"If you find from the evidence beyond a reasonable doubt that at the time the defendant first assaulted and shot the deceased with a pistol the deceased was making no hostile demonstrations toward the defendant which placed him in danger of losing his life or receiving great bodily harm at the hands of deceased, then you are told

that the defendant is not justified in killing deceased, and it will be your duty to convict him."

It will be noted that in these two instructions the court in effect told the jury that if defendant provoked an assault upon himself by the deceased for the purpose of having an opportunity of shooting and killing him, and the defendant, after deceased had slapped him, immediately drew his pistol and killed the deceased while the latter was making no hostile demonstration toward him, the defendant would not be justified in the killing. In other words, the two instructions in effect told the jury that the defendant could not provoke the deceased to strike him and then, without making any effort to abandon the difficulty, shoot the deceased while his own life was in no danger.

At the request of the State the court also gave instructions Nos. 13 and 14, which are as follows:

"No. 13. The court tells the jury that nowhere in these instructions does the court mean that you are to arbitrarily disregard the testimony given by any witness in this case. That is a matter solely with the jury, and it is not in the province of the court to tell the jury what weight should be given by you to the testimony of any witness."

"No. 14. You are instructed that you are the sole judges of the weight of the evidence and the credibility of the witness, and, in passing upon the weight to be given to the testimony of any witness, you may take into consideration his manner of testifying while on the witness stand, any bias or prejudice that may be shown, the reasonableness or unreasonableness of the statements of any witness, the interest of any witness in the result of the verdict, any conflicts or contradictions in the statements of any witness while testifying on the stand, as well as any conflicts or contradictions in the testimony of one witness with the testimony of other witnesses, and in applying these tests you will take into consideration your knowledge of men and affairs."

It is contended by counsel for defendant that in-

struction No. 14 is a charge upon the weight of the evidence; but we do not think so. Of course, it is well settled that the court may not instruct the jury as to the credit they should give to the witnesses; but the court may tell them that it will be their duty to reconcile any conflict which they may find in the testimony so as to give credit to the whole of it, but, if they can not, they may credit the whole or any part of a witness' testimony accordingly as the testimony of such witness shall impress their minds as being true, and in determining the truth or falsity of a witness' testimony they may consider it with reference to all the other testimony given in the case, and that, too, whether the other testimony is contradictory or not.

It is again contended by counsel for defendant that the court erred in refusing to give the instruction No. 5 asked by the defendant. We do not deem it necessary to set out this instruction. It is sufficient to say that the matters embraced in it were fully covered by other instructions given at the request of the defendant. We have examined the instructions carefully and think that the respective theories of the State and of the defendant were fully covered by the instructions given by the court, and, finding no prejudicial error in the record, the judgment will be affirmed.

COOK v. STATE.

Opinion delivered October 6, 1913.

1. INDICTMENT—PRESUMPTION AS TO REGULARITY.—When an indictment is properly returned into court, it will be presumed that it was duly found with the concurrence of the requisite number of the grand jury. (Page 387.)
2. BURGLARY—SUFFICIENCY OF EVIDENCE.—When the evidence showed that certain premises were left at 12 midnight and opened at 4:10 A. M., and that when opened a glass door was broken out, and goods missing, *held* that from this evidence, the jury was justified in inferring that the premises were broken into in the night time. (Page 388.)
3. WITNESS—IMPEACHMENT OF ACCUSED.—When a defendant takes the stand in his own behalf he thereby becomes subject to impeachment, the same as any other witness. (Page 389.)

Appeal from Cross Circuit Court; *W. J. Driver*, Judge; affirmed.

STATEMENT BY THE COURT.

The defendant, Willis Cook, was convicted of the crime of burglary, and from the judgment of conviction has duly prosecuted an appeal to this court.

Howell McElroy testified that he and the defendant, Willis Cook, were at the electric light plant in the town of Wynne, in Cross County, Arkansas, on the night of the 21st of May, 1912. That about 3 o'clock A. M. they left the light plant, went up town, and broke into the saloon of E. N. McElroy. That they took therefrom some whiskey in pint bottles and also some cigars. That they then went back to the light plant and stayed until about daylight, when they came back up town to a restaurant and ate breakfast. That they then went to Willis Cook's house and went to bed for a short time and then got up and went fishing.

E. N. McElroy testified: On the night of May 21, 1912, I locked up my saloon and left it about 12 o'clock. The next morning I missed twenty dollars, consisting of quarters, dimes and nickels. I also missed from a dozen to three dozen pints of whiskey called "Red Top Rye" and about the same amount of Barbee whiskey. A case of beer was also taken. The whiskey and beer were worth about twenty-five dollars. On the night in question Howell McElroy and the defendant were in my saloon. I refused to let Howell McElroy have any whiskey. About 11 o'clock they came back in the saloon, and the defendant again asked me to let Howell McElroy have some whiskey. I again refused, and the defendant said they would get it before morning if they had to take it. They then walked out of the saloon together.

The bartender of the saloon testified that he opened the saloon the next morning about 4:10. That the glass door was broken and twenty dollars in change that was usually left there was gone.

Other evidence for the State tended to show that Howell McElroy and the defendant ate breakfast in a

restaurant next to the saloon the morning after the burglary, and, later in the day, went fishing. That they had some whiskey in a bottle, labeled "Rep Top Rye." Several days after this the defendant was seen at Fair Oaks with three or four dollars in small change.

The defendant testified in his own behalf and denied that he broke into the saloon on the night in question, or at any other time. On cross examination he admitted that a few days after this he had several dollars in money, consisting of nickels and dimes, but said that he won it shooting craps.

An employee of the light plant testified that on the night the burglary was charged to have been committed Howell McElroy and the defendant were at the light plant. He said that about 3 o'clock in the morning Howell McElroy went up town and brought back some whiskey but that the defendant did not go with him; that the defendant, during the time McElroy was gone, was lying on the grass asleep, and stayed there until about daylight the next morning.

J. C. Brookfield, for appellant.

1. The court erred in overruling the motion to quash the indictment which raised the point that a true bill against appellant alone had not been concurred in by twelve of the grand jurors, without hearing evidence in support of said motion. Kirby's Dig., § 2223, and cases cited.

2. Appellant was entitled to the peremptory instruction to acquit, requested at the conclusion of the State's testimony. To constitute burglary, the house or building must be broken or entered in the night time with intent to commit a felony. Kirby's Dig., § § 1603-1606; 49 Ark. 514.

None of the witnesses, aside from McElroy, the accomplice, could testify that the offense was committed in the night time, and there is no sufficient corroboration of the accomplice. Kirby's Dig., § 2384, and cases cited.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee.

1. The motion to quash was properly overruled. The record is clear that the indictment was concurred in by the sixteen members of the grand jury. The record proper prevails over the showing made in the bill of exceptions. *Davidson* v. *State,* 108 Ark. 191.

2. There was no error in the admission of testimony, and it was proper to allow the prosecuting attorney to question defendant as to where he obtained the money he was seen to have two or three days after the burglary. 100 Ark. 199-202.

HART, J., (after stating the facts). Counsel for defendant moved the court to quash the indictment because it was not concurred in by twelve members of the grand jury, and assigns as error the action of the court in overruling his motion.

The record shows that the grand jury came into court, in charge of a deputy sheriff, and that all its members were present; that the indictment in question was returned in open court and was properly endorsed "A true bill" and signed by the foreman; that it was handed to the clerk and ordered filed and numbered, as the law directs.

Where an indictment is properly returned into court, it will be presumed that it was duly found with the concurrence of the requisite number of the grand jury, and the court did not err in overruling the defendant's motion to quash the indictment. *St. Louis, I. M. & S. Ry. Co.* v. *State,* 99 Ark. 1; *Nash* v. *State,* 73 Ark. 399.

It is next contended by counsel for defendant that the testimony is not sufficient to support the verdict. They first contend that there was no testimony, other than that of the accomplice, Howell McElroy, tending to show that the saloon was broken into in the night time.

The defendant himself introduced in evidence an almanac showing sunrise to have been at 4:39 o'clock on the morning of May 21, 1912. The proprietor of the saloon testified that he left there at 12 o'clock at night

and that the saloon showed evidence of having been broken into when he returned the next morning. The bartender said that he opened the saloon at 4:10 o'clock in the morning; that the glass door had been broken into since he had left the night before; and the evidence of both the proprietor and the bartender showed that whiskey and money had been taken from the saloon since it was closed up the night before. The jury might have inferred from their evidence that the saloon was broken into in the night time.

Counsel for defendant also insist that there is no evidence, other than that of Howell McElroy, tending to connect the defendant with the commission of the offense.

The proprietor of the saloon testified that Howell McElroy and the defendant came into the saloon about 11 o'clock on the night it was burglarized, and asked him to let Howell McElroy have some whiskey. He refused to do so, and the defendant told him that they were going to have it before morning if they had to take it.

Other witnesses testified that the defendant and Howell McElroy were seen together early the next morning; that they had in their possession whiskey of the same brand as that taken from the saloon, and that a few days thereafter the defendant was seen in possession of several dollars in nickels and dimes, and the proprietor of the saloon said that the money taken from it consisted of quarters, nickels and dimes.

It was also shown that Howell McElroy and the defendant were seen together shortly before and shortly after the burglary was committed.

This was a sufficient corroboration of Howell McElroy. *Celender* v. *State,* 86 Ark. 23.

Finally, it is insisted that the court erred in admitting questions concerning defendant's character.

The defendant took the stand in his own behalf, and thereby became subject to impeachment as any other witness. *Younger* v. *State,* 100 Ark. 321.

It was shown that the defendant had in his posses-

sion a few days after the burglary was committed several dollars, consisting of nickels, dimes and quarters. On cross examination the prosecuting attorney asked him where he had gotten this money and what kind of business he had been engaged in lately. The defendant responded that he had won it in a crap game. This was competent for the purpose of discrediting the defendant's testimony, and the court did not abuse its discretion in permitting the prosecuting attorney to ask the questions and requiring the defendant to answer them. *Turner* v. *State,* 100 Ark. 199; *Hollingsworth* v. *State,* 53 Ark. 387; *McAllister* v. *State,* 99 Ark. 604.

The judgment will be affirmed.

HUGHEY *v.* STATE.

Opinion delivered October 6, 1913.

LARCENY—ACCESSORY BEFORE FACT.—Where defendant is charged with larceny of a cow, but was not present aiding, abetting and assisting in stealing the animal, but merely encouraged another to steal cattle generally, defendant was at most an accessory before the fact of the larceny and could not be convicted of larceny as a principal.

Appeal from Phillips Circuit Court; *J. M. Jackson,* Judge; reversed.

W. R. Satterfield, for appellant.

1. The uncorroborated testimony of an accomplice is not sufficient to warrant a conviction. Kirby's Dig., § 2384; 75 Ark. 540.

2. Where a defendant is charged as a principal in the commission of a felony, and the evidence only tends to prove that he was an accessory before the fact, the evidence does not sustain a conviction as a principal. 37 Ark. 274; 41 Ark. 173; 55 Ark. 593.

3. Where a defendant is accused of grand larceny only, and the evidence tends to prove the crime of receiving stolen property, the evidence does not sustain a conviction of grand larceny. Kirby's Dig., § 1830; 61 Ark. 15.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee.

Argue that there is sufficient evidence in the record to corroborate the witness, Burke, and to sustain a conviction of appellant as a principal under the accusation of grand larceny.

KIRBY, J. Appellant brings this appeal to reverse the judgment of conviction of grand larceny for stealing a black cow, belonging to one Robert Boyd, contending that the evidence is not sufficient to support the verdict.

Tom Burke testified that Hughey was in the butcher business, and told him he was in shape to handle cattle, any that he could get, and if he couldn't get them one way to get them another, and that they went out and caught a black heifer and left it at Hughey's slaughter pen. "He gave me $6 or $7 and said if I went in with him he would divide the profits." Hughey wasn't with Burke when the animal was caught, nor when she was taken to the slaughter house after dark.

Robert Boyd testified that he missed the cow and was informed that it was at Hughey's butcher shop, and that Tom Burke said he had taken the cow, knew it belonged to Boyd and that he brought it to Helena and let Sharp Hughey have it. Hughey claimed that he had bought the cow and paid for it.

Another witness saw the animal being skinned at the slaughter pen and appellant told him he had bought and paid $6 for it, and witness remarked that if he bought that cow so cheap it must have been stolen. The yearling was small, worth about $12, and he said he had paid $6 for it.

Appellant testified that he was in the butcher business, denied any understanding or agreement with Burke for stealing cattle and any knowledge that he had stolen the cow belonging to Boyd. Said he bought the animal from him, after having sent his son to the butcher pen, where Burke had carried it, to get an idea and estimate of its value. He told the officers when they came for

him that he had purchased the cow and had a bill of sale for it, which he couldn't at the time find, but later produced.

Appellant's son corroborated him as to the purchase of the cow from Tom Burke; said he went to examine it after Burke had put the animal in the slaughter pen and told his father it was worth $8; that they had bought cattle before from Tom Burke. There is no testimony whatever tending to show that there was any agreement or understanding that this or any particular animal should be stolen and brought to appellant.

Appellant was not present, aiding, abetting and assisting in stealing the cow, and if he was in accord with the act and encouraged Tom Burke to steal cattle generally, as the evidence tends to show, he was at most an accessory before the fact of the larceny and could not be convicted upon an indictment for larceny. *Roberts* v. *State,* 96 Ark. 62; *Corley* v. *State,* 50 Ark. 313; *Smith* v. *State,* 37 Ark. 274; *Williams* v. *State,* 41 Ark. 173.

Neither can he be convicted upon an indictment for larceny of receiving stolen property, knowing it to have been stolen. Not being present aiding, abetting and assisting in the taking and carrying away of the animal, the asportation of which was complete upon her delivery at the slaughter pen for inspection and sale, he was not guilty of the offense of larceny, and the testimony is insufficient to support the verdict.

The judgment is reversed and the cause remanded for a new trial.

SCOTT v. STATE.

Opinion delivered October 6, 1913.

APPEAL AND ERROR—INSTRUCTIONS—MOTIVE—SINGLING OUT EVIDENCE.—**In a trial of appellant for murder, an instruction "that the proof of the presence of a motive or the absence of a motive upon the part of the defendant with reference to the killing of his wife has absolutely nothing to do with the case,"** ***held*** **erroneous as virtually telling the jury that they could not consider the proof, relative to**

the presence or absence of a motive for the commission of the crime.

Appeal from Craighead Circuit Court, Jonesboro District; *J. F. Gautney,* Judge; reversed.

J. H. Hawthorne and *Horace Sloan,* for appellant.

The court's fourth instruction to the effect that proof of the presence or absence of a motive was immaterial and had no bearing upon an issue of insanity as a defense to the crime of murder, was erroneous (1) because the presence or absence of a motive is often the test as to whether a man's acts are rational or irrational; (2) because it singles out evidence and calls the attention of the jury to one fact adduced in evidence to the exclusion of other facts equally material. 77 Ark. 418-421.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee.

1. Insanity as a defense must be proved by a preponderance of the evidence. 20 Ark. 523; 50 Ark. 330-333; *Id.* 511-519; 54 Ark. 588-602. And to warrant an acquittal it must be the sole cause of the crime. 64 Ark. 523-535; 55 Ark. 259.

2. Instruction 4 is correct. 83 Ark. 316-323.

KIRBY, J. Appellant appeals from a judgment of conviction of murder in the first degree for killing his wife.

The testimony shows that J. L. Smith and his wife took dinner on the day of the murder at appellant's house, and that after dinner his wife, the deceased, accompanied Mrs. Smith home. No ill feeling was known by her to exist between appellant and his wife, and she was well acquainted with the family, having lived close to them and known them for a long time. Appellant, shortly afterward, came to Smith's house, where his wife was visiting, and asked her when she was coming home, and she replied, "Pretty soon," and he said, with an oath, "You need not come back at all," and went home. The deceased and Mrs. Smith then went to Mrs. Casey's, next

door, and the defendant returned shortly and asked his wife, "Why didn't you come home?" and she replied, "You told me I needn't come unless I wanted to, and I am not coming." He thereupon grabbed her and attempted to cut her throat with a knife, which was taken from him by a couple of other women present; he then threw his wife off of the porch into the yard and jumped on her and stamped her in the face with his foot, and then took up a stick of stovewood and beat her over the head with it, while she was continually begging him to desist, saying, "Honey, please don't," and the other women were trying to prevent him beating her. He finally caught her around the neck and dragged her away to his home, still carrying the stick of wood with him.

The wife's face and head were crushed by the blows, and she died at 1 o'clock the next morning.

The constable testified that he went to Scott's house, after being telephoned about 5 o'clock in the afternoon; that there was no one there but Scott and his wife, and he did not go into the house until after the doctor came. The reason he did not go in was that Casey hallooed to him that he had taken to the woods. He said further that the only reason that appellant gave for committing the act was jealousy. There was also testimony tending to establish the insanity of appellant.

Appellant relied upon insanity as a defense, and the court, over his objections, among others, gave instruction numbered 4, as follows:

"You are instructed that the proof of the presence of a motive or the absence of a motive upon the part of the defendant with reference to the killing of his wife has absolutely nothing to do with this case. It is not incumbent upon the State to prove either the presence or the absence of a motive for the killing; and the presence or the absence of a motive has no bearing whatever upon an issue of insanity as a defense to the crime of murder."

This court has held that it is not proper for the court in its instructions to single out the proof of motive or the absence of motive, and tell the jury that they may

consider that as a circumstance in favor of the guilt or innocence of the accused. That by doing so undue weight is given the proof, thus invading the jury's province; that it is error to single out the question of motive for the commission of the crime, and point to it as a proper subject of consideration as an evidence of defendant's guilt, and that it is equally erroneous and improper to point to the want of motive as an evidence of his innocence.

"In criminal prosecutions it is competent to introduce testimony of facts and circumstances tending to show a motive or absence of motive for the commission of the crime by the accused, as tending, with more or less force, to establish his guilt or innocence. It is not improper for the court to instruct the jury that they may consider such testimony for that purpose. But this should be done in connection with all the other facts and circumstances proved." * * * *Ince* v. *State,* 77 Ark. 418.

The instruction is erroneous in stating that the proof of the presence or absence of a motive upon the part of the defendant for killing his wife had absolutely nothing to do with the case. It is true, it is not incumbent upon the State to prove, either the presence or the absence of the motive, but the jury had the right to consider such testimony in determining the guilt or innocence of the defendant, and the court, in the instruction, is in error in declaring that the presence or absence of a motive had no bearing whatever upon an issue of insanity as a defense to the crime of murder. The instruction virtually told the jury that they could not consider the proof, relative to the presence or absence of a motive for the killing; that that had absolutely nothing to do with the case and no bearing whatever, upon an issue of insanity as a defense to the crime charged. Since the appellant was entitled to a consideration by the jury of the testimony, relating to the presence or absence of a motive for the commission of the crime, he was, in effect, deprived of this right by the said instruction, which was also erro-

neous, as given, in singling out the proof relative thereto.

The evidence shows the unprovoked and brutal murder of deceased by her husband, the appellant, who gave no explanation of his act, and plead as a defense to his crime his insanity.

The erroneous instruction was prejudicial, in declaring that the proof, relating to the presence or absence of motive, had no bearing whatever upon the issue, and, in effect, a direction to disregard it, and the case must be reversed on that account, according to the opinion of a majority of the court, in which I do not concur.

The judgment is reversed and the cause remanded for a new trial.

LAW v. FALLS.

Opinion delivered October 6, 1913.

COUNTIES—COUNTY SEATS—COURTHOUSE.—Under Act 100, page 188, of the Acts of 1875, Yell County was divided into two judicial districts, and provision made for the establishment of a seat of justice at Dardanelle. The act became effective and the courthouse at Dardanelle being destroyed by fire, *held*, a seat of justice having been established at Dardanelle, the county court had authority to direct the erection of a new building for the use of the courts of the district.

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

STATEMENT BY THE COURT.

In 1875 the Legislature passed an act providing for holding separate chancery, circuit and probate court at Dardanelle, in Yell County, but the act did not interfere with the holding of any of the courts at Danville, the then, and the present, county seat. The act divided the county into two judicial districts and provided that the jurisdiction of the courts of the Dardanelle District should extend over that district the same, and in like manner, as if said district was a constitutional county of this State, and the clerk of those courts was required to keep an office at Dardanelle with the seal of office; and

public records were required to be provided in which to record all those instruments which the law requires to be placed of record. After providing in detail for the establishment of the district the following proviso was added to the act:

"Provided, that all business shall continue to be transacted in said county as is now provided for by law, and until the said commissioners named in the third (3) section of this act have reported that they have a courthouse in readiness for the purpose of holding the circuit and probate courts of the Dardanelle District, and as soon thereafter as the said commissioners procure a courthouse for the holding of the courts in the Dardanelle District, then the courts shall be holden and the business conducted in all respects as is by law required to be done at the county seat of said county, and it shall be the duty of the presiding judge of the county court to order and direct the clerk of the circuit court to prepare the circuit court records, and the circuit and chancery courts of the county of Yell for the two said districts, shall be held at such time as may be provided by law."

The citizens of Dardanelle met the conditions imposed by the Legislature and the act became effective, and the business of that district has been transacted continuously since, in conformity with the terms of this act. But the courthouse was destroyed by fire, except that the fire-proof vault containing all the public records was not destroyed.

On April 12, 1913, the county court, by an order entered of record, took initial steps to build a courthouse and jail at the expense of the county. Commissioners formed plans and let the contract subject to the court's approval, and the court appropriated $25,000 for building purposes. Before the commissioners reported, or other steps were taken, J. B. Law and other citizens and taxpayers of that county were, upon their written petition, made parties and allowed to defend against such improvement, and filed their motion to set aside and revoke the order. On June 20, 1913, the court denied

appellant's motion to set aside its former order, approved the plans prepared and submitted by the commissioners, and ordered the contracts let, and appellants appealed to the circuit court. The case was tried in the circuit court where the judgment of the county court was affirmed, and motion for new trial having been filed and overruled, exceptions were duly saved and this appeal taken.

Appellants contend the court had no authority to have built or to provide for more than one courthouse, and that that building must be at the seat of justice of the county, which means the county seat; and that by the terms of the act of 1875, by which the court was established, the county was exempted from the burden of providing or maintaining a courthouse in the Dardanelle District. The question in the case, therefore, is, whether the county court had the power to order a courthouse and jail built in the Dardanelle District, and charge the county with the cost thereof.

Priddy & Chambers and *J. F. Sellers,* for appellants.

1. Laws creating liabilities against counties are strictly construed. They are not to be made liable beyond the strict letter of the law. 11 Cyc. 390; 35 Pac. 97; 24 N. E. (Ill.) 626; *Id.* (Ind.) 138; 60 Am. St. Rep. 518; 1 Dil., Mun. Corp., 450, § 237; 86 Pac. 1022; 3 N. E. 848; 95 S. W. 1032; 32 Ark. 45.

The only law authorizing the building of courthouses is found at section 1009, *et seq.,* Kirby's Digest, and unless authority to build two or more courthouses is to be found there, it does not exist. 63 Ark. 402; 18 S. W. 1144; 36 Am. St. Rep. 439; 37 Pac. 484. The grant of power to the county court to build a courthouse at the county seat is a limitation on the power of the court, and effectually prohibits it from building one at any other place. 45 Ark. 524; 79 Ark. 235; 60 Ark. 343-355.

2. The statute, Kirby's Dig., § 1009, provides for the erection in each county, at the established seat of justice, of a good and sufficient courthouse and jail. "Seat of justice" and "county seat," as used by our

lawmakers, are interchangeable terms, and mean the same thing. When the statute was enacted in 1835, it was then customary to designate the county town as the seat of justice, but it meant then, as it means now, the county seat. The seat of justice of Yell County is Danville. 20 S. W. 501, 502; 102 Ark. 281; act creating Lonoke County, Acts 1873, p. 102; Const. 1874; 5 Ark. 20; act creating Grant County, Acts 1869, p. 34. See also Acts 1869, p. 74; 75 S. W. 93; 25 Am. & Eng. Enc. of L. (2 ed.), 156.

3. The act creating the Dardanelle District, Acts 1875, p. 188, expressly provides (§ 18) that the courthouse shall be furnished by that district, and exempts the county from it as a public burden. The county court is powerless under the law to charge the county with the expense of erecting the proposed building. 15 Mo. 600; 36 Cyc. 1190.

Bullock & Davis, for appellees.

1. For a full interpretation of the powers and duties of the county court under the statute, see 93 Ark. 11; see also, 63 Ark. 397; 68 Ark. 340; 73 Ark. 523.

It is conceded that Dardanelle is not a county seat, but it is an established seat of justice, under the act creating the Dardanelle District; and in contemplattion of law is "the established seat of justice in said county for the Dardanelle District." 16 N. W. 876; 16 S. W. 489; 84 Miss. 536. The "established seat of justice" is not always nor necessarily a county seat, and by the use of this broader term, the Legislature doubtless intended to meet emergencies that might arise requiring a courthouse at a different place from the county seat. 60 Ark. 343; 75 Tex. 136.

2. There is no merit in appellant's contention to the effect that the expense of rebuilding the destroyed courthouse is one to be met by the people of the Dardanelle District alone, and that the county court is without power to erect the same at the expense of the whole county. The amount paid by the Dardanelle District pursuant to the act creating the district has performed

its functions, and the people of that district are under no further obligation to contribute to the rebuilding of the courthouse other than that resting upon the people of the whole county. Moreover, any attempt by the Legislature to create a continuing burden upon the Dardanelle District to maintain the courthouse would have been invalid and not enforceable, because repugnant to the Constitution. 57 Ark. 554; 80 Ark. 150; 55 Ark. 323.

SMITH, J., (after stating the facts). It will be observed that the act establishing the district requires only that the Dardanelle District procure a courthouse, and it is not made a condition precedent to the continued existence of the district that the courthouse shall be maintained. When the conditions of the act were met the district became an entity, and now exists and will continue to exist, until abolished by the Legislature, whether the courthouse is ever rebuilt or not. Under the law, the courts may be held temporarily at some place in Dardanelle until a permanent courthouse is constructed, whether the cost of the construction be met by the county or by the district, and the jurisdiction of these courts, and the validity of their orders, judgments and decrees will not depend on the erection of a building as a courthouse. *Hudspeth* v. *State,* 55 Ark. 323.

Nor will the validity of any record be impaired because there now stands in Dardanelle only the fireproof vault over which the courthouse was burned down.

Appellant insists that in the absence of express legislative authority, the county can build a courthouse only at the county seat, and that "seat of justice," as used in section 1009, of Kirby's Digest, means the "county seat," because at the time of its passage there was only one place where courts were held, and it was the seat of justice, and that was the county seat. But, however nearly "seat of justice" and "county seat" are synonymous, it is apparent that a seat of justice is not always a county seat, although a county seat is perhaps always a seat of justice.

When this act became effective, upon the building of

the courthouse, Dardanelle became a seat of justice, for here the courts sat and administered justice, and the public officers kept their offices and performed the functions of their offices. *Whallon* v. *Ingham,* 16 N. W. 876; Words and Phrases, vol. 7, p. 6376; *Jesse Hinton* v. *Perry County,* 84 Miss. 536; *State ex rel.* v. *Hughes,* 16 S. W. 489.

And being thus a seat of justice there existed the same authority to build a new courthouse at Dardanelle that there would have been to build a new one at Danville. Section 1009, Kirby's Digest.

The existence of this seat of justice could not depend upon the occurrence or extent of a fire, and Dardanelle being the established seat of justice in said county for the Dardanelle District thereof, the authority exists under the law for the county court's order, directing the erection of a new building, and the judgment of the court below is therefore affirmed.

EMINENT HOUSEHOLD OF COLUMBIAN WOODMEN *v.* HOWLE.

Opinion delivered October 13, 1913.

1. INSURANCE—BENEFIT INSURANCE—EVIDENCE—BY-LAWS OF FRATERNAL ORDER.—The by-laws of a fraternal order constitute a part of the contract insuring its members, and evidence of the same is admissible, in an action against the order to enforce payment of an insurance contract, to show that deceased violated the contract in such a way as to prevent a recovery by the beneficiary. (Page 402.)
2. CERTIORARI—RECORD—IDENTIFICATION OF PAPER.—Where an amendment of the record is made by the circuit court and brought up on *certiorari,* showing that on motion of defendant a paper was filed in the trial court, before the commencement of the trial and marked filed, and where the stenographer's transcript of the evidence as incorporated in the bill of exceptions shows that the paper was read in evidence, and shows a call directing the clerk to copy the same, the paper being on file with the pleadings, the reference to it in the call, was sufficient identification of the paper, and authorized the clerk to respond to the call. (Page 402.)

Appeal from White Circuit Court; *Eugene Lankford,* Judge; reversed.

S. Brundidge, for appellant.

The testimony offered by the appellant to show that the deceased, Howle, was killed by the town marshal of the town of Searcy, who was acting in necessary self-defense against the deadly assault of Howle, was unquestionably competent under the issues formed by the pleadings. The constitution and by-laws of a fraternal order form a part of the contract of insurance, and will be held as binding where not inconsistent with the terms of the certificate. 52 Ark. 202; 55 Ark. 210; 80 Ark. 419; 81 Ark. 512; 98 Ark. 423.

J. N. Rachels and *John E. Miller,* for appellee.

The judgment should be affirmed because the bill of exceptions does not contain all the evidence. The policy sued upon was not made an exhibit to the complaint, and, if brought into the record, must come by way of the bill of exceptions. It was introduced in evidence, but does not appear in the bill anywhere, and the purported copy thereof appearing at page 5 of the transcript is nowhere called for nor identified as a part of the bill of exceptions. It is, therefore, not a part of the record. 101 Ark. 555; 46 Ark. 482; 45 Ark. 485.

S. Brundidge, for appellant in reply.

The record shows that a motion was filed to require appellee to file a copy of the policy sued on, which was conceded, and the copy filed. The copy appearing in the transcript was called for by the bill of exceptions, and is fully identified as a part of the record in the case. 101 Ark. 555-557; 80 Ark. 444.

McCULLOCH, C. J. John W. Howle, a citizen of the town of Searcy, White County, Arkansas, was a member in good standing of the Eminent Household of Columbian Woodmen, a fraternal insurance society, and held a policy or benefit certificate therein, payable to his wife, Laura O. Howle, who is the plaintiff in this action. He was killed in an encounter with the marshal of the town of Searcy, and this is an action to recover the amount of the benefit, which the officers of defendant society re-

fused to pay, denying liability on the part of the society on the alleged ground that his death occurred while he was violating the law.

The constitution and by-laws of the society are, according to the express terms of the benefit certificate, made a part of the contract, and they contain the following restriction upon the liability of the society, towit:

"If a guest holding a covenant shall * * * die in consequence of a duel, or of combat, except in self-defense, * * * or in consequence of violation, or attempted violation, of the law, by such guest, * * * the covenant shall be void and of no effect, and all payments made or benefits which might have been accrued thereon shall be forfeited without notice or service."

The defendant on the trial of the case offered to prove that deceased, Howle, at the time he was killed by the marshal of the town of Searcy, was violating the law of the State, in that he was making an unlawful assault upon said marshal, who killed deceased in self-defense.

The court refused to admit the testimony, or any of like character, and defendant saved its exceptions. This was error, and calls for a reversal of the case.

The by-laws constituted a part of the contract, as before stated, and the proof offered by defendant tended to show a violation of the contract on the part of deceased, which prevented recovery by the beneficiary. *Supreme Lodge K. & L. of H.* v. *Johnson,* 81 Ark. 512; *Supreme Royal Circle of Friends of the World* v. *Morrison,* 105 Ark. 140.

It is insisted, however, by counsel for plaintiff that the exception is not properly preserved in the record, for the reason that the benefit certificate is not properly brought up. An amendment of the record has been made by the circuit court and brought here on *certiorari,* showing that on motion of the defendant to make the complaint more definite and certain, the plaintiff confessed the motion and in compliance therewith filed a copy of the certificate with the complaint. The record shows, by the filing marks of the clerk, that the paper was filed as

a part of the pleadings before the trial commenced, and the stenographer's transcript of the evidence, as incorporated in the bill of exceptions, shows that the policy was read in evidence, and also shows a call directing the clerk to copy the same. The paper being on file with the pleadings in the case, the reference to it in the call, was sufficient identification, and authorized the clerk to respond to the call to copy it in the bill of exceptions, which has been done. We are of the opinion that the record was complete so as to preserve this exception, and that the error of the court is thereby made manifest. For that reason the judgment is reversed and the case remanded for a new trial.

HUGHES v. STATE.

Opinion delivered October 13, 1913.

1. DEFINITIONS — "UNION" — "LEAGUE" — "FEDERATION." — The words "union," "league," and "federation," imply, in their ordinary application an unincorporated union or association of persons for a common purpose. (Page 404.)
2. INDICTMENT—SUFFICIENCY—PARTNERSHIPS AND UNINCORPORATED ASSOCIATIONS.—In indictments under Kirby's Digest, § 1839, for larceny or embezzlement it is not necessary to state the names of persons composing a partnership or other unincorporated associations. Kirby's Digest, § 2233. (Page 405.)
3. LARCENY—INDICTMENT—CHARGE OF OWNERSHIP—SUFFICIENCY.—An indictment under Kirby's Digest, § 1839, for larceny, is sufficient which charges the ownership to be in a partnership. (Page 405.)

Appeal from Pulaski Circuit Court, First Division; *Robert J. Lea,* Judge; affirmed.

J. A. Comer, for appellant.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee.

McCULLOCH, C. J. Appellant was convicted of embezzlement under section 1839, Kirby's Digest, which 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."

It is alleged in the indictment that appellant was the "agent, bailee and treasurer of Local No. 313 (known as the Bartender's Union of Little Rock, Arkansas), of the Hotel and Restaurant Employees International Alliance of Bartender's League of America, the same being a labor organization and affiliated with the American Federation of Labor, and as such treasurer, agent and bailee, having received from said Local No. 313, as aforesaid, the sum of $1,265 * * * unlawfully and feloniously did convert and embezzle to his own use the said above-described money."

There was a demurrer to the indictment, which the court overruled, and it is insisted that the indictment is defective in failing to state whether the organization mentioned was a partnership, or a corporation, and, if the former, to set forth the names of the individuals composing it.

The language of the indictment indicates with sufficient certainty that the organization is a voluntary, unincorporated association, and such the proof shows it to be. The words, "Union," "League," and "Federation," in their ordinary acceptation imply an unincorporated union or association of persons for a common purpose.

We hold that it is not necessary in indictments for larceny or embezzlement to state the names of persons composing a partnership or other unincorporated association. That was the effect of the decision of this court in *Andrews* v. *State,* 100 Ark. 184, where we said:

"If the statute has any application at all to larceny and kindred cases, and if any effect at all is to be given to

it in such cases, we must hold that it applies, and that, there being a sufficient identification of the property in stating the partnership name, the statute applies and renders the erroneous allegation as to one of the persons injured, immaterial. It is true that ordinarily in cases of this kind the rules of criminal pleadings require that the names of partners be given, but, so far as identification of the property is concerned, it is described by naming the partnership and, by operation of the statute, an error as to the individual names of the partners is immaterial."

The statute referred to provides that "where an offense involves the commission, or an attempt to commit, an injury to person or property, and is described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the person injured, or attempted to be injured, is not material." Kirby's Digest, § 2233.

If an erroneous allegation as to the names of the persons composing a partnership is immaterial, it necessarily follows that the naming of the persons is immaterial, and we think that under a fair construction of this statute the indictment is sufficient if it charges the ownership to be in a partnership. It is unnecessary to name the individuals, for that is, of itself, a sufficient identification, and is all that the statute requires. That conclusion is reached in the case of *Ivy* v. *State,* 109 Ark. 446.

This view is in conflict with the language in the opinion in the case of *McCowan* v. *State,* 58 Ark. 17, where it was held that it is necessary, in an indictment for larceny of property of a partnership, to set out the names of the individuals composing the partnership. The language, holding to that effect, seems to be *dictum,* for it appears that the indictment did not allege that the owners were partners, and it also failed to give the names of the persons. We think it is sufficient where the name of the partnership or association is set forth in such words as amounts to an allegation that it is a voluntary association or partnership unincorporated. That is sufficient identi-

fication, and the individual names need not be set forth. The case of *McCowan* v. *State, supra,* is to that extent overruled.

The following cases cited in the McCowan case bear out the rule we here announce, and are, we think, correct: *People* v. *Ah Sing,* 19 Cal. 598; *Reed* v. *Commonwealth,* 7 Bush (Ky.) 641.

There is little else for discussion in the case. The testimony shows beyond dispute that the defendant was treasurer of the organization named, that he received $1,265 in money into his hands as such treasurer, and wrongfully converted it to his own use. The testimony shows that he admitted to several members that he had received the money and appropriated it, and promised to make it good. His books, introduced in evidence, also show that he had received the money, and he made no attempt to account for it except in his admissions to some of the members that he had used it.

The point is made that the court erred in admitting testimony as to the rules of the organization without proper identification.

It is difficult for us to see what bearing the rules have upon this controversy, for the proof is that he admitted receiving the money and using it. The effort is to bring the case within the rule announced by this court in *Supreme Lodge K. of P.* v. *Robbins,* 70 Ark. 364, where it was held that a law governing a society of this kind is not sufficiently proved by a witness stating its terms, and offering a pamphlet which he says is an official publication of the same, unless the witness shows that he has compared it with the record of the original, and knows it to be a true copy.

The testimony shows that the by-laws came through the hands of the appellant himself, and were given out by him as the rules under which he and other members of the association were working, so, if proof of the rules was essential to establishing the material facts of this case, that would be sufficient.

There are other assignments of error which we have

considered and found to be without merit or worth discussion in this opinion. Judgment affirmed.

SULLIVAN v. STATE.

Opinion delivered October 13, 1913.

1. LARCENY—PROPERTY STOLEN IN ANOTHER STATE.—Under Kirby's Digest, § 2100, which makes it larceny punishable in Arkansas, to steal property in another State and bring the same into this State, in order to convict a defendant it must be proved that the defendant stole the property in another State and brought it into Arkansas. (Page 409.)
2. LARCENY—PROPERTY STOLEN IN ANOTHER STATE—EVIDENCE—SUFFICIENCY.—Evidence of defendant's unexplained possession of property shown to have been recently stolen in another State, and his confession of a guilty knowledge of the theft, *held* sufficient to warrant the jury in drawing the inference that he was guilty of stealing the property himself, and bringing it into this State. (Page 410.)
3. TRIAL—CONTINUANCE—DISCRETION OF THE COURT.—Matters of continuance are peculiarly within the discretion of the trial judge, and unless an arbitrary abuse of such discretion is affirmatively shown, the ruling of the court will not be disturbed. (Page 410.)

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

Pratt P. Bacon, for appellant.

1. Due diligence was shown, and the testimony of the absent witness was material in that it would refute the State's contention that the belts were the property of the witness Farmer. The denial of appellant's motion for a continuance was an abuse of discretion.

2. In a case of interstate larceny, before the court can acquire jurisdiction, it must affirmatively appear that the defendant himself stole the property in the foreign jurisdiction, and himself, with continuous felonious intent, brought it into the jurisdiction of the trial court. Appellant's possession of the property in Miller county was not sufficient evidence that he, with continuous felonious intent, brought it from the foreign jurisdiction. 38

Ark. 568. The question of jurisdiction may be raised at any time. 45 Ark. 346; *Id.* 450; 95 Ark. 405.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee.

1. There was no abuse of discretion in overruling the motion for continuance. Aside from appellant's statement there is nothing in the record to show either that a subpoena was ever issued for the witness, or that he was absent in Louisiana temporarily.

2. There is proof sufficient to justify the inference that appellant himself stole the belts in Louisiana, which, taken in connection with his possession of them in Miller County, and his unsatisfactory explanation of such possession, warrants the verdict. 79 Ark. 432; 101 Ark. 473-485. On the question of continuous felonious intent, see 97 Ark. 412, 414.

McCULLOCH, C. J. The indictment against the defendant, George W. Sullivan, contained two counts, the first charging him with the crime of grand larceny by stealing two gin belts, of the value of $40 and $20, respectively, the property of one J. P. Farmer, and the other count charging him with receiving stolen property of said J. P. Farmer, knowing it to have been stolen. On trial of the case before a jury, defendant was found guilty of grand larceny under the first count.

The testimony adduced by the State tended to show that two belts, belonging to Farmer, were stolen from the latter's gin house just across the State line in the State of Louisiana about the last of November, 1912, and that within a few days thereafter, Farmer and his son found the belts on the machinery of the gin operated by the defendant in Miller County, Arkansas. Farmer and his son, and another witness, identified the property as belts which had been recently stolen from his gin house in the State of Louisiana. When Farmer found his belts in possession of defendant, he asked the latter where he had gotten them, and defendant declined to state who he got the belts from, saying, according to the testimony, that he "got them from a dangerous man, a dangerous

character," and that he knew they were stolen belts when he bought them, because he had only paid about half-price for them.

There is a statute in this State with reference to the crime of larceny committed by bringing stolen property into the State, which reads as follows:

"Every person who shall steal or obtain by robbery the property of another, in any other State or country, whether the same be within the jurisdictional limits of the United States or not, and shall bring the same within this State, may be indicted, tried and punished for larceny, in the same manner as if such property had been feloniously stolen or taken within this State, and in any such case the larceny may be charged to have been committed in any county into or through which such stolen property may have been taken." Section 2100, Kirby's Digest.

In the recent case of *Wilson* v. *State,* 97 Ark. 412, the court, speaking of that statute, said:

"In order to convict under the statute, it must be shown that the person who committed the larceny in the first instance brought the property into this State, and in this way show a continuous felonious intent, which is necessary to give the courts of this State jurisdiction. If appellant had no connection with the original stealing, and his only connection with the crime was that of receiving the goods after they were stolen, he committed no crime under the statute in question."

The court in its instructions to the jury properly defined the offense, telling the jury that, in order to convict the defendant of larceny, they must find that he stole the property in the State of Louisiana and brought it into Miller County, Arkansas.

It is insisted, however, that the evidence is not sufficient to establish the fact that defendant was a party to the theft of the property in the State of Louisiana, so as to make him guilty of larceny in bringing it into this State.

A consideration of the testimony adduced convinces

us, however, that defendant's unexplained possession of the property shown to have been recently stolen, and his confession of a guilty knowledge of the theft were sufficient to warrant the jury in drawing the inference of fact that he was guilty of stealing the property himself and bringing it into this State. *Gunter* v. *State,* 79 Ark. 432; *Douglass* v. *State,* 91 Ark. 492; *Wiley* v. *State,* 92 Ark. 586; *Jackson* v. *State,* 101 Ark. 473.

We think that the case was properly submitted to the jury and that the evidence was sufficient to sustain the conviction.

There is another assignment of error in the overruling of defendant's motion for a continuance.

He alleged in his motion that his son was an important witness, setting out material testimony which the witness would give, and alleged that the witness was in the State of Louisiana, but that his attendance could be procured at the next term of the court. He further stated in the motion that the witness, though his son, was unfriendly to him.

The motion sets up an unusual state of facts, in showing that the son, only a few months before, at the time of the commission of the offense, was with the defendant, his father, and on friendly terms, yet was unfriendly at the time of the trial, so that the defendant was not accountable for his absence. In view of the fact that defendant rested upon the mere statement of these things in his motion, without any proof to establish this unusual condition with reference to alleged estrangement between father and son, we are of the opinion that it can not be said that the court abused its discretion in refusing to continue the case for the term. Matters of continuance are peculiarly within the discretion of the trial judge, and unless an arbitrary abuse of such discretion is affirmatively shown, the ruling of the court will not be disturbed.

We are convinced that this case was fairly tried, and that the judgment should be affirmed. It is so ordered.

PALMER v. STATE.

Opinion delivered October 13, 1913.

1. LARCENY—CONVICTION—EVIDENCE—SUFFICIENCY.—Evidence that defendant received a note from one R for collection, and converted the same to his own use by hypothecating it to one C for the purpose of having C endorse defendant's note to a bank, *held*, sufficient to warrant a conviction for the crime of larceny under Kirby's Digest, § 1837. (Page 412.)

2. CRIMINAL LAW—EVIDENCE—AGE OF DEFENDANT—SUFFICIENCY OF PROOF.—Where defendant is charged with the crime of larceny, the fact that he was over sixteen years of age may be established by circumstantial, as well as direct, evidence, and when defendant testified before the jury, and made statements as to his former occupations, the jury would be justified in believing him to be over sixteen years of age. (Page 412.)

Appeal from Garland Circuit Court; *Calvin T. Cotham,* Judge; affirmed.

Appellant pro se.

1. There is no proof of age.

2. Cites 51 Ark. 119, as to the court's charge to the jury.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee.

1. Age may be proven by circumstantial evidence.

2. There is no error in the court's charge. Kirby's Digest, § § 1837-8; 53 N. W. 571; 100 Ark. 201.

McCULLOCH, C. J. The defendant was convicted under an indictment based upon the following statute:

"If any clerk, apprentice, 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 case of larceny." Section 1837, Kirby's Digest.

The charge contained in the indictment is, in substance, that defendant, being the agent and bailee of Sam Rye, and having entrusted to his possession a certain promissory note, the property of said Rye, which had been executed to him by one Miller Swancy, of a certain date, for the sum of $92, and of that value, did feloniously and fraudulently embezzle and convert said note to his own use, without the consent of said owner.

The indictment also contained another count charging defendant with the crime of grand larceny, alleged to have been committed by stealing $30 in money, the property of Sam Rye.

Upon a trial of the case the court gave a peremptory instruction in defendant's favor as to the second count, and the jury returned a verdict of guilty under the first count.

The testimony adduced by the State tended to show that defendant pretended to Rye that he was an "ex-attorney," and proposed to him to collect the note in question without charge; that the note was entrusted to him for collection, and that he subsequently converted the same to his own use by hypothecating it to a bank in the city of Hot Springs for a loan of money, or, rather, that he hypothecated it to one Cobb for the purpose of having the latter endorse his note to the bank.

The evidence was sufficient to sustain each of the elements of the crime.

It is especially contended by appellant that there was no affirmative proof that he was over sixteen years of age at the time of the alleged commission of the offense.

It is true that no witness testified directly as to defendant's age, but there are many statements of the witnesses from which the jury might infer that he was a ma-

ture man. There is much testimony about his former occupations and his statements concerning the same which would justify the jury in finding that, according to his own admissions, he was very much over sixteen years of age. He claims that he had been an attorney-at-law, and that he was an experienced worker in concrete. Besides this, he testified before the jury, and an opportunity was thus given to determine his age. This fact could be established by circumstantial, as well as by direct, evidence. *Douglass* v. *State,* 91 Ark. 492. Nothing seems to have been said or suggested during the trial, or in the instructions requested and given, about proof of the age of defendant. The alleged defect in the proof appears only to have been discovered after the testimony got into the transcript. But we are of the opinion, nevertheless, that there is enough in the testimony to warrant an inference by the jury as to defendant's age.

Errors are assigned in the refusal of the court to give certain instructions whereby it was sought to submit the question of defendant's good faith and honest belief that the note had been turned over to him by Sam Rye for the purpose of cancelling a debt which defendant claimed Rye owed him.

Defendant testified that Rye owed him a sum of money in excess of the amount of the note, that the note was assigned and delivered to him, and that the proceeds were to be appropriated as a payment on said debt. This was denied by Rye, who testified that he did not owe defendant anything, and that the note was entrusted to the latter for collection. There was a sharp conflict in the testimony on that point. There was scarcely any room to find, from the testimony, that, if the note was not delivered to defendant in satisfaction of the debt he claimed against Rye, defendant honestly believed that it was delivered to him for that purpose. In other words, if it is not true, as he claims, that Rye owed him and turned the note over to him to satisfy the debt, then there is nothing that would warrant the conclusion that he honestly believed so. But, be that as it may, the court

submitted that issue in an instruction which told the jury that before they could convict defendant, they must find that he converted the note to his own use "knowing that he had no right to do so," and that defendant "converted the note to his own use with the intent and purpose of cheating and defrauding the said Sam Rye out of the said note, or its value." This fully covered the point contained in the instruction requested by defendant, and there was no error in refusing to give the one he requested.

Objection is made to certain instructions given by the court, and error is assigned in that respect. But upon a careful consideration of them, we are convinced that the instructions given properly submitted the issue to the jury. Some of the instructions that defendant complains of referred to the conversion of the $30 in money received when the note was hypothecated, and, as a matter of fact, the first count does not charge the conversion of the money. The references in these instructions to the money collected relate only to the intent of defendant in using the note, and do not direct a finding of guilt because of the misappropriation of the money, but make guilt depend upon the conversion of the note itself. If defendant received the note for collection, as contended by the prosecuting attorney, and hypothecated it for the money which he appropriated to his own use, this would constitute an unlawful conversion of the note and would make him guilty under the indictment.

There is no prejudicial error in the proceedings so far as we can discover, and the judgment is therefore affirmed.

EMMONS v. STATE.

Opinion delivered October 13, 1913.

1. EVIDENCE—RELEVANCY—ASSAULT WITH INTENT TO KILL.—Where defendant was charged with assault with intent to kill, by sending poison through the mail, and denied the placing of any poison in the package sent, evidence of the general reputation of another

person, with whom defendant was jointly indicted, as a "voodoo" doctor, and that he gave her certain articles for certain magical purposes, is irrelevant and inadmissible. (Page 419.)

2. ASSAULT WITH INTENT TO KILL—IDENTIFICATION OF ARTICLE SENT BY MAIL—SUFFICIENCY OF EVIDENCE.—Where defendant sent bottles of whiskey and beer by mail, which were received by the prosecuting witness, evidence held sufficient to identify the bottles opened by a chemist and found to contain poison, as the same bottles that were sent by defendant. (Page 420.)

Appeal from Phillips Circuit Court; *J. M. Jackson*, Judge; affirmed.

STATEMENT BY THE COURT.

The appellant was indicted jointly with Sam Hunter for the crime of assault with intent to kill one Ellen Hall by administering poison.

The prosecuting witness testified that she lived at Elaine, in Phillips County. She received a letter postmarked "Helena, Arkansas," which reads as follows: "Helena, Ark., March 14, 1913. Ellen Hall. Dear Sweetheart: How are you? I am in Helena and feeling very well. Would be glad to see you, but it is so I can not today, but I am sending you a package by express, prepaid. Trusting you are well at present, yours truly." Witness went to the depot and got the package. She recognized the carton exhibited to the jury as the same she received. There was a quart of whiskey and two bottles of beer in the package, which witness carried to Ed Hare. When witness carried the package to Hare, it was closed down and sealed. He cut the seal, and the two bottles of beer and quart of whiskey were taken out. Afterward it was put back and carried and delivered to the doctor at Elaine. Witness had not seen it from that day until the trial.

Witness had known Hattie Emmons for two or three years. She had had trouble with her last March, before receiving this package. Hattie Emmons claimed that witness was going with her husband. Witness told the appellant that she had nothing to do with appellant's husband; never saw him, and didn't send him any letter. Witness got the package the same day she received the

letter. The beer looked green, and there was something in the whiskey bottle; never pulled the seal off of either of them. The bottles had tin tops.

Ed Hare testified that Ellen Hall brought a package of whiskey to him which was sealed up. He saw it cut open, and it contained a quart of whiskey and two bottles of beer. It was not opened at his house. The way Ellen Hall talked and acted, witness suspected that the beer and whiskey were not right. Therefore he did not drink any of it. The next morning Ellen Hall's brother Frank came, and they carried the whiskey to the doctor at Elaine.

Witness Annie Hare stated that she examined the beer and whiskey after her husband, Ed Hare, had taken same out of the sealed package, and the beer looked like it had little dregs in the bottom. She saw nothing about the whiskey except a little cork floating on the top. The color of the beer was bluish or kind of greenish looking. There were dents in the little tin stoppers.

The record contains the following stipulation: "It is admitted that Doctor.....would testify that Ellen Hall delivered to him two bottles of beer and a quart of whiskey, and that he delivered the same articles to J. N. Moore, and that Moore will testify that he received the same and turned them over to Albert Bailey."

Bailey testified that J. N. Moore, deputy sheriff at Elaine, turned over to him a bottle of Tom Collins whiskey and a bottle of Cook's Goldblume beer in March, 1913. That he first carried it to Doctor Trotter, and then afterward carried it to Myer's drug store, and had him pack it up and ship it to Memphis by express. He didn't remember the express company, but Doctor Morris got the receipt. It was addressed to Doctor McElroy.

By agreement the report of Dr. P. W. Holtzendorff, an analytical chemist, was read to the jury, showing that he received an express package from Doctor McElroy with instructions to open and analyze the contents of two bottles. He did so and found in each arsenite of copper, commonly known as paris green, emerald green, etc. It

was shown that one of the bottles was Cook's Goldblume beer, and the other was Tom Collins whiskey. It was shown from the analysis that the bottles of beer contained enough poison to have killed ten men.

The appellant objected to this testimony, the ground of the objection being that the testimony was incompetent for the reason that the "stuff" was opened "and in the woman's (Ellen Hall's) hands; that the testimony shows that she kept it over night." Appellant objected to any analysis made of "this stuff" after it had been in her hands that length of time.

It was shown by Doctor Trotter that when the bottles were received by him he thought both bottles had been opened. He was not positive whether the beer bottle had a tin stopper on it when he received it, but was inclined to think it had a stopper; he thought it had a cork in it. He further testified that he examined the bottles on the outside, and the color of the beer was a milky or muddy color. He saw but little change in the whiskey.

There was testimony on behalf of the State which tended to show that the appellant, in connection with a black man, bought two bottles of beer and a bottle of whiskey in Helena, and that appellant had same addressed to Ellen Hall, Elaine, on the 20th of March, 1913. They had the beer and whiskey put in a sealed package, and the carton was addressed to Ellen Hall. The party who was with the appellant offered to prepay the express on the package.

The appellant testified that she had had "fusses" with the prosecuting witness about her husband, and that Ellen Hall had come between her and her husband about a year ago last April. Appellant, while admitting that she bought the beer and whiskey, denied that she put any poison or compound of any kind in the same.

Appellant offered to prove by the testimony of various witnesses that the general reputation of one Sam Hunter in the community where he lived, among the colored people especially, was that of a "voodoo" doctor, and that he claimed to have magical powers over people;

that Sam Hunter gave to appellant three tablets which he told appellant to sprinkle around the house and on the footsteps of Ellen Hall, and thereby bring her husband back to her and cause him to forget the other woman. The court refused to permit this evidence of the general reputation of Sam Hunter among the colored people, and the testimony as to what Sam Hunter had said to appellant in regard to the effect of his mystic art both before and at the time appellant bought the beer, to which the appellant duly excepted.

The court read section 1588, of Kirby's Digest, defining assault with intent to kill by administering poison, and the punishment therefor, and gave other instructions to which no exceptions were taken. The jury returned a verdict finding the appellant guilty, and assessing her punishment at five years in the penitentiary, and from the sentence and judgment of the court this appeal has been duly prosecuted.

Appellant pro se.

1. The offered testimony of appellant as to what Sam Hunter, the "voodoo man," had told her he could do in regard to the trouble between herself and her husband, should have been admitted, and she should have been permitted to exhibit to the jury the "magic" potions he gave her to sprinkle around the house and on the tracks of Ellen Hall thereby to bring her husband back to her. These parties are all ignorant, superstitious negroes. The evidence was admissible to show the intent of appellant. 8 Fed. 232; 30 App. D. C. 1.

The jury were entitled to know all the facts and circumstances that might throw light on the actual intent of appellant. 54 Ark. 283. 49 Ark. 157; 1 Bishop, Crim. Law, § 735, note 1.

2. It was error to admit in evidence the analysis of the contents of the bottles by Doctor Holtzendorff, without proof that the condition of the contents was the same when received and examined by him as when received by Ellen Hall. 110 S. W. 52; 77 Ark. 238; 71 Ark. 69; 91 Ark. 175.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee.

1. Hunter's general reputation as a "voodoo man," etc., was properly excluded. 16 Cyc. 1211-1212.

2. Doctor Holtzendorff's analysis of the contents of the bottles was properly admitted. See *Davidson* v. *State,* 109 Ark. 450.

WOOD, J., (after stating the facts). The court did not err in refusing to permit the offered testimony as to the general reputation of Sam Hunter in the community where he lived as a "voodoo" doctor. Appellant denied that she put any poison or compound of any kind in the beer or whiskey. The testimony therefore was not relevant.

If the appellant had admitted that she had put a compound or powders in the beer or whiskey that she did not know to be poison, then this testimony might have been admissible as tending to show her purpose in so doing.

The testimony, as set forth in the statement, was sufficient to show that the bottles were in the same condition when received by the prosecuting witness, Ellen Hall, as they were when they were delivered to the chemist to be analyzed by him. The testimony of the prosecuting witness shows that she delivered the package to Ed Hare in the same condition in which she received it, and the testimony of Hare shows that the carton which held the beer and whiskey was sealed up when he received it. He shows that none of it was opened while it was in his house, and that the next day it was taken by the prosecuting witness and her brother to the doctor. It was admitted that the doctor, whose name was not given, would testify that he delivered the same articles to J. N. Moore, and that Moore would testify that he turned the same articles over to Bailey, and Bailey testified that he carried the same articles to Doctor Trotter, and Doctor Trotter testified that he sent the bottles of Cook's beer and Tom Collins whiskey, the same articles that Bailey delivered to him, over to his particular friend, Dr.

J. D. McElroy, and that McElroy turned it over to the State chemist, Doctor Holtzendorff. Doctor Holtzendorff shows that the package, as delivered to him, was intact and contained two bottles, one marked "Goldblume Beer," and the other "Tom Collins Whiskey," and that he analyzed the contents of these two bottles, and his report shows what they contained.

We are of the opinion that this testimony sufficiently identifies the beer and whiskey and shows that it was in the same condition when it was analyzed by the chemist, so far as the contents are concerned, as it was when it was received by the prosecuting witness, Ellen Hall. *Davidson* v. *State,* 109 Ark. 420. There is nothing in this testimony to warrant the inference that any one had injected any poison into the bottles from the time they were sent by appellant and her companion from Helena on the 20th of March, 1913, to Ellen Hall, at Elaine, nor anything to warrant the conclusion that anything had been injected into the contents of the bottles from the time Ellen Hall received the same until they were analyzed by the chemist, whose report showed that they contained poison.

There was testimony tending to show a motive on the part of the appellant for the commission of the offense, and the testimony, upon the whole, is sufficient, in our opinion, to sustain the verdict finding her guilty of the crime charged. It is conceded that there was no error in the charge of the court. The judgment must therefore be affirmed, and it is so ordered.

ROBERSON v. STATE.

Opinion delivered October 13, 1913.

CRIMINAL LAW—ASSAULT—ASSAULT WITH INTENT TO KILL—DUTY TO INSTRUCT AS TO LOWER DEGREES.—Where defendant is charged with the crime of assault with intent to kill, and there is evidence tending to show that defendant is guilty of a lower grade of offense, as where defendant acted in the sudden heat of passion, provoked by the prosecuting witness, it is error for the trial judge to refuse to

instruct the jury in reference thereto, when requested by the defendant.

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

Webber & Webber, for appellant.

1. To constitute assault with intent to kill, or, under the statute (Kirby's Dig., § 1588), a *specific intent* to take life must be shown. 91 Ark. 505; 54 *Id.* 489.

2. The question as to whether defendant had invited or provoked the assault should have been included in the court's charge. 73 Ark. 406; 95 *Id.* 431; 104 N. W. 191.

3. It was error to charge the jury that appellant was guilty of assault with intent to kill, or not at all. The court should have charged the jury as to the lower grades of the offense. 72 Ark. 569; 43 *Id.* 289; 21 Cyc. 111; 2 *Id.* (Ill.) B., p. 748; 12 *Id.* 639-640, 18A.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee.

1. A general objection to all the instructions is not sufficient. A charge of assault with intent, etc., includes murder in the second degree. 64 Ark. 69. No specific objection to the instructions were made.

2. It is the duty of the judge to determine whether there is any evidence at all justifying a particular instruction. 50 Ark. 506; 52 Ark. 345-7.

WOOD, J. Appellant was convicted in the Miller Circuit Court on an indictment charging her with the crime of an assault with intent to kill one Ethel Butler. The indictment alleged that the assault was made by striking and cutting with a hatchet. The testimony for the State tended to show that Ethel Butler was on her way home, had passed appellant's house, and was walking along talking to one of the neighbors; that appellant came upon the prosecuting witness when the latter was not looking, and cut her with a hatchet three times in the head and once on the shoulder; that she continued to cut Ethel Butler after she was down

and unconscious; that the prosecuting witness had said nothing to appellant, nor appellant to her; that she had no previous quarrel with appellant, and had not threatened her. In other words, the testimony on behalf of the State tended to sustain an assault with intent to kill as laid in the indictment.

On the other hand, the testimony for the appellant tended to show that Ethel Butler, on the day before the rencounter, had shoved appellant off of the sidewalk and had made some insulting remarks to her; that on the day of the rencounter Ethel Butler was seen going in the direction of appellant's house, and was heard to say that she was going to appellant's, and that appellant had to take back something or she (Ethel) would whip her; that Ethel Butler did go to where appellant lived, and stopped just off the sidewalk at appellant's gate; that the prosecuting witness called appellant, telling her to come out; that appellant was at her well in the yard, drawing water; that she went in her house, put up the water, came out and started out of her gate, when the prosecuting witness went toward her with a drawn knife, whereupon appellant drew the hatchet and struck the prosecuting witness three times with it.

Appellant testified that the prosecuting witness had been threatening all along to whip her; had shoved her off the sidewalk; that she would say things about appellant every time the latter went to market. When the prosecuting witness threatened to whip appellant, she was accompanied by Larcenia Hall. Appellant testified that she had nailed some planks on the porch, and that was the reason she had the hatchet out there; that she was going to have the prosecuting witness arrested, and so told the prosecuting witness; that she picked up the hatchet as she started out to the gate to protect herself in case the prosecuting witness attacked her; that when she got out of the gate and made a turn to go to the officer's house, the prosecuting witness met appellant; the prosecuting witness had a long, big knife; she ran up and drew back to cut appellant, when appellant struck her

with the hatchet. Appellant testified that the reason she didn't wait until the prosecuting witness left to go for an officer was, that she had waited so many times and had not gone, and she had taken insults until she was tired of it. She was afraid of the prosecuting witness. States that she was fighting to protect herself from the knife. They were facing each other. The prosecuting witness had been meddling with appellant so much "she got tired of it, and was going to have her arrested." The testimony of several witnesses tended to corroborate appellant.

Among other prayers for instructions, the appellant requested the following: 5. "If you find that defendant struck Ethel Butler, in the sudden heat of passion caused by a provocation apparently sufficient to make her passion irresistible, you can not find defendant guilty of assault with intent to kill or murder, because a killing under such circumstances would amount to manslaughter only, and not murder."

The court, in its charge, declared the law defining the necessary elements to constitute the crime of an assault with intent to kill, and also defining the law of self-defense. The court, in its charge, narrowed the inquiry of the jury to the question as to whether appellant was guilty of an assault with intent to kill, or whether the alleged assault was in self-defense. There was no specific objection to the court's charge given to the jury of its own motion, and, indeed, the charge as thus given, covering the phase of the evidence concerning an assault with intent to kill and self-defense, was correct. Likewise, the instruction on the credibility of witnesses.

But the question of appellant's guilt or innocence of the lower grades of assault included in the indictment was not submitted to the jury. The only issue under the instructions given by the court was whether or not appellant was guilty of an assault with intent to kill, or whether the assault was in necessary self-defense.

We are of the opinion that the court should have given appellant's prayer No. 5, which would have al-

lowed the jury to consider the lower grades of offense included in the indictment, and would have allowed the jury to convict her of a lower grade of offense if they found that appellant made the assault with a deadly weapon, but under circumstances which would have made her offense manslaughter only had death resulted.

The testimony on behalf of the appellee was sufficient to call for such an instruction. This testimony was sufficient to warrant them in returning a verdict convicting appellant of a lower grade of offense than that of assault with intent to kill. Had the court given the instruction and the jury been allowed to consider the question of the lower grades of offense included in the indictment, their verdict might have been for a lower offense, instead of the higher crime.

Where there is evidence tending to show that the defendant was guilty of a lower grade of crime, the appellant, upon request therefor, is entitled to have that issue submitted to the jury. See *Collins* v. *State,* 102 Ark. 180.

The verdict of guilty shows that the jury did not accept appellant's evidence tending to show that the assault was in self-defense. It is therefore unnecessary to remand the cause to have that issue again submitted.

The error of the court in refusing appellant's prayer allowing the jury to consider the lower grades of the offense included in the indictment will be cured if a judgment is entered against appellant convicting her of the lowest grade of offense which the jury could have found under the evidence.

For the error refusing to give appellant's prayer No. 5, the judgment will be reversed and the cause remanded for a new trial unless the Attorney General elects, within fifteen days, to have judgment entered convicting appellant of an assault and battery, the lowest offense for which she could have been convicted under the indictment.

DICKENS v. STATE.

Opinion delivered October 13, 1913.

1. ESCAPE AND RESCUE—INDICTMENT—SUFFICIENCY.—An indictment under Kirby's Digest, § 1673, which charges defendant with assisting in the escape of a prisoner, held sufficient, being sufficient to advise defendant that he was charged with the crime designated as "Escape and Rescue," by aiding the prisoner, who was in lawful custody, to make his escape by force exerted by "catching, holding and detaining" the officer having the prisoner in charge. (Page 428.)
2. ESCAPE AND RESCUE—EVIDENCE—SUFFICIENCY.—Where defendant was charged with the crime of escape and rescue, the evidence held insufficient to sustain a conviction under the indictment. (Page 428.)

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

STATEMENT BY THE COURT.

Appellant was convicted on an indictment which charged him with the crime of escape and rescue, committed as follows, towit: "Said John Dickens * * * did unlawfully, wilfully, maliciously and feloniously, and by force and menaces of bodily harm, set at liberty one Charlie Spears, by then and there aiding, abetting, advising and encouraging the said Charlie Spears to escape from the custody of one James N. Crenshaw, deputy sheriff for the county aforesaid, and by then and there forcibly catching, holding and detaining the said James N. Crenshaw in his efforts to recapture the said Charlie Spears at the time he, the said Charlie Spears, was then and there making his escape from the custody of the said James N. Crenshaw, he, the said James N. Crenshaw, then and there having the said Charlie Spears under lawful arrest upon a charge of grand larceny, he, the said Charlie Spears, having been tried before E. M. H. Duke, a justice of the peace within and for Red River Township, in the county aforesaid, and by him the said justice bound over to await the action of the circuit court of said county upon the charge aforesaid, and he, the said John Dickens, then and there well knowing that the said Char-

lie Spears was then and there under lawful arrest, and in the lawful custody of him, the said James N. Crenshaw, upon the said charge of grand larceny as aforesaid."

Appellant admitted that Charlie Spears was under lawful arrest. Crenshaw testified that he was deputy sheriff and jailer of Miller County; that Charlie Spears escaped from him about 1 or 2 o'clock while in a restaurant in Garland City. At the time, he, Lee Hensley, Enoch Dickens and Charlie Spears were taking soda water. Witness had his pocketbook open, fixing to pay for the soda. He turned his back a little to open his pocketbook, and heard a noise behind him like somebody running against a door. There was a partition door there, and Enoch Dickens had pulled this partition door, and was holding it with his hands, and Spears had gone. Enoch backed up between witness and the door, and witness gave it a push, and pushed him through the door. This door opened into the back room. When witness got into this back room, there was a screen door there, and appellant was standing outside with his hands against it and appeared to be pushing. Just before witness got to this door, he jerked his gun and threw it on appellant, and he fell back and opened the door. When witness got out of this door, Spears was trying to get on a horse just to the left of the door going out. He was eight or ten feet from the door where appellant was, trying to get on the horse appellant had been riding.

Witness arrested Spears and appellant. He had seen appellant with that gray horse there that day before this occurred; saw the horse at the trial, but didn't know who brought it there. This occurred in Miller County, Arkansas, between the June and November, 1912, terms of the Miller Circuit Court. Witness did not know whether appellant was using any strength or not. He had his hand up against the door pushing. Witness didn't push the door. The door was not hooked.

It was shown that appellant rode the horse that

Spears attempted to ride away, around behind the restaurant.

Appellant demurred to the indictment, and moved to compel the State to elect between the two offenses, which he alleged was charged in the indictment, towit: escape and rescue, and resisting an officer. Appellant was convicted and sentenced to three years in the penitentiary. He moved in arrest of judgment on the ground that the indictment did not charge a public offense within the jurisdiction of the court. Appellant also moved for a new trial, alleging errors of the court in overruling his demurrer and motions, and also alleging that the verdict was contrary to the evidence. The motion for a new trial was overruled, and appellant duly prosecutes this appeal.

John N. Cook, for appellant.

1. The demurrer should have been sustained. Kirby's Dig., § 1673; 38 Ark. 519; 47 *Id.* 488; 58 *Id.* 35; 68 *Id.* 251; 73 *Id.* 139. The indictment is indefinite.

2. The motion to compel the State to elect should have been sustained. Kirby's Dig., § § 1673, 1960, 1562; 73 Ark. 600; 67 *Id.* 156; 95 *Id.* 114; 74 *Id.* 528.

3. The verdict is without evidence to sustain it.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee.

1. The indictment is sufficient. Kirby's Digest, § 2229; *Brown* v. *State,* 109 Ark. 373.

2. The evidence is sufficient.

WOOD, J., (after stating the facts). The court did not err in overruling the demurrer to the indictment. The statute under which appellant was indicted is section 10 of an act approved December 17, 1838, and reads as follows:

"Whoever shall, by force or menaces of bodily harm, or by other unlawful means, set any one at liberty who is in custody, after a lawful arrest either before or after conviction, for any offense mentioned in this act, knowing or being informed that such offender is lawfully arrested as aforesaid; or any officer or other person having

such offender in custody, upon a lawful arrest or conviction for any of said offenses, who shall voluntarily, corruptly and of purpose, let such prisoner escape, shall, on conviction, be imprisoned in said jail or penitentiary house not less than two nor more than seven years. All persons being present, aiding and abetting, or ready and consenting to aid and abet in any of the foregoing offenses shall be deemed principal offenders, and indicted and punished as such." See also Kirby's Digest, § 1673.

The indictment follows substantially the language of the statute, and is sufficient. While the indictment is not artfully drawn, it does charge that the appellant unlawfully, wilfully and maliciously and feloniously, by force and menaces of bodily harm, set at liberty one Charlie Spears, and "by then and there aiding, abetting, advising and encouraging the said Charlie Spears to escape from custody," and "by then and there forcibly catching, holding and detaining the said James N. Crenshaw in his efforts to recapture the said Charlie Spears," etc.

The indictment is sufficient to advise the appellant that he was charged with the crime designated as "escape and rescue," by aiding Charlie Spears, who was in lawful custody, to make his escape by force exerted by "catching, holding and detaining" the officer having him in charge, and in this manner interfering with the officer in his efforts to recapture the prisoner who had escaped. The indictment charges a public offense, and it charges only one offense. Therefore, the court did not err in overruling appellant's motion to arrest the judgment, and also the motion to require the State to elect.

Appellant contends that there is no evidence to sustain the verdict, and we are of the opinion that this contention is sound. The testimony wholly fails to establish the charge made in the indictment that appellant effected the escape and rescue of Charlie Spears "by then and there forcibly catching, holding and detaining the said James N. Crenshaw," etc. There is no testimony to sustain this allegation. There is no charge in

the indictment that appellant committed the alleged offense in any other manner than by "forcibly catching, holding and detaining the said James N. Crenshaw," no other "unlawful means" is alleged. Appellant did not forcibly catch hold of the officer, and did not forcibly hold and detain him. The charge as laid is not proved. The verdict is without evidence to sustain it, and for this reason the court erred in not granting appellant's motion for a new trial.

The judgment is therefore reversed and the cause is remanded for a new trial.

STATE v. SCHNABLES.

Opinion delivered October 13, 1913.

POOL ROOMS—MINOR—INTENT OF PROPRIETOR.—Under Act 98, p. 62, of the Public Acts of 1911, making it unlawful for the owner or keeper of a pool room to permit any person under eighteen years of age to play in or frequent such pool room, wilful knowledge that a minor was frequenting or playing in the pool room, or any intent on the part of the owner or keeper is immaterial to render him subject to the penalty imposed by the statute.

Appeal from Clay Circuit Court, Western District; *J. F. Gautney,* Judge; reversed.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, and *M. P. Huddleston,* of counsel, for appellant.

The only question presented by the record is whether or not wilfulness is a necessary element of the crime denounced by the statute. The statute does not employ the word wilful, nor its equivalent, unless it is included in the meaning of the word "permit."

We contend that the purpose of the act is to impose the absolute duty upon keepers of pool rooms to prevent minors under eighteen years of age from playing games of pool therein, and from frequenting the same. 79 Ark. 351, 352; 17 N. W. (Ia.) 607; 96 Cal. 315, 31 Pac. 107; 57 Conn. 173, 17 Atl. 855; 98 Mass. 6.

No brief filed for appellee.

HART, J. It was shown by the State that, within a year prior to the return of the indictment in this case, Dale Young, a minor sixteen years of age, played pool in the pool room of the defendant, W. A. Schnables, in the town of Corning, in the Western District of Clay County; that Dale Young saw the defendant in there, and that the defendant did not say anything to him about staying in there or order him out of the place.

The defendant and another person who assisted him in running the pool hall testified that notices were posted up in it forbidding minors to enter the place, and that each of them, at different times, had ordered the minor, Dale Young, out of the pool room, and that they had stopped him playing on one occasion, and that he had never played there by their consent.

The defendant was indicted under an act of the General Assembly of the State of Arkansas which makes it unlawful for the owner or keeper of any pool room, or any employee of such owner or keeper, to permit any person under the age of eighteen years to play pool, billiards, or any other game, or to frequent or congregate in such pool room. (General Acts of 1911, page 63.) The punishment provided for by the act is a fine of not less than ten dollars nor more than one hundred dollars.

The State asked the court to instruct the jury that wilful knowledge is not one of the necessary elements to convict under this statute, and that if the jury found that Dale Young was a minor under the age of eighteen years, and that he played pool in the pool room of the defendant, Schnables, within one year next before the finding of the indictment, then it should find the defendant guilty, even though it might find that the defendant did not consent to the minor playing in his pool hall. The court refused to give the instruction asked for, and the State excepted to the ruling of the court. The court then read the statute under which the indictment was found, and instructed the jury that the defendant would be guilty if he permitted the minor to play in his pool room, and that if he did not permit him to play he would not

be guilty. The State duly excepted to the instructions given by the court. Under the instructions given, the jury returned a verdict of not guilty, and the State has appealed.

One of the definitions of the words "to permit" is: "To allow by not prohibiting." In the case of the *State* v. *Probasco,* 17 N. W. (Iowa) 607, the defendant was indicted under a statute making it unlawful for the keeper of a billiard hall to permit any minor to remain in such hall or to take part in any of the games known as billiards, nine or ten pins. The court held that where the keeper, or his employee, failed to take proper measures to prevent minors remaining in their saloons, they permit it within the meaning of the statute, and knowledge of the presence of minors therein, or of the fact of their minority, need not be shown to sustain a conviction. The court said:

"It is the duty of saloon keepers not to permit, but to prevent, minors remaining in their saloons. The same duty is imposed upon their employees. If the keeper or his employee fails to take proper measures to prevent minors remaining in their saloons, they permit it. Hence, if proper watchfulness is not exercised by either; if the keeper fails to enforce watchfulness on the part of his employee and thereby a minor is permitted to remain in the saloon, both violate the statute. It is obvious that, in the absence of watchfulness and proper effort to discharge the duty imposed by the statute, if a minor remains in the saloon without the knowledge of the keeper or employee, each are liable for the penalty provided by the statute. Neither can plead ignorance of the presence of the minor. It was their duty to know of his presence. Ignorance, especially when there has been no effort to gain knowledge, will excuse no one for the omission of duty, either in morals or law. In the case of the defendant, it was his duty to be vigilant to prevent the presence of minors. When he has failed to do his duty in this regard, he can not escape on the mere ground that he did

not know he was violating his duty, as prescribed by the statute."

In the case of the *Commonwealth* v. *Emmons,* 98 Mass. 6, the keeper of a billiard room was indicted for admitting a minor thereto without the written consent of his parent or guardian, and the court, in construing that statute, said:

"The prohibition of the statute is absolute. The defendant admitted them to the room at his peril, and is liable to the penalty, whether he knew them to be minors or not. The offense is of that class where knowledge or guilty intent is not an essential ingredient in its commission, and need not be proved. *Commonwealth* v. *Boynton,* 2 Allen 160; *Commonwealth* v. *Farren,* 9 Allen 489; *Commonwealth* v. *Waite,* 11 Allen 264. If the minors were actually present in the room and suffered to remain therein, either by the defendant or by his servants or agents who had the charge and keeping thereof, it was irrelevant and immaterial to prove that the defendant had previously forbidden them to enter, or that he was not present when they were permitted to be there."

In the case of *Bell* v. *State,* 93 Ark. 600, the court held that the owner of a saloon is criminally responsible for illegal sales of liquors made by his servants within the scope of their general employment.

We think that in the statute under consideration, the Legislature intended to impose the penalty irrespective of any intent on the part of the proprietor of the pool room to violate the statute.

Inasmuch as no punishment by imprisonment is provided by the statute, the judgment must be reversed and the cause remanded for a new trial.

BELL v. BOARD OF DIRECTORS OF JEFFERSON COUNTY BRIDGE DISTRICT.

Opinion delivered October 13, 1913.

1. STATUTES—RULE OF CONSTRUCTION.—In the construction of statutes, the general rule is that a limiting clause is to be restrained to the last antecedent, unless the subject-matter requires a different construction. (Page 436.)
2. BRIDGE IMPROVEMENT DISTRICT—PETITION—SIGNATURES.—Section 5 of Act 214, Private Acts of 1911, p. 608, provides that if the board of directors find that the petition "is signed by a majority, either in number, or in acreage or in value, of the holders of real property within the district, as shown by the last county assessment," they shall proceed to carry out the purposes of the act. *Held*, the words, "as shown by the last county assessment," relate to the preceding word, "value," only, and do not qualify any of the other preceding words in the section. (Page 437.)
3. BRIDGE DISTRICT—BOARD OF DIRECTORS—CONDUCT—EVIDENCE.—Evidence held to show that the action of the directors of the Jefferson County Bridge District in declaring that the district had been legally formed, that they had exercised their honest judgment, and made no attempt to disregard the facts or make a false finding. (Page 437.)
4. BRIDGE DISTRICT—FORMATION—FINDING OF BOARD OF DIRECTORS.—The validity of the organization of the Jefferson County Bridge District under Act 214, Private Acts of 1911, depends alone upon the fact, whether the board of directors shall find that it is legally organized. (Page 439.)

Appeal from Jefferson Chancery Court; *John M. Elliott,* Chancellor; affirmed.

A. R. Cooper, for appellant.

1. The directors, in passing on the question whether or not the petitions were signed by a majority, either in number, or acreage or value, of the holders of real property, did not confine themselves to the record of the "last county assessment," as prescribed by section 5 of Special Act No. 214, Acts 1911, p. 608. Words in common use are to be construed in their natural, plain and ordinary signification, where the language is unambiguous. 36 Cyc. 1114; 97 Ark. 38, 43; 93 *Id.* 45; 102 *Id.* 205; 97 *Id.* 287; 90 *Id.* 520; 81 *Id.* 208; 99 *Id.* 516.

2. The finding is not conclusive when false, fraudulent or irregular. 106 Ark. 151. Fraud includes all acts, omissions, or concealment, which involve a breach of duty, trust or confidence, or by which an undue advantage is taken. Eaton on Equity, § 120; Pom. Eq. Jur., § 873; Story Eq. Jur., § 187; Smith on Eq., § 153; 99 N. W. 191; 92 Ark. 509.

Coleman & Gantt and *Danaher & Danaher,* for appellee.

1. All qualifying clauses in an act of the Legislature, unless the manifest intention appears to the contrary, are construed to relate to the word or phrase immediately preceding. The words, "as shown by the last county assessment," relate only to "*value.*" 36 Cyc. 1123; 53 So. 454; 121 Pac. 821.

2. No fraud was shown. 153 S. W. 261.

Asa C. Gracie and *Carmichael, Brooks, Powers & Rector, amici curiae.*

1. The board was required to be governed solely by the last county assessment. Section 5, Acts 1911, p. 608. The finding of the board was false, and hence a fraud resulted. The board was not limited in its inquiry to the "*value*" alone. Page & Jones on Taxation by Assessment, § § 228, 229; 21 Ark. 40; 23 *Id.* 146. The county assessment was the sole guide. 49 Ark. 376; 99 *Id.* 508.

2. Sufficient evidence of fraud was shown. Pom. Eq., § § 872-921; Page & Jones on Taxation by Assessment, § 298; 70 Ark. 175.

3. The Legislature fixed the guide and the board must follow it. 78 Ark. 463; 99 *Id.* 508.

HART, J. The General Assembly of 1911 passed an act for the creation of an improvement district for the purpose of constructing a bridge over the Arkansas River, at or near the city of Pine Bluff, and the constitutionality of the act was sustained in the case of *Board of Directors of Jefferson County Bridge District* v. *Collier,* 104 Ark. 425. Subsequently, certain owners of land within the proposed district presented to the circuit

court of Jefferson County a petition for a writ of *certiorari* to bring up and quash the proceedings of the Board of Directors of the Jefferson County Bridge District finding that the petition for improvement had been signed by a majority, as prescribed by the terms of the statute authorizing the improvement. The circuit court sustained a demurrer to the petition, which, on appeal, was affirmed by the Supreme Court. *Collier* v. *Board of Directors of Jefferson County Bridge District,* 106 Ark. 151, 153 S. W. 259. The court held, however, that a property owner should be allowed to call in question, on the ground of fraud, a finding of the Board of Directors, and the court said:

"We are of the opinion, however, that the petition does not state facts sufficient to make out such a charge of fraud against the board of directors as will warrant setting aside the findings. Fraud which will vitiate the proceedings of the board does not mean errors of the board either of law or fact. In order to constitute fraud, there must have been an intent not to exercise an honest judgment and make a true finding, but to disregard the facts and make a false finding. This is not alleged in the petition. Taking the allegations as a whole, they amount only to a charge of error on the part of the board in refusing to hear and consider protests and evidence affecting the question at issue, and that the petition was not, in fact, signed by a majority of the property owners. The statute does not provide any method of procedure for the board, and the board had the right to inquire into the fact in its own way."

Thereupon, certain land owners within the proposed district instituted a suit in the chancery court of Jefferson County, seeking to enjoin the board of directors from continuing the improvement on the ground that the finding of the board was false and fraudulent within the meaning of this decision. The present suit was instituted against the board of directors by Roane C. Bell, and, after hearing the evidence introduced by both parties, the chancellor dismissed the complaint for want of

equity, and the case is here on appeal. The other cases were heard on the same testimony, and the plaintiffs in those cases have joined with the plaintiff in the request suit in briefing the case for hearing before us.

Section 5 of the act of 1911, Act 214, p. 608, Private Acts, under which the district was organized, provides, among other things, that if, at the hearing the board of directors shall find that the petition for the improvement was not signed by a majority, either in number or in acreage or in value, of the holders of real property within the district, as shown by the last county assessment, they shall so declare, and such findings shall terminate all proceedings under this act. It further provides that if said board of directors shall find that said petition is signed by a majority, either in number or in acreage or in value, of the holders of real property within the district, as shown by the last county assessment, they shall so declare and shall proceed to carry out the purposes of the act.

The board, after having examined the petitions filed with it, and after considering all the evidence introduced before it, found in favor of the organization of the proposed district, and the object and purpose of the present suit is to set aside the finding of the board on account of fraud.

The principal contention of counsel for plaintiff is that under section 5 of the act, set out above, the last county assessment on file with the county clerk of Jefferson County before the organization, is made the sole standard and guide whereby the board shall make an ascertainment and declaration of the question of whether or not there is a majority in numbers of the holders of real property within the district who signed the petition. On the contrary, it is contended by counsel for defendants that the words "as shown by the last county assessment" relate only to the value of the land within the proposed district, and are not to be taken as applying to the owners of the land or to the acreage.

In the construction of statutes the general rule is

that a limiting clause is to be restrained to the last antecedent, unless the subject-matter requires a different construction. *Cushing* v. *Worrick,* 9 Gray (Mass.) 382; *State* v. *Scaffer,* 95 Minn. 311; Lewis' Sutherland Statutory Construction (2 ed.), vol. 2, § 408; Black on Interpretation of Laws, p. 150. Under this rule of construction, we think that the words "as shown by the last county assessment" relate to the preceding word "value," only, and do not qualify any of the other preceding words in the section. We think this construction is manifest from the general scope and purpose of the statute, and that such construction carries out the intention of the Legislature. Our statutes authorizing the creation of improvement districts in municipal corporations provide that the council, in organizing the district, shall be governed by the valuation placed upon the property, as shown by the last county assessment on file in the county clerk's office. It is well known that persons differ widely as to the value of real property, and, by making the valuation placed by the county assessor on the real property a guide, a more uniform valuation of the property is ascertained than could be declared by any other means. It is a matter of common knowledge that land is frequently assessed and the taxes paid in the name of another person than the owner; and it is not to be presumed that the Legislature, in the act in question, intended that the board should be governed solely, as to the owners of property within the proposed district, by the county assessor's books, for it is evident that this would not be a sure and safe method of ascertaining who owned land within the district. See *Maney* v. *Burke,* 92 Ark. 84. Moreover, section 7113, Kirby's Digest, provides that no sale of land or lot for delinquent taxes shall be considered invalid on account of its having been charged on the tax book in any other name than that of the rightful owner.

The evidence upon the part of the defendants shows that they acted honestly and in good faith in making their finding that the district had been organized ac-

cording to the terms of the act. They examined both the tax books and the county assessment list, and heard the testimony introduced by the land owners who objected to the formation of the district. Under the decision of the court upon the former appeal, in the case of *Collier* v. *Board of Directors,* reported in 153 S. W. 259, 106 Ark. 151, the finding of the board that the district was organized in conformity with the provisions of the act is conclusive.

Moreover, if it should be said that we are mistaken in holding that the words, "as shown by the last county assessment of the land within the district," do not qualify the word "value," alone, the evidence does not show that there was an intent on the part of the members of the board not to exercise an honest judgment, and make a true finding. The evidence taken in the case is very voluminous. No useful purpose could be served by setting it out in detail. We deem it sufficient to say that we have carefully considered it, and are of the opinion that it shows that the members of the board gave a full and fair hearing to the land owners who opposed the formation of the district, and in declaring that the district had been legally formed under the provisions of the act, and that their conduct, as shown by the testimony, leads us to the conclusion that they exercised their honest judgment to make a true finding, and did not attempt to disregard the facts and make a false finding. We held, when the matter was before us before, that fraud which would vitiate the proceedings of the board did not mean errors of the board, either of law or of fact. The most that could be said in the present case is that the testimony showed that the board made an erroneous finding; but it does not show that it made a false finding. The fact that the board went into executive session to consider the testimony presented to it does not in any manner indicate fraud on its part.

It is again strongly insisted by counsel for plaintiff that, under the provisions of section 5 of the act the finding of the board is not conclusive. In support of their

position, counsel refer to the first part of the section which provides that the board of directors shall give public notice of the passage of the act and of their organization and the purposes of the act, and that the public improvement contemplated is conditioned upon its approval by a majority, either in numbers or in acreage or in value, of the holders of real property within said district. A subsequent clause of the same section provides that if the board of directors shall find that the petition is signed by a majority, either in number or in acreage or in value, of the holders of real property within the district, etc., they shall so declare, and shall proceed to carry out the purposes of the act. Thus it will be seen that the act does not provide that the validity of the organization of the proposed district shall depend upon the fact, whether a majority, either in numbers or in acreage or in value, of the holders of real property within the district, shall have signed the petition, but the validity of the organization depends alone upon the fact, whether the board of directors shall so find. It is true the first part of the act requires the board to advertise that the public improvement contemplated by the act is conditioned upon its approval by the majority; but, as we have already seen, power is conferred conclusively upon the board to ascertain and determine whether or not a majority has signed the petition. No doubt, the Legislature, in providing that the board of directors should give public notice that the public improvement is conditioned on its approval by a majority, contemplated that the finding of the board that a majority had signed the petition should be a true finding, and not a false one, and we so held when the matter was before us in our prior decision relating to the question.

Counsel have given no good reason why our ruling on this question was not sound, and we adhere to it on this appeal. Reference is made to our former decisions for the reason for adopting it. It follows that the judgment must be affirmed.

OSBORNE v. STATE.

Opinion delivered October 13, 1913.

1. REMOVAL OF MORTGAGED PROPERTY—PROOF OF DEBT.—It is necessary in actions involving the removal mortgaged property, upon which a lien exists, with the intention to defeat the holder of the lien and the collection of the debt secured by the mortgage or deed of trust, to allege the existence of the debt at the time of the commission of the offense, for unless there be a debt in existence, there can be no lien. (Page 445.)
2. MORTGAGES—EVIDENCE—MORTGAGE AND DEED OF TRUST.—Where an indictment charges that defendant sold property upon which one W held a mortgage, the admission of a deed of trust in evidence given to secure the debt, is proper, since a mortgage and deed of trust are the same in legal effect. (Page 445.)
3. REMOVAL OF MORTGAGED PROPERTY—EVIDENCE OF INTENT—PRIOR MORTGAGE.—When defendant is charged with having sold property mortgaged to W, evidence that one S held a prior mortgage on the property in question, and that defendant sold the property with the permission of S, is admissible as tending to show that defendant had no intention of defeating the lien held by W, the second mortgagee. (Page 446.)

Appeal from St. Francis Circuit Court; *J. M. Jackson,* Judge; reversed.

STATEMENT BY THE COURT.

Appellant was indicted for the crime of disposing of mortgaged property, upon which a lien existed, with the intent to defraud the holder of the lien, the indictment alleging:

"* * * That said Chester Osborne, in the county and State aforesaid, on the 20th day of May, A. D. 1912, then and there unlawfully and with the intent to cheat and defraud one Eugene Williams, did sell one red cow, of the value of twelve dollars, upon which the said Eugene Williams then and there had a lien, by virtue of a certain mortgage or deed of trust, which was duly executed, acknowledged and delivered to the said Eugene Williams by the said Chester Osborne; that the said Chester Osborne's sale of said cow was with the felonious intent to defeat the said Eugene Williams, the holder

of said lien, and the collection of his debt, which was more than ten dollars, against the peace, etc."

A demurrer was interposed to the indictment and overruled.

The testimony shows that after the overflow of the Mississippi River in 1912, the appellant sold a red cow, for the disposition of which he was indicted, to one McFall, who paid him $12.50 for her and butchered her some time in the fall, in September or October. It was also shown that he had executed a deed of trust on the 30th day of March, 1912, to S. H. Mann, as trustee for Eugene Williams, to secure certain indebtedness, conveying certain personal property particularly described, and "twenty-five head of cattle," "all the cattle I now own," etc., along with the crops of corn and cotton to be raised by him that year.

Appellant testified that he sold the cow, and did so openly, with the consent and under the direction of Theo Bond, a member of the firm of Scott Bond & Sons, who held a prior mortgage upon said cow, particularly describing her, dated March 22, 1911. That he needed some money to move some tenants back on his place, and went to Mr. Williams first for the money, and couldn't get any money from him. He then went to Scott Bond & Sons, and they told him to sell the cow, included in the mortgage, and take that money and use it for the purpose of putting his tenants back on the place after the overflow, which he did.

The court refused to allow him to introduce and read in evidence the mortgage to Scott Bond & Sons, of said date, in which the cow was included with other property, to secure the payment of a note for $500 and advances. A member of that firm testified that appellant came to them for money to move the family back into the bottoms on his place, and, not having the money, they directed him to sell the red cow covered by their mortgage and get the money, and that he did so by their direction and with their knowledge and consent. That he regarded that his firm became the owner of the cow after October

15, but they had not foreclosed the mortgage. "It was our cow, but still in his possession. * * * We took over possession of the property after the maturing of the mortgage. We didn't actually take it from the defendant. It was already ours, I mean, because he hadn't paid the mortgage debt. We had not agreed on the price of the animal, but he told us that the cattle were there for us for whatever he owed."

The court also refused to allow this witness to state what amount appellant owed to said Scott Bond & Sons, on the debt secured by their mortgage on the date of the sale of the cow by him, and likewise the value of the property described in their said mortgage which matured October 15, 1911.

Appellant testified that he did not give any mortgage to Eugene Williams on the red cow. That one George Walker drew the mortgage up in his presence alone, and wanted a mortgage on all his stock, and he explained to him that there was some stock or cattle that Bond had a mortgage on, describing it, including one red cow, and that Walker stated, "That is nothing. I can take a second mortgage. That will be all right. That will never hurt you." That he was misled by Walker in giving the mortgage to Williams upon the cow, if it was included therein. That he had no intention to include it. That he did not intend to give him a lien at all on the red cow and the other property in the Bond mortgage, as he explained to Walker at the time he drew the mortgage. He testified further that he had not paid the debt secured by the mortgage. That after the overflow, he came to Forrest City to get $5 from Mr. Eugene Williams to put some negroes back on his place, and Mr. Williams refused to let him have it, and, being under obligations to them, he then went to Mr. Bond to get the money, and he not being present, went to Theo. Bond, a member of the firm, who told him he didn't have the money, but that the negroes ought to be put back on the place to make a crop and to see Mr. Williams, who was furnishing him, and being told that Mr. Williams had refused to let him

have it, he said I had some cattle upon which they had a mortgage, and that I could go and get them and sell them. That that was all he could do. That he brought the cow down in broad daylight and carried it to McFall's, in Scott Bond & Sons' gasoline launch, and offered it for sale and was paid $11.95 in money, which was used to move the tenants back on his place. That he would not have disposed of it, except under the instructions of Mr. Bond, and further:

Q. At the time you sold that cow under the directions of Theo. Bond, did you owe Scott Bond & Sons?

A. Yes, I did. I owed them a debt that was due under the mortgage, that was past due, and a debt which was far more than the value of the stock named in the mortgage.

This question and answer was objected to and excluded from the jury's consideration, over appellant's exceptions. He said further that he did not have in mind at all that Mr. Williams had a mortgage on the cow nor any idea or intention of violating the terms of his mortgage by selling anything that the mortgage covered.

Walker testified that he remembered taking the mortgage for Mr. Williams; that Osborne told him that he had twenty head of cattle, and that was all he had. He told me to put it in the mortgage. He didn't tell me at the time not to include in the Williams mortgage the cattle in the Scott Bond mortgage. He then explained his interest in the transaction by saying that he didn't own half of the debt secured by the Williams mortgage, but that he was to be paid half the profits arising from the collection of some claims of a bankrupt firm purchased by Williams, one of which was owed by Chester Osborne.

The court instructed the jury, which returned a verdict of guilty, and from the judgment thereon, defendant prosecutes this appeal.

J. W. Story, for appellant.

1. The indictment is bad because it fails to allege that at the time the cow was sold a debt secured by the mortgage existed. 68 Ark. 491; 50 Ia. 194; 1 Tex. App.

438. In that the indictment alleges an offense in the alternative, it is also bad for uncertainty.

2. There is a fatal variance between the indictment and the proof. (a) It is not sufficient to admit in evidence a deed of trust conveying "twenty-five head of cattle, all the cattle I now own," without further evidence that the red cow described in the indictment was one of the "twenty-five head of cattle" mentioned in the trust deed. 2 S. W. 859.

(b) The instrument offered in evidence is a deed of trust executed to S. H. Mann, trustee, and is not a mortgage or deed of trust to Eugene Williams.

(c) The indictment charges the sale of a red cow upon which Eugene Williams had a lien, etc., whereas the testimony tends to prove that the deed of trust was taken to secure a debt due Eugene Williams and G. P. Walker jointly.

3. The court erred in excluding from the evidence a prior mortgage executed by the defendant to Scott Bond & Sons, duly recorded at the time the Mann trust deed was executed, which conveyed the red cow described in the indictment, and was unsatisfied at the time of the alleged sale. 12 So. 413; 4 S. E. 534; 158 S. W. 113.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee.

1. The language of the indictment is sufficient to charge the existence of a debt secured by a lien to Eugene Williams, and that the amount of the debt was more than $10. It is sufficient.

On the contention that the indictment is bad for uncertainty, this court has ruled adversely to appellant's claim. *Brown* v. *State,* 109 Ark. 373; Kirby's Dig., § 2229.

2. The court was correct in admitting the deed of trust in evidence; also in submitting to the jury, upon the evidence, the question whether or not the red cow described in the indictment was included in the twenty-five head of cattle conveyed by the deed of trust.

3. The evidence is sufficient to show that Geo. P.

Walker had no interest in the mortgage. But if Walker had jointly owned the debt secured by the deed of trust, proof of that fact would not be such a variance as to call for a reversal. This court reverses only for errors tending to the substantial prejudice of a defendant. 93 Ark. 313.

4. Evidence of the execution of a prior mortgage was properly excluded.

KIRBY, J., (after stating the facts). It is contended that the court erred in overruling the demurrer to the indictment and in the admission and exclusion of certain testimony.

It is necessary, in cases of removing mortgaged property, upon which a lien exists, with the intention to defeat the holder of the lien and the collection of the debt secured by the mortgage or deed of trust, to allege the existence of the debt at the time of the commission of the offense, for, unless there be a debt in existence, there can be no lien. *McCaskill* v. *State,* 68 Ark. 491.

The indictment herein charges that the appellant, with the intent to cheat and defraud one Eugene Williams, sold the cow, of a certain value upon which "the said Eugene Williams then and there had a lien by virtue of a certain mortgage or deed of trust, duly executed; * * * that the said Chester Osborne's sale of said cow was with the felonious intent to defeat the said Eugene Williams, the holder of said lien, in the collection of his debt, which was more than ten dollars, etc."

The indictment does not say in exact words that there was a debt in existence from appellant to Eugene Williams, but it does say that he sold the cow with the felonious intent to defeat the holder of said lien in the collection of his debt, which was a sufficient allegation of the existence of the debt.

We do not think the court erred in the admission of the trust deed executed by the appellant to S. H. Mann, as trustee, to secure the payment of the debt to Eugene Williams, under the allegations of the indictment. The court has held that a mortgage and deed of trust are the

same in legal effect, and it could make no difference to the accused in giving him notice of the offense with which he was charged, and there is no variance from the allegations of the indictment in the proof of the deed of trust.

We are of the opinion that the court did err, however, in refusing to allow appellant to introduce his mortgage to Scott Bond & Sons, in which the red cow, with the disposition of which he was charged in the indictment, was included. It also erred in refusing to permit the appellant to prove the amount of the indebtedness still existing, secured by the mortgage to Scott Bond & Sons, as well as the value of the property included in it, at the time of the sale of the cow. There must be shown to exist an intention to defeat the holder of the lien in the collection of his debt, or facts from which such intention can reasonably be inferred, in order to convict the defendant of the charge, and if he could show, as he had the right to do, that the property was covered by a prior mortgage to secure a debt past due and still existing, much larger in amount than the entire value of all the property included therein, and that he sold the cow with the approval of the holder of the said prior mortgage, it would, if not conclusive, tend strongly to show that there was no intention by the sale to defeat the holder of the lien under the second mortgage in the collection of his debt, and these errors were highly prejudicial to appellant.

The other contentions are not noticed, as the matters complained of will doubtless not occur upon a second trial. For the errors indicated, the judgment is reversed and the cause remanded for a new trial.

IVY v. STATE.

Opinion delivered October 13, 1913.

1. LARCENY—INDICTMENT—OWNERSHIP OF STOLEN PROPERTY—VARIANCE.—It is not a variance from the allegations of an indictment alleging the stealing of property from a partnership, to prove the names of the partners other than as alleged, nor is the failure to prove the names at all as alleged, a fatal variance. (Page 449.)

2. CRIMINAL LAW—CONFESSION—OTHER EVIDENCE.—Evidence of a confession of defendant to the commission of a crime, is sufficient to warrant a conviction when there is other testimony in the case that the crime was committed by some one. (Page 449.)

Appeal from Phillips Circuit Court; *J. M. Jackson,* Judge; affirmed.

Fink & Dinning, for appellant.

1. There is not sufficient legal evidence to sustain the verdict.

2. The ownership of a building alleged to have been burglarized is material, and must be proved as alleged. 102 Ark. 627; 73 Ark. 34.

3. The *corpus delicti* is not established.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee.

1. There is sufficient evidence to sustain the verdict, and the jury's finding upon conflicting testimony is conclusive unless there is no evidence at all upon which to base it.

With regard to extra-judicial confessions, this court has said that "the confession of a defendant, if accompanied with proof that the crime was committed by some one, will warrant a conviction, if the jury believe it." 107 Ark. 568; *Turner* v. *State,* 109 Ark. 332.

2. The ownership of the building and goods was proved as alleged in the indictment. In this respect this case is controlled by the *Andrews* case, 100 Ark. 184-186.

KIRBY, J. The appellant brings this appeal from a judgment of conviction, under an indictment, charging him with burglary and grand larceny, by entering the store of A. Hirsch & Co. and stealing a suit of clothes of the value of twenty dollars, it being alleged that said company was the owner of both the storehouse and the suit of clothes, and was a partnership, composed of Ludwig Hirsch and Mrs. Gertie Groneau. The testimony does not disclose whether A. Hirsch & Co. was a partnership, nor whether it was composed of the persons as alleged.

It appears from the evidence that the storehouse occupied by A. Hirsch & Co. was broken into in the night time and a suit of clothes of the kind described in the indictment taken therefrom.

Wash Bell testified that he was a partner in the restaurant business with appellant and that in August, 1911, he (appellant) brought this suit of clothes to the place of business and let Will Mayberry have it; and afterwards told him that he got it from Hirsch & Co. in the night. Appellant denied having made any such statements and also that he ever had in his possession this suit of clothes or sold the same to Will Mayberry, and claimed it was sold by Wash Bell. Mayberry, who had the suit of clothes in his possession, told the officer he got it from Bell.

There is much other testimony tending also to show that Bell did dispose of the suit of clothes to Mayberry.

It is contended for reversal that the evidence is not sufficient to support the verdict, and that there is a fatal variance between the allegations of the indictment and the proof in the case.

It is true that there is no evidence, showing that the firm of A. Hirsch & Co. was composed of the individuals as named in the indictment, and the proof is slight that said company was a partnership.

One witness stated that the suit of clothes belonged to A. Hirsch & Co., and that that firm was the only one in town handling goods of that kind, and that he was in charge of the clothing department and would have known if the sale of it had been made. That although he was not always consulted before a sale was made, he generally was, unless it was made by the members of the firm, and that they very seldom sold anything. From this testimony the jury could have inferred that A. Hirsch & Co. was a partnership, and the proof is sufficient on that point.

While at the common law, it was necessary in cases of larceny to allege the ownership in the partnership name, and the names of the individuals composing it,

our court has held under the provisions of section 2233 Kirby's Digest that an indictment is sufficient in stating the partnership name in charging the ownership of the property stolen in larceny and that it is a sufficient indentification of the property stolen by stating the partnership name and that an erroneous allegation as to the names of the partners is immaterial and that proof of the correct names of the partners was no variance from the erroneous allegations of the indictment. *Andrews* v. *State,* 100 Ark. 184.

The court, having already held that it is not a variance from the allegations of the indictment to prove the names of the partners, other than as alleged, is of the opinion that the failure to prove the names of the individuals at all as alleged is not a fatal variance.

My individual opinion is that the name of the injured person was described with sufficient certainty by the allegation of the partnership name, within the meaning of the said section of the digest and our decisions thereunder, without any statement that it was either a partnership or a corporation, and that any former contrary holding of the court should be disregarded.

The confession of the appellant, as testified to by Wash Bell, is about all the testimony tending to connect him with the crime, but, when believed, it warranted the conviction, the other testimony in the case being sufficient to show the commission of the crime by some one. *Greenwood* v. *State,* 107 Ark. 568; *Turner* v. *State,* 109 Ark. 332; *Burrow* v. *State,* 109 Ark. 365.

The testimony in the case, tending to show the guilt of appellant, is meager and not very satisfactory, but is direct and positive on the part of one witness, whom the testimony tended strongly to discredit, but the jury believed him and we can not say the evidence is not sufficient to support the verdict.

The judgment is affirmed.

DAVIDSON v. STATE.

Opinion delivered October 13, 1913.

1. CONTINUANCES—DISCRETION OF TRIAL JUDGE.—Applications for continuances are addressed to the sound discretion of the court, and the refusal of the court to grant a continuance will not be a ground for reversal, in the absence of a showing of an abuse of the judicial discretion. (Page 455.)
2. CHANGE OF VENUE—SUPPORTING AFFIDAVITS—REQUISITES.—The motion for a change of venue was properly overruled, when the testimony of the witnesses making the supporting affidavits disclose that they had no definite and sufficient information as to the state of mind of the inhabitants of the district, showing a necessity for the granting of the motion in order to secure a fair trial to the defendant. (Page 455.)
3. JUROR—DISQUALIFICATION BY OPINION.—A juror is not disqualified who states that he has an opinion about the case, formed from rumor, where he states that he will forego that opinion and give the defendant a fair and impartial trial on the evidence produced. (Page 455.)
4. JUROR—DISQUALIFICATION BY OPINION.—It is not error for the court to excuse a juror, who states that he has known defendant a long time, is intimately acquainted with him and his family, and could not view the case with the same fairness and impartiality as if defendant was not known to him. (Page 455.)
5. HOMICIDE—HABIT OF CARRYING A PISTOL.—Where defendant is indicted for homicide, it is not harmful error to admit evidence that defendant habitually carried a pistol, as that evidence negatives the idea of his having armed himself for the specific occasion. (Page 455.)

Appeal from Phillips Circuit Court; *J. M. Jackson*, Judge; affirmed.

STATEMENT BY THE COURT.

Appellant was indicted for murder in the first degree. He moved for a continuance upon the ground of the absence of Lee Bush, a material witness, setting out what he expected to prove by him, and stated that the witness was within the jurisdiction of the court and he believed could have him present at the next term. The motion being overruled, he filed a petition for a change of venue, supported by the affidavits of G. E. Penn and N. T. Guthrie. The court examined the affiants, one of

whom (Penn) stated that he was a physician, residing at Marvell, and had been since 1893; that he had a practice in the surrounding country for twenty miles, that he came to Helena often and traveled through the country to see his patients. That he had heard the case discussed a great deal and he did not believe the defendant could obtain a fair trial in the county.

The other witness stated that he had lived at Marvell for twenty years and that he had heard people talk all over the county and in the city of Helena, and had heard some say the defendant ought to be hanged on general principles; that he was of the opinion that the defendant could not get a fair and impartial trial in the county, and based his opinion on what he had heard people say. The motion for a change of venue was overruled.

It appears from the testimony that the deceased and his brother, W. S. Eix, were operating a billiard hall in the rear end of a storehouse, in the front end of which there was a barber shop, in the town of Marvell. That they had a wheel in the room, with paddles to correspond with the numbers and which was called a raffle wheel, or wheel of fortune, and on the evening of the homicide they had raffled five turkeys, after which appellant came in with two turkeys and asked permission to use the wheel to raffle them off and the deceased consented and got him the paddles and the turkeys were raffled. The appellant then walked out of the front door and the deceased in gathering up the paddles missed four of them and asked his brother, W. S. Eix, if he knew where they were, and upon his replying "No," he then went in search of Davidson, the appellant, and in a few minutes came back inside the front door with defendant following him, and Davidson said to him, "Did you think I was trying to steal your paddles and run away with them?" to which deceased replied, "No; I just wanted to locate them." Defendant thereupon made a motion to strike, or struck, deceased, and they clinched and fell to the floor, the deceased on top. The deceased

cried out, "Boys, give me a hand, he is pulling his gun." Deceased's brother tried to get appellant's hand, but failed, and appellant pulled the gun, pressed it to deceased's side and fired. That he was trying to prevent him from using the gun. That the deceased at the time the gun was fired had hold of appellant, pushing him down and trying to prevent his using the gun; that he wasn't doing anything except trying to pinion defendant's arms. That there was no blow struck. After the shot was fired, deceased got up and said, "I am shot," and started for the barber shop. Davidson got up, backed toward the door, presented his gun at deceased's brother, and said, with an oath, "I will get you next." The parties had not had any difficulty before and were on friendly terms to within a few moments of the shooting. A witness for the State, Posey, testified that he was present as the deceased passed out of the barber shop, was gone a few minutes and returned; that the appellant rushed in behind him and cursed and struck him and deceased whirled and caught Davidson by the right leg and threw him down and underneath, and his brother from the back said, "Come in here, he is pulling his gun." That he and the barber rushed over to them and Davidson was on the bottom; that he stooped to catch his hand and said, "Look out," and as soon as he saw the gun he ran behind the lattice work. The shot was fired and Eix ran through the house to the door, saying, "I am shot," and Davidson held W. S. Eix, the brother, up with the gun and said, "Now, Goddamn you, I will get you next." Then the barber turned and said, "Bob, you have shot me," and Davidson said, "Forgive me; I never intended to shoot you."

Davidson was a stronger man than deceased, who didn't appear to be striking him. Another witness saw them clinch and fall and heard some one call for help, saying, "Come boys; he is trying to get his gun and shoot me." The bullet entered the left side between the eighth and ninth ribs and came out on the right side between

the tenth and eleventh ribs, causing his death the next day.

Defendant testified that he borrowed the paddles to raffle the turkeys off and won the last turkey himself, which he raffled again, and took four chances, keeping four of the paddles, representing them. He walked out of the billiard hall with the paddles in his pocket and deceased came up to him and said, "Where are those paddles?" and he asked deceased if he meant to say he tried to steal his paddles, and deceased said, "Yes, you have, and they are there in your pocket," and he pulled them out of his pocket and said, "There, take them," and deceased said, "No; you bring them back in the pool room where you got them," and turned around and went into the house and he followed him inside and said, "Here are your paddles." That he was four steps behind deceased and handed the paddles to him and said, "I never intended to steal your paddles," and deceased called him a liar and grabbed him by the leg and threw him down and deceased's brother run up and said, with an oath, "We have got you now," and grabbed him by the arm and ran his hand in his front pocket, and, "seeing there were three of them on me, I thought best to come out from under them." That he shot to save his life and only fired once and didn't try to shoot W. S. Eix, the brother of deceased, and didn't snap the pistol at him, and only told him not to come on him again. That he told the marshal that Eix started the trouble about the four paddles. He said he had had the pistol with which the shot was fired about a week and had been on friendly terms with the deceased until the night of the difficulty and the time of the shooting. That he offered the paddles to the deceased in the street and again in the barber shop. That when Will Eix and Posey came to where deceased had him down on the floor he thought they were going to do him bodily injury and that both the brothers said what they did in an angry manner while he was on the floor, and that Milton Eix, the de-

ceased, struck him once or twice, with his fist, while he had him down and he was asking him to get off.

The court instructed the jury which returned a verdict of guilty and from the judgment thereon this appeal comes.

P. R. Andrews and *Moore, Vineyard & Satterfield,* for appellant.

1. A denial of the petition for continuance, under the circumstances shown, was an abuse of the court's discretion. 99 Ark. 394; 21 *Id.* 460; 60 *Id.* 564; 71 *Id.* 180.

2. The change of venue should have been granted.

3. In a criminal prosecution the State can not prove the accused's bad character as a circumstance of guilt. 91 Ark. 555.

4. One offense can not be proved by evidence showing the commission of another. 91 Ark. 555; 68 *Id.* 577; 73 *Id.* 262; 100 *Id.* 321.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee.

1. The burden is upon appellant to show an abuse of discretion. 94 Ark. 169; *Ib.* 538-545.

2. There was no error in denying the motion for change of venue. 100 Ark. 218; *Ib.* 301-307; 107 Ark. 29.

3. The court committed no error in its ruling as to the qualifications of jurors (85 Ark. 64), nor as to the admission of testimony. 73 Ark. 291.

KIRBY, J., (after stating the facts). It is first contended that the court erred in denying the motion for a continuance. The court found that on May 1 the case was set for trial on the 22d, thereafter, and that shortly thereafter the defendant caused a subpoena to be issued directed to the sheriff of Prairie County, for the absent witness, not giving the sheriff any information as to his whereabouts, and had not made any effort to have the subpoena returned. Besides, the testimony of this witness was largely cumulative of that introduced. Half a dozen or more people, all of whom saw the difficulty, being ex-

amined as witnesses. Applications for continuances are addressed to the sound discretion of the court, or trial judge, and we do not find that there was an abuse of judicial discretion in the denial by the court of this motion. *Jackson* v. *State,* 94 Ark. 169; *Miller* v. *State, Ib.* 538; *McIlroy* v. *State,* 100 Ark. 310.

Neither did the court err in overruling the motion for a change of venue. The court examined the witnesses, making the supporting affidavits, and their testimony disclosed that they did not have such definite and sufficient information as to the state of mind of the inhabitants of the county toward the defendant to make it necessary for the granting of the motion in order to give the defendant the benefit of a fair trial. *Williams* v. *State,* 100 Ark. 218; *McIlroy* v. *State, Ib.* 307; *Wolfe* v. *State,* 107 Ark. 29.

It is next contended that the court erred in ruling upon the qualifications of two jurors, Meerifield and Nolan. Merrifield stated that he had an opinion about the case, formed from rumor, but that he could forego that and give the defendant a fair and impartial trial on the evidence produced, and the court correctly held him qualified. *Decker* v. *State,* 85 Ark. 64.

The juror, Nolan, stated that he had long been acquainted with the appellant and knew his family intimately and could not view the case with the same fairness and impartiality, as if appellant was not known to him; that he would be biased in his favor, and would be influenced by his acquaintance with the family to some extent and the court thereupon excused him and committed no error in doing so. *Decker* v. *State, supra,* 85 Ark. 64.

Appellant also complains of the court's action in allowing a witness to state that he was in the habit of carrying a pistol, but if there was any error committed in permitting the introduction of this testimony we are of the opinion that it was harmless and could not have prejudiced appellant's case. It tended in no wise to show that he had armed himself for the encounter, but

rather the contrary, and he did in fact have the pistol and fired the shot which killed deceased, a club-footed man, not physically strong, and under such circumstances as fully warranted his conviction for the grade of the offense of which the jury found him guilty.

Finding no prejudicial error in the record, the judgment is affirmed.

FISHER v. STATE.

Opinion delivered October 13, 1913.

1. HOMICIDE—DEATH—INDICTMENT—SUFFICIENCY.—An indictment for homicide which charges that defendant did "unlawfully * * * kill and murder one J. C. * * * by then and there stabbing and cutting him, * * * with a certain knife * * * held in his hand with * * * intent then and there to kill and murder him," * * * is not defective for failing to state that J. C. died, and the indictment held sufficient to warrant a conviction, since the words "did kill and murder J. C.," gave defendant specific notice that J. C. died from the effects of the stabbing, and of the offense with which he was charged. (Page 462.)
2. DEFINITIONS—"KILL."—In an indictment for homicide, that defendant "did unlawfully kill and murder one J. C.," the word "kill" is used in its ordinary acceptation and means to slay, to put to death, to deprive of life. (Page 462.)
3. HOMICIDE—SELF-DEFENSE—NECESSITY OF ACT.—In order to avail himself of the plea of self-defense, it must have appeared to defendant that the killing was necessary in order to save his own life, or to prevent his receiving great bodily harm or injury. (Page 463.)
4. HOMICIDE—SELF-DEFENSE—ATTACK.—The law of self-defense does not imply the right of attack, and defendant can not invoke the law of self-defense, no matter how imminent his peril, if armed with a deadly weapon, and with a felonious intent, he sought out the deceased. (Page 464.)

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

STATEMENT BY THE COURT.

The appellant was indicted for murder in the first degree, the indictment alleging:

"The said Tom Fisher, in the county and State aforesaid, on the 24th of December, 1912, did unlawfully, wilfully, feloniously and of his malice aforethought, and after premeditation and deliberation, kill and murder one Jack Chandler, a human being, by then and there stabbing and cutting him, the said Jack Chandler, with a certain knife which he, the said Tom Fisher, then and there had and held in his hand, with the wiful, felonious, malicious, premeditated and deliberate intent then and there to kill and murder him, the said Jack Chandler, against the peace," etc.

A demurrer was interposed to the indictment and overruled and exceptions duly saved.

It appears from the testimony that Jack Chandler and appellant, after having had a fight the day before, on the day of the killing came together on the corner of East Broad Street, in Texarkana, near the Dixie Theater, and renewed their quarrel. Fisher first came up and was talking to W. A. Coleman, a peace officer, when Chandler walked up and something was said between them about the prior fight; both were drinking. The officer walked between them and started west to the justice's office. He had hold of both of them and they had proceeded but a few steps, Fisher on his right next to the buildings, and Chandler on the left, next to the street, with the officer about the middle of the walk, when the officer discovered Fisher had a knife open in his hand. He turned Chandler loose and pushed Fisher three or four feet up against the wall of the building and called for Doc Johnson to help take the knife. The defendant was doing nothing, but wouldn't give up the knife. He didn't see deceased after turning him loose, as he was behind him, and he had Fisher up next to the wall for a minute or so, and just as Fisher made the lick at the deceased he said, "I bought this knife to cut his damn throat." He saw the lick made over his shoulder and said that Fisher was right up against him. The difficulty occurred about 1 or 2 o'clock in the afternoon, and the deceased's throat was cut clear round, from ear

to ear, and he died that night. He also said that if Chandler had remained where he left him that Fisher could not have reached him by striking him with the knife; that he thought Chandler must have walked up behind him. It was a brand new knife.

Several witnesses testified that they saw the difficulty and that Coleman pushed Fisher up on the sill plate and pushed Chandler the other way and called for help. One witness said that he grabbed Fisher's hand and just as he did he jerked loose from Coleman and cut Chandler. "I saw Chandler standing just where Coleman had left him; he never advanced, and his hands were by his side. Just before the cutting Fisher said he would do something and Chandler said no he wouldn't, and Fisher said, "Yes, the hell I won't," and about that time cut over Coleman's shoulder, and Fisher and Coleman were struggling. Coleman called me first and I didn't go, shook my head, and before he called me again I saw the knife in Fisher's hand and had time after the second call to take twenty-five steps before the cutting. Coleman was bound to have taken two or three steps toward the building after turning Chandler loose. Witness didn't think Chandler moved at all. He may have been a little inside the walk.

Joe Vinson, a justice of the peace, said he was five or six feet from the parties when Chandler was killed, and saw the officer turn Chandler loose and hold Fisher and push him toward the door. He then saw the knife and ran to them, and before he got there Fisher made the lick. After Coleman turned him loose Chandler followed after them; must have been twenty-five feet up the street. Chandler came slowly behind, and just before the lick, was a few feet or steps behind, doing nothing. Fisher jerked loose, made a step or two, reached out and cut Chandler, who was then standing with his hands down. Fisher stepped off the sill plate when he struck and advanced a step or two.

Q. Now, isn't it a fact he struck the blow over the shoulder of Coleman?

A. No; it isn't a fact; he got clear loose from him.

E. L. Butler stated he saw Fisher about thirty minutes before the cutting about 100 feet from where the difficulty occurred, who asked if I had seen the deceased and said, "I am going to kill him; I have just bought a knife;" and I advised him that that wouldn't do, and he said that "he had done been butting in on him and he was going to cut him in two." He had a new spring back knife. Fisher acted like he was drunk, was reeling and staggering about.

Henry Jones testified that appellant swung around toward the deceased as he cut him. That deceased was doing nothing and was trying to get away. That they were holding them apart. That he heard defendant tell Butler, the other gentleman, that he was going to put the knife in him. That was the gentleman that was killed. This conversation was about fifteen minutes before the fight.

Defendant testified that he and the deceased had been friendly always, until a day or so before the killing; that he was drunk at that time; got drunk Saturday night, and continued drunk until Tuesday morning. That he and the deceased had a row at Brice's restaurant, where they had been drinking beer that morning, but he didn't remember what it was about, and they were cursing each other, and deceased called him a son-of-a-bitch, and they had tried to fight. That he didn't remember buying the knife that day, nor meeting Coleman, the officer, at the corner, nor anything up to the time of the cutting; to the best of my recollection, the first I remember about Coleman or Chandler being on the street was when all three got together; Jack made some remark; seems as though we was trying to get together; Jack said, "You son-of-a-bitch, I'll get you now," or something like that, and I struck at him. Jack had put his hand in his pocket and taken out what I taken to be a knife and come up behind Coleman; he had the knife in his hand, kind of drawed up in his hand, and I used my knife, because I thought he was going to cut at me. I

don't know where I was when I cut him. I was drunk. I don't remember Coleman trying to take the knife away from me, nor saying I had bought the knife to cut his throat; Chandler was advancing on me with the knife when I cut him; I can remember he had the knife, and I must have had one in my hand when I cut him. I cut him because he was advancing on me with a knife. I don't remember trying to cut him in any particular place. I did have mind enough to try to protect me when he was advancing on me; Jack had a knife in his hand when I first saw it; I don't remember which hand he had the knife in, but he had it open. I don't know how many steps he took toward me, and I don't know what Coleman was doing when I cut him.

Another witness said that Chandler was walking over toward Fisher and he saw him pull his hand out of his pocket, with his left hand, while Fisher was up against the wall and doubled up his fist as he went toward the defendant. He was ten feet distant, and he didn't believe that Fisher got away from the officer when he cut deceased. He thought he reached out over the officer's shoulder. Chandler was walking toward him with his fist doubled up when he was cut, but didn't strike at the defendant.

Another witness said he heard them quarreling, and deceased said, "You treated me dirty, and I am going to get even with you." A man walked between them and pushed Chandler away and carried Fisher toward the store. That Chandler moved his hand to his pocket and advanced to Fisher, who was up next to the wall, and that Chandler had got in reach of the defendant when he was cut. I never saw him draw his hand out. I never heard anything said by either of them at that time and never saw any movements made.

There was other testimony tending to show that appellant broke away from the officer, and cut the throat of the deceased while he was standing with his hands down and making no demonstration whatever, while

some of the testimony tends to show that he made the fatal thrust over the officer's shoulder.

None of the witnesses stated that he made any attempt to get away from the officer and the difficulty.

The court instructed the jury, giving, over appellant's objection, instructions numbered 9 and 10 and refusing to give requested instruction numbered 21, as follows:

No. 9. In ordinary cases of one person killing another in self-defense, it must appear to the defendant that the danger was so urgent and pressing that in order to save his own life, or prevent his receiving great bodily harm or injury, the killing was necessary; and it must appear also that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further contest before the mortal blow or injury was given.

No. 10. The law of self-defense does not imply the right of attack. If you believe from the evidence in this case that the defendant, armed with a deadly weapon, sought the deceased with the felonious intent to kill him, or sought or brought on or voluntarily entered into the difficulty with the deceased with the felonious intent to kill him, then the defendant can not invoke the law of self-defense, no matter how imminent the peril in which he found himself placed.

No. 21. You are instructed that even though you should find the defendant either invited, or provoked the attack, yet, if you further find that the defendant was pushed or shoved by Mr. Coleman away from and apart from the deceased, and you find that deceased thereupon followed up the defendant, and that deceased was making or was about to make an assault upon the defendant with a deadly weapon, and that it reasonably appeared to the defendant that he would receive great bodily injury, then you are instructed, if the defendant was restrained by Coleman, it was not his duty to retreat, but he had a right to defend himself against the assault of the deceased.

The jury returned a verdict of murder in the second degree, fixing appellant's punishment at eight years in the penitentiary, and from the judgment this appeal comes.

Louis Josephs, James S. Steel, J. S. Lake and *James D. Head,* for appellant.

1. The indictment was fatally defective in that it wholly failed to aver that deceased died of any wounds inflicted by defendant. 93 Ark. 81; 94 *Id.* 242; 95 *Id.* 48; 55 *Id.* 556; 70 *Id.* 521; 85 N. C. 581; 163 U. S. 662.

2. The instructions as to the duty of defendant to retreat were erroneous. 99 Ark. 474. Instruction No. 13 was correct. 69 S. W. 871.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee.

1. The indictment is good. 80 Pac. 1125; 22 Ind. 1; 14 S. W. 122; 63 Pac. 752; 4 Nev. 265; 33 La. Ann. 227; 71 Ga. 44; 43 Cal. 29; 13 Minn. 371.

2. We see no error in the instructions, nor in excluding of testimony. 100 Ark. 201; 85 Ark. 300-303.

KIRBY, J., (after stating the facts). Appellant challenges the sufficiency of the indictment, claiming it does not allege that death resulted from the wound inflicted by him upon the deceased. The indictment charges that he did "unlawfully * * * kill and murder one Jack Chandler * * * by then and there stabbing and cutting him, the said Jack Chandler, with a certain knife * * * held in his hand with * * * intent then and there to kill and murder him, the said Jack Chandler."

It is true, it does not say that he died and that his death was caused from the wound inflicted by the stroke with the knife, but it does say he did kill and murder him with a knife held in his hand, by cutting and stabbing him with the intent to kill and murder him, and although the word "murder" has a technical meaning, which may be ascribed to it in the indictment, the word "kill" is by no means technical, it is used in its ordinary acceptation and means unmistakably to slay, to put to death, to

deprive of life, and when the indictment charges that the defendant "did kill and murder Jack Chandler * * *" it gave him clear and specific notice that Jack Chandler died from the effects of the stabbing, and of the offense with which he was charged. Neither was it defective in failing to specifically alleged that the deceased died within a year and a day after the infliction of the wound. It is true our statute (Kirby's Digest, § 1774) provides that in order to make the killing murder or manslaughter, it is requisite that the person injured die within a year and a day after the wound was given, but under other statutes, requiring what indictments shall contain and providing that none is insufficient for "any defect which does not tend to prejudice the substantial rights of the defendant on the merits," it is immaterial that no specific allegation is made of the death resulting within such time after the mortal wound, since murder has a technical meaning, and when it is sufficiently alleged in the indictment the defendant is put upon notice that death resulted within the time specified by law to make the offense of that grade. Kirby's Digest, § § 2228-9 and 2243; *State* v. *Sly,* 80 Pac. (Idaho) 1125; *Cordell* v. *State,* 22 Ind. 1; *Caldwell* v. *State,* 14 S. W. 123-4; *State* v. *Kirby,* 63 Pac. 752; *Thomas* v. *State,* 71 Ga. 44; *People* v. *Sanford,* 43 Cal. 29; *State* v. *Ryan,* 13 Minn. 371.

Instructions numbered 9 and 10 correctly state the law, and were applicable to the case made. The evidence shows that after appellant and deceased were arrested, and while they were being taken to the office of the justice, the officer discovered open in appellant's hand a new dirk knife, which he had purchased and exhibited to witnesses, declaring that he bought it to kill deceased with, and there was much testimony tending to show that deceased was standing where the officer left him when he tried to wrest the knife from appellant or prevent him using it, with his hands by his side, making no attempt whatever to assault appellant when the fatal blow was struck. It also tends to show that appellant broke

away from the officer, and made two or three steps toward deceased, and struck him with the knife, cutting his throat from ear to ear. That he did this, notwithstanding the officers and others were trying to prevent him and take the knife from him. He claims he thought the other man was advancing upon him, and believed that he had a knife and that he struck the fatal blow in order to protect himself; but no witness said for him that he attempted in any way to avoid the difficulty or get away from the officer or to get out of the way of deceased, and he himself does not contend that he did.

Neither was error committed in refusing to give instruction No. 21, as requested. The evidence shows that appellant had voluntarily entered into the difficulty; that he was about to assault the deceased and the officer to prevent him doing so pushed him aside and tried to wrest the knife from him, and that he made no effort whatever to go around the officer or attempted to get away from the difficulty, but broke loose and went by the officer, or pushed him back and struck over his shoulder and killed the deceased, who was unarmed, so far as the testimony shows, and was not at the time, according to the great preponderance of it, making any hostile demonstration toward appellant. Instruction numbered 9 correctly covered the phase of the case upon which this instruction was asked. Neither was there error committed in refusing to allow the witness, Z. R. Fisher, to state what the deceased said to him after the cutting relative to who was to blame for the trouble. The conversation was not a part of the *res gestae*, was not shown to have been made under such circumstances as to render it admissible as a dying declaration, and was but a mere expression of an opinion and inadmissible on that account.

We find no prejudicial error in the record, and the judgment is affirmed.

STATE v. WILLIAMS.

Opinion delivered October 13, 1913.

1. SHERIFFS—DUTY TO FILE INFORMATION—GAMING—STATUTE—CONSTITUTIONALITY.—Kirby's Digest, § 1742, requiring sheriffs and other peace officers who shall have knowledge that any person is guilty of operating a gambling device, to give notice thereof to some judge or justice, and requiring the judge or justice, by appropriate process, to bring the accused into court, to be dealt with according to law; *held* not to conflict with art. 2, § 15, of the Const. of 1874, which provides that all people, shall be secure in their persons, etc. (Page 474.)
2. GAMBLING DEVICE—DUTY OF SHERIFF—NONFEASANCE.—Under Kirby's Digest, § 1742, a sheriff is required to act when it comes to his knowledge that a gambling device is being operated, and the law violated thereby, and he is guilty of a violation of this statute, only when he wilfully refuses to act upon this knowledge. (Page 475.)
3. SHERIFFS—GAMBLING DEVICE—DUTY OF SHERIFF—NONFEASANCE—QUESTION FOR JURY.—It is a question for the jury in each case to decide whether the sheriff has knowledge of the commission of the offense of running a gambling device, and whether he, exercising an honest and intelligent judgment, fails to act as required by Kirby's Digest, § 1742. (Page 475.)

Appeal from Garland Circuit Court; *A. B. Grace,* Judge, on Exchange; *Guy Fulk,* Judge on Exchange, in Case No. 1789; reversed.

STATEMENT BY THE COURT.

The appellee is the duly acting sheriff of Garland County, and was twice tried upon indictments charging him with nonfeasance in office. It was alleged in each indictment that it had come to appellee's knowledge, as sheriff, that Sam Watt and divers others were guilty of violating the gambling laws of the State, by setting up and exhibiting, in certain described buildings, various gaming tables and gambling devices at which money was won and lost, and that appellee had unlawfully and knowingly failed, refused and neglected to give notice of such violations of the law as was his official duty to do, to some justice or magistrate of the county.

The prosecutions were had under section 1742,

Kirby's Digest, which is set out in full in the judge's charge to the jury in the second trial.

At the conclusion of the evidence at the first trial the court directed the jury to return a verdict of not guilty because, in the opinion of the court, the evidence was not sufficient to warrant a conviction.

At the conclusion of the second trial, upon the second indictment, which was presided over by a different judge from the one presiding at the first trial, the jury was instructed to return a verdict of not guilty for the reason that the said section 1742 was unconstitutional. In directing this verdict for the reason that the prosecution was being conducted under an unconstitutional statute, the trial judge gave the following statement of his views:

"The defendant, R. L. Williams, is being prosecuted in this case under an indictment alleging what is technically called nonfeasance in office, as sheriff of Garland County. The specifications of the charge are that he failed to comply with the provisions of section 1742 of Kirby's Digest of the Statutes of Arkansas, which reads as follows:

" 'When it shall come to the knowledge of any peace officer that any person is guilty of any offenses aforesaid, it shall be his duty to give notice thereof to any judge or magistrate in the county who shall issue his warrant and cause such offender to be brought before him; and it shall be the duty of the judge or magistrate to examine the matter in a summary manner, and to discharge, bail or commit the offender, as the circumstances and the right of the case may require."

(The offenses referred to in this section are certain violations of the gambling statutes.)

"The section quoted is a part of an act passed in 1838, and incorporated in the old Revised Statutes.

"At the time it was adopted, the Constitution of 1836 was in force, and under this Constitution justices of the peace had no jurisdiction to try persons charged with crime. They could only sit as an examining court

and discharge, commit or admit to bail the person accused.

"It is also true that in the Constitution of 1836 there was nothing to prohibit the Legislature from enacting a law for the issuance of warrants of arrest not based on any oath or affirmation. Hence, the section first quoted (1742) was a valid exercise of the legislative powers. The purpose of the act was clearly to prohibit and punish gaming, and the exhibition of gaming devices, by causing the offenders to be arrested and brought before an inferior court for examination, and there to be bound over or committed to await indictment by the grand jury if the evidence justified it.

"In 1874 the people of the State adopted a new Constitution, article 2, section 15, which reads as follows:

" 'The right of the people of this State to be secure in their person, houses, papers and effects against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except on probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized.'

"Since the adoption of the above provision, no magistrate or other person in this State had any legal authority to issue a warrant for the arrest of any person on any charge, except after affidavit or affirmation describing the offense shall have first been filed. This is so clearly in direct conflict with section 1742, Kirby's Digest, as to operate to repeal and render it nugatory. It is true that the sheriff might still give the information, but he is not required to do so under an oath, and the magistrate receiving it has no power to compel any other person to do so. Therefore, he could not legally issue any warrant of arrest under the law, as it now stands, and the enforcement of the law would be in no wise facilitated.

"It is a maxim that no man is required by law to do a vain thing, and another that when the reason ceases the rule ceases also. The Constitution having deprived

the court or magistrate of the power to act, it would be an idle form for the sheriff to give notice which no one is authorized to act upon—it would be a vain thing. The main object and purpose of section 1742 having been repealed, that is the power to arrest and punish, the mere accessory provisions must fall with it, according to well-known canons of construction. The result is that there is now no law on the statute book authorizing the prosecution of the defendant for the nonfeasance charged in the indictment. It is wholly immaterial whether or not these charges are sustained by the evidence. Even if they were conceded to be true, they constitute no offense at common law and violate no statute.

"You are therefore instructed that as a matter of law the defendant is not guilty of any crime, and you are directed to return a verdict of not guilty."

We set the charge out in full because it presents the issue raised for our decision. The appellee's counsel say it clearly states their views of the law and they pitch their present defense upon its soundness. And for these reasons we do not set out the evidence, which in our opinion was sufficient to require the submission of the cases to the jury, so far as the proof was concerned.

Section 1472 was brought forward from the Revised Statutes, where it is found on page 274, as section 9 of chapter 44, division 6, article 3, and as there found reads as follows:

"Section 9. When it shall come to the knowledge of any sheriff, coroner or constable, or either of their deputies, that any person is guilty of any of the offenses created or prohibited by this title, it shall be their duty to give notice thereof to any judge or justice of the peace for the county, who shall issue his warrant and cause such offender to be brought before him, and it shall be the duty of the justice or judge to examine the matter and discharge, bail or commit the offender as the circumstances and the right of the case may require."

This is the correct reading of the section, the

changes having been made by the digester in conforming that chapter.

As stated by the learned trial judge, we have adopted the Constitution of 1874 since the enactment of the above-quoted section of the statute, and in this Constitution is found section 15 of article 2 as set out in the judge's charge. It will be observed that this section 15, article 2, of our Constitution is practically identical with the Fourth Amendment to the Constitution of the United States. Is the statute constitutional?

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, and *Vaughan & Akers,* for appellant; *Gibson Witt,* prosecuting attorney, and *W. G. Bouic,* of counsel.

1. The word "warrant" occurring in section 15, article 2, Const. '74, stressed by the trial court in his instruction, refers to, and means "search warrant," as appears by the marginal explanation thereof. See Cooley's Const. Lim. 367, 368, 369, 370, 377. Compare Kirby's Dig., § § 1644, 1672, 1737, 2132-4-5, 7483, 7973.

In holding that "since the adoption of the above provision, no magistrate or other person in this State has any legal authority to issue a warrant for any person for the arrest of any person on any charge except after affidavit or information describing the offense shall first have been filed," etc., the court erred, because article 7, section 40, of the Constitution gives jurisdiction of misdemeanors to justices of the peace. It further committed reversible error in holding that the sheriff was not bound to give the notice or file information. The evidence shows that appellee not only knew that gambling was going on in Hot Springs, but that he saw it going on. Kirby's Dig., § § 2109, 7754, 7760, 7765. He was guilty of nonfeasance in failing to arrest where gambling was going on openly and in his view. This is true, even if section 1742 be held invalid, for it was his duty, in that case, to arrest under section 2068, Kirby's Digest, treating the gamblers as vagrants. See Kirby's Dig., § § 2447-2450.

2. If we had no statutes requiring sheriffs to give notice or file information, appellee was guilty of nonfeasance under the common law. 40 Am. St. Rep. 708, and notes; *Id.* 911; 15 N. W. 330; 17 Am. & Eng. Enc. Pl. & Pr. 242, par. 2, 243, and notes, 246, par. b, and note 3; *Id.* 252; 19 Am. & Eng. Ann. Cases, 86; 2 Bishop, Cr. L., § 978; *Id.*, § § 459, 464, 468a; 2 Bishop, Cr. Proc., § 824; 68 Ark. 561; 47 Pac. 282.

If the indictment was a good statutory indictment, it is good under the common law. 1 Bish. Stat. Cr., § § 164-5, note 4. Section 1742 is declaratory of and affirms the common law. 1 Bish. Cr. Proc., § 599, note 1, § § 600, 601.

3. There is no inconsistency between article 2, section 15, Constitution, and section 1742, Digest. 34 Ark. Law Rep. 385.

The statute has not been repealed. (a) Repeals by implication are not favored. 101 Ark. 239-244; 41 Ark. 149; Kirby's Dig., § § 7792-7819.

(b) The presumption is that legislative acts are constitutional. 56 Ark. 485; 36 Ark. 171; 51 Ark. 534; 32 Ark. 131; 100 Ark. 175; 93 Ark. 612-620; 85 Ark. 171; 75 Ark. 125, 126.

(c) Long acquiescence in the validity of a statute will have great weight in determining its constitutionality. 10 Cent. Dig. 1233-1234, and cases cited; 44 N. E. 469; 5 U. S. Rep. 299; 11 Cal. 175; 141 Ill. 469; 2 Gill. 487; 15 Md. 376; 22 Md. 468; 85 Am. Dec. 658; 15 Mass. 197; 77 Am. Dec. 539; 54 Mo. 238; 54 Pa. St. 255; 101 *Id.* 560; 22 Tex. 504.

4. If the Constitution, article 2, section 15, renders void the latter part of section 1742, Digest, which is not conceded, the statute being separable, the unobjectionable part would still stand. 92 Ark. 93; 91 Ark. 284; 89 Ark. 418-423; *Id.* 466-7, 470; 80 Ark. 151; 70 Ark. 94; 53 Ark. 491-4; 40 Ark. 448.

5. Appellee is not entitled to raise the constitutionality of the act. "Ministerial officers can not contest the constitutionality of a statute as a defense in proceed-

ings against them for disobeying its mandate." 8 Cyc. 789, par. 4, and note 96; 3 Mackey (D. C.) 32; 90 N. Y. 498; 4 Ohio St. & C. Pl. Dec. 461. See also 8 Cyc. 789, note 1, and cases cited; *Id.* 787 F., note 90; *Id.* 790, note 2; 75 Ark. 328; 70 Ark. 549; 69 Pac. 199, 200; 106 Fed. 886; 73 N. W. 87; 4 Am. Dig. (Dec. ed.), par. 42, Constitutional Law; Cooley's Const. Lim. 198-9, 200; 121 Fed. 772; 62 Atl. 1017-18; 70 N. E. 156-158; 71 N. W. 438; 12 Am. St. Rep. 185, 186; 47 Pac. 278; 23 Col. 300.

M. S. Cobb, W. H. Martin and *X. O. Pindall,* for appellee.

1. It is sufficient answer to a large part of appellant's argument touching the duty of sheriffs to say that appellee was indicted for the specific offense of failing to give notice under section 1742, Kirby's Digest. He can not in this proceeding be convicted for failing to arrest gamblers as vagrants, etc.

2. There is no merit in the argument that the indictment is good at common law, if good under the statute. Gambling was not a common law offense, hence failure to give information to a magistrate or judge that gambling was going on was not a violation of the common law. 15 Ark. 259; 20 Cyc. 879, and note 3, citations.

3. This is the first instance we can find, and the industry of appellant's counsel has not been more successful where the statute in question has been called into operation since its enactment. The claim of long acquiescence in determining its constitutionality can have no weight, and the authorities cited by appellant are not applicable.

4. Section 1742, Digest, is not divisible. It is composed of a single sentence, no part of which could be taken away without destroying the entire section.

When the invalid part of a statute is so related to the valid part as to constitute an essential element of it, it renders the whole of it unconstitutional. 62 Atl. 1017; Ann. Cas. 1913, B. 946. See also 48 Ark. 370; 53 Ark. 490.

5. Appellee is not precluded from raising the constitutionality of the act. 8 Cyc. 868; 64 Am. Dec. 50;

Cooley's Const. Lim. 108; 61 Am. Dec. 381; 54 *Id.* 253, and note; 23 Col. 300; 170 Mo. 272, 77 S. W. 560; 46 Ark. 312; 24 Ark. 161.

6. The statute is unconstitutional. Section 1742, being in conflict with the Constitution, art. 2, § 15, and inconsistent with its provisions, was expressly repealed. Section 1, Schedule, Const. 1874; 8 Cyc. 747; 29 L. R. A. 798; 28 Ala. Ann. 601; 74 Mo. 335; 64 Mo. 58; 46 Neb. 612; 65 N. W. 873; 33 L. R. A. 554; 2 Wheeler, (N. Y.) 77.

SMITH, J., (after stating the facts). It is proper and essential that we consider what duties are imposed upon the officer here charged with the enforcement of the gaming laws. The statute, as applied to the facts of this case, provides that when it comes to the knowledge of a sheriff that any person is guilty of the offense of operating a gambling device, such sheriff shall give notice thereof to some judge or justice of the peace of the county. When this notice has been given, it becomes the duty of the officer to whom it was given to immediately bring before him, by appropriate process of his court, the person so accused of violating the law, to be dealt with according to the law. This section does not require the sheriff to set the law's machinery in motion whenever he shall merely have heard of a violation of the law. He is not required to run down every idle rumor, or to act upon information which he may not regard as reliable. He is required to act only when it comes to his knowledge that the law is being violated, and he is guilty of a violation of this statute only when he wilfully refuses to act upon this information. It is of course a question of fact in each case for a jury to determine whether or not a sheriff has this knowledge, and in determining that fact the jury should regard the evidence alleged to constitute the proof of this knowledge from the sheriff's viewpoint, and, in doing so, should decide whether this officer, exercising an honest and intelligent judgment, would have knowledge, which in effect here means probable cause, to give notice under this statute of its violation.

But it is said this section is void because the officer was not required to give this notice under oath and because the Constitution provided that warrants for search and seizure can be issued only upon oath or affirmation. But such is not the case. Only officers can give this notice, and only such officers as have been required to take an official oath. They act officially, and are under the sanctity of an official oath. Their action is taken in compliance with their oath. The burden, or privilege, of giving this notice is not imposed by this statute upon any private citizen, whatever his knowledge of the facts may be. If the private citizen who has knowledge of the facts desires the law put in motion he must apprise the officer whose actions are had under an official oath. Had the statute intended to dispense with the necessity of an oath, the privilege of giving this notice could have been conferred on private citizens. But the private citizen can give notice to the justice of the peace only by making an affidavit for a warrant of arrest. The Legislature in its wisdom determined that there was a necessity to make certain peace officers prosecuting officers in the enforcement of the laws against gambling. Gambling, in a sense, is an impersonal offense, and there is not usually a prosecutor at hand, as there is in prosecutions of offenses for violation of the laws protecting one's peace, person or property. And so certain peace officers are made prosecuting officers in regard to gaming, and the judicial officers to whom they report are required to proceed when they have this notice of the violation of the laws against gaming. The statute does not say how this notice must be given, but a proper practice, which would make for an orderly enforcement of the law, would require this notice to be in writing. This notice is in the nature of the information which the prosecuting attorney and his deputy are required to file against persons believed to be guilty of carrying concealed weapons, the unlawful sale of liquor, gambling and certain similar offenses. "The deputy prosecuting attorney provided for in section 6387 shall have authority to file, with any

justice of the peace in his county, information charging any person with carrying weapons unlawfully, the unlawful sale of or being interested in the sale of intoxicating liquors; violation of the blind tiger act or gambling, whereupon it shall be the duty of the justice of the peace to issue a warrant for the arrest of the offender, and in such cases no bond shall be required for the costs of prosecution." Section 6388, Kirby's Digest.

This section might also be said to offend against article 2, section 15, of the Constitution, except that in filing this information the prosecuting attorney is acting under his official oath.

The right of prosecuting officials to file information is well recognized and has long been a common method of instituting prosecutions for misdemeanors.

"A criminal information is an accusation in the nature of an indictment, from which it differs only in being presented by a competent public officer on his oath of office, instead of a grand jury on their oath.

"This proceeding by criminal information comes from the common law, without the aid of statutes; and is allowable by the common law in a great variety of cases, the rule appearing to be that it is a concurrent remedy with the indictment for all misdemeanors, but not permissible in any felony.

"The right to make the information is, by the English law, as it stood when our forefathers imported it to this country, in the Attorney General, who acts upon his own official discretion without the interference of the court; or, if the office of Attorney General is vacant, it is in like manner in the Solicitor General.

"In the American States the criminal information should be deemed to be such, and such only, as, in England, is presented by the attorney or solicitor general. This part of the English common law has plainly become common law with us. And as, with us, the powers which in England are exercised by the Attorney General and the Solicitor General are largely distributed among our district attorneys, whose office does not exist in England,

the latter officers would seem to be entitled, under our common law, to prosecute by information, as a right adhering to their office, and without leave of court. And such is the doctrine extensively if not universally acted upon in our States, though in some of them it is more or less aided by statutes." *State* v. *Whitlock,* 41 Ark. 406. *State* v. *Kyle,* 65 S. W. 763.

Section 1742 of Kirby's Digest makes certain peace officers prosecuting officers for the specified purposes, and imposes upon them the burden of giving notice, or filing information, under the conditions stated. Likedise, section 1748 of Kirby's Digest imposes similar duties in cetrain cases upon prosecuting attorneys.

"It shall be the duty of each prosecuting attorney in this State who knows or is informed of any person or persons exhibiting or setting up, or aiding or assisting in setting up, any [gambling] device described in the preceding section, in his circuit to take immediate steps to have such person or persons immediately arrested for trial, and such prosecuting attorney shall have such person or persons arrested as above provided for each separate offense done or committed on every separate day."

The making of the peace officers named in this section 1742 prosecuting officers, and giving them authority to file information under the conditions there required, does not in our opinion offend against this section 15 of article 2, of the Constitution, and the judgment of the court below, in each of the cases, is accordingly reversed and remanded for a new trial.

MOORE v. STATE.

Opinion delivered October 13, 1913.

1. HOMICIDE—SELF-DEFENSE—USE OF WEAPON UNLAWFULLY CARRIED.—While a person may use in his necessary self-defense a weapon which he is carrying unlawfully, an instruction is properly refused which says that appellant had a right to go to the place when she believed deceased (her husband) was staying with another woman, "and to carry with her a weapon to defend herself against any possible attack," because such instruction is argumentative, and is objectionable because it permits one who is expecting trou-

ble, and probably looking for it, to be armed and ready for it when it comes. (Page 478.)

2. HOMICIDE—SELF-DEFENSE.—When appellant fired four shots at deceased, if the first two were fatal and fired in her necessary self-defense, the fact that she fired two other ineffective shots, would not deprive her of the right to plead self-defense against the fatal shots. (Page 478.)

3. INSTRUCTIONS—REFUSAL TO GIVE INSTRUCTION COVERED BY OTHER GIVEN INSTRUCTIONS.—It is not error to refuse to give an instruction at appellant's request which properly states the law, when the court has given another instruction which exhaustively covers the law of the case. (Page 478.)

4. NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—A new trial upon the ground of newly discovered evidence is properly refused, when the new evidence is merely cumulative to other testimony, and in the absence of a showing why, with any diligence, the thing sought to be proved by the new evidence, could not have been proved at the first trial. (Page 479.)

Appeal from Pulaski Circuit Court, First Division; *Robert J. Lea,* Judge; affirmed.

Jones & Owens, for appellant.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee.

SMITH, J. Appellant was indicted for the crime of murder in the second degree, alleged to have been committed by shooting her husband, Arthur Moore, and upon her trial she was convicted of voluntary manslaughter and sentenced to two years' imprisonment in the penitentiary.

On the 24th of February, 1913, appellant, a negro woman, went to a house of ill repute in the segregated portion of the city of Little Rock, where she found her husband in the company of a negress named Mary Johnson. Appellant says she went to this house to persuade her husband to leave there and return home with her, but that her husband became angry, coaxed her into an alley adjoining the house, and there attacked her with a knife, telling her he would cut her, cursed her, and was about to stab her with the knife when she drew a revolver from her bosom and fired twice, and that deceased then dropped the knife and turned to flee, running out of the

alley across the street, and fell dead on the sidewalk. That she then went down the alley in the direction deceased had gone, firing two shots about the time she came out of the alley. She further testified deceased had threatened to kill her if she came to this house for him, that he had beaten her on several occasions, and was a large and powerful man, without regular occupation, and spent his time gambling and in places of bad repute; and had been frequently confined in jail. Appellant offered evidence tending to corroborate her in several particulars. It developed that the two first shots both struck the deceased, one striking him in the face and the other in the back part of the shoulder.

The evidence upon the part of the State was to the effect that deceased was unarmed and that defendant went to the house for the purpose of killing her husband; that when she had shot him she said, "I killed my husband here, I did, he is my husband;" and, when asked why she killed him, she said: "I am the one that done the shooting; I'd soon not to have no man at all than have half a man."

Without reviewing the evidence in detail, it is sufficient to say that while, according to the evidence on the part of appellant, she fired in her necessary self-defense and should have been acquitted, on the other hand the proof on the part of the State is that the killing was committed deliberately, and the jury tempered justice with mercy because of the circumstances under which the killing was done.

A number of questions are presented by counsel for appellant, which were either not properly saved at the trial, or are not now regarded as prejudicial, or of sufficient importance to require discussion.

Appellant strenuously insists there should be a reversal because of the court's refusal to give instructions numbered 1 and 3, asked in her behalf. These instructions are as follows:

No. 1. "You are instructed that if you believe from the evidence in this case that defendant saw her husband

(this deceased) in the early part of the evening, on the night of the killing, in company with another woman, as she described, she had at least a legal right to interfere and separate them, and that she had a legal right to go to the home where she believed they were staying and to carry with her a weapon to defend herself against any possible attack; and, further, while in an effort to persuade her husband to return home she was attacked by him, she had a perfect right to shoot in her own defense, and should therefore be acquitted."

No. 3. "If you find from the evidence that defendant fired the first two shots to protect her own life, or to prevent great bodily harm being done her, and that the first two shots were the ones that caused the death of deceased, and though she fired two other shots even after deceased had turned to flee, but that the last two shots neither contributed to nor hastened on the death of deceased, then your verdict should be an acquittal."

The first instruction is not the law. It is true that one may use in his necessary self-defense a weapon which he is carrying unlawfully; that is, he is not to be deprived of his right to use a weapon in his necessary defense because he is carrying it unlawfully. But this is not the purport of the instruction, for it says: "She had a legal right to go to the home where she believed they were staying and to carry with her a weapon to defend herself against any possible attack." This instruction, besides being open to the objection that it is argumentative, is subject to the more serious objection that it permits one, who is expecting trouble, and probably looking for it, to be armed and ready for it when it comes.

The third instruction is more nearly correct, and might well have been given. If the first two shots were the fatal shots and were fired in her necessary self-defense, the fact alone that she fired other shots, which neither contributed to nor hastened the death of deceased, would not deprive her of the right to plead self-defense against the fatal shots. But the court gave an

extended charge and covered the law of self-defense exhaustively; in fact, appellant complains of the very length of the court's charge, and the jury was correctly told in the plainest terms when the right of self-defense might be exercised in accordance with the principles announced in many decisions of the court.

It was also urged as a ground for a new trial that appellant could produce some newly-discovered evidence in regard to the finding of the knife in the alley, and to the effect that there were slits in the cloak which appellant wore on the night of the killing. The evidence in regard to finding the knife was cumulative to other testimony, and there is no showing why, with any diligence, the cuts in the cloak could not have been proved at the first trial. Moreover, nothing appears of this newly-discovered evidence except in the motion for a new trial, and, as was said in the case of *Cravens* v. *State,* 95 Ark. 325, "We can not consider this alleged assignment of error. The bill of exceptions does not show that such testimony was offered to be introduced by the defendant. It is true that such appears to be the case from the motion for a new trial, but motions for a new trial can not be used to bring into the record that which does not otherwise appear of record." Here nothing appears in the record in regard to this new evidence except the statements in regard to it found in the motion for a new trial.

Upon the whole case, we think appellant had a fair trial, free from prejudicial error, and the judgment of the court below is accordingly affirmed.

HANSON v. HODGES.

Opinion delivered October 13, 1913.

1. INITIATIVE AND REFERENDUM—REFERENDUM—LEGISLATIVE ACTS.—Under Amendment No. 10 to the Constitution of Arkansas, all acts of the Legislature are subject to the Referendum, except such laws as are necessary for the immediate preservation of the public peace, health and safety. (Page 486.)

2. STATUTES—ADOPTED CONSTRUCTIONS.—When a State adopts the laws of another State, it will be held to have adopted previous constructions of such law by the latter State. (Page 489.)

3. CONSTITUTIONAL LAW—INITIATIVE AND REFERENDUM—EMERGENCY—LEGISLATIVE QUESTION.—It is a question exclusively for legislative determination, whether a statute is necessary for the immediate preservation of the public peace, health or safety. (Page 490.)

4. CONSTITUTIONAL LAW—REFERENDUM—EMERGENCY.—The Legislature must expressly declare the existence of an emergency so as to exclude the Referendum under Amendment No. 10, to the Constiution, although it is not essential that the declaration of the emergency be in the exact words of the exception in the amendment, other words of similar import unmistakably showing such intention, being sufficient. (Page 490.)

5. CONSTITUTIONAL LAW—REFERENDUM—DECLARATION OF AN EMERGENCY.—The act of February 17, 1913, to regulate the issuance of liquor license, which provides that "this act being necessary for the public peace, health and safety, shall take effect and be in force from and after December 31, 1913," uses substantially the language of the emergency clause in the Tenth Amendment to the Constitution; and by the words used the Legislature declared an emergency and took the act out of the operation of the Referendum. (Page 492.)

6. STATUTES—APPROVAL BY GOVERNOR—WHEN OPERATIVE.—The act of February 17, 1913, p. 180, with the emergency clause that it "take effect and be in force from and after December 31, 1913," became a law when it was approved by the Governor, although its provisions were not enforceable until after December 31, 1913. (Page 492.)

7. CONSTITUTIONAL LAW — REFERENDUM — EMERGENCY—"IMMEDIATE."—Amendment No. 10 to the Constitution confers power upon the Legislature to pass laws for the "immediate" preservation of the public peace, health or safety, without reference to the people under the Referendum. *Held*, the word "immediate" means and applies to those laws that should take effect in order to conserve the purpose of protecting the public, before the people under the provisions of the amendment would have time to vote upon them. (Page 492.)

8. CONSTITUTIONAL LAW—INITIATIVE AND REFERENDUM AMENDMENT—"IMMEDIATE."—Amendment No. 10 to the Constitution does not require that laws, which the Legislature determines and declares necessary for the immediate preservation of the public peace, health or safety shall be put into effect immediately, and a law will not be held to be unconstitutional because the Legislature, acting upon the facts before them, in their judgment and discretion, deemed it wise to postpone the time for the law to take effect until some future date. (Page 492.)

Appeal from Pulaski Circuit Court, Second Division; *Guy Fulk,* Judge; affirmed.

STATEMENT BY THE COURT.

This is a mandamus proceeding to compel the Secretary of State to accept and file a petition for a referendum of an act entitled "An Act to Regulate the Issuance of Liquor License in Arkansas," approved February 17, 1913.

The petition therefor recited that petitioners are residents of the State, and were such on January 1, 1913, and were then and are now duly qualified electors of the State of Arkansas, in the county of Pulaski.

The petition further recited "That at the session of the General Assembly of the State of Arkansas, held in the year 1913, an act entitled as stated above was passed and was signed and approved by the Governor on February 17, 1913, a copy of which act was attached to the petition marked exhibit 'A' and made part thereof.

"That by the terms of said act the sale of intoxicating liquors in cities and counties where the vote had been in favor of such sale was and is made dependent upon the filing of a petition to be signed by a majority of the adult white inhabitants living within the corporate limits of any incorporated town or city, in manner and form as provided in said act; but that by the seventh and last section of said act it was and is provided as follows, towit: 'This act being necessary for the public peace, health and safety, shall take effect and be in force from and after December 31, 1913.'

"That being advised and believing the fact to be that the said act could be the subject of referendum under the amendment to the Constitution of the State of Arkansas relating to the Initiative and Referendum, being known as Amendment No. 10, and under the act of the General Assembly of the State of Arkansas, being 'An act to provide for carrying into effect the initiative and referendum powers reserved by the people in Amendment No. 10 to the Constitution of the State of Arkansas on general county and municipal legislation, to regulate elections

thereunder and to punish violations of this act,' approved June 30, 1911, petitioners, together with 12,155 other citizens and electors of the State of Arkansas, after said February 17, 1913, and within less than ninety days after the final adjournment of the said General Assembly of the State of Arkansas, caused to be filed with the defendant, Earle W. Hodges, as Secretary of State of said State of Arkansas, a petition or petitions prepared and circulated as required by said amendment and act, ordering and asking that said act be referred under the said referendum clause of Amendment No. 10 to the people of the State of Arkansas, either for adoption or rejection, as the case might be, at the general election to be held on the second Monday of September, 1914, said petitions being in matter and form as shown by exhibit 'B' thereto attached and made part thereof.

"That the whole number of votes cast for the office of Governor of the State of Arkansas at the regular election last preceding the filing of said petitions for the referendum of said enactment aggregated 169,649 votes, and under the said tenth amendment the number of citizens and electors required to obtain said referendum was 8,483, and that the number of citizens and electors who have signed said petitions exceeds the required number 3,675.

"That notwithstanding said petitions are in the proper form and contain more than sufficient signatures as required by law, and notwithstanding that the said act contains no emergency clause such as is required by the provisions of the said tenth amendment, and is otherwise subject to the referendum aforesaid, yet the said defendant, as such Secretary of State, on the 31st day of May, 1913, refused and still doth refuse to accept and file said petitions, or either of them, as required by law, to the end that the said act might be properly submitted for the referendum under the said provision of the tenth amendment to the Constitution and act of the General Assembly aforesaid. And that the petitioners are therefore remediless except by the means of a writ of man-

damus to be granted by this honorable court, compelling the said defendant, as such Secretary of State, to accept and file the said petitions for a referendum of this act, as contemplated by the law in such cases made and provided.

"Wherefore, petitioners pray for a writ of mandamus directed to the said Earle W. Hodges, as Secretary of State of the State of Arkansas, commanding and requiring him, as such Secretary of State, to accept and file said petition as required by law, to the end that a referendum be had as to said act, as contemplated by law, and for costs and other proper relief."

Said petition was duly sworn to and was filed in the Pulaski Circuit Court, Second Division, on the 31st day of May, 1913, and proper notice of the application for mandamus was duly served on the Secretary of State; and in addition to said notice there was duly served upon him on said day an alternative writ of mandamus. Attached to the petition was a copy of the act referred to and a copy of the form of a properly prepared petition for referendum as presented to the Secretary of State. The act in question is Act No. 59 of the Acts of 1913 at page 180.

Respondent, Secretary of State, demurred to the petition for mandamus for the reason that it did not state facts sufficient to constitute a cause of action.

The sole issue presented on the demurrer to the petition, and the sole question now presented for our decision is whether or not said act was subject to referendum. The lower court held that it was not subject to the referendum, and on this issue sustained the demurrer and dismissed the petition. Appellants have appealed from that action of the court.

In the record is a written stipulation of counsel to the effect that it was agreed that if said act is, or was, subject to the referendum the mandamus prayed for should have been granted by the circuit court, and that it should be so ordered by this court, and if said act

by reason of the provisions of section 7 is not so subject, the judgment of the lower court should be affirmed.

W. L. & D. D. Terry and *Morris M. & Louis M. Cohn,* for appellants.

1. The legislative declaration is not conclusive upon the courts. 76 Ark. 202; 81 *Id.* 562; 83 *Id.* 54; 118 Ind. 502; 21 N. E. 39; 103 U. S. 637. The power of the Legislature is not *unlimited.* 76 Ark. 202; 74 Pac. 720; 88 *Id.* 522; 145 S. W. 199.

2. The Legislature has not determined that this law was necessary for the immediate preservation of the public peace, health or safety. The language used is the criterion, and the words used are given the meaning they ordinarily bear. The law is self-executing. 76 Ark. 303; 75 *Id.* 542; 60 *Id.* 343; 59 *Id.* 237; 66 *Id.* 361; 138 Mo. 347; 103 Ark. 48.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee.

1. No act will be considered necessary for the immediate preservation of the public peace, etc., except such acts as the Legislature find to be so, and when the Legislature does so find it is conclusive. 74 Pac. 710; 88 *Id.* 522; 100 *Id.* 559; 103 Ark. 54.

2. It was the intention of the Legislature to remove the act from the operation of Amendment No. 10, and the declaration, while not in the best words that might have been employed, expresses unmistakably the legislative intent. The courts always endeavor to ascertain from the language used the intent of the Legislature and what it intended to accomplish.

Coleman & Gantt, Sam Frauenthal and *J. V. Bourland, amici curiae.*

1. The *immediate* necessity alone can deprive the people of their voice in accepting or rejecting the act. 7 Ind. 13. Either the exact words of the exception * * * must be used, or their necessary equivalent. Nothing can be taken by implication but must be expressly de-

clared. 133 Pac. 1145; 88 Pac. 522; 31 Ark. 701; 103 Ark. 53; 36 Cyc. 1194; 18 L. R. A. (N. S.) 664.

2. The Legislature must determine the necessity of the law; if not, the courts can not do so. The Legislature did not do so. 74 Pac. 710; 85 N. W. 605; 88 Pac. 522; 100 *Id.* 559; Cooley, Const. Lim. 89; 36 Cyc. 1194.

SMITH, J., (after stating the facts). The provisions of Amendment No. 10, the Initiative and Referendum Amendmenmt, are as follows:

"Section 1. The legislative powers of this State shall be vested in a General Assembly, which shall consist of the Senate and House of Representatives, but the people of each municipality, each county and of the State, reserve to themselves power to propose laws and amendments to the Constitution, and to enact or reject the same at the polls as independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly. The first power reserved by the people is the Initiative, and not more than 8 per cent of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon.

"The second power is a Referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health or safety), either by the petition signed by 5 per cent of the legal voters or by the legislative assembly as other bills are enacted. Referendum petitions shall be filed with the Secretary of State not more than ninety days after the final adjournment of the session of the legislative assembly which passed the bill on which the referendum is demanded. The veto power of the Governor shall not extend to measures referred to the people. All elections on measures referred to the people of the State shall be had at the biennial regular general elections, except when

the legislative assembly shall order a special election. Any measure referred to the people shall take effect and become a law when it is approved by a majority of the votes cast thereon and not otherwise. The style of all bills shall be, 'Be it enacted by the people of the State of Arkansas.' This section shall not be construed to deprive any member of the legislative assembly of the right to introduce any measure. The whole number of votes cast for the office of Governor at the regular election last preceding the filing of any petition for the Initiative or for the Referendum shall be the basis on which the number of legal votes necessary to sign such petition shall be counted. Petitions and orders for the Initiative and for the Referendum shall be filed with the Secretary of State, and in submitting the same to the people he and all other officers shall be guided by the general laws and the acts submitting this amendment until legislation shall be specially provided therefor."

It is apparent that all acts of the Legislature are subject to the referendum except such laws as are necessary for the immediate preservation of the public peace, health or safety, and to determine whether or not the act in question is subject to the referendum it is necessary for us to consider and decide two questions: First, is the determination that an emergency exists for putting an act immediately into effect a legislative or a judicial question? Second, if it is a legislative question, has the Legislature properly evidenced its finding that an emergency existed and has this finding been given that expression in the act, which excludes it from the referendum?

As is well known, this amendment is substantially a copy of the Oregon amendment, and shortly after its adoption there it became necessary for the Supreme Court of that State to determine the first question, which is now before us, and in an opinion by Justice Bean of that court the subject was exhaustively discussed, and among other things he said:

"This brings us to the question as to whether the

legislative declaration that the Portland charter was necessary for the preservation of the public peace, health and safety is conclusive on the courts. Under the initiative and referendum amendment, laws 'necessary for the immediate preservation of the public peace, health or safety' are excepted from its operation. As to them, the action of the legislative and the executive departments is conclusive and final, so far as their enactment is concerned. No power is left to the people to approve or disapprove them. They are not subject to the referendum amendment, and as to them the powers of the other departments of the government derived from the Constitution are unaffected. The legislative assembly, may, in its discretion, put them into operation through an emergency clause, as provided in section 23, article 4, of the Constitution, or it may allow them to become laws without an emergency clause; the necessity or expediency of either course being a matter for its exclusive determination. As to all other laws the amendment applies, and they can not be made to go into operation for ninety days after the adjournment of the session at which they were adopted, or until after approval by the people, if the Referendum is invoked. Section 28, article 4, of the Constitution, giving the legislative assembly power to put any law into force upon approval by declaring an emergency, has been modified by the amendment of 1902, so as to exclude from the power to declare an emergency all laws except those necessary for the immediate preservation of the public peace, health or safety. So far, all are agreed. But the vital question is, what tribunal is to determine whether a law does not fall under this classification? Are the judgment and findings of the legislative assembly conclusive, or are they subject to review by the courts? The inquiry is much simplified by bearing in mind that the exception in the constitutional amendment is not confined to such laws as the legislative assembly may legally enact by virtue of the police power of the State, nor to those alone that may affect the public peace, health, or safety. The police

power is limited to the imposition of restraints and burdens on persons and property, in order to secure the general comfort, health and prosperity of the State. Tiedeman, Lim. Pol. Power, 1. But the language of the constitutional amendment is broader, and includes all laws, of whatsoever kind, necessary for the immediate preservation of the public peace, health or safety, whether they impose restraints on persons and property, or come strictly within the police powers, or not. The laws excepted from the operation of the amendment do not depend alone upon their character, but upon the necessity for their enactment in order to accomplish certain purposes. As to such laws, the amendment of 1902 does not in any way abridge or restrict the power of the Legislature, which, by the insertion of a proper emergency clause, may unquestionably cause them to go into effect upon approval by the Governor. As the Legislature may exercise this power when a measure is in fact necessary for the purposes stated, and as the amendment does not declare what shall be deemed laws of the character indicated, who is to decide whether a specific act may or may not be necessary for the purpose? Most unquestionably, those who make the laws are required, in the process of their enactment, to pass upon all questions of expediency and necessity connected therewith, and must therefore determine whether a given law is necessary for the preservation of the public peace, health and safety. It has always been the rule, and is now everywhere understood, that the judgment of the legislative and executive departments as to the wisdom, expediency or necessity of any given law is conclusive on the courts, and can not be reviewed or called in question by them. It is the duty of the courts, after a law has been enacted, to determine in a proper proceeding whether it conflicts with a fundamental law, and to construe and interpret it so as to ascertain the rights of the parties litigant. The powers of the courts do not extend to the mere question of expediency or necessity, but, as said by Mr. Justice Brewer, 'they are wrought out and fought out

in the Legislature and before the people. Here the single question is one of power. We make no laws. We change no Constitutions. We inaugurate no policy. When the Legislature enacts a law, the only question which we can decide is whether the limitations of the Constitution have been infringed upon.' Prohibitory Am. Cas. 24 Kan. 700-706. The amendment excepts such laws as may be necessary for a certain purpose. The existence of such necessity is therefore a question of fact, and the authority to determine such fact must rest somewhere. The Constitution does not confer it upon any tribunal. It must therefore necessarily reside with that department of the government which is called upon to exercise the power. It is a question of which the Legislature alone must be the judge, and when it decides the fact to exist, its action is final." *Kadderly* v. *City of Portland,* 74 Pac. 710.

The decision is of special force because it was rendered on December 21, 1903, which was some years before we borrowed the amendment from the State of Oregon. In the case of *State* v. *Arkansas Brick & Mfg. Co.,* 98 Ark. 130, Special Judge NORTON, for the court, there said: "The case last cited comes with especial force, as it arose in Kentucky after her adoption of a code which was subsequently adopted by Arkansas. When one State adopts the laws of another State, it is quite generally held that constructions of the adopted law go along with it." This is an accepted rule of construction announced in many cases. *McNutt* v. *McNutt,* 78 Ark. 346.

Substantially the same question arose in this State about as soon as such question could arise. The Legislature of 1911 passed the act known as the Turner-Jacobson act, which concluded with the following words: "And this act shall take effect and be in force from and after its passage." The act imposed certain duties upon certain officers in connection with the assessment of property for taxation, the performance of which was required before the expiration of ninety days after the close of

the session. In the case of *Arkansas Tax Commission* v. *Moore,* 103 Ark. 48, which involved the right to refer this Turner-Jacobson act, the court there first determined the constitutional amendment was self-executing and then proceeded to a consideration of the question whether the exception of acts from the operation of the Referendum was a purely legislative question or not.

In discussing that question the court said: "The constitutional provision is also a chart for legislative guidance, and leaves it in the power of the Legislature, in its discretion, to determine what laws come within the exception as necessary for the immediate preservation of the public peace, health or safety, for as to all such its power is not restricted. It was a question exclusively for legislative determination, and such determination alone could bring it within this exception and power of the Legislature to make it immediately effective and thereby remove it from the general class of laws upon which the people reserved the right to order the Referendum. *Stevens* v. *Benson, supra; Kadderly* v. *Portland,* 74 Pac. (Ore.) 720; *Sears* v. *Multnomah County,* 88 Pac. (Ore.) 522."

It was there further said: "It is the business of the court to ascertain the legislative intent and determine when the act becomes operative as a law. If the Legislature had used the words of the exception in the amendment and said that the act was necessary for the immediate preservation of the public peace, health or safety, and should go into effect from and after its passage, there could have been no question as to the time of its becoming operative, or if it had used any other words of similar import unmistakably showing such an intention no doubt would have arisen; but it failed to do so, making necessary construction by the court."

It appears therefore from the decision in the *Tax Commission* case to be already settled that the existence of the emergency is exclusively a question for legislative determination. To the same effect, see *Oklahoma City* v. *Shields,* 100 Pac. 559.

This principle has long been recognized by this court, and controlled all those decisions arising under section 23 of article 5 of the Constitution. This section provides that in all cases where a general law can be made applicable, no special law shall be enacted, yet in each case this court has held that whether a special act is necessary is a matter within the discretion of the Legislature. *Boyd* v. *Bryant,* 35 Ark. 73; *Davis* v. *Gaines,* 48 Ark. 371; *State* v. *Sloan,* 66 Ark. 579; *Carson* v. *Levee District,* 59 Ark. 513; *Powell* v. *Durden,* 61 Ark. 21; *St. Louis S. W. Ry. Co.* v. *Grayson,* 72 Ark. 119; *State* v. *Moore,* 76 Ark. 197.

"The judiciary can only arrest the execution of a statute when in conflict with the Constitution. It can not run a race of opinions upon points of right, reason and expediency with the law-making power." Cooley's Const. Lim. (7 ed.) 236; *State* v. *Moore,* 76 Ark. 200.

The court held the Turner-Jacobson act subject to the Referendum in the *Tax Commission* case, *supra,* for the reason that "the concluding provision of the revenue act and the others fixing dates for the performance of certain things before the act could become operative under the constitutional amendment unless it comes within the exception, do not manifest an intention upon the part of the Legislature to put it into effect as a law necessary for the immediate preservation of the public peace, health or safety, and were not meant for, and are not a legislative determination that the act should take effect as such, and it could not therefore take effect until ninety days after the final adjournment of the session of the Legislature at which the act was passed or after its approval by the people if the Referendum is invoked."

The point which controlled the decision in the *Tax Commission* case, *supra,* is the same proposition involved in the second question in the case now under consideration. It appears to have been decided in the *Tax Commission* case that while it was exclusively a question for legislative determination as to the existence of the emergency excluding the Referendum, yet that the existence of

this emergency must be expressly declared in the act, although it is not essential that the declaration of the emergency be in the exact words of the exception in the amendment, if it has used "any other words of similar import unmistakably showing such an intention."

Is there any uncertainty in the language which the Legislature has employed? If there is, the act is subject to the Referendum. But we think the doubt does not exist. The Legislature did not employ the formula used before the adoption of the amendment "that this act shall take effect and be in force from and after its passage, or from and after December 31, 1913," but it undertook to use substantially the language of the emergency clause of the amendment, and did employ its exact words except for the omissions of the words "immediate preservation." The use of these words would have to be declared purposeless, and the words themselves without meaning, and the Legislature to have had no intent in their employment, if it be not held that by their use the Legislature undertook to declare an emergency which should take the act from without the operation of the Referendum. The omissions of the words "immediate preservation" is said to be fatal because if its purposes can not be immediately accomplished it is subject to the Referendum. But this act, with the emergency clause, became a law when it was approved by the Governor and it was immediately a law upon his approval, although its provisions were not enforceable until after December 31, 1913.

One purpose of Amendment No. 10 was to confer upon the Legislature the power to pass laws that were necessary for the immediate preservation of the public peace, health or safety, without reference to the people under the Referendum. Immediate, in the sense of this amendment, means those laws that should take effect in order to conserve this purpose before the time when the people under the provisions of the amendment would have the opportunity to vote upon them. In other words, such laws as the Legislature deem necessary for the im-

mediate preservation of the public peace, health or safety, they may so find, and declare, and put in force at any time before the next general election. The framers of Amendment No. 10, and the people who adopted it, did not intend that laws necessary for the immediate preservation of the public peace, health or safety should wait the slow processes of the Referendum, hence the amendment provides that the Legislature could enact such laws and put them in force before the time required for the people to pass on them under the Referendum. But the amendment does not require that laws which the Legislature determines and declares necessary for the immediate preservation of the public peace, health or safety shall be put into effect immediately. In the absence of such requirement a law should not be held unconstitutional because the Legislature, acting upon the facts before them, in their judgment and discretion, deemed it wise to postpone the time for the law to take effect until some future date. The judgment of the court below is therefore affirmed.

LITTLETON v. CARRUTHERS-JONES SHOE COMPANY.

Opinion delivered October 20, 1913.

1. HOMESTEAD—CREDITORS—LIEN.—When A purchased goods from B on credit, and selling them, purchased real estate with the proceeds, and moved upon the same, *held*, regardless of A's purchase of the goods in bad faith, or an intention to defeat B, in the collection of his debt, A was entitled to claim his homestead exemptions in the land purchased. *Semble*, the rule might be different if A purchased the goods from B with the fraudulent intent not to pay for them. (Page 495.)
2. SALE OF CHATTELS—LEGAL FRAUD.—When A purchased goods from B, and then sold out his business to F, and after the sale to F, B sent goods under the original order directed to A. *Held*, F, by converting the goods to his own use, without notifying B of the change in business, became liable to B for the amount of their value. (Page 497.)

Appeal from Logan Chancery Court; *J. V. Bourland*, Chancellor; reversed in part, affirmed in part.

Priddy & Chambers, for appellant.

1. Appellee had a complete and adequate remedy at law, hence appellant's demurrer should have been sustained.

2. Littleton had the legal right to convert his unencumbered assets into a homestead, and to hold it as exempt from the claims of creditors. 99 Ark. 45.

W. B. Rutherford, for appellee.

1. The objection to the forum should have been by motion, and not by demurrer, and no motion having been made, the objection was waived. 37 Ark. 185; 32 Ark. 562; 31 Ark. 411.

2. When Littleton fraudulently and without the knowledge or consent of appellee converted the latter's goods into the land, an equitable lien on the land attached *eo instanti* in favor of appellee. 19 Am. & Eng. Enc. of L. (2 ed.) 19-23. See also 62 Ark. 400.

The facts are so entirely dissimilar in the Ferguson case, 99 Ark. 45, relied on by appellant, that that case is not applicable as an authority in this case.

McCULLOCH, C. J. Appellant, J. M. Littleton, was engaged in the mercantile business at Blue Mountain, Arkansas, and became indebted to appellee, Carruthers-Jones Shoe Company, of St. Louis, Missouri, in the sum of $394.50 for a bill of shoes purchased from the latter. While thus indebted to appellee, he exchanged his stock of goods with T. F. Finch, for a farm in Yell County, Arkansas, which he soon after moved upon and made his homestead.

Of the goods so purchased from appellee and shipped to Littleton at Blue Mountain the first consignment was on May 19, 1911, of goods amounting to $327.15, and the remainder of the bill was shipped on June 23, 1911. Both consignments were made pursuant to an order sent in by appellee's traveling salesman prior to the date of the first shipment. The exchange by Littleton of his goods with Finch for the farm occurred some time in June, the precise date not being given, but it is evident that it took place before the last bill of goods was shipped

and that it was received by Finch and placed among the other goods after he had taken possession of the stock.

Appellee instituted this action in the chancery court against Littleton and Finch, and also making prior lienors of the farm property parties, alleging that the sale by Littleton to Finch was made with the fraudulent intent to cheat, hinder and delay the appellee in the collection of its debt, and seeking to have a lien declared on the farm which Littleton had received in the exchange and which he occupies as his homestead.

The decree of the chancery court, on final hearing of the case, declared a lien in favor of appellee against Littleton on the farm for the amount of the first consignment of the goods, $327.15, and interest, and the court also decreed that appellee recover from Finch the amount of the second bill of goods, $76.95, with interest.

Littleton and Finch both appealed to this court.

It is unnecessary to determine whether or not Littleton acted in good faith in exchanging the stock of goods for the farm and then taking possession of the latter as a homestead. Conceding that his purpose was to defeat his creditors in the collection of their debts, appellee is not entitled to have a lien declared on the place, for, regardless of the good or bad faith in the transaction, Littleton is entitled to claim his homestead exemptions. *Ferguson* v. *Little Rock Trust Co.,* 99 Ark. 45.

In the case just cited we quoted with approval the following language taken from the decision of the United States Circuit Court of Appeals for the Eighth Circuit in the case of *First National Bank* v. *Glass,* 79 Fed. 706, as follows:

"An insolvent debtor may use with impunity any of his property that is free from liens and vested equitable interests of his creditors to purchase a homestead for himself and family in his own name. If he takes property that is not exempt from judicial sale and applies it to this purpose, he merely avails himself of a plain provision of the Constitution or statute enacted for the

benefit of himself and family. He takes nothing from his creditors by this action in which they have any vested right."

We also quoted with approval language of the Supreme Court of Minnesota in the case of *Jacoby* v. *Parkland Distilling Co.,* 41 Minn. 227, 43 N. W. 52, as follows:

"Even if he disposes of his property subject to execution for the very purpose of converting the proceeds into exempt property, this will not constitute legal fraud. This he may do at any time before the creditors acquire a lien upon the property. It is a right which the law gives him, subject to which every one gives him credit, and fraud can never be predicated on an act which the law permits."

Now, the rule might be different if the proof was sufficient to show that the goods were purchased from appellee with the fraudulent intent not to pay for them, for in that case the title would never have passed on account of the fraud thus practiced, and the creditor might in equity be permitted to trace the proceeds of his misappropriated property into the property in which the proceeds were invested. But we have no such case here, for there is no proof at all to the effect that Littleton purchased the goods with intention not to pay for them, or that he was insolvent at the time he purchased the goods, or that he misrepresented his financial condition. In other words, no state of facts existed which prevented the title from passing from appellee to Littleton, and the only fraud, if any there be, consisted in his disposing of the goods without leaving enough to pay his creditors. As already shown, according to the principles settled by the decisions of this court, fraud in that respect does not affect his right to hold as exempt the property acquired by exchange. It follows, therefore, that the chancellor erred in declaring a lien on the lands in controversy.

We are of the opinion that the court was correct in rendering a personal decree against Finch for the amount of the last invoice of goods. The proof is not sufficient to show that Finch participated in the fraudulent design of Littleton, if it be conceded that the latter acted with

fraudulent design toward his creditors, nor is it necessary, in order to sustain the finding of the chancellor, to show that he did participate in such fraud. The proof shows clearly that the last bill of goods shipped from St. Louis, after the stock of goods was exchanged, was delivered to Finch, and it was received at Blue Mountain after the exchange of property took place. Littleton and Finch both testified that this bill of goods, even though it was received after the exchange was completed, was included in the invoice; but we are not altogether satisfied that that is true, for it does not appear that Littleton had any invoice of this bill of goods at all when he exchanged the stock of goods with Finch. But, be that as it may, we think that the circumstances under which Finch received the bill of goods made him liable to appellee for the amount. The goods were shipped by appellee to Littleton in compliance with the order formerly transmitted through the traveling salesman, and evidently without any knowledge of the fact that Littleton had quit business and sold out to Finch. If appellee had known at that time that Littleton had sold out and was no longer in the mercantile business, it seems probable that, according to ordinary commercial customs, they would not have shipped the goods. Good faith on the part of Finch required that, before taking the goods into his possession, he should notify appellee of the change in the business. By failing to do this, and taking the goods and converting them to his own use, he made himself liable for the amount. His acceptance of the goods without notifying appellee was, to that extent, a legal fraud, which makes him liable for the value thereof.

The personal decree against Littleton for the amount of the first bill of goods is affirmed; likewise the decree against Finch for the amount of the last bill, with interest thereon, is affirmed, but that part of the decree which declares a lien against Littleton's land is reversed and the cause is remanded with directions to dismiss the complaint so far as it concerns that feature of the case.

FRIEND v. STATE.

Opinion delivered October 20, 1913.

CRIMINAL LAW—ACCESSORY—CONVICTION AS PRINCIPAL.—One not present when an offense is committed can not properly be indicted as a principal, but if indicted at all, must be indicted as an accessory.

Appeal from Clay Circuit Court, Western District; *J. F. Gautney,* Judge; reversed.

J. L. Taylor and *F. G. Taylor,* for appellant.

An accessory before the fact can not be convicted of a felony under an indictment charging him with being a principal, unless he is present at the commission of the crime. Kirby's Dig., § § 1560, 1561; 37 Ark. 274; 41 Ark. 173; 55 Ark. 593; 96 Ark. 58; 22 Cyc. 455, and note 2.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee.

Error is confessed for that where the proof shows an accessory before the fact was not present when the crime was committed, he can not be convicted under an indictment charging him as a principal. 96 Ark. 58-62, and authorities there reviewed.

McCULLOCH, C. J. Appellant stands convicted of the crime of grand larceny under an indictment which accuses him of being a principal in the commission of the offense, not an accessory before the fact.

The testimony adduced by the State establishes the fact that one Kimmel committed the crime of grand larceny by stealing a horse in the State of Missouri and bringing the same into this State. The proof tends to show that appellant encouraged and advised the commission of the offense, but there is no testimony in the record tending to show that he was present when the offense was committed nor when the animal was brought into the State. In fact, there is no testimony showing that the stolen property was ever brought into the possession of appellant. Not being present when the offense was committed, he could not properly be indicted as a principal, but should have been indicted as accessory. *Smith*

v. *State,* 37 Ark. 274; *Williams* v. *State,* 41 Ark. 173; *Roberts* v. *State,* 96 Ark. 58; *Hughey* v. *State,* 109 Ark. 389.

The Attorney General confesses error on this ground, and it is clear that his confession must be sustained. The judgment of conviction is therefore reversed and the cause remanded for further proceedings.

WOOD v. FREEMAN-SMITH LUMBER COMPANY.

Opinion delivered October 20, 1913.

1. TITLE—TITLE FROM COMMON SOURCE.—Where plaintiff and defendant in a suit to quiet title both deraign title from the same source, the plaintiff need not go behind that source to prove his title. (Page 500.)
2. CLOUD ON TITLE—TITLE FROM COMMON SOURCE—ESTOPPEL.—Appellant claimed title to lands by a deed from D, and appellee claimed the right to cut the timber on said lands by a conveyance of the timber from D, prior to appellant's deed, but which right had expired; *held,* appellee is estopped to deny the title of his grantor D, and appellant is entitled to a decree quieting his title to said lands. (Page 501.)

Appeal from Calhoun Chancery Court; *James M. Barker,* Chancellor; reversed.

B. L. Herring and *E. E. Williams,* for appellant.

Plaintiffs need not go back of a common source of title in this suit to quiet title. 90 Ark. 420-423; 41 Ark. 17-21; 44 Ark. 517-519; 49 Am. Dec. 383-389; 8 L. R. A. 727-732; 139 S. W. 149.

Gaughan & Sifford, for appellee.

The principle of "common source of title," invoked by appellants, does not obtain in this case, and the rule basing recovery on the strength of plaintiff's title has no application. The only question is, can plaintiffs show title to the land so that the court may find that the existing *timber deed* is a menace to that *title.*

MCCULLOCH, C. J. This is an action instituted by appellants, Mattie Wood and C B. Primm, against appellee, Freeman-Smith Lumber Company, to quiet title

to certain tracts of land in Calhoun County, Arkansas, and to restrain appellees from removing timber from such lands.

Appellee held a timber deed, executed to it by W. C. Dunn, dated November 2, 1899, conveying to appellee the timber on the lands and giving time to remove the same. That time has, according to the allegations of the complaint and proof in the case, expired, and the purpose of this suit is to cancel the timber deed as a cloud on the title of appellants and to prevent appellee from cutting the timber as it threatens to do.

The chancery court granted the relief sought as to some of the tracts and cancelled the timber deed as to those tracts; but dismissed the complaint as to the other tracts on the ground that appellants had failed to prove title to those tracts.

Both parties appealed to this court, but it is not insisted by the defendant, Freeman-Smith Lumber Company, that the decree against it cancelling its timber deed as to some of the tracts was erroneous; therefore, that part of the decree will stand affirmed without further discussion.

W. C. Dunn conveyed the lands to appellant subsequent to the execution of his timber deed to appellee. The parties, therefore, claim title from a common source, and it was unnecessary for appellants to deraign title beyond the common source. That is the rule in actions of ejectment as well as those to quiet title. *Stafford* v. *Watson,* 41 Ark. 17; *Griesler* v. *McKennon,* 44 Ark. 517; *Harrison Machine Works* v. *Bowen,* 200 Mo. 235. The rule is stated as follows in Sedgwick & Wait on Trials of Title to Land, § 803: "Whenever plaintiff and defendant both deraign title from the same source, the plaintiff usually need not go behind this source to prove his title. * * * Where the defendant can show a better title outstanding, and has acquired it, the rule ceases to apply. Where the defendant is allowed to impeach the common source of title, he must establish that he himself has acquired a superior title, and, except to

this extent, he is not permitted to invoke the rule that the defendant can defeat the plaintiff by showing a better title in a third person."

This principle applies with peculiar force to the present action wherein appellants seek to cancel, as a cloud on their title, a timber deed previously executed by their grantor to appellee. Appellee is estopped to deny the title of its grantor, W. C Dunn, who is also the grantor of appellants, and it does not claim any right to take the timber except under that deed. The court, therefore, erred in denying relief as to all of the tracts of land described in the complaint. The decree as to those tracts to which appellants were denied relief is, therefore, reversed and the cause remanded with directions to enter a decree in appellant's favor as to those tracts.

RUSSELLVILLE WATER & LIGHT COMPANY v. SAUERMAN.

RUSSELLVILLE WATER & LIGHT COMPANY v. BENEFIELD.

RUSSELLVILLE WATER & LIGHT COMPANY v. CARPENTER.

RUSSELLVILLE WATER & LIGHT COMPANY v. BALL.

Opinion delivered October 20, 1913.

1. APPEAL AND ERROR—OMISSIONS IN RECORD—CURED HOW.—Where appellees ask an affirmance on the ground that a contract, material to the issues involved, was not brought into the record, the omission will be held to be supplied, when appellees in their brief admit the use of the contract in the court below, and in a motion asking an affirmance state that if the court considers the contract here, that permission to file an additional brief be granted, the contract being fully set out in the additional brief. (Page 506.)
2. MECHANICS' LIENS—RIGHT OF MATERIAL MEN AND LABORERS UNDER CONTRACT BETWEEN PRINCIPAL AND CONTRACTOR.—W contracted to construct a dam for appellant, the contract providing that the dam should be turned over to appellant "free of all liens for labor or materials," that moneys advanced, be used first in payment of all labor, material and other liens. Fifteen per cent of the contract price was to be retained. W became bankrupt without paying

appellees, who were labor and material men. In an action by appellees against appellant to collect the amount due them by W out of the 15 per cent retained by appellant, *held*, the provision of the contract for the retention of the 15 per cent was for the protection of appellant against laborers and material men, and there being no privity between appellant and appellees, the reservation of part of the contract price will not be construed for the benefit of appellees, in the absence of more specific language to that effect. (Page 509.)

Appeal from Pope Chancery Court; *Jeremiah G. Wallace,* Chancellor; reversed.

STATEMENT BY THE COURT.

On November 14, 1908, the Russellville Water & Light Company entered into a contract with one Fred Wilson to build a dam across the Illinois river and a reservoir, in Pope County, Arkansas, for the purpose of furnishing power for a water and light plant in the city of Russellville. The contract, among other things, provided that the dam was to be constructed for the sum of $34,700, 85 per cent of the value of the transportation, labor and material furnished during the period then ending, to be determined by the engineer in charge, was to be paid to Wilson and the remaining 15 per cent was to be retained until ten days after the completion of the work and the possession of the dam delivered to the Russellville Water & Light Company. The dam was to be delivered to the company "free from all liens for labor or material, or purchase money or otherwise." The money to be paid Wilson under the contract was to be applied, first, to the payment of all labor, material or other liens, and should not be used for any other purpose until such payments were made, and Wilson could not demand any of the semi-monthly payments until he had shown that the preceding semi-monthly payments had been disbursed as provided by the contract. Statements as to the amount of the disbursements were to be furnished by Wilson to the company on demand. The contract provided that the money for all labor, machinery, appliances or material shall be deducted from any moneys due said Wilson or that may thereafter become

due to him from said water and light company" under the terms of the contract; that if at any time there should be any evidence of any liens or claims for which the company might become liable and which are chargeable to the said Wilson, then and in that event the water and light company shall have the right to retain out of any of the payments then due or thereafter to become due to the said Wilson an amount sufficient to completely indemnify said water and light company against said liens and claims." The cases are considered together.

The plaintiffs, Benefield and others, filed their separate complaints in the Pope Chancery Court, in which some of them set up that they had performed work and labor on, and others that they had furnished material for, the dam at the request of Wilson, setting forth the respective amounts of their several claims. The complaint in the Benefield case set up the contract of the water and light company with Wilson; alleged that Wilson had completed the reservoir and dam except a small portion and some extra work agreed upon between himself and the company, amounting to only a small per cent of the entire contract; that Wilson, about the time of the completion of the contract, had been adjudicated a bankrupt, and that he was insolvent; that he had absconded and his whereabouts was unknown to the plaintiffs; that under the contract the company had reserved 15 per cent of all sums due Wilson until all labor and material used by him were fully paid, and that this amounted to about five thousand dollars, and was largely in excess of the amount due plaintiffs; that plaintiffs should be paid out of this amount; that they had been subrogated to the rights of Wilson to the amount of their respective claims, *pro tanto,* and asked that they have judgment against the water and light company for said amounts. The contract was made an exhibit to the complaints.

There was a special demurrer to all the complaints, setting up that they showed on their face that the claims were barred by the statute of limitations; that the plain-

tiffs had not complied with the statute for preserving their liens, and that the court was without jurisdiction. The court did not pass on the demurrer. An answer was filed, denying all the material allegations of the complaints, and, among other things, setting up that if the plaintiffs were entitled to subrogation to the rights of Wilson, that their claims had been litigated and settled in the bankruptcy proceedings; that the claims sued on were barred by the statute of limitations; that plaintiffs had not attempted to enforce their claims under the statute for preserving liens on the property and had not complied with that statute in any particular. The demurrers to the complaints were renewed in the answers. It does not appear that they were passed upon by the court.

The court, after hearing the testimony, rendered a decree reciting "the cause was heard upon the pleadings and the exhibits thereto and the depositions of witnesses." The court found that the company was indebted unto the plaintiffs in the various amounts, which are set forth in the respective decrees, and entered a judgment for such amounts, with costs. An appeal was prosecuted in each of the cases.

A. S. Hays, J. M. Martin and *Danaher & Danaher,* for appellant.

1. The complaint is bad, and the demurrer should have been sustained, because it does not allege that ten days' notice had been given to the owners before filing the lien. Kirby's Dig., § 4976; 150 S. W. 770; 147 S. W. 620. This notice should have been in writing. 20 Am. & Eng. Enc. of L. (2 ed.) 380; 51 Ark. 302. The demurrer should have been sustained because it fails to set out facts sufficient to show that plaintiffs had a lien and the right to enforce it, and fails to show that the material furnished was actually used in the construction of the dam. 30 Ark. 682; *Id.* 29; 77 Ark. 156; 84 Ark. 562; 20 Am. & Eng. Enc. of L. (2 ed.) 346.

2. Appellee's right to recover would depend on the right of Wilson to recover, had he completed the work,

and the evidence shows he could have recovered nothing. 77 Ark. 35; *Id.* 156; 84 Ark. 560.

R. B. Wilson and *J. T. Bullock,* for appellees, in causes numbered 2617-19-20.

For the omission from the record of the contract, which was material evidence as appears by the court's decree, the judgments should be affirmed, the presumption being that the omitted evidence was sufficient to sustain the court's decree. 45 Ark. 240; *Id.* 306; 58 Ark. 135; 38 Ark. 477; 35 Ark. 230.

The decree is right and should be affirmed. Fed. Stat. Ann. 125, 28 Stat. L. 278; 92 Fed. 549; 34 C. C. A. 526-530; 100 Fed. 400; 40 C. C. A. 450-453; 135 Fed. 78, 67 C. C. A. 552, *syl.* 1; 128 Fed. 918; 63 C. C. A. 644, 645.

A. S. Hays and *Danaher & Danaher,* for appellant in reply.

1. The contract was attached to the complaints and abstracted as a part of them. See Benefield case. Documents attached to the pleadings need not be repeated. 88 Ark. 477.

2. The reservation was optional with appellant, and was solely for its benefit, and even if it had been a bond it could not have inured to the benefit of the material men or laborers. 86 Ark. 298; 37 Cyc. 314; *Id.* 317; 194 Pa. St. 571, 45 Atl. 333; 6 Col. App. 541, 41 Pac. 844.

WOOD, J., (after stating the facts). In the cases of *Russellville Water & Light Company* v. *Sauerman & Ball, D. C. Carpenter, J. M. Ball and T. C. Cole,* numbered respectively 2617, 2619 and 2620, the appellees ask the court to affirm the judgments for the reason that the contract, which is material to the determination of the issues involved, and which was in evidence below, is nowhere brought into this record.

There is an agreement of record here by the attorneys representing the respective parties in the above cases that the transcripts now on file here in each of the causes may be used as a part of the transcript in the other causes; that the causes may be submitted the same

as if the matter contained in each of them were contained in all of the others. By an examination of the record in one of the causes we find that the answers allege the existence of a contract between the company and Wilson, and that the reply of one of the plaintiffs to the answer admitted the contract between the company and Wilson, and the reply to the answer states as follows: "That the defendants by their contract with said Fred Wilson kept and agreed to withhold and withheld 15 per cent of all funds due said contractor for the purpose of paying any indebtedness in the construction and erection of the improvements in controversy; that said defendants after the bankruptcy of said Fred Wilson appropriated said 15 per cent so held back by them to their own use and interest, when in equity and good conscience the same should have been applied to the payment of plaintiff's claim."

The appellees, in their briefs, acknowledge that the contract was adduced in evidence. Since the appellees admitted the existence of the contract, and show in their briefs that it was considered by the lower court, we are of the opinion that the causes should not be affirmed because of the omission from the transcript of the contract upon which appellant relies to sustain its contention.

Counsel, in their brief, in presenting this motion for affirmance, state that "if the court should be inclined to have this contract considered here," we respectfully ask permission to file as a part of our brief and argument the brief and argument of Hon. U. L. Meade, filed in the case of *Russellville Water & Light Company* v. *H. D. Benefield et al.* In that case the contract is fully set out, and copied by Mr. Meade in his brief. This statement of the attorneys, we are of the opinion, supplies the omission of the appellant to set forth the contract in the record and in its abstract, and sufficiently brings to the attention of the court the contract that was in evidence, and upon which the court, in part, based its decree.

The only remaining question therefore is whether or not under the terms of this contract as shown in the Benefield case the appellees were entitled to recover.

The contract, after providing for the erection of the reservoir and dam and specifying the manner in which same should be completed and the time for the completion of the same, contains the following:

"*Third.* The company shall pay to the said contractor for the construction and completion of the said dam and reservoir in accordance with said plans and specifications and this agreement to the satisfaction of the company, the sum of thirty-four thousand seven hundred dollars in lawful money, which said sum shall include the cost of all labor, machinery, freight thereon, installation thereof and all materials and other things used in and about the construction and completion of the said dam and reservoir, as well as other items of cost which may be incurred by the said contractor or those working for or under him in the erection and completion of said dam and reservoir under this contract. Said sum of money shall be paid to the contractor semi-monthly as the construction of said dam and reservoir shall progress, 85 per cent of the actual value of the cost of transportation and the installation of all machinery and appliances placed on said premises, and all labor performed during the erection and completion of said dam and reservoir during the period then ending, shall be paid to the contractor, which value is to be determined and ascertained by the engineer then in charge of the said work, as herein provided, and the remaining 15 per cent shall be retained by the said company and not paid to the contractor until ten days after the completion of the said work and the possession thereof delivered to the company, free of all liens for labor or materials or purchase money or otherwise. It is understood and agreed in this connection that the contractor will use and supply all moneys so advanced to him under this contract at first, to the satisfaction and payment of all labor, materials and other liens used in and about the construction of the said dam and reservoir, and shall not divert or use any of the same for any other purpose until all amounts owing by the contractor for such labor,

materials and other things are fully paid off and discharged, and such contractor shall not have the right to demand any of the said semi-monthly payments until he has shown to the satisfaction of the engineer then in charge, that the preceding semi-monthly payments have been disbursed as herein provided."

It is contended by the appellees that they have an equity in the 15 per cent retained by the company under the contract until the completion of the work, but we are of the opinion that this provision of the contract was made expressly for the benefit of the company, and not for the benefit of laborers and material men. The contract provides that the dam and reservoir should be turned over to the appellant "free of all liens for labor or materials or purchase money or otherwise," and it provides that all moneys advanced to the contractor shall be used, first, for the payment of all labor, material and other liens, and that the contractor shall not have the right to demand the semi-monthly payments until he has shown to the satisfaction of the engineer in charge that the money previously advanced had been used to pay off the claims of laborers and material men. All this was to be done, under the contract, before the 15 per cent was due and payable to the contractor.

Taking all of the provisions together, they clearly show that the 15 per cent to be retained by the company was for its protection against any lien for labor or materials.

The provisions of the contract under consideration are similar to the provisions in the contract and bond under consideration in the cases of *Eureka Springs Stone Co.* v. *First Christian Church,* 86 Ark. 212, and *Morris* v. *Nowlin Lumber Co.,* 100 Ark. 253. In those cases, construing similar provisions, we held that the provisions of the bond were for the benefit of the owner of the buildings to be erected, and not for the benefit of laborers and material men.

There was no privity of contract between the appellant and the appellees. The contract was made with

Wilson, and the reservation of part of the contract price due him upon the completion of the dam and reservoir and the delivery of possession thereof to the appellant can not be construed as for the benefit of the appellees in the absence of more specific language to that effect. See *Pine Bluff Lodge of Elks* v. *Sanders,* 86 Ark. 292-299.

The appellees rely upon certain decisions of the Circuit Court of Appeals to support their contention, towit: *Anniston Pipe & Foundry Co.* v. *National Security Co.,* 92 Fed. 549, 34 C. C. A. Rep. 526; *United States, etc.,* v. *Rundle et al.,* 100 Fed. 400, 40 C. C. A. Rep. 450; *United States* v. *American Surety Co., etc.,* 135 Fed. 78, 67 C. C. A. Rep. 552, and *Chaffee* v. *United States Fidelity & Guaranty Co.,* 128 Fed. 918, 63 C. C. A. Rep. 644. These decisions are grounded on an act of Congress for the "protection of persons furnishing materials and labor for the construction of public works." See Vol. 6, Fed. Stat. Ann., p. 125. The act, among other things, provides for a bond to be given by the contractor with good and sufficient sureties "that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract, * * * upon which (contract and bond) the said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to bring suit in the name of the United States for his or their benefit against said contractor and sureties," etc.

It is clear from the provisions of this statute that the contracts and bonds under them are, in part, expressly for the benefit of laborers and material men, since they are given a right of action thereon. These authorities are not applicable to the contract under consideration.

The undisputed testimony shows that at the time Wilson abandoned his contract he was indebted to appellant in a sum in excess of the amount of the 15 per cent reserved. After Wilson left, appellant had to expend a

large sum in excess of the 15 per cent to finish the dam and reservoir.

It follows that the decree was erroneous. It is therefore reversed and the causes are dismissed.

SCOGGIN v. STATE.

Opinion delivered July 14, 1913.

1. HOMICIDE—BURDEN OF PROOF.—In a trial for homicide, an instruction that, "The killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve on the accused, unless by proof on the part of the prosecution it is sufficiently manifest that the offense only amounted to manslaughter, or that the accused was justified or excused in committing homicide," is proper under Kirby's Digest, § 1765, and under this instruction the burden is on the State to show that defendant was guilty of some degree of homicide. (Page 514.)
2. HOMICIDE—LESSER DEGREE OF HOMICIDE—BURDEN OF PROOF.—In a trial for murder, where the killing is proved as alleged, and the testimony on the part of the State does not show mitigation or excuse, or show a lower grade of homicide than murder, then the accused must be convicted, unless he produces testimony to convince the jury that he is innocent, or that he is guilty of a less degree of homicide than that of murder. (Page 514.)
3. HOMICIDE—SELF-DEFENSE—RULE.—Where defendant, being tried for homicide, pleads self-defense, he must show that the circumstances surrounding him were sufficient to excite the fears of a reasonable person placed in defendant's situation. (Page 514.)
4. CRIMINAL LAW—EVIDENCE—DYING DECLARATIONS.—Where deceased told witness, "that he would not get well," the witness may properly testify as to declarations of deceased made to him at the time, the same being dying declarations. (Page 516.)

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

STATEMENT BY THE COURT.

Appellant Scoggin was indicted in the Hempstead Circuit Court for the crime of murder in the first degree. He was convicted of murder in the second degree, sentenced to imprisonment in the penitentiary for a period of ten years, and has appealed to this court.

Charner Wesson, the deceased, was the father-in-law of the appellant. He was killed by the appellant in Hempstead County, Arkansas, in December, 1912. Appellant and his wife had separated the day before the killing and his wife had gone to the home of her father, Charner Wesson.

The testimony, giving it its strongest probative force on behalf of the appellant, tended to show that on the morning after appellant and his wife had separated, appellant's wife, her brother and two sisters, went back to the home of the appellant, and that appellant's wife engaged in a fight with one of his sisters, and after the fight she returned to her father's home. After reaching the home of her father, her brother, Forney Wesson, immediately went to meet his father, who was away from home.

When the deceased returned home he immediately started on horseback to appellant's home, followed by his son and two daughters in a wagon. He reached appellant's home in advance of the wagon and found that the appellant had started toward his father's house in a wagon loaded with potatoes. The deceased rode up in front of appellant's team, stopped them and immediately got down, turned his mule loose, pulled off his gloves, threw them down and began to curse and abuse the defendant. Leaving the front of the mules, he walked down by their side, using violent and insulting language toward the appellant and cursing him, remarking that he came after the potatoes and if he didn't get them he would get something else. He caught the lines and stopped the team, threw his hand to his hip pocket as if to draw a weapon, whereupon the defendant shot him.

The deceased, at the time he was shot, was about opposite the back part of the fore wheels and the defendant was about the middle of the wagon. The shooting took place within the enclosure of the defendant.

The defendant testified, in part, that deceased "never did tell me that he was going to kill me, but he

was going to have them potatoes or something else, and when I told him I would let the law settle it, he said, 'Law, nothing; you little G—d d— s— of a b—, we will see about it now.' He didn't tell me that he was going to shoot me, but he said he was going to see about it now. He put his left hand to his hip pocket, and I had the gun on my foot and I picked the gun up and cocked it as I was bringing it up. He had thrown his hand to his hip pocket when I shot." He further testified: "I was afraid of him, and when he started toward me I had the gun standing on my foot in one hand, and I shot him because he made an attempt; I thought he was going to do something to me; I thought he meant to kill me and that is why I shot."

On behalf of the State, the proof tended to show that deceased went to the defendant's home for the purpose of getting some potatoes and chickens for his daughter; that he went to defendant to ask whether or not he wanted his wife, deceased's daughter, to have part of the potatoes, and said that if defendant didn't want her to have them he would just leave them alone and go back. Deceased went horseback, and at the time he was shot he was near defendant's house. Deceased had dismounted, and was about ten feet from defendant's wagon and seemed to be talking to him and had said a few words before the shot was fired. He had not turned his horse loose, but was holding the rein with his left hand and was not doing anything with his right hand. About the time the defendant shot, the deceased threw up both hands. The shot entered his right hand, tearing same almost off. There were also a few shot in the left hand, about the wrist and thumb. There were also some in his face, over his right eye, in the eye and up to his hair; part of it went over the right eye, and in the eye, and up to the hair. The principal part of the load entered just over his right eye and in his eye. The nature of the wounds indicated that the deceased was standing in front of the defendant, facing him.

The court permitted witness Turner Rogers to testify, over defendant's objections, to a conversation he

had with the deceased on Sunday after the shooting. Witness stated that he left his home between daylight and sunup, and that he lived about a quarter of a mile from deceased; that no one was present but witness and the deceased when the deceased told him about how the shooting occurred. The deceased told him that he would not get well, and told witness that he "went up there to see Ezra to straighten up this little difference between him and his wife." He said he "went there to talk about this little trouble between him and his wife. Said he got over there and spoke to him, and that he told him he came over there to talk with him, and that he says Ezra sorter reached down this way and picked up his gun and threw it over on him and fired and he threw up his hands."

The court refused, over appellant's objection, to permit testimony tending to show the feeling existing between deceased and defendant's people prior to the killing and testimony about the fight between defendant's wife and his sister on the morning of the shooting, and also refused to allow testimony that the deceased had a pistol prior to the killing. Appellant duly excepted.

The court, among others, gave the following instruction: "The killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve on the accused, unless by proof on the part of the prosecution it is sufficiently manifest that the offense only amounted to manslaughter or that the accused was justified or excused in committing homicide."

Other facts stated in the opinion.

Sain & Sain, for appellant.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee.

WOOD, J., (after stating the facts). There was no error in the granting of prayer for instruction No. 11 at the instance of the State. This instruction is a copy of the statute. Section 1765, Kirby's Digest. It does not

shift the burden of proof from the State to the defendant in a trial for homicide. On the contrary, under it the burden of the whole case is on the State to show that the defendant is guilty of some degree of homicide. When the State has done this, then if there is nothing in the testimony adduced by the State to show that the accused is justified or excused, it devolves upon him to make such proof before he would be entitled to an acquittal. Where the testimony on behalf of the State tends to show the killing, and that it was done as charged in the indictment, if there is nothing in the evidence adduced by the State tending to show that the defendant is guilty of manslaughter, then it devolves upon the defendant to bring forward such testimony if he would have the grade of homicide reduced from murder to manslaughter. In other words, where the killing is proved as alleged, and the testimony on the part of the State does not show mitigation or excuse, or show a lower grade of homicide than murder, then the accused must be convicted unless he produces testimony to convince the jury that he is innocent, or that he is guilty of a less degree of homicide than that of murder. *Petty* v. *State,* 76 Ark. 515. The statute does not shift the burden of proving guilt from the State to the defendant.

In many of the other instructions the court required that the jury should be convinced of appellant's guilt "beyond a reasonable doubt" before they were authorized to convict appellant, and gave a correct instruction defining a reasonable doubt. So that the jury could not have understood that the burden of proof was on the appellant to establish his innocence. They were clearly told that it was the duty of the State to prove his guilt. See *Thomas* v. *State,* 85 Ark. 357; *Cogburn* v. *State,* 76 Ark. 110.

The court, at the request of the State, granted prayers telling the jury, in effect, that before the appellant could be justified in killing Wesson, it must have appeared to him, that the killing was necessary in order to save his own life or to prevent his receiving great

bodily harm, and that he must have acted in good faith, having reasonable cause for his belief, and that if it so appeared to him, acting in good faith, and he had reasonable cause therefor, he would be excused, though he might have been mistaken as to the apparent danger. In other words, that the circumstances surrounding the appellant must have been sufficient to excite the fears of a reasonable person placed in appellant's situation.

The court, at the instance of the appellant, gave instructions to the effect that if the appellant believed that it was the intention of the deceased to kill appellant, or to do him some great bodily harm, and that appellant, without fault or carelessness on his part, shot the deceased, he was justified in so doing; that it was sufficient if the appellant, acting without fault or carelessness on his part, honestly believed that the killing was necessary, if he acted under such circumstances as made it reasonable to entertain that belief.

In *Hoard* v *State,* 80 Ark. 87, this court held: That "it was not error to instruct the jury that one who killed another was justified in defending himself if it appeared to him, 'acting as a reasonable person,' without fault on his part, that he was in danger of losing his life or receiving great bodily harm, as the law presumes, where nothing to the contrary is shown, that the accused is of ordinary reason and holds him accountable accordingly."

The instructions given at the request of the appellant followed the language of the rule approved by this court in *Smith* v. *State,* 59 Ark. 137, and *Magness* v. *State,* 67 Ark. 594.

The instructions given at the instance of the State followed the rule approved by this court in other cases. *Palmore* v. *State,* 29 Ark. 248; *Levells* v. *State,* 32 Ark. 585; *Fitzpatrick* v. *State,* 37 Ark. 257.

Speaking for the court in *Hoard* v. *State, supra,* Mr. Justice RIDDICK said: "For ordinary cases, we think there is no substantial difference in these two ways of stating the rule, and consider it a matter of form that

should be left to the taste and judgment of the trial judge."

Other instructions were given and refused, to which exceptions were duly saved, and which we have carefully examined, but find no prejudicial error in the rulings of the court.

Appellant contends that the court erred in permitting the witness, Turner Rogers, to testify concerning the declarations of the deceased to him on Sunday morning after the shooting; but the testimony was competent as showing dying declarations. Rogers testified that the deceased told him "that he would not get well."

Appellant contends that the court erred in not permitting him to show that the doctors had informed the deceased after the shooting that he would get well, but the appellant did not offer to show that the doctors imparted such information to the deceased before he made the statements shown by the testimony of the witness, Rogers. There was nothing, therefore, in this offered testimony tending to rebut the testimony of the witness, Rogers, showing that the declarations of Wesson, the deceased, were made while he was *in extremis*.

The testimony was sufficient to sustain the verdict. The charge of the court correctly submitted the issues that were raised by the evidence. There was no error in the rulings of the court in the admission or rejection of testimony.

We have considered the assignments of error presented in appellant's motion for a new trial, and find that there is no prejudicial error in the rulings of the court in any of them. The judgment is therefore correct, and must be affirmed.

CARLTON v. STATE.

Opinion delivered October 20, 1913.

1. HOMICIDE—LESSER CRIME—SUFFICIENT EVIDENCE.—Under an indictment for murder, it is proper to submit to the jury the question of the defendant's guilt of any particular grade of offense included

in the indictment, if there is sufficient evidence in the cause which would justify a conviction for that offense. (Page 523.)

2. HOMICIDE—LESSER CRIME—QUESTION FOR JURY.—Where defendant is indicted for murder, and there is evidence that would warrant the jury in finding defendant guilty of murder in the second degree, it is proper for the trial court to submit to the jury the question of defendant's guilt or innocence of the crime of murder in the second degree. (Kirby's Digest, § 1765.) (Page 523.)

3. INSTRUCTIONS—MODIFICATION.—It is not error to refuse to modify an instruction given by the court, where the court gave another instruction covering the requested modification. (Page 523.)

4. HOMICIDE—INSTRUCTIONS—READING STATUTE.—In a trial for homicide, the reading of the statute to the jury defining voluntary and involuntary manslaughter is proper, in the absence of a specific request from defendant for a correct instruction on the issue. (Page 523.)

5. CRIMINAL LAW—INDICTMENT AS EVIDENCE OF GUILT.—An indictment is not evidence of guilt, and is only the means of bringing a defendant into court. (Page 523.)

6. CRIMINAL LAW—PRESUMPTION OF INNOCENCE.—The presumption that a defendant in a criminal cause is innocent, clings to him throughout the trial, and until overcome by competent evidence sufficient to convince the jury of his guilt beyond a reasonable doubt. (Page 523.)

7. CRIMINAL LAW—WITNESS—EXAMINATION.—Where a witness at a trial gives different testimony from that given by him before the grand jury, the prosecuting attorney, being surprised by such testimony, may read or have the witness read his testimony taken before the grand jury, and may question him concerning the correctness thereof. (Page 524.)

8. CRIMINAL LAW—JURY—IMPROPER INFLUENCE.—Under Kirby's Digest, § 2390, it is within the discretion of the trial court to allow the jurors to separate or to keep them together, and when the court has not exercised its discretion to keep them together, although a juror separates himself from the rest of the jury during the trial, the burden is upon the defendant to show that the juror had been subjected to improper influences. (Page 524.)

Appeal from Newton Circuit Court; *George W. Reed,* Judge; affirmed.

STATEMENT BY THE COURT.

Carlton was a constable in Newton County, Arkansas. One night in December, 1912, there was a box supper at a schoolhouse for the purpose of raising funds to

purchase Christmas presents for the children. Some women requested Carlton to be present to keep the peace, as they had heard that a number of young men in the neighborhood had said they had ordered whiskey, and had also said they were going to "can" the box supper. Carlton was at the schoolhouse. He told the brother of the deceased and a companion that if any one drunk came into the house amongst the women and children, he would arrest them. Carlton then went into the schoolhouse, and after he had gone, the deceased remarked, "B— G—, he could not arrest him."

Roscoe Barr, a brother of the deceased, entered the schoolhouse in a drunken condition, and approached the stove, around which the women and children were gathered. Carlton went to him and took him by the shoulder and led him or pushed him out of the room. The deceased followed Carlton and his brother out of the house. When deceased got outside, he shoved appellant loose from his brother with the statement, "No G— d— man could arrest his brother." Deceased put his hand either in his right hip pocket or into the opening of his bib overalls, with the remark, "You G— d— s— of a b——, you can't arrest me."

Carlton drew his revolver and commanded him to take his hands out of his pocket or to put up his hands. Deceased repeated the statement that he had made to Carlton, and made a motion as though to draw a weapon. The revolver that Carlton had was a borrowed one, with which he was not very well acquainted. The pistol was out of repair and would not stand cocked. Carlton had cocked the pistol with his right hand, but, believing that it had not caught, he took hold of the barrel with his left hand and cocked it again. This time he felt it catch, and, thinking it was safely cocked, he took his thumb off the hammer. The hammer immediately fell, firing the pistol, the ball of which passed through appellant's finger and struck the deceased in the temple, killing him instantly. Some one grabbed or jerked the appellant around, and the pistol was again discharged, the ball entering the

foundation of the school building back in the opposite direction from where appellant had been facing.

When the deceased was picked up and carried in the house, his knife was found lying upon the ground near his right hand. There was some dispute as to whether the knife was open or closed. Appellant stated immediately after the pistol was fired that it went off, but that he would have had to shoot the deceased anyway. The next day the appellant went to the county seat and voluntarily surrendered himself to the sheriff.

The above are substantially the facts as they were developed at the trial by the testimony for the appellant.

There was testimony on behalf of the State which tended to show that Carlton said to the deceased, "Hands up;" that Carlton drew his revolver and brought it up, holding it with both hands, when the same was fired. He said that he didn't aim to do it. Deceased's right hand, at the time, was on his brother's left shoulder, his left hand hanging down by his side, and not in his pocket. Witness didn't see him making any effort with his hands.

It was shown that Carlton said that he shot deceased accidentally. It was also shown that he stated that he shot him because he thought he had to do it to save his own life. He stated that he shot him because he didn't take his hands out of his pocket; that he thought he was going to draw something.

The appellant was tried for murder in the first degree, and the above is substantially the testimony upon which he was convicted of involuntary manslaughter and sentenced to two years' imprisonment in the State penitentiary.

Among other instructions, the court gave the following:

"The killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve on the accused, unless by the proof on the part of the prosecution it is sufficiently manifest that the offense committed only amounted to manslaugh-

ter, or that the accused was justified or excused in committing the homicide."

The appellant objected to the giving of the instruction, and also requested the court to modify it by adding the words, "however, if, in the whole case, you have a reasonable doubt of the defendant's guilt, you will acquit him," which the court refused.

The appellant objected to the court's reading the section of the digest pertaining to voluntary and involuntary manslaughter, and at the time specifically requested the court to give a correct charge to the jury as to the law of involuntary manslaughter, which request the court refused, further than the reading of the section of the statute, to which the appellant duly excepted.

The appellant requested the court to charge the jury as follows: "I charge you that the indictment constitutes no evidence against the defendant; it is simply the means by which he is brought into court, and should not be considered by you even a circumstance against him. Upon the interposition of defendant's plea of not guilty to the charge, there arises the legal presumption that he is innocent, and this presumption is, within itself, sufficient to warrant an acquittal at your hands, unless overturned by the proof, and remains with the defendant as a complete defense until it is overcome by legal evidence that satisfies your minds beyond a reasonable doubt of his guilt."

The court refused this prayer for instruction, to which appellant excepted. The court, of its own motion, gave the following:

8. "The indictment is no evidence of the defendant's guilt. It is only the means of bringing the defendant into court, and when this is done, it has served its purpose."

9. "The defendant is presumed to be innocent, and this presumption clings to him through every material step of the trial until overcome by competent testimony sufficient to convince you beyond a reasonable doubt of the defendant's guilt."

Appellant complains that it was error to permit the prosecuting attorney to ask one of the State's witnesses with reference to what he testified before the grand jury, and to read to him in the presence of the trial jury from a book purporting to be the minutes of the grand jury, and asking the witness if he did not testify as was therein written.

The record shows that during the examination of the witness Walter Waters because of a rain and hail storm, the trial was suspended temporarily, and during the time of such suspension, one of the jurors, towit, J. N. Davis, without the knowledge or consent of the defendant, left the court room, and was gone for some length of time, and was not present in the court room when the court was ready to resume the trial and the further examination of the witness, and did not come back into the court room until after a wait of some minutes. Whereupon the court adjourned until the next morning at 7 o'clock, and, the jury being held together, were placed in charge of J. M. Brisco, special deputy sheriff, who was specifically sworn, as required by law.

The appellant makes the above one of his assignments of error in the motion for a new trial.

Troy Pace, for appellant.

Under the evidence, the offense at most amounted only to manslaughter, and it was prejudicial error to give an instruction which submitted any other question to the jury. Instruction No. 4, section 1765, Kirby's Digest, is only applicable where the evidence shows murder in one of the degrees, and was prejudicial in this instance. 71 Ark. 459. The modification requested, as to reasonable doubt, should have been given. 76 Ark. 489; *Ib.* 110; *Ib.* 517.

It was error for the court to refuse to give, at the specific request of appellant, a correct charge as to what constituted involuntary manslaughter. 102 Ark. 180-6; *Ib.* 195-9; 100 Ark. 218; 74 Ark. 453.

It was error to allow a juror to separate from his fellows during the trial, without an order of court, and

is *prima facie* ground for a new trial, unless it affirmatively appears that the separating juror was not subject to any noxious influence. 12 Ark. 782; 33 Ark. 317; 20 Ark. 36; *Ib.* 53; 26 Ark. 323; 28 Ark. 155; 34 Ark. 341; 35 Ark. 118; 44 Ark. 115; 57 Ark. 1; 76 Ark. 487; 103 Ark. 4.

A witness may not be impeached by reading to him the minutes of the grand jury, without proof identifying the same.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee.

The evidence warranted a conviction of second degree murder, and it was therefore not error to give as an instruction section 1765, Kirby's Digest. Nor in refusing to add the modification requested as to reasonable doubt, as this was sufficiently covered in another instruction given by the court. 76 Ark. 515.

It was not error for the court to read the sections of the Digest covering the subject of involuntary manslaughter in the absence of a specific instruction requested by appellant on this point. *Scoggin* v. *State,* 109 Ark. 510.

Where the testimony of the State's witness is different from that given before the grand jury, and State's counsel is thereby surprised, he is entitled to read to witness his testimony taken before the grand jury, and question him thereon. 92 Ark. 237.

It is within the discretion of the court to allow a juror to separate from his fellows, unattended, where they have not been ordered kept together, Kirby's Digest, section 2390; and in such case the burden is on the defendant to show that improper influences were brought to bear on him. 84 Ark. 567-572.

WOOD, J., (after stating the facts). 1. Appellant contends that the strongest force of the testimony on behalf of the State only tends to show that appellant was guilty of manslaughter, and that therefore the court erred in giving instruction No. 4. (Kirby's Digest, § 1765.)

In *Allison* v. *State,* 74 Ark. 444, we said: "The

question of whether it is proper to submit to the jury the question of the defendant's guilt of any particular grade of offense included in the indictment must be answered by considering whether there is evidence which would justify a conviction for that offense."

Under the testimony in this case on behalf of the State, the jury would have been warranted in finding the defendant guilty of at least murder in the second degree. The court therefore did not err in submitting to the jury the issue of appellant's guilt or innocence of the crime of murder in the second degree. One of the witnesses testified that appellant shot Barr while the latter had his right hand on the shoulder of his brother and his left hand hanging down by his side, the same not being in his pocket, and that Barr was making no effort with either hand. This testimony was sufficient, if believed by the jury, to have warranted the jury in returning a verdict of at least murder in the second degree, and therefore there was no error in the giving of instruction No. 4. See *Allison* v. *State, supra.* Moreover, the instruction, even if improper, was not prejudicial because the verdict of the jury was for the lowest grade of homicide included in the indictment.

The court gave an instruction on reasonable doubt which fully covered the modification asked by appellant, and it was therefore not error to refuse this modification. See *Petty* v. *State,* 76 Ark. 515-517.

2. The appellant requested the court to give a correct instruction on involuntary manslaughter, but did not present what he considered a correct instruction. He can not complain therefore that the court did not grant his request. The reading of the statute defining voluntary and involuntary manslaughter without a more specific request of appellant, setting forth his prayers for instruction, was sufficient. *Scoggin* v. *State,* 109 Ark. 510.

The court, in its instructions 8 and 9, fully covered the matter presented by appellant's prayer as to the

presumption of innocence, and there was therefore no error in refusing such prayer.

Where a witness at the trial gives different testimony from that testified by him before the grand jury, the prosecuting attorney, being surprised by such testimony, may read or have the witness read, his testimony taken before the grand jury, and may question him concerning the correctness thereof. *Derrick* v. *State,* 92 Ark. 237-239. See also, *Davidson* v. *State,* 108 Ark. 191.

3. The separation of the juror from his fellows while the trial was temporarily suspended during the thunder storm is not shown to have been prejudicial to the rights of the appellant. This separation took place before the court had exercised its discretion to keep the jurors together. At the time the juror separated himself from the other jurors, the court had not concluded to keep them together, and had not at that time placed them in charge of the bailiff with directions to keep them together with specific instructions not to allow them to separate. The record shows that at the time the juror separated himself from his fellows he was under no instructions of the court not to do so, and therefore violated no instructions of the court in so doing. No testimony was offered to show that the juror, while absent from his fellows, was guilty of any conduct prejudicial to appellant.

It is within the discretion of the court to allow the jurors to separate or to keep them together, (Kirby's Digest, § 2390), and as the court had not exercised its discretion to keep them together at the time the conduct of the juror here complained of occurred, the burden was upon the defendant to show that the juror was exposed to improper influences. See *Reeves* v. *State,* 84 Ark. 572.

The record is free from errors prejudicial to appellant, and the judgment must therefore be affirmed.

WALKER v. GOODLET.

Opinion delivered October 20, 1913.

APPEAL AND ERROR—DIRECTIONS TO LOWER COURT—NEW ISSUE.—Where, on an appeal, the Supreme Court directed a decree to be entered in favor of the plaintiff, the order is conclusive on the lower court, and it is error for the lower court to permit another issue to be raised and testimony taken on the same.

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

STATEMENT BY THE COURT.

This is the second appeal in this case. When the case was here before we stated the issue as follows: "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."

On the former appeal the case was "reversed and remanded with directions to enter decree for plaintiff in accordance with this opinion." The Chief Justice, in rendering the opinion, used this language: "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 encumber his estate for the value of necessities furnished to him, but can not irrevocably alienate his estate even for that purpose."

The appellant filed a mandate in the lower court and asked a decree in accordance therewith. But the court construed the mandate to mean that the defendant below (appellee here) was entitled to reimbursement for necessaries, and granted the defendant sixty days in

which to take further testimony to ascertain the amount of supplies furnished plaintiff (appellant here).

Appellant filed his plea of *res judicata,* and afterward a motion to quash the depositions that were taken. The court overruled the plea of *res judicata,* and the motion to quash the depositions, and rendered a decree in favor of the appellee for $188.18, and directed the land of appellant sold to satisfy the same, and this appeal has been duly prosecuted.

J. W. Bishop and *A. F. Auer,* for appellant.

There was no plea for necessaries furnished in the first instance, nor involved in the first appeal, and appellee is now barred from asserting such claim. It is *res judicata.* 127 Am. St. Rep. 363; 137 Am. St. Rep. 55.

The opinion on first appeal is the law of the case. The court's decree should be reversed, if for no other reason, because it directed that the land be sold, whereas this court held that the land could not be irrevocably alienated, and the chancellor's ruling is incompatible with the mandate in the case.

WOOD, J., (after stating the facts). As shown by the opinion on the former appeal, the only issue "which the chancellor was called on by the pleadings to decide was whether or not the appellant here was under twenty-one years of age when he executed the deed." That being the only issue, the court erred in injecting into the case the issue as to whether or not the plaintiff below (appellant here) was liable for necessary supplies furnished him by the appellee. That was a new issue, and it could not be raised for the first time after the cause had been tried on another issue and a judgment directed in favor of the plaintiff.

This court having directed a decree to be entered in favor of the plaintiff, no issue of fact could be tendered thereon in the lower court. The chancery court, instead of entering a decree in favor of the plaintiff according to the mandate, permitted testimony to be taken and finally entered a decree in favor of the appellee, which was contrary to the directions of this court on the

former appeal. The directions on the former appeal constituted the law of the case and the guide for the lower court in entering its decree. In *Gaither* v. *Campbell,* 94 Ark. 329-332, we said: "A direction here is conclusive on the lower court unless matters are left open for further proceedings below."

Here, by the special directions of this court, nothing was left open for further adjudication. The decree ordered to be entered in favor of the plaintiff (appellant here) was final. Under these directions the only decree that could be entered was one in favor of the appellant.

For the error indicated the decree is reversed and the cause remanded with directions to enter a judgment in favor of the plaintiff (appellant here) as heretofore directed.

GRAND CAMP OF COLORED WOODMEN OF ARKANSAS *v.* JOHNSON.

Opinion delivered October 20, 1913.

PLEADING—SUFFICIENCY OF COMPLAINT IN SUIT ON SURETY BOND.—Plaintiff, the beneficiary of a policy of insurance, sued the sureties on the bond of the insurance company. The bond was "conditioned for the prompt payment of all moneys coming into the hands of its officers, to which beneficiaries are entitled." The complaint alleged "that said company has failed and refused, after repeated demands, to pay said claim, except a partial payment of $25; that there is now due and unpaid to this plaintiff, the beneficiary named in said contract, the sum of $300," which was the only allegation of the complaint as to a breach of the bond sued on. On demurrer, the complaint was held bad, because no breach of the condition of the bond was assigned.

Appeal from Woodruff Circuit Court, Northern District; *J. S. Thomas,* Special Judge; reversed.

Scipio A. Jones and *Carmichael, Brooks, Powers & Rector,* for appellant.

1. The liability, if any, accruing under the policy, existed prior to the execution of the bond sued upon, and the bondsmen, therefore, could not be liable for its non-

payment. 76 Ark. 410; 91 Ark. 43; 97 Ark. 549; 42 Ark. 392.

2. The bond, upon which the individual appellants are liable as sureties, was conditioned for the prompt payment of all moneys coming into the hands of the officers of the Grand Lodge, and was not an agreement upon the part of the sureties to guarantee the payment of any liability accruing under the policy. 89 Ark. 378.

Harry M. Woods, for appellee.

1. In arriving at the liability of the sureties, it is not the time of the loss which is conclusive, but the time of the receipt of or failure to pay over the funds belonging to beneficiaries. The bond was executed pursuant to section 4354 of Kirby's Digest, which section must be read into the bond. 97 Ark. 549.

2. It was not necessary for the complaint to specifically allege that "the officers of the society have misappropriated or misapplied its funds." It did allege that the defendant was a fraternal company doing business under the laws of Arkansas; that individual appellants were upon its bond; that it had partially paid the policy, and that it had "failed and refused, after repeated demands, to pay said claim." The individual appellants were properly joined as defendants in the complaint. Kirby's Dig., § 4376; 87 Ark. 72-78; 101 Ark. 514; 100 Ark. 9.

It may be a good defense to sureties on bonds of this character that the principal did not receive or fail to pay over funds which came to hand, but a demurrer to this complaint will not be sustained because it fails to negative that defense. If the complaint was inaccurate, indefinite, etc., the demurrer did not reach the error complained of. 90 Ark. 158; *Id.* 480; 95 Ark. 250; 87 Ark. 424; 87 Ark. 136; 77 Ark. 1; 94 Ark. 434. Every intendment will be indulged in support of the pleadings. 96 Ark. 163-166; 93 Ark. 371.

HART, J. This is an action on a life insurance policy. Jane Johnson was a member of the Grand Camp of Colored Woodmen of Arkansas, a fraternal insurance

company doing business under the laws of the State. She had a policy of insurance in the sum of $325, and Fed Johnson was the beneficiary named in the policy. Jane Johnson died in Woodruff County, Arkansas, on July 2, 1911. Fed Johnson instituted this action against the fraternal insurance company and the sureties on its bond. The company executed a bond in compliance with section 4354 of Kirby's Digest, and it is "conditioned for the prompt payment of all moneys coming into the hands of its officers to which beneficiaries are entitled." The language quoted is the exact language of both the bond and the statute. The defendants in the action, who were sureties on the bond of the company, interposed a demurrer to the complaint. The court overruled the demurrer and the sureties elected to stand upon their demurrer. Thereupon, the court rendered judgment against each of them for the amount sued for. The case is here on appeal.

The complaint alleges "that said company has failed and refused, after repeated demands, to pay said claim, except a partial payment of twenty-five dollars; that there is now due and unpaid to this plaintiff the beneficiary named in said contract, the sum of three hundred dollars." This is the only paragraph of the complaint which attempts to allege a breach of the bond sued on. The liabilities of the sureties on the bond is fixed by the terms of the bond itself. *American Insurance Co.* v. *Haynie,* 91 Ark. 43; *Ingle* v. *Batesville Grocery Co.*, 89 Ark. 378. Hence, it will be seen that the plaintiff's right to recover from the sureties on the bond depends upon a breach of its condition; and the injuries resulting from the nonperformance of a bond do not appear until a breach thereof is assigned. See *Euper* v. *State,* 85 Ark. 223. Where a complaint is assailed by general demurrer, the question is whether it entitles plaintiff to any relief. A consideration of the paragraph of the complaint above set out leads us to the conclusion that no breach of the conditions of the bond is assigned. As above stated, the bond was executed in compliance with

the provisions of section 4354 of Kirby's Digest, and the condition of the bond is in the language of the statute. It is conditioned for the prompt payment of all moneys coming into the hands of the officers of the company to which beneficiaries under a policy of insurance are entitled. No breach of the condition of the bond was assigned in plaintiff's complaint, and, for this reason, the court should have sustained the demurrer of the sureties on the bond. For the error in not doing so, the judgment will be reversed, and the case remanded for a new trial.

MORRIS v. STATE.

Opinion delivered October 20, 1913.

1. SLANDER—SUFFICIENCY OF INDICTMENT.—An indictment for slander will be held bad on demurrer, which does not set out the words used, but only a conclusion as to the meaning and effect of the words. (Page 532.)
2. SLANDER—ACTIONABLE WORDS.—Charging another with being a negro, is actionable slander. (Page 533.)

Appeal from Boone Circuit Court; *George W. Reed,* Judge; reversed.

Troy Pace, for appellant.

The indictment is bad, and the demurrer to it should have been sustained, because it does not set out the language used.

In an indictment for slander it is not sufficient to state conclusions, but it must allege either the actual words or the substance of the actual words used. 25 Cyc. 577-8; 17 S. W. (Tex.) 548; 11 S. W. (Tex.) 521; 32 Cent. Dig., "Libel and Slander," § 243; 86 S. W. (Mo.) 1098.

The Morphew case, 84 Ark. 488, relied on by the State, is not contrary to this position. The court in that case, page 489, distinctly states that "the indictment, in plain, intelligible language, *sets forth the conversation,* etc., on which the slander is predicated."

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee.

All the cases cited by appellant show that the courts are satisfied with an indictment for slander if the substance of the matter complained of is given. The indictment in this case meets this requirement, and is good. 84 Ark. 488; *Brown* v. *State,* 109 Ark. 373; Kirby's Dig., § 2229.

HART, J. Bill Morris prosecutes this appeal to reverse a judgment of conviction against him for the crime of slander. The body of the indictment is as follows:

"The said Bill Morris, in the county and State aforesaid, on the 10th day of October, 1912, then and there maliciously, wilfully, feloniously and falsely did use, utter and publish, in the presence of H. S. Seitz, of and concerning Mrs. James Holt, words which, in their common acceptation, amounted to charge the said Mrs. James Holt with being an illegitimate child, the descendant of a negro and a descendant of a thief.

"This prosecution is with the knowledge and consent of the said Mrs. James Holt, against the peace and dignity of the State of Arkansas."

The testimony on the part of the State is substantially as follows: The defendant, Morris, in the latter part of October, 1912, went to the home of Henry Seitz, in Boone County, Arkansas, and, in the presence of Seitz and his wife, said that one Mrs. Holt's father was a thief, and her mother a negro, and she was a half-breed. He made this statement in an angry manner. After he had repeated it a time or two Mrs. Seitz told him that she did not believe the statement he was making was true. The defendant replied that the statement he had made about Mrs. Holt was not true, and that he had only made it to her husband that afternoon in order to get him to fight. Mrs. Holt was a white woman, and had no negro blood in her veins. She was the wife of James Holt, a white man.

The defendant interposed a demurrer to the indictment, and assigns as error the action of the court in overruling his demurrer.

The Attorney General seeks to uphold the ruling of the court upon the authority of *Morphew* v. *State,* 84 Ark. 487; but we do not think that case sustains the position taken by him. It is true that the court, in stating the case, said that the defendant, Morphew, used language which, in its ordinary acceptation, amounted to charging that one Anna Morrow had been guilty of fornication with him; but the court was only stating the conclusion it had reached from reading the indictment, and was not attempting to state the language of the indictment itself. Later on in the opinion the court said: "The indictment, in plain, intelligible language, sets forth the conversation with Frank Kennedy, on which the slander is predicated."

In the case of *Laster* v. *Bragg,* 107 Ark. 74, the court, following the decision in *Miller* v. *Nuckolls,* 77 Ark. 64, held that in an action for damages for slander it is not sufficient for plaintiff to prove words of similar import merely, but that he must prove that defendant used substantially the same words as charged in the complaint. The court further held that a variance in the mere form of expression is not material, and that where words accompanying the actionable words are merely descriptive, and the slander proved substantially corresponds with the allegations of the complaint, there is no variance. The same rule prevails in criminal prosecutions for slander.

It will be seen, by an examination of the indictment, that the prosecuting attorney does not set out the words which were proved to have been used. He only set out his conclusion as to the meaning and effect of the words. This was not sufficient; he should have set out the language used. As we have already seen, it is necessary to set out enough of the language alleged to have been used to constitute the charge. It follows that the court erred in overruling defendant's demurrer to the indictment.

The defendant was indicted under section 1856 of Kirby's Digest, which reads as follows:

"It shall be deemed slander to falsely use, utter or

publish words which, in their common acceptation, shall amount to charge any person with having been guilty of any other crime or misdemeanor not mentioned in this act, or to charge any person with having been guilty of any dishonest business or official conduct or transaction, the effect of which charge would be to injure the credit or business standing, or to bring into disrepute the good name or character of such person so slandered, and such words so spoken shall be actionable, and the person so falsely publishing, speaking or uttering the same shall be deemed guilty of slander, and punished accordingly."

Slander was not an indictable crime at common law, and only became so by the terms of this statute. It will be noted that the statute is very broad and comprehensive. It uses the language "or to bring into disrepute the good name or character of such person so slandered."

Under our statute, railroads are required to furnish separate coaches for the negro and white races, and it is unlawful to permit them to occupy the same coach. Street cars are also required to segregate the two races. Separate schools are also provided for white and colored children. Under our social conditions, the white and negro races do not mingle together and by law are prohibited from marrying each other, so that under these conditions it can not be disputed that charging a white man with being a negro is calculated to bring into disrepute his good name or character. No one could make such a charge, knowing it to be false, without understanding that its effect would be injurious to the character of the person so slandered. See *Flood* v. *News and Courier Co.,* 4 A. & E. Ann. Cases (S. C.) 685, and case note; *Spotorno* v. *Fourichon,* 40 La. 423.

It is next insisted that the language proved does not amount to slander. Counsel for defendant insist that he was simply repeating the details of an encounter that he had had with the husband of Mrs. Holt, and that he stated at the time that he had only made the charge for the purpose of inciting Holt to fight. It will be remembered, however, that the witnesses for the State testified that the defendant spoke in an angry manner and repeated

the language upon which the charge of slander is predicated a time or two before Mrs. Seitz said anything to him. From this the jury might have found that he had used the language proved and only said that he did not believe it to be true when, after he had repeated it, Mrs. Seitz told him that she knew it was not true. If she had not brought him to task, he might never have admitted that he knew the language was not true. Under all the circumstances under which the language was proved to have been uttered, it can not be said that the qualification the defendant finally made was made in the immediate connection in which he used the language.

For the error in overruling the defendant's demurrer to the indictment, the judgment will be reversed and the cause remanded for a new trial.

STARK v. COUCH.

Opinion delivered October 20, 1913.

TRIAL BY JURY—APPEAL FROM JUSTICE COURT.—Under section 7, article 2, of the Constitution of Arkansas, which provides that "the right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy," defendant, in an action in replevin for two mules, is entitled to a trial by jury in the circuit court, on appeal from a justice court.

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

Jones & Owens, for appellant.

1. Replevin is strictly a possessory action. Under the evidence, replevin does not lie in this case. 82 Ark. 362-364; 66 Ark. 135; 15 O. Cir. Ct. R. 515; 23 Ind. App. 410; 60 Mich. 357; 17 Kan. 204; Kirby's Dig., § 6854; 74 Ark. 557.

2. Without reference to the amount involved, appellant was entitled, on his demand therefor, to a trial by jury. Art. 2, § 7, Const. Ark.; 4 Ark. 158; 8 Ark. 436; 56 Ark. 391; 75 Ark. 443; 40 Ark. 297; 61 Ind. 415; Kirby's Dig., § 6170.

A. J. Newman, for appellee.

1. The evidence shows that appellee would not deliver the mules to Hutchinson until appellant endorsed the note and thereby made himself a party to the contract. Under said contract appellant had possession and control of the mules, and he could not dispose of them or put them out of his possession and thereby avoid an action in replevin. 34 Ark. 93; 40 Ark. 551; 46 Ark. 245.

2. If there was error in denying appellant a trial by jury it was rendered harmless by the fact that the court rendered judgment against appellant for a smaller amount than a jury under the evidence could have found, and necessarily must have found, against him. Kirby's Dig., § 6869.

KIRBY, J. W. J. Couch brought an action in replevin against W. M. Hutchinson and V. Starks, for the possession of two mules, alleged to have been sold to Hutchinson by Couch and a note given in payment upon which Starks was endorser. The title to the property was retained in the note until it was paid for. Suit was brought in a justice court in Pulaski County, and appellant, being ill, did not appear and judgment was rendered against him, and he appealed to the circuit court. Upon the calling of the case for trial there, it appeared that no service of process had been had on Hutchinson and appellant demanded a trial by a jury. The court refused to allow the cause to be tried by a jury, stating, "Let the record show that the court has no jury and is not willing to put the county to the expense of going out and summoning twenty-four jurors at two dollars a piece to try a thirty or forty dollar case. All of these cases were tried before the justice of the peace without a jury."

The note was introduced in testimony and also the return of the constable upon the summons that he had found but one mule, the other one having been traded off.

The appellee testified that he sold the mules to Hutchinson, taking the note therefor, with the reservation of title, until the purchase money was paid; that

Starks was not present when the contract was executed but afterward came in and endorsed it, and that neither he nor Hutchinson had ever paid the note. He also said he would not have turned the stock over to Hutchinson if Starks had not endorsed the note, and that Starks came once and asked him for an extension of time on the note. That he had told Starks to take possession of the stock after Starks had failed to pay the note.

Starks testified that he did not recollect endorsing the note, that he could neither read nor write, that he had plenty of stock and did not desire the purchase of the mules by Hutchinson in order that he could make a crop on his place. He said the mules were never in his possession at any time and that he had nothing whatever to do with them. That they were bought by Hutchinson to haul lumber with. That he was going to let him have stock to make the crop. That Hutchinson had possession of them all the time, that the other mule died and that Hutchinson traded off the one that was left and went away. Two other witnesses testified positively that they visited Stark's house often, knew his stock, and also that they knew Hutchinson kept these mules out in the country all the time and that Starks never had possession of either one of them at any time. There was other testimony as to whether Starks signed the note, and as to what his condition was, whether drunk or sober, at the time.

The court erred in not granting appellant the right to a trial of his case by a jury. Section 7, article 2, of the Constitution provides:

"The right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy."

As early as the 4th Arkansas, the court said: "It is certainly true that each party, under the Constitution of the United States and of our own State, is entitled to the benefit of a trial by jury." *Wilson* v. *Light,* 4 Ark. 158; *State* v. *Cox,* 8 Ark. 436.

In *Ashley* v. *Little Rock,* 56 Ark. 391, the court said:

"The right of trial by jury extends to all cases in which legal rights are to be ascertained and determined, in contradistinction to those where equitable rights alone are recognized and equitable remedies administered. In *Louisiana & N. W. Rd. Co.* v. *State,* 75 Ark. 443, it is said:

"It was thoroughly settled at common law that issues of fact were triable by jury, therefore the right of trial by jury of issues of fact is a constitutional right under our Constitution."

Replevin cases were triable by a jury at common law, and the right to trial by jury being guaranteed by our Constitution, the court's refusal to grant it to the appellant was a deprivation of a substantial right, operating to his prejudice, for which the case must be reversed. *Williams* v. *Citizens,* 40 Ark. 297; Kirby's Digest, § 6170; *Reynolds* v. *State,* 61 Ind. 415.

It may be that the court can try a lawsuit, where the amount involved is small, as well as it could be done by a jury, or one for a large amount, for that matter, but our Constitution and law guarantees the right to a trial by jury which shall extend to all cases at law, without regard to the amount involved. Constitution, § 7, art. 2; Kirby's Digest, § 6170.

It also appears from the testimony herein that the property in controversy was not sold to appellant and was never in his possession nor under his control, and an action for replevin would not lie against him therefor. *Casey* v. *Scott,* 82 Ark. 364, 18 Am. St. R. 80; *Hodges* v. *Nall,* 66 Ark. 135.

For the errors indicated, the judgment is reversed and the cause remanded for a new trial.

PITTSBURG STEEL COMPANY *v.* WOOD.

Opinion delivered October 20, 1913.

1. CONTRACTS—CONSTRUCTION—QUESTION OF LAW.—In the absence of ambiguity, or fraud in its procurement, the construction of a contract is a matter of law for the court. (Page 542.)

2. CONTRACTS—INTENTION OF THE PARTIES.—The intention of the parties to a written contract should be derived from the whole instrument. (Page 542.)

3. CONTRACTS—TERMS—DUTY TO KNOW TERMS.—A party who executes a written contract is bound under the law to know its contents, and, in the absence of fraud or ambiguity, he can not excuse himself from its terms by saying he did not read it or know what it contained. (Page 542.)

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

Marsh & Flenniken, for appellant.

It was improper to submit the contract to the jury for interpretation, because it was susceptible of but one reasonable construction, and that construction is the natural meaning of the words used in it. There was no oral testimony that either explained, altered or varied it or that threw any light on its meaning in any way. Its construction was wholly a matter for the court. 20 Ark. 583; 67 Ark. 553; 75 Ark. 55; 9 Cyc. 591; 53 Ark. 156. If there is any conflict between the clauses, "Fencing 73 per cent off list, f. o. b. Memphis, Tenn.," and "All above f. o. b. Strong, Ark.," the first quoted stipulation would prevail because it is a particular clause relating to a particular thing, whereas the latter clause is general and must be controlled by the particular clause. 72 Ark. 630; 193 U. S. 551.

Appellee's excuse for not understanding the contract is not sound in law. He is not an ignorant man, though his testimony shows that he was careless. It was his duty to read the contract and inform himself of its contents. 34 Ark. 316; 91 U. S. 45; 9 Cyc. 391, § 5; *Id.* 392.

R. G. Harper, for appellee.

The words, "All above f. o. b. Strong, Ark.," would, to any merchant of average intelligence, be understood to mean *everything above,* including all the goods that he had purchased; and since it was evident that the order on its face was uncertain and indefinite, it was proper for the court to admit oral testimony. Where the provisions of a contract are apparently conflicting, it is per-

missible to show the circumstances surrounding the transaction and the conduct of the parties under the contract. 52 Ark. 65; *Id.* 95; *Id.* 94; 46 Ark. 131; 75 Ark. 58. The court properly submitted the issues to the jury.

KIRBY, J. Appellant company sued W. S. Wood in the justice court to recover a balance of $39.86, claimed to be due on some merchandise shipped by it from Memphis to him at Strong, Arkansas, consisting of fencing, wire, nails and staples. On appeal to the circuit court, judgment was rendered in favor of Wood, from which judgment appellant brings this appeal. The amount sued for was the exact amount of the freight charges from Memphis, Tenn., the point of shipment, to the point of destination, Strong, Arkansas. Appellant claims the fencing was sold to him at an agreed price, f. o. b. Memphis, Tenn., and the wire nails and staples at a price f. o. b. Strong; appellee insisting that the entire bill of goods was to be sold f. o. b. Strong, for the agreed price. The written order, signed by appellee, expressing the terms of the contract, was read in evidence and is as follows:

PITTSBURG STEEL COMPANY
Pittsburg, Pa.

Ship to W. S. Wood at Strong, Ark.
Invoice to same at same.
When ship, earliest convenience.
This order subject to approval of Pittsburgh Steel Company and is payable only by current funds in Pittsburgh, New York or Chicago. All agreements contingent upon strikes, accidents and other causes beyond the control of the seller.

FENCES, GATES, TOOLS, ETC.							BARBED WIRE, NAILS, STAPLES, ETC.		
40 rod rolls	20 rod rolls	10 rod rolls	Total rods	Style No.	Distance between stays	Kind of Fence			
							50-80 rod spools 4pt. galv. P. P. Hog per spool	2	32
							60-80 rod spools 2pt. galv. Star cattle per spool	1	66
		25	250	5819	6″	Spec. P.& G.	2-40d common @ barrel	2	26
	24		480	328	6″	Reg.	3-30d common.		
	45		900	267	6″	"	4-20d "		
							10-10d "		
	25		500	267	12″	Reg.	16- 8d "		
							50- 6d "		
							2- 3d "		
							1- 8d fine.		
Te	rms	due	net 5-	1-'11	subject t	o a dis-	1- 8d casing.		
coun	t of	2%	for ca	sh if p	aid befor	e 3-10-	6 Kegs 1 1-8 pol.		
1911	. In	teres	t at t	he rat	e of 6% p	er an-	staples	2	26
num	allo	wed	for an	ticipa	ted paym	ent	Smooth wire @ base	2	06
from	dat	e of	paym	ent to	March 1,	1911.	400 No. 12 galv.		
Set	tlem	ent t	o be	made	by note	upon	smooth in 1-lb bundles, 2.51.		
recei	pt of	inv	oice.						
Th	ese d	isco	unts	appl	y from lis	t.	400 No. 12 galv.		
Aug.	1, 1	907.					smooth, 50-lb. bundles, .05 per bundle extra 1000 lb.; No. 14 galv. smooth, 2.71.		
							1000 lbs. No. 14 galv. smooth in half catch wt. bundles .05 per bundle extra.		

No agreements except those stated on order will be recognized by this Company.

Fencing 73 per cent off list, F. O. B. Memphis, Tenn.
Gates and stretchers .... per cent off list, F. O. B.
Splicers and fence tools .... per cent off list, F. O. B.
Terms of payment.
Salesman, N. W. Smith.

All above F. O. B. Strong, Ark.
Terms of payment 60 days net.
Two per cent off ten days from date of invoice.

W. S. Wood, Buyer.

The salesman testified that appellee executed the contract and that there was no agreement that the entire car was to be delivered at Strong and that Mr. Wood did not tell him he wouldn't buy it unless it was sold f. o. b. Strong. Appellee denied owing the account, stated that he did not agree to pay the freight on any part of the merchandise purchased, and that it was his understanding that it was all to be delivered f. o. b. Strong; just like it reads above his signature, "All above goods, f. o. b. Strong." That when he signed the order he glanced up and noticed above the place for the signature, "All above goods f. o. b. Strong," and that if he had not understood that the goods were to be delivered he would not have signed the order. He admitted that he signed the order; that he did not notice the line, "Fencing 73 per cent off, f. o. b. Memphis, Tenn." That he did not always read every line of an order, and having seen the "f. o. b. Strong," supposed that it stated the terms and that he kept a duplicate of the order, which was introduced in evidence. That the order was made out in his store and handed to him right away, and that he filed it away and did not think any more about it until the question came up about the freight when he looked it up and noticed that it did have some stuff on the left-hand column, marked f. o. b. Memphis; that that was the first time he ever knew the order had been taken that way. One of the clerks in his store testified that he heard part of the conversation when the trade was made and heard Mr. Wood tell the salesman at the time the order was executed that he wouldn't buy the wire unless it was delivered at Strong. The salesman stated that the words, "All above goods f. o. b. Strong," mean only the items on the right-hand side of the double column of the order. That the left side specified the terms of payment.

The court refused to instruct the jury to find for the plaintiff and instructed them that if they should find from a preponderance of the testimony that the contract provided that a certain part of the bill of goods was to be delivered f. o. b. Strong, and that another part was sold f. o. b. Memphis, that they would find for the plaintiff,

and that if they should find under the terms of the contract all the property was to be delivered f. o. b. cars at Strong, they would find for the defendant.

The written order executed by appellant expressed the terms of the contract and its construction was a question for the court, there being no ambiguity arising from it and no fraud claimed to have been practiced in its procurement. 9 Cyc. 591; *Estes* v. *Booth,* 20 Ark. 583; *Arkansas Fire Insurance Co.* v. *Wilson,* 67 Ark. 553; *Dugan* v. *Kelly,* 75 Ark. 55.

The intent of the parties to a written contract should be derived from the whole instrument. *Kelly* v. *Dooling,* 23 Ark. 582; *Railway* v. *Williams,* 53 Ark. 58; *Vaugine* v. *Taylor,* 18 Ark. 65.

Appellant does not contend that the contract as executed has been changed, but only says that he did not in fact examine it sufficiently and closely to discover the provision that the fencing was priced f. o. b. Memphis. He executed the order, and, no fraud having been practiced upon him in its procurement and there being no ambiguity in its terms, he can not excuse himself from his liability thereon by saying that he did not read it all and that if he had understood that it read as it appears to read that he would not have signed it. He is bound, under the law, to know the contents of a paper signed by him, and he can not excuse himself by saying he did not read it or know what it contained. *Upton* v. *Tribilcock,* 91 U. S. 45; 9 Cyc. 391; *Stewart* v. *Fleming,* 105 Ark. 37.

The terms of the contract are plain and unambiguous and the court erred in not instructing a verdict for the appellant.

The judgment is reversed and judgment will be entered here for the amount sued for. It is so ordered.

KNIGHTS OF PYTHIAS OF NORTH AMERICA, SOUTH AMERICA, EUROPE, ASIA, AFRICA AND AUSTRALIA *v.* BOND.

Opinion delivered October 27, 1913.

1. APPEAL AND ERROR—ERRORS—BILL OF EXCEPTIONS—FAILURE TO SET OUT ALL THE EVIDENCE.—Where a bill of exceptions recites "this record does not contain all the evidence," where it is contended that the evidence was insufficient to warrant the verdict, the court will presume that every fact necessary to sustain the verdict was established by the evidence. (Page 544.)
2. BILL OF EXCEPTIONS—AMENDMENT—POWER OF TRIAL COURT AFTER EXPIRATION OF TERM.—It is within the power of the trial court to permit a bill of exceptions, filed within time, to be amended so as to make it speak the truth, but the court has no power, after the closing of the term to allow a new bill of exceptions to be filed. (Page 544.)

Appeal from Pulaski Circuit Court, Second Division; *Guy Fulk,* Judge; affirmed.

L. J. Brown and *Thomas J. Price,* for appellant.

S. A. Jones and *Carmichael, Brooks, Powers & Rector,* for appellee.

1. The judgment should be affirmed for want of a proper bill of exceptions. A trial court has no power, after the lapse of the term in which a case was tried, to extend the time for filing a bill of exceptions. 52 Ark. 554; 38 Ark. 216; 42 Ark. 488; 45 Ark. 102; 53 Ark. 415; 103 Ark. 44; 58 Ark. 110.

Not only must a bill of exceptions be *filed,* but it must also be *signed by the trial judge,* within the time fixed by the court. 34 Ark. 627; 37 Ark. 528; 95 Ark. 331; 82 Ark. 164.

2. Where a purported bill of exceptions contains the affirmative statement in the judge's certificate: "This record does not contain all the evidence," the conclusive presumption is that every fact necessary to sustain the finding and judgment of the court was proved. 95 Ark. 302; 79 Ark. 263; 40 Ark. 185; 44 Ark. 74; 72 Ark. 21.

McCULLOCH, C. J. This is an action instituted below by appellee against appellant, a fraternal insurance

society, to recover the amount of a benefit certificate issued on the life of one of its members, now deceased.

The errors complained of are that the evidence is not legally sufficient to sustain the judgment, and that incorrect instructions were given at the instance of appellee, and that correct instructions requested by appellant were refused.

These errors must have been brought upon the record by bill of exceptions before they could be considered here.

There is in the record what purports to be a bill of exceptions duly signed by the trial judge and filed within the time allowed by the court; but there is an affirmative statement at the conclusion, reading, "This record does not contain all the evidence." In other words, the trial judge certified that the bill of exceptions did not contain all the evidence. This being true, we must indulge the conclusive presumption that every fact necessary to sustain the verdict of the jury was established by the evidence.

While the bill of exceptions appears to have been signed by the trial judge and filed within the time prescribed by the order of court, there also appears in the record an order of the court, made on the day that the bill of exceptions was filed, showing that it had not been signed by the trial judge, but was filed for his consideration. Later, and after the expiration of the time for filing the bill of exceptions, there appears an order of the court striking the bill of exceptions from the files and granting appellant leave to prepare and file another bill of exceptions within two weeks from that time.

It is, therefore, clearly established by the whole record that the bill of exceptions was not, in fact, signed by the trial judge until long after the time specified in the order of the court. At the time the order was made giving a further extension, it was beyond the power of the court to do so, for the term had closed, and the court lost its power in the premises further than to allow amendments to the bill of exceptions. It is within the

power of the court to permit a bill of exceptions filed within time to be amended so as to make it speak the truth, but the court has no power, after the lapse of the time, to allow a new bill of exceptions to be filed.

There is, therefore, nothing before us for consideration, and the judgment must be affirmed. It is so ordered.

LEWISVILLE LIGHT & WATER COMPANY *v.* LESTER.

Opinion delivered October 27, 1913.

1. CONTRACTS—FINDING OF THE JURY.—Where the sole issue in a cause is as to the existence of a contract between the parties, the verdict of the jury is conclusive as to their rights. (Page 547.)
2. CONTRACTS—TERMS—EFFECT OF ACTION OF ONE PARTY.—Where defendant made a contract with the promoter of a light company to supply his lights at a certain figure below the customary rates, while the company had the right to terminate the contract and charge defendant the customary rates, if it failed to do so and accepted payments under the contract made by the promoter, they can not later sue defendant for the difference in the rates. (Page 547.)
3. TRIAL—AMENDMENT TO ANSWER—CONTINUANCE.—Where, in a trial, defendant filed an amendment to his answer, and plaintiff's attorney "asked the court for permission to continue the case for the term," and saved an exception to the ruling of the court denying the request; *held*, since the record showed that plaintiff offered no reason for the continuance, it can not be said that the court abused its discretion in refusing to grant a continuance. (Page 547.)

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

D. L. King, for appellant.

1. An agent can bind his principal only to the extent of his authority. One who deals with an agent must ascertain what his authority is. 32 *Id.* 354; 92 Ark. 315, 535.

2. Miller had no authority to make the special rate.

Searcy & Parks, for appellee.

1. The contract of the general manager bound the company. 49 S. E. Rep. 621; 121 Ga. 555.

2. The contract was within the apparent authority of the manager, and bound the company. 152 S. W. 282.

McCULLOCH, C. J. This is an action at law instituted by the Lewisville Light & Water Company, a copartnership doing business under that name, composed of G. W. Dobson and A. T. Ward, to recover from the defendant, M. D. Lester, an amount claimed to be due for electric lights furnished during several years prior to the institution of the action.

The electric light plant in the town of Lewisville was originally owned by a corporation under the same name under which plaintiffs are now doing business, and it sold the plant and franchise to the paintiffs.

The defendant was a citizen of the town, and ten lights were installed in his residence. The customary price for furnishing lights in residences was a flat rate of fifty cents per light, and ten lights were installed in defendant's residence, making his monthly bill the sum of $5, according to the customary rates. Defendant claims, however, that the manager of the concern, while being operated as a corporation, made a special contract with him to furnish the ten lights for $3 per month, and that monthly bills were furnished for that amount, which he always paid, and that no notice of any change was ever given until about the time this suit was instituted.

This action is to recover the additional amount of $2 per month, the amount sued for aggregating the sum of $194.25.

Plaintiff's testimony showed that the customary rate was fifty cents per light in residences; but defendant testified that one Miller, the manager of the plant, and what he terms the "promoter" of the corporation, made him a special rate of $3 per month at the time the ten lights were installed in his house, and that he paid that amount every month upon bills presented to him, and that he had never been notified of any change in the rate.

The court submitted the case to the jury upon the

sole issue of fact as to whether or not such a contract existed with reference to the price of the lights furnished, and the jury returned a verdict in the defendant's favor. We think that is the only issue in the case, and the verdict of the jury is conclusive as to the rights of the parties. The fact that plaintiffs, and its predecessor, in rendering monthly bills to defendant, only specified six lights does not alter defendant's liability according to the contract originally made with him by Miller. There is no evidence of collusion between defendant and Miller to cheat the latter's principals out of the customary price of lights. No evidence that the contract was not entered into fairly and in good faith.

There is no evidence that the rates had ever been fixed by any ordinance of the town, and there is no statute making a special contract of this kind unlawful. If the contract was entered into and its existence recognized by both parties by the payment and acceptance of the amount specified therein, then there is no right of action for the recovery of the difference between the customary rates and the rates stipulated in the special contract.

The plaintiffs undoubtedly had the right to terminate the contract and charge the defendant according to the customary rates, but they failed to do so, and, on the contrary, recognized the existence of the contract by furnishing bills for that amount and accepting the monthly payments.

The authority of Miller to make the special contract is challenged. But it was certainly within the apparent scope of his authority, for he was the manager, and had authority to fix rates. In any event, his act in fixing the rates was ratified by the acceptance of the specified amount from month to month.

It is contended that the court erred in refusing to postpone the trial when defendant filed an amendment to his answer. The record merely shows that when the amendment was filed, plaintiff's attorney "asked the court for permission to continue the case for the term,"

and that an exception was saved to the ruling of the court denying the request. No reason was, according to the recitals of the record, stated, and it can not be said that the court abused its discretion in refusing to postpone the trial until the next term.

No objection is pointed out to the instructions of the court, and the evidence is legally sufficient to support the judgment, so the same is affirmed.

COSTON v. LEE WILSON & COMPANY.

Opinion delivered October 27, 1913.

1. JUDGMENTS—PAYMENT—RIGHT TO APPEAL.—Plaintiff recovered a judgment against defendants in the circuit court, and accepted payment of the same. *Held*, the judgment being such that it must be sustained or reversed as a whole, plaintiff will not be allowed later to appeal from the judgment of the circuit court. (Page 550.)
2. DRAINAGE DISTRICTS—CONTRACT OF COMMISSIONERS.—Where C sued a drainage district for his fees for organizing same and recovered judgment and accepted payment by the commissioners of the amount of the judgment, when a taxpayer intervened, an agreement between C and the commissioners that the payment to C would not prejudice his right to appeal from the judgment, will not give to C the right to appeal. (Page 551.)

Appeal from Mississippi Circuit Court, Osceola District; *Frank Smith*, Judge; appeal dismissed.

J. T. Coston, pro se.

The acceptance by appellant of $8,000, the amount found by the lower court, when the great weight of the evidence, as appears by the special finding of the court, entitled him to a much greater sum, and when it is, and has been, at all times conceded by the defendant that he was entitled to as much as $10,000, does not estop appellant from prosecuting this appeal. 53 Ark. 515; 67 Ark. 343; 47 N. Y. App. Div. 477; 26 Pac. 225; 2 Cyc. 653; 4 Enc. L. & P. 102; 3 Wall. 701; 107 U. S. 7, 8; 1 N. E. 642, 643; 29 N. W. 623; 18 Atl. 387; 33 N. E. 546; 56 Pac. 76; 4 Ky. Law Rep. 617; 7 *Id.* 364.

Allen Hughes and *Charles T. Coleman,* for appellee.

The appeal should be dismissed because the appellant has collected the judgment, and, by acceptance of a benefit under the judgment inconsistent with the appeal, has waived the right of appeal. 24 Ark. 14; 53 Ark. 514; 77 Pac. 212; 2 Cent. Dig., "Appeal and Error," § 162; 4 Enc. Law & Prac. 101; 2 Cyc. 652.

McCULLOCH, C. J. Mr. Coston, the appellant, was attorney for the Grassy Lake & Tyronza Drainage District No. 9, of Mississippi County, in the organization of the district, the sale of bonds, and other matters concerning the business thereof, and this case involves a controversy between him and the taxpayers of the district concerning the amount of his fee. Appellees, as taxpayers, intervened in the proceeding before the county court for the allowance of the fee. Appellant claimed $20,000, and both sides appealed from an order of the county court fixing the fee at $12,500. The case was tried in the circuit court on appeal, and the fee was fixed at the sum of $8,000.

The judgment of the circuit court was rendered in March, 1912, and some time during the month of May of the same year the commissioners of the district paid to appellant the sum of $8,000, the amount of the judgment, and took his receipt therefor, which stipulated that he accepted the sum without prejudice to his right to prosecute an appeal.

He prayed an appeal from the clerk of this court on March 28, 1913, just before the expiration of the time, and the appeal was granted.

Appellees now move the court for the dismissal of the appeal on the ground that appellant is estopped by reason of having accepted payment of the judgment.

This question was decided in favor of the contention of appellees in the case of *Watkins* v. *Martin,* 24 Ark. 14, where the court, speaking through Mr. Justice COMPTON, held that, "Where a party has recovered a judgment, and received the amount of it from defendant, he will not be permitted to reverse the judgment on error."

The only distinction between that case and this is, that, in the former the plaintiff collected the judgment upon process issued at his instance, whereas, in the present case, the payment was voluntarily made by the commissioners of the district. That, however, is a distinction without a controlling difference, for it is the acceptance which amounts to a waiver of the right of appeal, regardless of the manner in which the fruits of the judgment are secured.

Nor is the principle altered by the fact that payment was voluntarily made by the commissioners of the district upon stipulation that it was not to prejudice appellant's right to prosecute his appeal. This is a controversy between the taxpayers and appellant, and the commissioners had no authority to deprive the latter, by making a voluntary payment, of their right to contest.

In the case of *Bolen* v. *Cumby,* 53 Ark. 514, Chief Justice COCKRILL, speaking for the court, stated the rule as follows:

"A party may prosecute his appeal from a judgment, partly in his favor and partly against him, even after accepting the benefit awarded him by the judgment, provided the record discloses that what he recovers is his in any event—that is, whether the judgment be reversed or affirmed. But he waives his right to an appeal by accepting a benefit which is inconsistent with the claim of right he seeks to establish by the appeal."

It will be noticed that the right to prosecute an appeal turns upon the question whether the party merely accepts that which is "his in any event," for, if his right to recover the amount paid is in dispute, his acceptance of the amount cuts off the right of the other party to further contest the claim in the event of a reversal, and he can not be allowed to occupy the inconsistent position of further prosecuting his appeal.

The rule is clearly stated in the Cyclopedia of Law and Procedure, vol. 2, p. 652, as follows:

"It is the general rule that if the prevailing party obtains a judgment or decree which is so indivisible that

it must be sustained or reversed as a whole, he can not prosecute an appeal or writ of error to reverse it after having accepted money voluntarily tendered by the judgment debtor in discharge or partial satisfaction of it. * * * But this rule has no application to cases where the appellant is shown to be so absolutely entitled to the sum collected upon the judgment that the reversal of it will not affect his right to it."

Many authorities are cited in support of the text, which we conceive to be sound in principle and in accord with the views already expressed by this court in the cases cited above.

The Supreme Court of Idaho, in a well-considered opinion (*Bechtel* v. *Evans,* 10 Idaho 147, 77 Pac. 212) lays down the following test, which we think is a clear and correct statement of the true rule:

"If the party has collected his judgment, and, in seeking to gain more by the prosecution of an appeal, thereby incurs the hazard of eventually recovering less, then his appeal should be dismissed. If, on the other hand, the appeal is from such an order or judgment as that he could in no event recover a less favorable judgment, and that he incurs no hazard of ever receiving less than the judgment already collected by him, we see no objection to the prosecution of his appeal."

Now, testing the present case by that rule, it is clear that appellant has waived his right to prosecute an appeal from the judgment in his favor. The whole amount of his fee was in controversy, and there was evidence tending to fix it at an amount much less than he recovered below, or much more than he recovered. If the judgment should be reversed, and the amount had not already been paid to him, he would take the hazard of recovering less, but since he has accepted the amount tendered, he has cut off the right of the appellees to test his right, in another trial, to recover that amount. It follows that the appeal must be dismissed, and it is so ordered.

SMITH, J., not participating.

STORTHZ v. SMITH.

Opinion delivered October 27, 1913.

1. LANDLORD AND TENANT—RENT—LIABILITY OF SUBTENANT.—Under Kirby's Digest, § 5035, the liability of a subtenant of land to the landlord is limited to the rent of the land which is cultivated or occupied by him at the price specified in the contract between the principal tenant and the landlord. (Page 554.)
2. LANDLORD AND TENANT—SUBTENANT—"CULTIVATED OR OCCUPIED."—In Kirby's Digest, § 5035, which provides that a subtenant of land shall be held responsible for the rent of such lands as are cultivated or occupied by him, the words "cultivated or occupied" mean the quantity of land which the subtenant contracts to take. (Page 554.)
3. MORTGAGES—GROWING CROPS—DESCRIPTION.—Where a subtenant of land mortgaged the crops thereon to one Smith, describing the same as "entire crop of cotton, cotton seed, corn, oats, small grain, and all other products which shall be grown or cultivated" (by the mortgagor) "on S. F. Smith's farm, or elsewhere in Faulkner County, Arkansas, during the year 1911," although the crop was not grown on land belonging to Smith, the description held sufficient to give notice to all parties of the lien on any crop raised by the mortgagor in that county. (Page 555.)
4. COSTS—MORTGAGES—FORECLOSURE.—Appellant leased land to C, who sublet to G. G mortgaged the crops to appellee. Appellee brought an action to foreclose the mortgage and made appellant a party defendant. *Held*, appellant had a prior lien to appellee, on the crop, and where the crop was turned over to him to gather and satisfy his account for rent, and appellee made no tender of the amount of the rent to appellant, the latter's possession of the crop was not wrongful, and it was error to tax costs against the appellant. (Page 555.)

Appeal from Faulkner Chancery Court; *Jordan Sellers,* Chancellor; modified and affirmed.

W. T. Tucker, for appellant.

1. Section 5032, Kirby's Digest, gives the landlord a lien upon the *crop grown on the premises, etc.* 146 S. W. 133. This covers *all* the crops grown. 95 Ark. 37; 35 *Id.* 231; 89 N. C. 137; 71 Miss. 482; 4 So. 442; 64 Mo. App. 351; 131 Iowa 62; 107 N. W. 1032; 51 Miss. 155. The landlord's lien is superior to that of mortgagee. 25 Ark. 417; 24 *Id.* 545, and cases *supra.*

2. The mortgage is void for uncertainty in description. 54 Ark. 92; 43 *Id.* 350.

R. W. Robins, for appellee.

1. Gordon and the crop were liable only for the rent of the land rented by Gordon from Carr, or ten acres, at the agreed price. Kirby's Dig., § 5035; 146 S. W. 133.

2. The description in the mortgage is sufficiently definite. 54 Ark. 92; 43 Ark. 350; 28 N. Y. 362; 37 *Id.* 593; Smith on Chat. Mortgages, 10; 57 Ark. 371; 51 Ark. 410.

McCULLOCH, C. J. Appellant, L. Storthz, owned a farm in Faulkner County, Arkansas, and rented a portion of it to one Robert Carr to cultivate during the year 1911. Before the time passed to plant the crop, Carr died, and appellant agreed with the latter's widow that she should carry out the rental contract, the effect of the contract, as disclosed in the evidence being, to constitute a new rental contract between appellant and Mrs. Carr. Mrs. Carr subrented ten acres of the land to one Gordon, who raised a crop thereon, and mortgaged it, before maturity, to appellee, S. G. Smith, a merchant in Conway, Arkansas, to secure an account for supplies. Gordon left before the crop was gathered, and Mrs. Carr authorized appellant's agent to take possession of it for the purpose of gathering it to pay the rent.

Appellee Smith instituted this action in the chancery court of Faulkner County to foreclose his mortgage, making Gordon, Mrs. Carr, and appellant defendants; and he asked that a receiver be appointed by the court to take charge of the crop, and the chancellor, in vacation, made an order for the appointment of a receiver.

Appellant resisted this order on the ground that he was solvent and was therefore accountable for the crop, and also offered to make bond for the delivery of the crop according to the orders of the court.

Appellant claims that there were thirty-two acres of the land, and that he was to be paid $6 an acre for it, and the proof introduced on his part tends to establish

that contention. The proof, however, adduced by appellee, which the court accepted as true, tends to establish the acreage of the land rented at only twenty acres, and that Gordon cultivated ten acres thereof. It also shows that only the ten acres cultivated by Gordon could be put in cultivation that year, the remainder being covered at planting time by overflow water. The chancellor found that appellant was only entitled to enforce a lien for the sum of $60, being $6 per acre on the ten acres of land on which was the Gordon crop, and that the balance of proceeds of the crops, which was sold under order of the court, should be paid over to appellee, Smith, on his mortgage debt. A decree to that effect was rendered, and all of the costs of the cause, including the fee of the receiver and other expenses of the receivership, were awarded against appellant.

It is insisted on behalf of appellant that the decree was erroneous in not awarding him the full amount of rent which he claimed; in other words, it is contended that a lien should be declared in his favor against the crop for rent on thirty-two acres of land at $6 per acre.

The testimony is sufficient, we think, to warrant the finding of the chancellor that there were only twenty acres of the land rented by appellant to Carr, and that only ten acres of this was cultivated by Gordon. The proof is not entirely satisfactory, but our conclusion is that it is sufficient to show that it was a sub-renting to Gordon, and that he only sub-rented the amount that he put into cultivation. This being true, he is only liable for the ten acres of land at $6 per acre under the statute of this State which declares that, "Any person sub-renting lands or tenements shall only be held responsible for the rent of such as are cultivated or occupied by him." Kirby's Digest, § 5035. The purpose of this statute is to limit the liability of a sub-tenant to the rent of the land which he sub-rents at the price specified in the contract between the principal tenant and the landlord. The words, "cultivated or occupied," as used in the statute, mean the quantity of land which the sub-tenant con-

tracts to take. *Jacobson* v. *Atkins*, 103 Ark. 91, 146 S. W. 133.

We can not say that the chancery court erred in its finding that appellant was only entitled to enforce a lien for the sum of $60 against Gordon's crop.

Nor do we think there is any foundation for the contention of appellant's counsel that the mortgage executed by Gordon to appellee, Smith, was void on account of the lack of a correct description of the property, which is described as "entire crop of cotton, cotton seed, corn, oats, small grain, and all other products which shall be grown or cultivated" (by the mortgagor) "on S. G. Smith's farm, or elsewhere, in Faulkner County, Arkansas, during the year 1911."

The crop was not raised on the Smith farm, but on appellant's farm in Faulkner County. But we think the description is sufficient to give notice to all parties of the lien on any crop raised by the mortgagor in that county. *Gurley* v. *Davis*, 39 Ark. 394; *Johnson* v. *Grissard*, 51 Ark. 410.

Our conclusion, however, is that the court erred in taxing the costs of the case, particularly the costs of the receivership, against appellant. His lien was prior to that of the mortgagee, and his possession of the crop, which had been turned over to him for the purpose of gathering and paying his rent, was not wrongful. If appellee, as mortgagee, had tendered to appellant the true amount of his rent, and he had refused to accept it, then his holding of the crop might be treated as wrongful so as to subject him to the costs of any litigation which followed; but that is not the state of the present case, for the suit was brought against Gordon, and appellant was made a party without any offer to pay his rent. So there is no reason why the costs should be taxed against him and taken out of his rent, for which he is entitled to have a first lien declared.

The decree, insofar as it fixes the amount of appellant's rent to be charged against the crop, is affirmed; but the decree is modified so as to strike out the award of

costs against appellant. The costs of this appeal will be divided equally between the parties.

STATE OF ARKANSAS ON RELATION OF THE ATTORNEY GENERAL *v.* TRULOCK.

RAMSEY *v.* FARMER.

Opinion delivered October 27, 1913.

1. STATUTES—RULES OF INTERPRETATION.—The cardinal rule for the interpretation of statutes is the ascertainment of the meaning of the language used in the statute, and not what the lawmakers themselves meant. (Page 563.)
2. STATUTES—AMENDATORY STATUTES—INTERPRETATION.—Where a statute amends an existing statute, "to read as follows," and a literal construction of the amendatory statute would result in the abrogation of the whole law on the subject, but when other parts of the amendatory statute show the intention of the Legislature not to abrogate the whole law, the court will give effect to the evident intent of the lawmakers, in its construction of the statute. (Page 563.)
3. STATUTES—CONSTRUCTION—AMENDMENTS—LEGISLATIVE INTENT.—The intention expressed in a statute prevails over the letter, and the mere literal construction of a section will not be permitted to prevail if it is opposed to the intention of the Legislature made apparent by the statute. (Page 565.)
4. STATUTES—AMENDATORY SECTIONS—CONSTRUCTION.—The words, "be amended to read as follows," in an amendatory statute, constitute a mere formula, except that it ordinarily carries the meaning, when not otherwise limited, that the amendatory statute excludes all omitted provisions of the former law. (Page 565.)
5. STATUTES—REPEALING OR AMENDATORY WORDS.—Amendatory or repealing words of a statute are subject to the same rules of construction as any other parts of the statute, and the literal meaning may be put aside in order to carry out the obvious intention of the lawmakers as otherwise indicated. (Page 566.)
6. IMPROVEMENT DISTRICTS—STATUTES—AMENDMENTS.—Act 125, page 527, Acts of 1913, provided: "That section 5667 of Kirby's Digest be amended to read as follows * * *." The act amended provided for the appointment of commissioners while the amendatory act omitted any reference to the appointment of commissioners. *Held*, the Legislature did not intend to amend the whole of section 5667 of Kirby's Digest, but left unimpaired that part of it

which covered the subject of the commissioners which was not treated in the new statute. (Page 566.)

7. IMPROVEMENT DISTRICTS—STATUTE—AMENDMENT.—Article 5, § 22, of the Const. of 1874, which provides that no law shall be amended or revived by reference to its title only, is not violated by construing Act 125, Acts of 1913, as having in effect left unchanged section 5667 of Kirby's Digest relative to the appointment of commissioners for improvement districts. (Page 567.)

8. IMPROVEMENT DISTRICTS—CONTIGUOUS TERRITORY.—The cutting in two of an improvement district by an intersecting district for the paving of a single street, does not necessarily separate the parts so widely that it can be declared, as a matter of law, that the whole of the territory affected is not contiguous to the improvement within the meaning of the law. (Page 568.)

9. IMPROVEMENT DISTRICTS—DIFFERENT CLASSES OF PROPERTY.—Where a street reaches through different classes of property, business houses and residences, it can not be said that the two kinds of property can not be classed together and put into one improvement district. (Page 568.)

Appeal from Jefferson Circuit Court; *Antonio B. Grace,* Judge; affirmed.

Appeal from Pulaski Chancery Court; *John E. Martineau,* Chancellor; affirmed.

Wm. L. Moose, Attorney General, and *A. R. Cooper,* for appellant.

Section 1 of the act of March 3, 1913, not only operates as a repeal of that part of section 5667, Kirby's Digest, providing for the appointment of the board of improvement districts by the city council, but also as a repeal of the entire section.

Generally speaking, where a statute is amended "so as to read as follows," the amendatory act becomes a substitute for the original, which then ceases to have the force and effect of an independent enactment. This does not mean, however, that the original is abrogated for all purposes, or that everything in the later statute is to be regarded as if first enacted therein; but the better and prevailing rule is that so much of the original as is repeated in the later statute without substantial change is affirmed and continued in force; that so much as is omitted is repealed, and that any substantial change in

other portions of the original act, as also any matter which is entirely new, is operative as new legislation. 75 N. W. (Minn.) 717; 92 N. W. (N. D.) 449, 450; 18 L. R. A. 713; 155 Fed. 945; 34 Atl. (Pa.) 954; 1 Sutherland, Stat. Const. 442; 49 N. Y. 332; 84 N. Y. 610; 15 N. Y. 595; 63 Cal. 261.

Danaher & Danaher and *Rose, Hemingway, Cantrell & Loughborough,* for appellee; *Thomas & Lee, Gordon Frierson, Ira D. Oglesby, James P. Clarke, C. W. McKay* and *Wm. H. Arnold* and *Gustavus G. Pope* filed separate briefs as *amici curiae.*

Article 5, section 22, of the Constitution, has reference to the substance of the law, and does not deal with sections as divided in the statutes. It does not say that no section of the statute shall be amended unless the whole section is set out at length, but only that the law shall not be amended unless the *amendment* is so set out.

Kirby's Digest, section 5667, deals with two matters, first, the presentation of the petition by a majority of the property owners, and, second, the appointment of commissioners by the city council. The act of 1913 deals only with the first of these subjects, makes no change therein by reference, but sets out fully, as required by the Constitution, the law as amended.

It was plainly not the intention of the Legislature to repeal that portion of the statute giving power to the city council to appoint commissioners. To do so would be to nullify the act, whereas the statute in question was passed expressly to facilitate the operations of such improvement districts. As further evidence that the Legislature did not intend to repeal this part of the statute, every clause, almost, of the act refers to the commissioners. See sections 2, 6, 8, of the act.

In construing legislative enactments, the object of the courts is to ascertain the intention, the purpose, of the law-makers. All rules of construction are directed to this end, and whenever the purpose is plain, the language, however inapt, must be moulded to accomplish the desired result. 34 Ark. 263-269; 35 Ark. 56-59; 58

Ark. 113-116; 60 Ark. 343-348; 37 Ark. 491-494; 94 Ark. 423-426; 100 Ark. 175-178; 153 S. W. (Ark.) 821, 822. The foregoing cases give emphasis to the principle that when the intention of the Legislature is apparent, it is to be given effect, however careless it may have been in the use of language. See also, in support of our contention, 44 N. E. 779, 780; 150 N. Y. 200; 50 Pac. 522, 523, 525; Lewis Sutherland, Stat. Const., § 236.

The power of the city council to appoint commissioners is necessarily implied from the other sections of the statute, and this is a conclusive answer to appellant's contention that it has no such power. The whole scheme of municipal improvement is based upon the appointment of commissioners, and other sections of the statute provide for their activity. See section 5670, as amended by Act 81, Acts 1909, and 48 Ark. 82; 60 Ark. 356; 78 Ark. 453.

J. W. & J. W. House, Jr., for appellant.

1. In addition to the authorities cited by appellant in *State ex rel.* v. *Trulock,* we refer also to the following on the effect of the use of the words "amended to read as follows." 107 Pac. 980, 981; 105 Pac. 994; 86 N. E. 1042; 97 S. W. (Ark.) 662-664.

In view of the authorities cited and referred to, the act of March 3, 1913, unquestionably repealed that part of section 5667, Kirby's Digest, relating to the appointment of commissioners. "The effect of an amendment," says this court, "is to so change the former act as to make it read in the same manner it would have read, and to give it the same effect it would have had, if it had been originally enacted as amended." 91 Ark. 243; 100 Ark. 175; 55 Ark. 389; 73 Ark. 600; 89 Ark. 598.

The cases relied on by appellees in the case of *State ex rel.* v. *Trulock,* refer to the interpretation of a statute on account of some ambiguity; but in none of them does the court go so far as to supply that part of an enactment which goes to the whole substance of the statute. It is not within the province of the courts to legislate, to make a law, but only to declare it, and to supply the

defect in this statute would be legislation. Neither do courts "sit to supervise legislation and keep it within the bounds of propriety and common sense." 72 Ark. 195-201; 11 Ia. 367, 368; 27 Me. 285; 1 Bland, 46; 65 Pac. 563-565; 47 N. W. 923-925; 106 N. W. 451; 138 N. Y. Sup. 975-981; 149 S. W. (Ark.) 656-661; 36 Cyc. 1112-13; Endlich on Interpretation of Statutes, § 22; 117 U. S. 567; 29 Law Ed. 940. Regardless of any expression of its intent by the Legislature, without a positive declaration of intention to repeal section 5667, the provision with reference to the commissioners would be repealed by implication. 92 Ark. 600; 82 Ark. 302; 96 Ark. 92-98. And this leaves the city council with no implied power to appoint commissioners, since all its powers must be derived from Legislative enactment. 86 Ark. 1-11.

2. Before an improvement district can be created under our statute, the improvements must constitute an entirety. It is both unjust and unreasonable that property in a business district should be improved by assessments made on property far removed from the business center, as is the case here. 109 Pac. 610-11-12.

Rose, Hemingway, Cantrell & Loughborough, for appellees.

1. The court is not called upon to legislate. The only question is whether or not the Legislature *intended to repeal* the section with reference to the appointment of commissioners, and to arrive at this intention by construing the act of 1913 in the light of *all of its provisions.*

2. The territory is contiguous within the meaning of the law. The power of a city council to lay off improvement districts according to its own discretion has always been upheld by this court; and its action in "including property in an improvement district is conclusive of the fact that it is adjoining the locality to be affected, except when attacked for fraud or demonstrable mistake." 52 Ark. 112; 59 Ark. 305; 70 Ark. 465; 98 Ark. 544; 101 Ark. 227; 54 Ark. 321-325.

McCULLOCH, C. J. In each of these cases an attack is made on the validity of an improvement district, one

in the city of Pine Bluff, and the other in the city of Argenta, Arkansas, organized pursuant to the general statutes of this State. The point of attack in each case is that the General Assembly of 1913 enacted a statute purporting to amend the general statutes on the subject of organization of improvement districts in cities and towns, but which omitted any provision for the appointment of commissioners, and that the effect of that omission was to render the whole of the law on that subject inoperative.

The original statute relating to the appointment of commissioners by the city council reads as follows:

"If within three months after the publication of any such ordinance a majority in value of the owners of real property within such district adjoining the locality to be affected, shall present to the council a petition praying that such improvement be made, which petition shall designate the nature of the improvements to be undertaken, and that the cost thereof be assessed and charged upon the real property situated within such district or districts, the city council shall at once appoint three persons, owners of real property therein, who shall compose a board of improvement for the district." Kirby's Digest, § 5667.

The amendatory statute was approved and went into effect March 3, 1913, and the title thereof is "An Act to amend the statutes in reference to improvement districts in cities and towns." Act No. 125, page 527, Acts 1913. The first section reads as follows:

"That section 5667 of Kirby's Digest be amended to read as follows:

"If within three months after the publication of any such ordinance, persons claiming to be a majority in value of the owners of real property within such district adjoining the locality to be affected shall present to the council a petition praying that such improvement be made, which petition shall designate the nature of the improvements to be undertaken, and that the cost thereof be assessed and charged upon the real property situated

within such district, the city clerk or town recorder, by order of the city or town council, shall give notice by publication once a week for two weeks, in some newspaper published in the county in which such city or town may lie, advising the property owners within the district that on a day therein named, the council will hear the petition and determine whether those signing the same constitute a majority in value of such owners of real property. At the meeting named in the notice, the owners of real property within such district shall be heard before the council, which shall determine whether the signers of said petition constitute a majority in value, and the finding of the council shall be conclusive, unless within thirty days thereafter suit is brought to review its action in the chancery court of the county where such city or town lies. In determining whether those signing the petition constitute a majority in value of the owners of real property within the district, the council and the chancery court shall be guided by the record of deeds in the office of the recorder of the county, and shall not consider any unrecorded instrument."

Other sections of the amendatory statute make further changes in the law by adding new provisions and changing others.

An analysis of section 5667, as it stood before the amendatory statute was passed, reveals three separate points covered by it, namely, (1) a specification of the time within which the petition may be filed; (2) the requirement as to contents of the petition, and (3) the authority for the appointment by the city council of the board of commissioners and the specification of their qualifications.

The section, as amended by the last statute, omits any reference to the appointment of commissioners, and the contention is that this operated as a repeal of the old section without providing any method for making such appointment. Learned counsel for the appellants rely upon the well settled rule of construction announced by so many of the courts and text writers that, "when a

statute amends a former statute 'so as to read as follows,' it operates as a repeal, by implication, of inconsistent provisions in the former law, and of provisions omitted in the amended law." In re *Prime,* 136 N. Y. 347, 18 L. R. A. 713.

The authorities in support of that rule are so numerous that it is unnecessary to cite them. The rule is clearly recognized by decisions of this court. *Mondschein* v. *State,* 55 Ark. 389; *Rennau* v. *State,* 72 Ark. 445; *Henderson* v. *Dearing,* 89 Ark. 600; *Edland* v. *State,* 91 Ark. 243.

But that rule of interpretation is not an absolute or an inflexible one, and is not always arbitrarily applied. It must be considered with other rules equally well settled, and must yield place to others which may, under the language of a statute, be more appropriately and accurately employed. The cardinal rule of interpretation is the ascertainment of the meaning of the law-makers as expressed in the language which they have used. Not what the law-makers themselves meant, but what the language they used means. And all rules of interpretation must yield to this as the paramount one.

"The intent of a statute being the law," said Mr. Sutherland, "it necessarily follows that the object of all interpretation is to find out that intent." 2 Lewis' Sutherland on Statutory Construction, § 364.

In reaching the goal, we adopt any of the rules of construction which are found appropriate.

An examination of the amendatory statute discloses an irreconcilable conflict between the language thereof, when literally interpreted, and other parts of the same statutes as well as other parts of the old act which there appears no intention to amend or repeal. The language of the amendatory statute is that the section named above "be amended to read as follows;" but, as before stated, it omits any reference to the appointment of commissioners, and if a literal meaning be given to the words used, the result is that the whole law on the subject of improvement districts is abrogated. This the law-makers

did not intend. The new act clearly contemplates the continued existence of a complete statutory scheme for organizing and carrying out the purposes of improvement districts, for we find in later sections of the amendatory statute references to the commissioners and their duties, and also find many untouched provisions of the old statute which contain references to the duties of the commissioners. For instance, there is a section which specifies when the commissioners shall take the oath of office, and what the oath shall contain; another section contains a provision for filling vacancies, and another provides what shall constitute a quorum of the board for the transaction of business. Numerous other sections specify duties to be performed in carrying out the purposes of the organization of the district.

Now, the title of the act shows that the purpose of the law-makers was not to repeal the statute on the subject of improvement districts, but to amend the same, and if we give literal meaning to the words, we reach a result which the law-makers, not only are not presumed to have intended, but which the language they used shows affirmatively that they did not intend. Therefore, to adopt that construction would be to defeat the expressed will of the law-makers and work out an absurd result in the repeal of the law on this important subject.

Right here we find application for a principle which is nowhere more clearly expressed than by this court in the case of *State* v. *Smith,* 40 Ark. 431, as follows:

"It is the duty of every court, when satisfied of the intention of the Legislature, clearly expressed in a constitutional enactment, to give effect to that intention, and not to defeat it by adhering too rigidly to the mere letter of the statute, or to technical rules of construction. And any construction should be discarded that would lead to absurd consequences."

We announced the same principle in the recent case of *Hodges* v. *Dawdy,* 104 Ark. 583, where we said, in speaking of a certain meaning contended for in construing the language of an enactment, that "such a construc-

tion leads to an absurdity and must be rejected for that reason."

This court in quite a number of recent cases has said that, in ascertaining the true legislative intent and "in order to conform to the legislative intent, errors in an act may be corrected or words rejected and others substituted." *Garland Power & Development Co.* v. *State Board of Railroad Incorporation,* 94 Ark. 422; *Pryor* v. *Murphy,* 80 Ark. 150; *Bowman* v. *State,* 93 Ark. 168; *Hughes* v. *Kelley,* 95 Ark. 327; *Williams* v. *State,* 99 Ark. 149; *State* v. *Handlin,* 100 Ark. 175; *Snowden* v. *Thompson,* 106 Ark. 517.

Mr. Sutherland states that rule as follows: "The mere literal construction of a section in a statute ought not to prevail if it is opposed to the intention of the Legislature apparent by the statutes; and if the words are sufficiently flexible to admit of some other construction, it is to be adopted to effectuate that intention. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act." 2 Lewis' Sutherland, Statutory Construction, § 376.

The words, "be amended to read as follows," constitute a mere formula, in which there is no magic, except that it ordinarily carries the meaning, when not otherwise limited, that the amendatory statute excludes all omitted provisions of the former law.

The rule of interpretation that those words ordinarily operate as a repeal of inconsistent and omitted provisions is nowhere more clearly recognized than by the Court of Appeals of New York, in numerous cases in which it has been announced, but that court, while thoroughly recognizing its force, says that it is not an absolute and inflexible one. In the case of *Bank of the Metropolis* v. *Faber,* 150 N. Y. 200, after reiterating the rule announced in the *Prime* case, *supra,* that court said:

"The effect upon a prior statute of a subsequent amendment, 'so as to read as follows,' is not to be determined in all cases by any fixed and absolute rule, but frequently becomes a question of legislative intent to be de-

termined from the nature and language of the amendment, from other acts passed at or about the same time, and from all the circumstances of the case. The duty of the courts is to give effect to the legislative intent rather than the literal terms of the act." Pursuing the subject further, the court said:

"It is scarcely possible to conceive that the Legislature actually intended, by the amendment, to displace section 30 of the original law from its place as a part of the revised system of statute law, and substitute the amendment in its place. That conclusion must be reached, if at all, not from the circumstances or inherent probabilities of the case, but by the application of some arbitrary rule as to the legal effect of amendments in that form. That rule is not so absolute and unqualified as not to be made to yield to a contrary intention when it is to be found in the nature of the case, in the language employed, and in the course of contemporaneous legislation on the same subject."

Amendatory or repealing words of a statute are subject to the same rules of construction as any other parts of the statute, and the literal meaning may be put aside in order to carry out the obvious intention of the lawmakers as otherwise indicated.

"A repealing clause is subject to construction, the same as any other provision of a statute," said the Supreme Court of Indiana in *Indianapolis Union Ry. Co.* v. *Waddington,* 82 N. E. 1030, "and even an express declaration of a repeal will not be given that effect when it is apparent that the Legislature did not so intend."

"An absolute repeal may be construed as a qualified or partial repeal, where other parts of the statute show such to have been the real intent." 1 Lewis' Sutherland on Statutory Construction, § 293.

It is obvious, from a consideration of the whole of the amendatory statute, that the Legislature did not intend to amend the whole of the section named, but left unimpaired that part of it which covered a subject not treated in the new statute, namely, the third and last

clause of the section which related to the appointment of commissioners and prescribing their qualifications.

We are called upon to decide between an amendment of the whole section, which accords with the liberal meaning of the words used, though it defeats the real meaning as otherwise clearly expressed, and a partial amendment, which the whole of the statute clearly indicates that the law-makers intended. We feel impelled, by the paramount rule of construction, that is, the one which demands the ascertainment of the real intention of the Legislature, to adopt the latter construction, and say that only a partial amendment was intended, and that the provision with reference to the appointment of commissioners is left unimpaired.

It is earnestly insisted by counsel that this construction puts the statute in conflict with the clause of our Constitution which provides that "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 re-enacted and published at length." Article 5, section 22, Constitution 1874.

We can not agree with counsel in this contention. No part of the old statute is "revived, amended, or the provisions thereof extended or conferred by reference to the title only." In fact, under the construction we place upon it, no part of the old section is revived or extended, but the part which is the subject of this controversy is, as we have already explained, left unamended. It is untouched by the amendatory statute, which is, as we have already said, only partial in its operation.

The purpose of the constitutional provision was, as its language clearly implies, merely to prohibit the revival, amendment, or extension of laws merely by reference to title, and has no application to the interpretation of its language in determining whether it operated as an amendment of the old section in its entirety or merely as a partial amendment.

Our conclusion is that that part of section 5667, having reference to the appointment of the commissioners by the city council, has not been repealed, but remains a part of the statute.

In the case of *Ramsey* v. *Farmer,* there is another point raised against the validity of two improvement districts on the ground that they embrace noncontiguous territory. They are street improvement districts, and it is shown that the streets to be improved cross a certain intersecting street which has already been paved, and constitutes a separate improvement district, and it is contended that this breaks the contiguity of the district, and separates it into two parts, which it is contended can not be legally done.

It does not appear that the property embraced in the old district through which the other street was paved is, on account of the paving of the intersecting street, freed from benefits to be derived from the improvement sought through the new districts. For that reason, if for no other, it can not be said that the new districts are broken up, or that the parts are separated. But even if it was otherwise, the cutting in two of the districts by an intersecting district for the paving of a single street does not necessarily separate the parts so widely that it can be declared, as a matter of law, that the whole of the territory affected is not contiguous to the improvement within the meaning of the law on the subject.

Nor can it be said, because the street reaches through different classes of property, business houses and residences, that the two kinds of property can not be classed together and put into one district. The mere statement of the fact, as in the complaint in that case, that all the property in the district is not of similar character, is not sufficient to defeat the organization.

The judgment in each of the cases is affirmed.

KIRBY, J., dissents.

YANCEY v. BRUCE.

Opinion delivered October 27, 1913.

1. INSTRUCTIONS—GENERAL OBJECTIONS.—Where the trial court gave on its own motion a general instruction containing several paragraphs, none of which were numbered, but several of which contain correct statements of law, a general objection to the same will be held insufficient. (Page 573.)
2. TRIAL—ARGUMENT OF COUNSEL—PREJUDICIAL ERROR.—After the close of the testimony it is error for the trial court to permit counsel, during his argument to the jury, to give his recollection of a witness' testimony, and call upon the witness to vouch for the correctness of his recollection by asking the witness if that was not his testimony, and receiving an affirmative answer from the witness. (Page 574.)

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

STATEMENT BY THE COURT.

This was a suit in replevin for timothy hay grown on land belonging to the Meadow Lake Farm Company, in Independence County, Arkansas. The plaintiff claimed that he owned the hay by virtue of a verbal lease for the year 1912. The plaintiff had subrented the land from one Cain, who had leased the land for five years.

Plaintiff testified "that he (Yancey) was to let me have it the remainder of the lease that I had from Mr. Cain, four years. That is what he (Yancey) said. That was in the latter part of 1910, or the first part of 1911. On the day of the Cain sale, I had another talk with him. That was some time in February, 1911. He (Yancey) repeated the same thing."

After Cain died, plaintiff went to Yancey, who had authority to rent the land, and explained to him that he had a verbal contract with Cain to lease the land for the period that Cain had same leased. This conversation occurred in the latter part of 1911. Plaintiff told Yancey what his contract was with Cain, and Yancey agreed to it. Plaintiff stated that Yancey told him, when he spoke to him about it, that he would see his partner, and would call plaintiff up over the phone, and plaintiff, not hear-

ing from him, took it for granted that they didn't want the land.

Yancey testified on behalf of the appellants that Bruce (appellee) had told him at the time of the Cain sale (in February, 1911) of his contract with Cain, and stated that he told Bruce that he could go ahead with the contract until they disposed of the place. "I told him at the time," says Yancey, "that until I did make some disposition of it, it was all right for him to keep it."

There was further testimony on behalf of appellee to the effect that in May, 1912, he spent four days weeding the meadow, and making it nice and clean; that Yancey was across on the adjoining forty acres, while plaintiff was weeding the meadow, but did not come over to where plaintiff was. He supposed that Yancey saw him. He was less than a quarter of a mile away, and it was perfectly level. One could see plainly a half a mile or a mile. Plaintiff was not disturbed in his possession until July, 1912, when Yancey, as agent for the Meadow Lake Farm Company, took possession of the hay. The plaintiff paid the rent for the year 1911, paying the same in November. He had not paid any rent for the year 1912.

The court, in part, instructed the jury as follows:

"If you find from the evidence, by a preponderance of the testimony, that the plaintiff continued to exercise control and possession of the strip of land in question during the year 1912, and went upon it and cleaned it up and harvested it, and that the defendant, or either of the defendants, had knowledge of his exercising the control and possession of this land, then you would be authorized to find for the plaintiff."

And, further, "If you find for the plaintiff, you will say, 'We, the jury, find for the plaintiff for the market value of the hay at the time it was taken, whatever it was, whatever the proof shows it was.' "

The appellants made a general objection to the instruction, and saved their exceptions to the ruling of the court.

The record shows that Mr. Jones, attorney for the

plaintiff, in his argument to the jury, stated, "Mr. Bruce testified that Mr. Yancey told him in November, 1911, that he could still go ahead with the contract," and when this statement was objected to by counsel for the defendant, and after the objection to same had been overruled by the court and appellants had saved exceptions to the ruling, Mr. Jones continued as follows: "I ask Mr. Bruce, now, in the presence of the jury, if that is not what he said," and Mr. Bruce, sitting by, in response to said statement, nodded his head affirmatively, to which the appellants objected, and, upon their objection being overruled, saved their exceptions.

Other objections were made to argument of counsel, which it is unnecessary to set out. The jury returned a verdict in favor of the appellee as follows: "We, the jury, find for the plaintiff in the sum of $320, the value of the hay." Judgment was entered in favor of the appellee against the appellants in the above sum, and the case is here on appeal.

Samuel M. Casey, for appellants.

1. The court's charge to the jury is clearly erroneous. If it be conceded that there was a contract between appellee and Yancey, it was oral and necessarily terminated with the year 1911. Moreover, there was no consideration passing to Yancey for the contract so as to make it binding. Besides not being the law, there is no evidence upon which to base that part of the instruction which permits the jury to find for the plaintiff on finding that he "continued to exercise control over the land for the year 1912," etc., and that the defendants, or either of them, had knowledge thereof.

The landlord of a tenant holding over after termination of a lease may treat him as a trespasser. 10 Am. Rep. 609; 14 Am. Rep. 890, notes.

The instruction as to the form of the verdict was manifest error. The verdict and judgment should be in the alternative. Kirby's Dig., § 6868; 65 Ark. 448; 50 Ark. 300.

2. The closing argument of counsel for plaintiff was

reprehensible and clearly prejudicial. 100 Ark. 107; 61 Ark. 130; 58 Ark. 353; 95 Ark. 233.

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

1. The court's instruction was right under the facts; but appellants, having tendered no instruction covering the points complained of now, and having raised no specific objections to the instruction as given, will not be heard to make specific complaint here for the first time.

2. Under the facts developed in evidence, there existed a tenancy from year to year, to terminate which notice was essential. Kirby's Dig., § 3664; Tiffany, Landlord and Tenant, § 241. But, even if appellee was only a tenant at will, he was entitled to the crop. Tiffany, L. & T., § 249; 71 Ark. 302.

3. Under the circumstances attending the interruption of the argument, there was no impropriety in plaintiff's counsel calling upon him for confirmation of the statement counsel had made. The court and jury remembered the testimony, and appellant could not have been prejudiced.

WOOD, J., (after stating the facts). Appellants' objection to the instruction can not avail for the reason that the parts of the instruction complained of were separate paragraphs of a general instruction, given of the court's own motion, which contains several paragraphs, none of which are numbered, but several of which contain correct propositions of law. The general objection to the charge as a whole, did not raise in the mind of the trial court the specific objection of which appellants now complain. Moreover, to get the benefit of their exceptions here, the appellants should have called the attention of the trial court to the alleged error of which they here complain. Also, we are of the opinion that the instruction, except as to the form of the verdict, when taken in connection with the evidence, was substantially correct, and could not have misled the jury. The court meant to tell the jury, in that part of the instruction objected to,

that if the plaintiff continued to exercise control over the land for the year 1912 with the acquiescence and consent of the appellants, that they would be authorized to find for the appellee. Upon the testimony tending to show that the appellee was in possession of the land for the year 1912, and that this was with the knowledge and consent of the appellants, the instruction was free from error.

There was testimony to warrant a finding that appellee, at the time the possession of the hay was taken from him, was holding the land under his contract for the year 1912. In other words there was testimony to warrant the jury in finding that appellee, under the contract, was a tenant from year to year.

But the appellants denied that there was any contract for the lease of the land to appellee for the year 1912, and the testimony in their behalf would have also warranted a finding to that effect. They contended that the contract with Bruce ended with the year 1911, that being a verbal contract for the lease of land, it could not last longer than the year 1911, and that the conversation that Yancey had with the appellee, in which he told him that he could go ahead under the contract with Cain until they disposed of the place, had reference to the lease of the land for the year 1911; that this conversation took place some time in February, 1911, and had reference to the rent for that year.

According to the testimony of Yancey, the conversation that he had with appellee in the fall of 1911 had reference to paying appellee for putting in the meadow. He says that he thought that appellee at that time had "thrown up his claim of lease," and was asking remuneration for his trouble and expense in putting in the meadow. Yancey stated that he did not know that appellee had been on the land weeding it out and cleaning it up in the spring of 1912.

In view of the controversy developed by the testimony as to whether Yancey had consented in November, 1911, for appellee to continue the contract for the year

1912, the argument of Mr. Jones was prejudicial. The time for the taking of testimony had closed. It was then a matter for the recollection of the jury as to whether witness Bruce, while on the stand as a witness, had made the statement attributed to him by counsel in argument. It was disputed by the appellants. Appellants contended that Bruce had made no such statement, and it was highly improper and prejudicial for the court to permit counsel to give his recollection of what the witness's testimony was, and call upon the witness, during his argument, to vouch for the correctness of his recollection by asking the witness if that was not what he testified to, and receiving an affirmative answer from the witness. This method of conducting an argument would necessarily result in great prejudice to the opposite party, who, at the time, had no opportunity to cross examine the witness on the matter about which he was being interrogated.

Even if counsel, in his argument, was not misstating the testimony, it would be giving the party he represented an undue advantage to have his statements, as he proceeded in the argument, corroborated by an affirmative and approving nod of the witness. Such method of argument is contrary to the order of procedure prescribed by our statute for the conduct of trials by jury, and should never be tolerated by the court. Kirby's Digest, § 6196. Prejudice must necessarily result in such procedure, for it is tantamount to having a witness, after the testimony is closed, repeat material parts of his testimony without any opportunity afforded the opposite party to cross examine or challenge the accuracy of his statements.

For this error, the judgment must be reversed and the cause remanded for a new trial.

FORT SMITH LIGHT & TRACTION COMPANY *v.* SCHULTE.

Opinion delivered October 27, 1913.

1. EMINENT DOMAIN—DAMAGES—SUFFICIENCY OF EVIDENCE.—**In a suit to condemn property, evidence held sufficient to warrant the verdict** assessing the damages. (Page 578.)
2. INSTRUCTIONS—WHEN AIDED BY OTHER INSTRUCTIONS.—**Although one instruction given might be susceptible of an erroneous construction, when all the instructions read together properly state the** law, no error will be held to have been committed. (Page 578.)
3. EMINENT DOMAIN—ELEMENTS OF DAMAGE.—When a railway condemned a right-of-way through appellee's land, damages may be awarded for the value of the land taken, and damages, if any, to the balance of appellee's land. (Page 579.)

Appeal from Sebastian Circuit Court, Fort Smith District; *Daniel Hon,* Judge; affirmed.

STATEMENT BY THE COURT.

This suit was brought by appellant for the purpose of condemning a right-of-way across a strip of land owned by appellees near the city of Fort Smith, in Sebastian County, Arkansas.

Appellees, in their answer to the petition for condemnation, set up that the location of the appellant's line of road and the shape of the land thereafter, the necessity for constructing additional fences, streets and crossings on account of the erection of the street railway track across the land, would damage the same in the sum of $3,000, and they prayed judgment for that amount.

Schulte, one of the appellees, testified: "I think we would have to fence the right-of-way on both sides, and put a road through the center of the farm to get back to the Jenny Lind road. I think the right-of-way through the entire farm where it is, ought to be worth $500 an acre. It leaves all of the high land on the east of the tract, and cuts off the low land. It would be a hard matter to sell the low land cut off from the high ground. The high ground would have sold the low ground."

A plat was introduced in evidence, and the witness pointed out on the plat the condition of his land before and after the railway track was constructed across the

same. He stated, among other things, that there was a cut of four and a half feet across the best ground; said that there was no public highway from the north side of the land to the land on the west side. Stated that they raised "a good many horses, hogs, cows and mules, and it would be hard to use the place for that purpose with the street car track there." He stated that he thought they should have $5,000 damages, including the right-of-way. He said the chief value of the land was because of its proximity to the city of Fort Smith. The street car track would injure the land for residence purposes. The land would sell for truck farming, but, by putting the street car on the low ground, they would never be able to sell the high land for residence property.

Other witnesses corroborated appellee, Schulte, as to the inconvenience in getting to the land by reason of the right-of-way of the appellant, and as to the damage caused thereby. One witness stated that he estimated the damage to the whole tract at $4,000 or more. Another witness stated that if the land were cut up into smaller tracts, it would sell for more than $300 an acre. One witness stated that the west side, lying between the Iron Mountain railway track and the street car track was flat and undesirable for residence property; that the best of the land was east of the street car track, and to get the best price, the good land must sell the bad. One witness stated that the road running through there "almost ruins the farm if a man wants to rent it out;" that the low land, on the west, had very little value disconnected from the high land on the east. The land would not be as valuable for truck farming, because of the street car track. Witness placed the value of the land taken for right-of-way at from two to five hundred dollars per acre. Including the damage to the farm by the running of the right-of-way through it, the total sum ranges from two to five thousand dollars, according to the testimony of the witnesses for the appellee.

This testimony was given by witnesses who had been on the land, and knew from personal observation as to

the damage caused by the right-of-way of appellant through the land.

The testimony of some of the witnesses on behalf of the appellant, on the other hand, tended to show that there was no damage to the residue of the land by reason of the right-of-way of appellant over it, and tended to show that the value of the land taken for the right-of-way averaged from $125 to $150 per acre. The quantity of land taken by the right-of-way was 1.8 acres.

In instructions numbered 2 and 3, the court told the jury, in part, that, "in determining the damages to the balance of the farm by reason of the taking of this road-bed, you should take into consideration the lay of the whole tract, and its location with reference to public roads," etc., specifying the various elements, as shown by the testimony, that the jury might consider in determining the amount of damages.

At the request of the appellant, the court instructed the jury, in part, as follows: "Your verdict should be for the plaintiff, condemning said strip of land for right-of-way purposes, and for the defendants and against the plaintiff for the value of the land taken, and damages, if any, to the balance of said tract of land."

Further, "In arriving at the amount of defendants' damages, you should allow them the fair market value of the land actually taken for right-of-way on the date that this action was commenced, together with the amount of damages to the balance of the tract, if any, owned by defendants and crossed by the said right-of-way."

The jury returned a verdict in favor of the appellees, assessing the value of the land taken at $600, and awarding damages to the balance of the tract in the sum of $1,500. The appellees remitted $200, and judgment was entered in their favor for the balance.

Hill, Brizzolara & Fitzhugh, for appellant.

1. The verdict is grossly excessive and shocking to one's sense of justice. There was no evidence to sustain it. There was also error in admitting evidence as to

the value of the land. The true test was the difference in value before the railway was built and afterward, leaving out of consideration the enhanced value on account of building the road.

2. The instructions *assumed* that the balance of the tract was damaged. This is error and invaded the province of the jury. The question, whether the land was damaged by the construction of the road, was not left to the jury.

A. A. McDonald and *Winchester & Martin,* for appellees.

1. It was the duty of the jury to weigh the testimony and give it such weight as it was entitled to. 30 Ark. Law Rep. 537.

2. There is no error in the court's charge to the jury as to the damages. Lewis on Em. Dom., § 656, note 73; 44 Ark. 106. The verdict is not excessive.

WOOD, J., (after stating the facts). The testimony on behalf of the appellees as to the value of the land taken for the right-of-way and the damages to the remainder by reason thereof was competent, and was sufficient here to sustain the verdict. See *Fort Smith & Van Buren Dist.* v. *Scott,* 103 Ark. 405.

Appellant complains that the instructions of the court assumed that the balance of the tract of land was damaged by the taking of the right-of-way and the construction of the street railway, and that, inasmuch as this was controverted by the testimony in behalf of the appellant, the instructions were erroneous and prejudicial. When these instructions are taken in connection with the instructions given at the instance of appellant, we are of the opinion that they could not have misled the jury, and that, they were not conflicting, but submitted the question to the jury as to whether the remainder of the land had been damaged.

In *Brinkley Car Works & Mfg. Co.* v. *Cooper,* 75 Ark. 325, it was contended that an instruction assumed the existence of a fact which was in dispute, and we held that, the instruction standing alone might be open to that

construction, but not so when read in connection with the other instructions, and that it would not be susceptible of the construction contended for by appellant.

So we say here, the instructions, when considered together, as they must be, are not contradictory, and they furnished the jury a correct guide as to the elements to be considered in determining the measure of damages in suits to condemn according to the rule that has been often announced by this court. *Stuttgart & Rice Belt Ry.* v. *Kocourek,* 101 Ark. 47, and cases there cited.

Judgment affirmed.

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

Opinion delivered October 27, 1913.

1. RAILROADS—IMMIGRANT CARS—CUSTOM AND USAGE.—Plaintiff, who was a caretaker, rode in an immigrant car with the live stock of the owner thereof, and was injured. *Held,* in an action by the caretaker against the railroad company for damages due to personal injuries while so riding, the custom of the railroad company to permit caretakers to ride in immigrant cars with stock may be testified to by any person who has knowledge of the custom; and testimony that such was the custom, if believed by the jury, will warrant the jury in finding that such was the custom of the railroad company. (Page 582.)
2. RAILROADS—RULES AND REGULATIONS—VIOLATION—ACQUIESCENCE.—Although it is the rule of a railroad company to prohibit a caretaker from riding in an immigrant car, and it was the duty of the train conductor to so notify the caretaker, and if the conductor saw the caretaker so riding and neglected to notify him to ride elsewhere, the jury will be warranted in finding that the conductor acquiesced in his riding on the immigrant car. (Page 583.)

Appeal from Greene Circuit Court; *W. J. Driver,* Judge; affirmed.

E. B. Kinsworthy, Campbell & Suits and *T. D. Crawford,* for appellant.

1. Opinions of witnesses are not admissible in evidence. The jury are as competent to pass on matters

of common, ordinary knowledge and give their opinion, as the witnesses who testified as to the necessity of some caretaker in the box car. 65 Ark. 98; 85 *Id.* 64; 82 *Id.* 214; 95 *Id.* 157; 97 *Id.* 180; 94 U. S. 469; 113 *Id.* 645; 118 Ga. 590.

2. Testimony as to custom is not admissible. 84 Ark. 389; 23 *Id.* 215; 62 *Id.* 1.

3. A passenger is bound to furnish the conductor evidence, beyond his own statement, of his right to passage on the car. 32 Am. St. 528. There is error in the court's charge.

W. W. Bandy, for appellee.

1. Evidence as to custom and the admission of opinions, even if erroneous, was not prejudicial. The law of this case was settled on former appeal. 105 Ark. 340. Evidence as to custom is often admissible. 158 S. W. 118.

2. The instructions, as a whole, correctly state the law. It is not error to refuse to *repeat* instructions, or fail to do so. 104 Ark. 489.

HART, J. J. W. Jameson chartered an immigrant car from the St. Louis, Iron Mountain & Southern Railway Company, within which to ship his household goods, including a milch cow and some chickens, from a station on its line of railroad in the State of Arkansas to another point on its railroad within the State. He placed French Loyd, his brother-in-law, in charge of the car, and Loyd rode in it for the purpose of milking the cow and taking care of her. While *en route,* a brake beam fell down upon Loyd and severely injured him, and he instituted this suit against the railway company to recover damages therefor. This is the second appeal in the case. The opinion on the former appeal is reported in 105 Ark. 340, under the style of *St. Louis, Iron Mountain & Southern Railway Co.* v. *Loyd,* and reference is made to that opinion for a more extended statement of the issues. Upon the retrial of the case in the circuit court, the jury again returned a verdict for the plaintiff, Loyd, and to reverse that judgment, the railroad company prosecutes this ap-

peal. On the former appeal, which is the law of the case, the court held:

"Where, in an action by a caretaker for injuries received in being struck by a falling brace while he was riding in a box car in charge of a shipment of live stock, there was evidence of a general custom for caretakers to ride in box cars, and that the conductor knew and assented to plaintiff so riding, it was a question for the jury whether plaintiff was negligent, though there was evidence that it was against the carrier's rules for a passenger to ride in a box car with live stock."

Upon a retrial of the case, the evidence in regard to the manner in which the plaintiff was injured, and the character and extent of his injuries was substantially the same as on the former trial. As no question is raised on this point, we do not deem it necessary to abstract the testimony in regard to it, but confine ourselves to the questions upon which the railway company bases its right for the reversal of the judgment.

At the request of the railway company, the court told the jury that the mere occasional violation of a rule by the company does not make a custom that will have force or effect; and also gave the following:

"Before custom would be deemed to give plaintiff any right to ride in the box car, such custom must have been brought to the actual knowledge of the officials of the defendant of higher authority than a mere conductor, and acquiesced in by such higher officials, or the violation of the rule and the existence of the custom must have been of such long and continued and general existence that such higher officials would be presumed to have acquiesced therein."

The plaintiff and two other witnesses for him testified that they had worked on the defendant's line of railroad, as well as other lines of railroad in the same section of the State, for the past six or seven years, and that it was the custom for a caretaker to ride in an immigrant car to take care of the stock placed in it, and that every few days they would see immigrant cars contain-

ing household goods and livestock going up and down the railroad, and that it was the custom for a caretaker to ride in the car and take care of the live stock; that this custom obtained as to immigrant cars, and did not obtain when cattle were exclusively shipped in a car.

On the part of the railroad company, it was shown by the trainmaster, conductor and one of its station agents, that, under the rules and regulations of the railway company, caretakers of immigrant outfits are permitted to ride free to care for the live stock, but that they are required to ride in the caboose, and that no conductor is authorized to permit a man to ride in the car with the stock, and that they had no knowledge of a custom permitting caretakers to ride in an immigrant car with the stock and household goods.

The plaintiff testified for himself, and said that it was warm weather, and it was necessary for him, or some one else, to be in the car to milk the cow and otherwise care for her. That he rode with the door of the car open. That the conductor knew he was to go along to take care of the cow, and that the conductor passed along by the side of the open door of the car, and that he was standing in the door, and saw the conductor, and supposed the conductor saw him. That at another stop, he saw the conductor standing near where a brakeman had been injured, and that he thought the conductor saw him at that time. The injured brakeman testified that he saw the plaintiff at the time and spoke to him, but did not know whether or not the conductor saw him. The conductor stated that he did not see the plaintiff, and that if he had done so, he would have ordered him back to the caboose.

Counsel for the railway company insist that the testimony of plaintiff and his witnesses in regard to the custom was not competent; but we do not agree with them in their contention. The existence of a custom of the kind under consideration in this case may be testified to by any person who possesses knowledge of the custom. The plaintiff and his witnesses testified that for several

years they had seen immigrant cars going up and down the railroad every few days, and that it was the custom for the caretaker to ride in said cars. This testimony, if believed by the jury, was sufficient to establish the custom, and the jury might have inferred from it that it had continued with such uniformity and for such a length of time as that the trainmaster had knowledge of it. See *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Wirbel,* 158 S. W. (Ark.) 118; 108 Ark. 437.

The conductor placed the car in his train, and does not deny but that he saw plaintiff at the immigrant car then in charge of it. He knew that plaintiff did not ride in the caboose, at least, the jury might have found from the attendant circumstances, that such was the fact. The jury then was justified in inferring from plaintiff's testimony, and the surrounding circumstances that he saw the plaintiff riding in the immigrant car, and acquiesced in his so doing. The conductor had sole charge of the train, and it was his duty, when he saw the plaintiff riding in the immigrant car, to notify him that it was against the rules of the company to ride there, if such was the case, and from the fact that he did not do so, the jury was warranted in finding that he acquiesced in his riding in the immigrant car.

Again, it was objected by counsel for the railway company that the plaintiff and Jameson, the owner of the goods shipped in the immigrant car, were permitted to testify that it was necessary for some one to ride in the car to milk the cow and care for her, because it was warm weather. Even if it could be said that this testimony was incompetent because it did not tend to establish a custom, we do not think it was prejudicial to the rights of the railway company. The instructions given by the court, both at the request of the plaintiff and of the defendant railway company, predicated the plaintiff's right to recover solely upon the existence of the custom above referred to, and on the further fact of whether or not the conductor knew that the plaintiff was riding in the immigrant car, and acquiesced in his so doing. The

question of the contributory negligence of the plaintiff was fully submitted to the jury in the instructions given by the court. Objections have been made by counsel for the railway company to certain instructions given by the court, but we do not deem it necessary to set them out. We have carefully examined the instructions given by the court and those refused, and we have reached the conclusion that the case was submitted to the jury upon the principles of law announced in our decision on the former appeal, which is the law of the case. The judgment will be affirmed.

NEDRY v. VAILE.

Opinion delivered October 27, 1913.

1. CORPORATIONS—DIRECTORS—RELATION TO STOCKHOLDERS AND CREDITORS.—The directors of a corporation stand in the relation of trustees to the stockholders and creditors of the corporation. (Page 590.)
2. CORPORATIONS—DIRECTORS—PURCHASE OF ALL ASSETS—FRAUD.—A purchase of all the assets of a corporation by a director is only to be voided for fraud at the instance of some party in interest. (Page 590.)
3. CORPORATIONS—SALE OF ASSETS TO DIRECTORS—FRAUD—JUDGMENT-CREDITOR.—A corporation owed certain *bona fide* commercial debts, and sold all of its assets to one of its directors for a good and sufficient price, and paid said debts with the proceeds. *Held*, in the absence of a showing of fraud the sale will not be set aside upon suit of a judgment-creditor. (Page 592.)
4. INSOLVENT CORPORATIONS—PREFERENCES—TIME OF OBJECTION.—A judgment-creditor of a corporation who fails to bring suit within ninety days after it has notice that the corporation had disposed of its assets to other creditors, is barred from setting aside the sale under Kirby's Digest, § § 949 and 951. (Page 593.)

Appeal from Sebastian Chancery Court, Fort Smith District; *J. V. Bourland,* Chancellor; affirmed.

STATEMENT BY THE COURT.

This is an appeal by plaintiffs from a decree of the chancery court in defendants' favor in an action brought by Annie Nedry and John B. Nedry against John Vaile,

John W. Vaile and Walton Vaile, to compel them to pay the claims of plaintiffs as creditors of the Fort Smith Automobile & Supply Company, a corporation, whose assets defendants are alleged to have absorbed. The complaint seeks to set aside certain conveyances made by the corporation to the defendants as a fraud upon the creditors of the company.

The Fort Smith Automobile & Supply Company was organized in 1907 with an authorized capital stock of fifteen thousand dollars, with eleven thousand dollars paid up. Subsequently, in the same year, the defendant, John Vaile, bought the stock of Sam McCloud and A. M. Sicard, in said company, amounting to six thousand dollars, and paid therefor the sum of $1.15 on each dollar's worth thereof. At the same time, the defendant, Vaile, agreed with Jim Kelley, Frank Blocker and Gus Bohmer, the remaining stockholders of the company, that if they would remain in the company, he would guarantee to pay them, at any time in the future, par for their stock with 6 per cent interest. The defendant, Vaile, assigned to his sons, John W. Vaile, and Walton Vaile, defendants in this action, one share of stock each, in order that they might become directors in said company. John Vaile was then elected president of the company, Walton Vaile vice president, and John W. Vaile secretary. In October, 1909, the defendant, John Vaile, ascertained that the company was insolvent, and, pursuant to the agreement made with Bohmer, Kelley and Blocker in 1907, he purchased their stock at the price which had been agreed upon. The First National Bank of Fort Smith, of which John Vaile was also a director, was the principal creditor of the company. On the 9th day of June, 1909, said bank loaned to said automobile company $9,936.33, and took its note therefor. Again, on July 6, 1909, the bank loaned to the company $2,122.15, and took its note therefor. On July 12, 1909, the bank loaned the company $2,625.25, and took its note therefor. Again, on July 20, 1909, the bank loaned the company $2,695.75, and took its note therefor. John Vaile became surety

on all these notes. The total amount of this indebtedness on the 1st day of November, 1909, was $13,802.07. This money was borrowed from the bank principally for the purpose of paying for automobiles purchased by the company. On November 1, 1909, said automobile company owed other commercial debts, amounting, in the aggregate, to $3,082.43, and to Gus Bohmer, for labor and salary, the sum of $316.21, and to John Vaile, for money borrowed from him to meet the payrolls, the sum of $932.71, making a total indebtedness due at the time of $18,133.42. At this date, the company had the following assets: Lot 9, in block 2, Elmwood place; and lot 3, in block 9, Fitzgerald Addition to the city of Fort Smith, Ark.; and also a lot of tools, supplies and automobiles in stock. For the purpose of paying the commercial debts of the company, its board of directors, by resolution in November, 1909, transferred these assets to John Vaile for the aggregate sum of $17,659.55. A deed was made to him to the lots above described, and the consideration therefor was $12,000. He paid $4,000 for the automobiles on hand, and $1,659.55 for the tools and other supplies in stock, and a bill of sale therefor was executed to him. Vaile sold lot 3 in block 9, Fitzgerald Addition to the city of Fort Smith, to one Woodson for the sum of $10,000. He sold the tools, etc., for the sum of $1,546.31, and the automobiles for $3,950. From the book accounts, he collected $163.24, making the total sum realized from the assets sold, $15,659.55. He paid out on the debts of the company listed above, the sum of $17,-659.55. This included $458.84 of the debt owed John Vaile, himself, by the company. The market value of the lot in Elmwood Place, according to the testimony, is $200. On the 15th day of February, 1910, the said company filed its annual statement, as required by law, signed by its president and attested by its secretary, in which it stated that it had no assets and owed no debts. On the 29th day of June, 1911, it filed with the county clerk and Secretary of State, the certificate required by law for the surrender of its charter. On August 19,

1908, the plaintiffs brought suit against said automobile company to recover damages for personal injuries which they alleged they had sustained by reason of the negligence of the servants of said company. On June 30, 1910, plaintiffs obtained judgment against the company in the circuit court in favor of Annie Nedry for $5,000, and in favor of John B. Nedry, in the sum of $20. An appeal was taken to the Supreme Court by said automobile company, but no supersedeas bond was given. The judgment was affirmed by the Supreme Court on the 30th of October, 1911. See *Fort Smith Automobile & Supply Co.* v. *Nedry,* 100 Ark. 485. On the 29th day of June, 1911, executions were issued on said judgment and returned unsatisfied on August 9, 1911, because the officer was unable to find anything to levy on. The present suit was instituted on the 23d day of November, 1911.

John Vaile was placed on the stand by the plaintiffs, and, after testifying that notes were given to the First National Bank to pay drafts drawn for Ford cars by the factory, there also appears in his testimony the following: "That there was no credits on the back of either of the notes given for the Ford cars in June and July, 1909, and he did not know what became of the cars, or what became of the money after they were sold." John Vaile also became a witness for the defendants, and testified that he bought the stock of Bohmer and others, as stated above, in pursuance of the agreement he had made with them in 1907; and in this he is corroborated by Bohmer and the other two stockholders. He further stated that in October, 1909, numerous claims were in the hands of attorneys, who were pressing the company for payment. That he made an inventory of the assets of the company, and found them to be as listed above. That a resolution was passed by the stockholders of the company authorizing the company to convey to him all the assets listed above for the price stated above, in order that he might pay the commercial debts of the company, and that the assets were devoted to that purpose, and that he lost $2,000 by the transaction because he was unable to sell

the lot in the Fitzgerald Addition for more than $10,000, and that this amount was the fair market value of said property. He also stated that he sold the automobiles and supplies on hand for their fair market value, and that $200 was the fair market value of the lot in Elmwood Place. That he paid all the debts of the company, except the claims of the plaintiffs in this action, and he said that was not regarded by the company as a debt or liability due by it, and that when he took over the assets of the company, he did not agree to pay it. At the time he took over the assets of the company, the claim had not been reduced to judgment.

Other facts will be stated or referred to in the opinion. The chancellor found that the price paid by said Vaile for the lots, tools and automobiles purchased by him from the company was their fair market value at the time, and that the sale was made in good faith, and was free from fraud. The complaint of the plaintiffs was dismissed for want of equity.

J. F. O'Melia and *Ben Cravens,* for appellants.

1. The assets of a corporation are a trust fund for the payment of its debts, and may be followed into the hands of any person acquiring them with notice of the trust. An officer and director of the corporation is presumed to know its pecuniary condition and his purchase of the assets will not be *bona fide* and without notice of the trust. 8 Pet. 281; 15 How. 308; 22 *Id.* 387; 7 Wall. 299; 7 *Id.* 392; 11 *Id.* 96; 16 *Id.* 390; 17 *Id.* 610; 91 U. S. 60; *Id.* 47; 101 U. S. 205; 103 U. S. 498; 38 Ark. 17.

2. The purchase of the assets of an incorporated company by a director thereof is voidable at the instance of a party in interest. 91 U. S. 587; 23 Ark. 622; Kirby's Dig., § 949.

Jurisdiction obtained by a court of all the parties and the subject-matter remains and is binding until reversed. 5 Ark. 424; 8 Ark. 318.

3. Corporations, whether private or public, are liable for their torts, and for the tortious acts of their ser-

vants while engaged in the company's business, in the same manner that individuals under like circumstances would be liable. 26 Am. & Eng. Enc. of L. 75; 100 U. S. 697, 100 Ark. 485.

4. If there was a preference made it was in secret, and there was no point of time, so far as outsiders were concerned, from which to measure the ninety days.

Appellants were in a legal sense such creditors of the Fort Smith Automobile & Supply Company at the time it disposed of its assets as to entitle them to participate in a *pro rata* distribution of the assets. 143 N. Y. 398; 2 Root (Conn.) 261; 2 Day (Conn.) 70; 37 N. J. L. 300; 81 Ill. 186, 25 Am. Rep. 276; 6 Ill. 397, 41 Am. Dec. 190; 83 Ind. 157; 62 N. E. 100; 51 O. St. 462-468, 38 N. E. 881; 25 Utah, 379, 71 Pac. 873-878; 107 Fed. 311-317; 63 Ark. 244. Appellants are not barred for failing to institute suit within ninety days after the company had transferred its assets. 63 Ark. 244; 67 Ark. 11.

Winchester & Martin, for appellees.

1. Directors may contract with the corporation just as any one else may do, provided the transaction is in good faith, for a fair consideration and is authorized by the board of directors. 150 U. S. 386, 37 Law. Ed. 1117; 71 Ark. 514; 128 Mo. 473; 157 U. S. 316, 39 Law. Ed. 716; 174 Mass. 224, 54 N. E. 532; 10 Cyc. 807, note 90, and authorities cited.

2. That the purchase of the assets of a corporation by a director thereof is voidable at the instance of a party in interest, is true if the sale is procured by fraud or misunderstanding, or without the action of a majority of the board of directors; but, as a general rule, directors have power to enter into contracts with their corporations. 10 Cyc. 794-4; 150 U. S. 386, 37 Law. Ed. 1117.

The statutory prohibition against giving preferences to creditors by corporations in this State extends to those preferences which are sought to be set aside by proper proceedings begun in the chancery court within ninety days after they are given. Kirby's Dig., § 951; 71 Ark.

514, 20 S. E. 765; 111 Fed. 782; 50 N. W. 1117; 150 U. S. 150, 37 Law. Ed. 1117, 150 U. S. 386.

3. The date from which the running of the ninety days limited by the statute is clearly fixed by the notices and certificate filed with the clerk and Secretary of State, by the record of the deed to Vaile, the *nulla bona* return of appellant's execution, etc. 67 Ark. 11. After two years' delay and the assets disposed of to pay creditors, it is too late to complain. Appellant's cause of action did not survive against a director after dissolution of the corporation. 143 N. Y. 398.

4. There is no direct trust or specific lien on the property of a corporation in favor of its creditors. 71 Ark. 514; 128 Mo. 473; 157 U. S. 316; 150 *Id.*, 37 L. Ed. 1117; 20 S. E. 765; 111 Fed. 782; 50 N. W. 1117. The company had the right to pay the bank, even though Vaile was an endorser on the notes, for the bank was neither a stockholder nor director. 34 S. E. 348; 29 *Id.* 27; 51 N. E. 642; 45 *Id.* 775.

5. Preferences of creditors by a corporation are not void under the act of 1893. 71 Ark. 515; 59 Ark. 562; 150 U. S. 37.

HART, J., (after stating the facts). It may be said at the outset that a director of a corporation stands in the relation of a trustee to the stockholders and creditors of the corporation. Some of the authorities hold that a purchase by a director of all the assets of the corporation is absolutely void, without regard to the good faith of the transaction, and that the property belongs to the corporation the same as it did before such sale. Our court has held, however, that such sale is only to be voided at the instance of some party in interest for fraud. *Jones, McDowell & Co.* v. *The Arkansas Mechanical & Agricultural Co.*, 38 Ark. 17; *Wesco Supply Co.* v. *El Dorado Light & Water Co.*, 107 Ark. 424. In the last mentioned case, the court held (quoting from syllabus):

"When one corporation of which A is the president, manager and owner of all the stock, sells all its assets to

another corporation of which A. is also president and manager and owner of four-fifths of its stock, and the new company issued its stock directly to A. in payment for the transfer, and A. knew that the old company was indebted to the plaintiff, and knew of the insolvent condition of the old company, *held*, the new company is not an innocent purchaser of the assets of the old company and is bound to the payment of the creditors of the old company to the extent of the value of the assets received therefrom, whether it agreed to assume the obligations of the old company or not."

In that case, however, it appears that the president and principal owner of the stock of the old corporation as well as the purchasing corporation was also the principal creditor of the old corporation, and that the assets of the old corporation were chiefly used for the payment of his debt, and the court held that under all the circumstances of the case the sale was fraudulent and could be set aside by a creditor of the corporation. Here the facts are essentially different. It is true that John Vaile was surety on the debt due the First National Bank, which was the principal creditor of the company, but he was not primarily liable for the debt. The testimony clearly shows that the Fort Smith Automobile & Supply Company was actually indebted to the bank in the amount claimed by it, and the mere fact that Vaile was surety for the debt is not sufficient to make the transfer of the assets of the corporation to him fraudulent. Vaile testified (and his testimony in this respect is not contradicted) that he paid the fair market value for all the assets of the company which were conveyed to him, and that the assets were conveyed to him, under resolution passed by the board of directors for the purpose of enabling him to pay the debts of the company, which he did pay, and which are listed in the statement of facts. These claimants were all *bona fide* creditors of the company, and the company actually owed them the amounts paid to them by Vaile. Vaile sold one of the lots conveyed to him by the automobile company for $10,000,

and he said this was the fair market value of the lot. So it will be seen from the statement of facts that Vaile lost $2,000 in the transaction and reaped no personal benefit from it. It is true that when placed upon the stand by the plaintiffs, the record shows that he stated that the money borrowed from the First National Bank was used in paying for cars consigned to the company, and that he does not know what became of the cars or the proceeds of sale thereof. When placed upon the stand by the defendants, however, he testified that some of the money arising from the sale of cars was used in paying the running expenses and the commercial debts of the corporation. He testified that he made an inventory of all the assets of the company and has accounted for these assets and the disposition he made of them. If it was thought or believed by the plaintiffs that assets belonging to the company had been concealed by Vaile or the other defendants, an effort should have been made by them to develop that fact. The present suit is not predicated upon the fact that any of the assets of the company were not accounted for, but is based solely upon the fact that the sale to Vaile was in fraud of the rights of the creditors, and on the further fact that under the laws of this State insolvent corporations can not prefer creditors. It will thus be seen that no attempt was made by plaintiffs to develop the fact, if such be a fact, that assets of the corporation were concealed by the directors and not accounted for. Hence, under all the circumstances, we think that the finding of the chancellor that the sale to Vaile was made in good faith for the purpose of paying the commercial debts of the corporation, and that the same was free from fraud, was not against the preponderance of the evidence.

Section 949 of Kirby's Digest provides that no preference shall be allowed among the creditors of insolvent corporations, except for the wages and salaries of laborers and employees. Section 951 provides, in substance, that every preference obtained, or sought to be obtained, by any creditor of such corporation, whether by attach-

ments, confession of judgment, or otherwise, and every preference sought to be given by such corporation to any of its creditors, in contemplation of insolvency, shall be set aside by the chancery court if complaint thereof be made within ninety days after such preference is given or sought to be obtained. In the case of *Dozier* v. *Arkadelphia Cotton Mill,* 67 Ark. 11, the contention was made that the preference by a board of directors of an insolvent corporation was not objected to within ninety days after the same was given, as required by section 951. The court held that the objection was not well taken, because the preference was made in secret and without knowledge of the party aggrieved, and that therefore there was no point of time from which to measure the ninety days. In that case, the directors of the corporation, by a resolution, provided for the sale of its assets and paid certain creditors to the exclusion of others, but there was nothing in the proceedings or transactions by which the creditor who was not paid could have ascertained that the corporation had disposed of its assets, and on this account the court held that the preference was made in secret and that there was no point of time from which to measure the ninety days, so far as outsiders were concerned, and no showing made that the plaintiffs in the action had notice of the distribution or payments made to the other creditors. Here the facts are essentially different. The corporation, by resolutions complying with the statutes, formally surrendered its charter, and after the plaintiffs had obtained a judgment in the circuit court and the case had been appealed to the Supreme Court, no supersedeas bond having been given, they caused an execution to be issued on the 3d of July, 1911, and the sheriff, on the 9th day of August, 1911, returned said execution unsatisfied, for the reason that he was unable to find anything to levy on. The present suit was not commenced until November 23, 1911. Under the authority of *Papan* v. *Nahay,* 106 Ark. 230, the plaintiffs were creditors of the corporation, but be-

cause they did not bring suit within ninety days after they had notice that the corporation had disposed of its assets to its other creditors, they are barred from setting aside the sale under sections 949 and 951 of Kirby's Digest. The decree will be affirmed.

BRADLEY LUMBER COMPANY v. LANGFORD.

Opinion delivered October 27, 1913.

1. LIMITATION OF ACTIONS—SEVEN YEARS' POSSESSION—PAYMENT OF TAXES.—Payment of taxes upon unenclosed and unimproved lands for a period of seven years in succession is not sufficient to give title by limitation, when suit is commenced by the true owner of the land, before the expiration of seven years, from the first payment. (Page 596.)
2. CLOUD ON TITLE—LACHES.—A suit to remove a cloud upon title of wild and unimproved land will not be barred by laches when suit is commenced by the true owner before defendant had paid taxes on the same for seven years, when the plaintiff had done nothing to indicate that he had abandoned the land except a failure to pay taxes for a long period of time. (Page 597.)
3. APPEAL AND ERROR—CORRECTION OF RECORD.—Where oral testimony was taken in a chancery case, but it was not brought into the record by a bill of exceptions, or other proper method, the chancery court can not, by *nunc pro tunc* entry, bring the oral testimony into the record by recitals in the decree of its recollection of the testimony. (Page 598.)

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

STATEMENT BY THE COURT.

This was an action instituted by appellees against appellants in the Bradley Chancery Court to cancel certain deeds executed by the State Land Commissioner to B. F. Gardner in 1903.

On February 10, 1858, J. R. Langford acquired title to the lands in controversy by patent from the State, based upon the swamp and overflow land act. Langford died on the 1st day of March, 1885, leaving surviving him appellees, as his only heirs at law. In 1869 the lands

were forfeited to the State for the nonpayment of taxes of 1868; and it is conceded that the forfeiture was void. On August 1, 1903, the State conveyed the lands to B. F. Gardner, and on the 3d day of August, 1903, Gardner conveyed the pine timber on said land to the Bradley Lumber Company. On the 4th day of August, 1903, he conveyed said lands to Lucy Ricks, one of the appellants. No taxes were assessed and paid on said lands from the time they were forfeited for the nonpayment of taxes for 1868 until the 25th day of March, 1905, when Mrs. Lucy Ricks paid the taxes on the same. She also paid the taxes in 1906, 1907, 1908, 1909 and 1910, and also paid the taxes on the 3d day of March, 1911. The present suit was commenced on the 25th day of April, 1911. The lands are wild, unenclosed and unoccupied and unimproved. The lands are chiefly valuable for the timber that is on them. When they were forfeited to the State for taxes in 1869, the lands were of very little value. In 1903 and 1904, one witness says the lands were worth about four dollars per acre, and another said they were worth five or six dollars per acre. In 1906, they were worth six or seven dollars per acre. Other facts will be referred to in the opinion. The court decreed that the title to the land was in appellees and ordered cancelled the conveyance to appellants and their grantors as a cloud on their title. The case is here on appeal.

D. A. Bradham and *B. L. Herring,* for appellants.

1. Appellees are barred by *laches.* 83 Ark. 162.

2. The court did not err in amending the recitals of the decree *nunc pro tunc.* 23. Cyc. 867; 141 Pa. St. 266; 21 Atl. 592; 70 Fed. 656; 17 C. C. A. 317; 99 Ark. 433; 51 *Id.* 287.

3. The court had the power to bring the oral testimony into the record by *nunc pro tunc* order. 48 Ark. 45-50; *Ib.* 60-65.

Mehaffy, Reid & Mehaffy, for appellants.

1. Equity will refuse its aid where one has slept on

his rights and acquiesced for a great length of time. 101 Ark. 230; 55 *Id.* 85; 95 *Id.* 7; 90 *Id.* 430.

J. R. Wilson and *Williamson & Williamson,* for appellee.

1. The court had no power to amend the decree by *nunc pro tunc* order, nor bring oral testimony into the record by recitals as to its recollection or knowledge. 23 Cyc. 880; 30 Cent. Dig. 623; 13 Cal. 107; 57 Ill. App. 688; 98 Ark. 269.

2. The testimony of the witnesses not having been preserved, every essential fact to sustain the decree will be assumed. 77 Ark. 195; 84 *Id.* 429; 83 *Id.* 424; 98 *Id.* 269; 81 *Id.* 428; 58 *Id.* 134; 45 *Id.* 240; 80 *Id.* 79.

3. There is no bar by laches. 83 Ark. 162; 102 *Id.* 61; Tiedeman on Real Property, § 739; 100 Ark. 582; 90 *Id.* 420; 90 *Id.* 500; 103 Ark. 251.

HART, J., (after stating the facts). It is conceded that the sale of the lands for the nonpayment of the taxes of 1868 was void. Mrs. Lucy Ricks, one of the appellants, paid the taxes for 1904 on March 25, 1905, and continued to pay the taxes for each successive year thereafter until the present suit was instituted, which was on April 29, 1911. In the case of *Updegraff* v. *Marked Tree Lumber Co.,* 83 Ark. 154, the court, in discussing the question of title acquired by payment of taxes on unimproved and unenclosed land, said:

"And we think it necessarily follows from that conclusion that there must be an unbroken possession for a period of seven years from the date of the first payment, and that the mere payment of taxes seven times is not of itself seven years' possession, where the possession is broken by the commencement of an action within seven years after the date of the first payment. We are therefore of the opinion that appellee failed to show title by limitation."

So here the lands were unenclosed and unimproved, and there was not seven years from the date of the first payment of taxes by Mrs. Ricks until the institution of this suit.

Appellants also invoke the doctrine of laches to bar appellees of their right of recovery in this action. It is true that appellees did not pay taxes on the lands after they were forfeited in 1869, and that they did not thereafter exercise any control over the lands until the institution of the present suit; but the lands were wild and unimproved, and there was no need or occasion for them to exercise any control over them. The mere fact that they did not pay the taxes and remained silent during all these years did not estop them from claiming title to the lands, or bar them of their right of recovery in this action. It is also true that the lands increased in value, and that this increase in value was partly due to the fact that appellants, and other sawmill companies, established sawmills in that part of the country, and for the further reason that a railroad was constructed there. Thus, it will be seen that the increase in value was common to all the lands in that part of the country, and was not due to any act of appellants exclusively in regard to the lands in question. Appellees did nothing to cause appellants to believe that they had abandoned their title to the lands or to induce appellants to purchase the same on the faith that they did not claim title thereto. Mere inaction on the part of appellees and the failure to pay taxes by them short of the statutory period do not constitute supervening equities calling for the application of the doctrine of laches. *Updegraff* v. *Marked Tree Lumber Co., supra,* and cases cited; *Chancellor* v. *Banks,* 92 Ark. 497; *Tatum* v. *Arkansas Lumber Co.,* 103 Ark. 251. Moreover, the decree must be affirmed for another reason. The recitals of the decree originally rendered in the chancery court shows that, in addition to the depositions and documentary evidence read in the cause, it was submitted upon the oral testimony of three witnesses. This oral testimony is not brought into the record by a bill of exceptions nor by any other proper method. Appellants sought to remedy that defect by a *nunc pro tunc* order made at a subsequent term of the court. By that order the decree is made to read as be-

fore with this addition: "And the oral testimony of these three witnesses was to the point, and only to the point, of identifying the records of sale of forfeited lands for taxes in 1868, set out above, so far as the court remembers." In the case of *Bradley Lumber Co.* v. *Hamilton,* 109 Ark. 1, 159 S. W. 35, this court said, in regard to a precisely similar contention, that the chancery court could not by *nunc pro tunc* entry bring oral testimony into the record by recitals in the decree of its recollection of the testimony. It follows that the decree must be affirmed.

BRADLEY LUMBER CO. *v.* HAMILTON.

Opinion delivered October 6, 1913.

APPEAL—SEPARATE ISSUE IN CAUSE—FINAL JUDGMENT.—Where the chancery court by its decree cancelled certain deeds purporting to convey lands to defendant, and adjudged title in plaintiffs, declaring a lien in defendant's favor for taxes paid, the decree is final, although a master was appointed to determine the amount of timber cut by the defendant, and the decree was rendered before the master made his report. The adjudication of the value of the timber is a separate issue, which the chancery court still has jurisdiction to determine.

Appeal from Bradley Chancery Court; *Z. T. Wood,* Chancellor; motion to modify judgment; overruled.

PER CURIAM.* The decree of the chancery court cancelled the deeds purporting to convey the lands in controversy to defendant and adjudged the title to the lands to be in the plaintiffs, but declared a lien in favor of the defendant for taxes paid, the amount of same being agreed upon by the parties. This part of the decree was a complete adjudication *pro tanto* of the rights of the parties and was final. *Davie* v. *Davie,* 52 Ark. 224; *Young* v. *Rose,* 80 Ark. 513. It does not fall within another line of decisions of this court holding judgments and decrees which are incomplete not to be final. *Har-*

*Opinion on motion to modify decree in *Bradley Lumber Co.* v. *Hamilton, Ante* p. 1.

gus v. *Hayes,* 83 Ark. 186; *Brown* v. *Norvell,* 88 Ark. 590; *Sennett* v. *Walker,* 92 Ark. 607. The decree went further and determined that defendant is liable to plaintiffs for the value of timber cut from the lands and referred the case to a master to determine the amount to be awarded as damages, and the appeal upon the first part of the decree was prosecuted without waiting for the report of the master to come in. That, however, was a separate issue which could be prosecuted to a conclusion while the appeal was pending here or after the affirmance by this court. The plaintiffs (appellees) now move this court to modify the judgment here so as to remand the cause for further proceedings. That is unnecessary for the reason stated above, namely, that the adjudication of the value of the timber is a separate issue which the affirmance of the original decree here does not affect, and the chancery court still has jurisdiction to proceed to a determination of that issue. The motion to modify the decree is, therefore, overruled.

APPENDIX

I.

IN MEMORIAM
JUDGE URIAH M. ROSE

Memorial resolutions presented in the Supreme Court October 20, 1913, by Hon. W. E. Hemingway.

May It Please Your Honors:

During your summer vacation, Judge Uriah M. Rose finished his work and passed quietly from among us. His long familiar presence will not be noted at your sittings, and he will answer to your roll-call no more. When the painful fact became known, his brethren of the bar met and adopted resolutions expressive of their sentiments, and designated me to present a copy to Your Honorable Court. They are as follows:

RESOLUTIONS OF THE LITTLE ROCK BAR ASSOCIATION.

On August 12, 1913, at an early hour of the morning, when all nature was at rest, the final summons came to Judge Uriah M. Rose, and he yielded up his spirit to his Maker, full of years and full of honors, after a long life of high endeavor, with a reputation for greatness as a jurist which went far beyond the confines of his city, or his State, or his country—for it was truly international.

And thus, outside of the irreparable loss which his taking away has caused, his brave, loving and faithful helpmate, and the esteemed members of his large family, his city, his State, his country and the nations of the earth will mourn his loss, as that of one who, in modest and retiring ways, and without political self-seeking, won the highest place among the ranks of men.

Since this is true, and since in His inscrutable wisdom an Almighty Power has thus called from our midst this distinguished citizen and lawyer, publicist and scholar, philanthropist and humanitarian,

Therefore, Be It Resolved by the members of the Bar of the City of Little Rock, That in the death of Judge Uriah M. Rose, the State of Arkansas has lost her foremost lawyer, whose absence from her tribunals and her walks of life will be profoundly felt, and whose counsel in times of storm will be sorely missed.

Resolved, Further, That in the death of this distinguished jurist, we recognize and acknowledge the creation of a vacancy which can not

be filled again in our day, for thereby the State has been deprived of her greatest citizen and the leader of the Bar of Arkansas.

Resolved, Further, That the sympathy of this Little Rock Bar Association be, and it is hereby extended to the widow, children and grandchildren, and other relatives of the deceased, and that, as a token of our respect for the deceased, a copy of these resolutions be sent to his widow and family, and a copy thereof be presented to the Supreme Court of the State of Arkansas by Judge W. E. Hemingway; also to the United States District Court for the Eastern District of Arkansas by Morris M. Cohn; and to the Pulaski Circuit Court and the Pulaski Chancery Court, sitting jointly, by John M. Moore, with appropriate remarks.

(Signed) MORRIS M. COHN,
GEO. W. MURPHY,
W. C. RATCLIFFE,
J. M. MOORE,
J. W. HOUSE,
J. W. BLACKWOOD,
Committee.

As appears from the resolutions, Judge Rose was distinguished for many qualities, and he merited it equally for the degree of their excellence and for their broad scope. His fame as a lawyer was national, and capable critics have called him the scholar of the American Bar. As widely as personal acquaintance with him extended, he was esteemed as a lawyer, scholar, publicist, humanitarian and man.

For two generations he was the recognized leader of the State Bar, and during the same period he was the most esteemed and best loved of our lawyers, by his brethren of the Bar and by the people generally who knew him.

Some misconception has existed, perhaps, as to the extent of his early advantages. The facts are, that they were meager, and that he was favored by no fortuitous circumstances. A frail physique was against him; and he had neither inherited property, family influence nor exceptional schooling; but his success was an achievement of his own personality, triumphing over great difficulties.

He was born at Bradfordsville, Ky., March 5, 1834, of Virginian parentage. During childhood he was delicate; as a man he was always frail. He was often seriously ill, and never felt that he could reasonably expect to live ten years. His mother died when he was twelve years old, and his father when he was but fourteen. His father was a successful physician and was a strong personality. But he had voluntarily liberated his slaves, and but a short while before his death had lost all his other property through the failure of a manu-

facturing firm in which he was a non-active partner; therefore he had no estate when he died. Judge Rose received no inheritance, and his schooling was limited to attendance upon the neighboring schools, prior to his father's death. After that, he was bound to earn his own livelihood, and he did it during the first year from work on a farm.

Already he wrote a plain and pretty hand, which enabled him to get work in the office of the clerk of the court at Lebanon, Ky. For three years he worked there, devoting his spare time to the study of the law, and made such progress that he graduated at the Transylvania Law School, at Lebanon, Ky., after an attendance of six months, and which conferred on him the bachelor's degree two years later. Attendance at the law school, which he provided for himself, and at the country schools, before his father's death, comprised his entire school advantages. The learning of his later life was the acquisition of untutored efforts.

His marriage to Miss Margaret T. Gibbs, of Lebanon, Ky., took place there on October 25, 1853, and very soon the young couple came to Arkansas and fixed their home at Batesville. There Judge Rose entered upon the practice of his profession; and there, among a people who were strangers to him, he laid the foundations of his career, destined to great length, honor and usefulness. After entering upon the practice, retainers came quickly, and such was his skill that more followed, and soon the young lawyer became noted as an unusual man. He attended the courts in that part of the State, rode the circuit with court officers and brother lawyers and was brought in contact with the heterogeneous people of a new country, of all kinds and of every variety of opinions and talents, in their natural and unaffected manner of living. This no doubt taught him many valuable lessons in human nature, and gave him an understanding of the aspirations, struggles and experiences of men, that broadened and quickened his sympathies throughout life. It certainly provided a fund of anecdote and reminiscence that gave charm to his conversation in later years.

In 1860 he was appointed chancellor of the Pulaski Chancery Court, which conferred the title by which he was called afterwards. Under usual conditions, this office would have afforded him the opportunity to show his judicial talent that, probably, would have caused his retention on the bench, of that or a higher court, and assured for him a distinguished career as a judge. But the conditions were unusual when he took office, and grew more so as his term progressed. At first, the State was agitated by the excitement that preceded the Civil War, and later by the war itself. He had a poor opportunity to do judicial work, and what was done had slight attention in the excitement of the times. Before the war ended his term had expired, the old order had been displaced and a new regime

inaugurated; so that he retired from the chancellor's office and, as the result proved, took final leave of the bench. That he would have made a great judge, and that his opinions would have won a distinction as unique as that enjoyed by any from the American Bench, can not be doubted. For he had the instinct of justice to enlighten his judgments; and his learning, industry and gift of expression have rarely been equaled and never excelled. He was a master in the use of classic English and in all his productions there is such brilliancy, perspicuity, terseness, simplicity and elegance, as is rare in the best writings of any time. But it was not in the plan of events that he was to remain on the bench; and if this is to be counted among the misfortunes of the war, it has its compensation in the fact that he was restored to the ranks of lawyers; and in the further fact, that the leisure afforded him by the war, gave an opportunity to pursue systematic and extended courses of reading and study, that made him a profound jurist and ripe scholar in later years.

On account of his official duties, he changed his residence, in 1861, to the town of Washington. In 1865, after his term had expired, he formed a partnership with ex-Chief Justice Geo. C. Watkins, for the practice of law, and removed to Little Rock, where they practiced in the firm name of Watkins & Rose. From that time to the end, a period of almost a half century, he resided continuously in Little Rock and was actively engaged in the practice until a few years ago, when declining physical strength caused his retirement.

The partnership of Watkins & Rose continued until the death of Judge Watkins; and after that, Judge Rose was the senior in other firms. Significant of his character is the fact that there was never a voluntary dissolution of a firm of which he was a member.

Most of the years of his long life were passed in Little Rock. They were years of maturity, and witnessed the activities and achievements that won his fame. His law practice was large and varied, and involved matters of every kind that entered into litigation concerning public affairs or individual controversies of the times. He was constantly engaged in attending to its demands, went to various courts held in the State, and conducted many trials. His practice in the Federal courts was extensive, and he often appeared and argued causes before the Supreme Court of the United States. Wherever he appeared, he received the attention and commanded the respect of the judges, and left a reputation for his personal culture and legal ability.

His demeanor in court, as elsewhere, was courteous, respectful, easy, unassuming and pleasing; he never infringed the proprieties, but instinctively conformed to all rules and usages. His statements of his cases and of the questions presented were clear, pointed, brief but complete. They omitted no essentials and included nothing that was immaterial. His arguments were short, to the point and not

encumbered by nonessentials or extraneous matter. He stated his points with perfect simplicity and clearness, and yet in such form as often carried conviction and made argument unnecessary. He grasped the salient features of the authorities he relied on, and by a terse and tactful statement of them, showed their application and controlling effect, without extensive explanation. And he often disposed, entirely, of the authorities relied on against him, by the same short and simple method of statement. He always saw things with absolute distinctness, and therefore communicated his ideas clearly and plainly, so that his meaning was at once apprehended.

His investigation of authorities was thorough, but his use of them, in brief or oral argument, sparing and judicious. Where authorities directly in point were available, analogies were not used, and when the former were numerous, he used only such as were best reasoned or of highest sanction. His talents had finest play in cases where there were no authorities directly in point, or where there was a fair division among them, and his cause was to be controlled by the weight of justice and reason. In them his profound knowledge and understanding of the law as a science, his powers of analysis, discrimination and reasoning constituted him a master in argument, with few rivals. He never wasted the time of the courts by citations that were pointless or superfluous, either to display the extent of his research or for lack of discrimination; but his only purpose was to sustain his position, and he was able to discriminate, and to put to the side, whatever was superfluous or inapplicable.

In the use of language, his skill was masterful. He expressed his thoughts, even to the nicest shades, in the fewest and simplest words, and the highest precision and elegance; and this talent was employed with equal facility in oral discourse or in writings. Wit, humor and a large fund of anecdote and interesting reminiscence, were ever ready for his use, and he employed them easily and with charming felicity, in oral addresses and briefs, as seemed desirable; but his use of them was only designed to brighten serious matter, or relieve the attention, and was little needed in a style naturally bright and animated.

His manner in speaking was unaffected and easy, and his voice was never pitched above a usual tone. His power lay wholly in his ideas and their expression. If brilliant ideas, lucidly expressed in terms of classic elegance, is eloquence, his addresses contained much eloquence; but he attempted it in no other way.

His practice was always general. He never specialized. He was open to employment by people generally, and never confined his services to a single clientage or class of clients. He was loyal and active within the scope of his employment, but never became the champion of his client outside of it. He never participated in any

of the animosities arising out of the controversies in which he was engaged, or permitted his employment to influence his attitude toward people, questions or measures. His individuality was personal, not professional; it belonged to him and not to anybody else, and he maintained its integrity with absolute independence and without any restraint from the opinions, interests or necessities of any one else, whether clients or not. He was open-minded, got light from every available source and formed his opinions and took his positions from the viewpoint of broadest general good. His evenly developed and well-rounded character required for its growth the open light, and could never have matured in any one-sided exposure. It is, therefore, fortunate that he avoided all narrowing influences.

He was economical of his own time and of the time of others; he was punctual in meeting all engagements; prepared his cases so as to be ready when they were reached in regular order; rarely asked a postponement, and never, when it was avoidable; and when a cause had been deliberately decided, he seldom asked a rehearing, and then only because he thought the decision had been rendered under a misconception as to the matter involved, or as to some controlling law or fact.

In most of the causes heard by this court, that involved important legal principles of general effect, during almost half a century, he participated as counsel, and the decision was made after a careful and learned exposition from his viewpoint. During the same period, public officers obtained his counsel with respect to matters of legislation and administration, and upon questions of all kinds that affected the wellfare of the State. And lawyers of the State took his advice on questions of every character that had interest for them, whether of law, ethics, morals, general knowledge or individual conduct. In every capacity his opinions were given with candor and after careful consideration, and the correctness of their content as well as his character and wisdom assured them great influence. So that by his arguments before the courts and by his counsel to others, and by the example of his life, the impress of his wisdom and learning and of his ethical and moral standards was idelibly made on the jurisprudence, on the legislative and administrative policies of State, and on the ideals, conduct and attainments of the lawyers. And through that impress, and those influenced by it, he will live as an active and efficient force, intellectual and moral, long after the last of those who knew him shall have followed him to the Great Beyond.

Perhaps as long ago as forty years, articles from his pen that showed thorough understanding of the law, wide general information and a scholarly literary style and finish, were published in leading law journals. They had national circulation among lawyers, and won him a requtation as an accomplished and great lawyer, which never declined.

If one is impressed by the position he attained as a lawyer, or as a scholar, or as a publicist, or as a citizen, how far more impressive is the fact that he won great distinction in so many capacities. He was a very busy lawyer, and it seems strange that he had time for other activities. But while he was attending, with skill and care, to the duties of his large law practice, he was engaging in many other lines of activity; he discharged all the duties that an eminent citizen owes to his State and community; he participated in all broad measures to improve the conditions or to develop the resources of the State; he bore his part in the business and social life of his city, and fulfilled all the obligations of neighbor or of friend. He took annual summer vacations for travel and recreation; he was up-to-date in his understanding of everything connected with the world's progress in learning and in the useful arts and sciences, and with the events of the day; and he maintained perfect familiarity with the current judicial decisions, with the changes being made in the law and with the development of the law as a progressive science, and his general reading and research was never neglected but always actively pursued. Ability to give any attention, at all, to the many things that he actually did, would have been remarkable; to have done them all with such excellence, is one of the most striking facts in his life.

In connection with the variety and extent of Judge Rose's achievements, it is proper to mention that he never appeared to hurry or to exert himself; that he went about everything calmly and easily, and found opportunity to undertake new matters as they came up.

His love of books was a passion, liberally indulged, but not to the exclusion of other means of enjoyment or culture. His miscellaneous library embraced more than eight thousand volumes, collected in small quantities, at intervals during his life, and represented every branch of literature. He was familiar with every volume it contained, that had substantial merit; and ability to acquire such familiarity disclosed the qualities of genius that differentiated him from talented men generally. He had matchless acumen, and his nerve endurance and mental persistence were most unusual. Combined, they constituted an intellectual entity, with almost unlimited capacity for quick work, continuing constantly, for a long time. He read with electric rapidity. A volume of large size was taken up after supper and finished before a seasonable hour for retiring. And this habit was not confined to light books, superficially read, but applied as well to thoughtful works, read thoroughly. And it was possible only because of his extraordinary acumen. His perceptions were instantaneous, and all his processes were so direct and clear that his mind kept pace with his eye, and took in the meaning of a page as rapidly as the eye went over it. His lucidity gave him the

similar faculty of plain, clear and concise expression, and he communicated his thoughts in few words and very brief time. Thus, through the faculty of acquiring knowledge and imparting his own ideas quickly, and of continuing to do so indefinitely, he possessed a practical efficiency and power to achieve results that I have not seen equaled. This faculty was exercised so quietly and unobtrusively as to escape casual notice, but its existence was manifest in the daily results of his labors. Let an actual incident illustrate what is meant. A man sent him a written statement of the facts on which two persons, whom he designated as A. and B. based conflicting claims to land, and asked whether A. or B. was entitled to it. Judge Rose read the statement and at once telegraphed his reply, consisting of the single letter B., and proceeded with other work. It was a complete reply to the question. Nothing that could have been added would have made his answer fuller; but any omission would have left it a blank. If it seems that a faculty which operates so simply does not amount to much, the truth is, that it signifies the highest degree of mental lucidity; and that those who have it, have the sunlight to work in, while those without it, work among shadows or in darkness. Judge Rose's genius was essentially the genius of light, not of strength.

Coupled with acumen, and utilizing its advantages, was the faculty of mental persistence, which never tired, or abandoned the quest of knowledge or the performance of mental work. They were continued steadily and systematically throughout his active life, and evidenced an unvarying degree of excellence. Although his physical strength was never great his nerve endurance seemed unlimited; and during spells of illness, when he was suffering from fever that would have thrown most men into a delirium, his mind was clear and active and he pursued his reading just as well. These are the qualities of transcendent intellect, which in the course of years, spell the difference between a great career and an ordinary life.

A very active and retentive memory was a valuable auxiliary to his higher qualities. During the years he was in active practice he kept perfectly familiar with the standard text books and with all the opinions of this court and of the Supreme Court of the United States, and with such of the opinions of other courts as decided questions of great importance and general application. When a question arose, he knew almost instantly whether it had been settled by any such opinion or text book; and if so, he remembered the general purport of the authority and the title of the case or book, which he could quickly find. Examination almost uniformly sustained his recollection of the content of the authority, as well as of the title. For accuracy in recalling the style of cases others have equaled him; but few, if any, have equaled him in holding in his

mind accurately and recalling correctly the content of an opinion or text book.

He held no office under State authority except the chancellorship; his only other office, conferred by President Roosevelt, was ambassador of the United States to The Hague Peace Conference, held in 1907. He never sought office, and he owed nothing to the prestige or powers of office for his fame. The achievement of great fame as a chancellor was denied him by the conditions of war at the time he was in office; and such as he won, was dimmed by the greater luster of his later distinctions; and his reputation had been won and fixed upon secure foundations, before his appointment as an ambassador, which was due to his fame, not the cause of it. His appointment was entirely upon the President's initiative, and the thought of his fitness for it is said to be traceable to an impromptu after-dinner talk, that the President heard him make at a luncheon here. It was so replete with wit, humor and happy illustrations, taken from the various fields of literature, sacred and profane, and withal so scholarly and felicitiously made, that the President at once recognized in him a very extraordinary man.

Public affairs possessed great interest for him and had his thoughtful consideration. He never failed to vote at party primaries or at a regular election, when it was practicable to do so.

He was a life-long Democrat, and believed in the fundamental tenets of that party, as reflecting the correct principles of government and as best calculated to promote general well-being. But his allegiance was held by the principles, and not by the name of the party; and when its representatives undertook to do what he believed would violate those principles, disregard national obligations and do a great wrong, he withheld his support. Under his sense of what national honor and personal justice exacted of a citizen, he would not countenance the accomplishment of what he deemed an outrage upon them; but with his faith in true democratic principles, he could not support a party that antagnoized them. So long as each party seemed to attempt a wrong, he supported neither. But when his own party returned to its true attitude, his allegiance to it was restored, and no one felt more profound gratification in the nomination and election of President Wilson and in the auspicious beginning of his administration. Reading *The New Freedom* afforded him much gratification and delight, and in it he saw the promised fulfillment of many reforms for which he had anxiously hoped.

And it may be interesting to state that he was a genuine reformer, and had favored every one of the great reforms which has met the approval of the best thought of the day or stood the test of trial, including reforms of legal procedure and practice, of the criminal codes, in the laws of married women, in the control of public utilities

and of large aggregations of capital exercising corporate powers. And he favored any reforms not yet accomplished that would promote justice or abrogate abuses, reduce suffering or increase comforts, or that would put more light into the lives of people generally.

He believed in popular government, conducted by the people governed, under the safeguards of time-honored constitutional restrictions. Government in the interest of any class or section, or of one people by another, was abhorrent to his sense of justice and right, and the policy of maintaining a protective tariff and governing foreign peoples as colonial dependencies excited his intense opposition.

Of course, such a man opposed war, as long as honorable peace was possible.

His understanding of important public questions and measures was up-to-date and thorough, and his opinions were mature and decided. At different times, when public interest centered about some matter that he deemed important, he participated in its discussion by published articles and addresses. They were characterized by a very clear exposition of the matter at issue, that made it easily intelligible, and by an interesting and convincing argument to maintain his side. In the campaign of 1888, which was educational on the subject of the tariff, he made an addres before a club in this city, which was not surpassed by anything contributed to that discussion, either for clearness in explaining the operations of a protective tariff, not then much understood, or for brilliancy in marshalling the arguments in favor of its reform.

So long as his strength permitted, he attended the public meetings held here to advance any worthy enterprise, and gave them his support in counsel, service and pecuniary contributions. Even when the burden of his own business was heaviest, he did not fail to carry his full share of the burdens of public enterprise.

He never sought prominence, but he did not decline a call to duty merely because it brought him into prominence. His varied talents and accomplishments often put his services under requisition that he gracefully honored. He was a delightful speaker, and could amuse, entertain or instruct, as he chose; and no one surpassed him in tender appeals to the sensibilities. In response to invitation, he delivered numerous addresses which, if collected, would constitute a literary treasure of brilliant thought, noble sentiment and finished composition. No better specimen of classic English could be found. It would not contain an unworthy suggestion, nor an obscure sentence, nor a qualifying parenthesis or "provided." He said just what he meant, and it was never necessary to follow a statement with eliminating clauses. He addressed the meetings of the bar associations of a number of States, and wherever he went he won lasting recognition as an accomplished lawyer, brilliant speaker and delightful personality.

He was one of the organizers of the State Bar Association, and also of the American Bar Association. Of the former he was the first president, and he was elected president of the latter in 1901. He attended many of the meetings of each association, served on important committees, read papers and took part in the discussions of the meetings. His services in every capacity were capable and useful, and he enjoyed the greatest respect and fondest affection of his associates.

An interesting fact in his career was the hold he had on the affections of people who knew him well. While others have received distinction and high honors, no one in the same circle has rivaled him in holding their affections. At the meetings of the State Bar Associations of late years, and at the last meetings he attended of the American Bar Association, he was the object of tender regard; his modest entry of the meeting place was greeted with applause; and as he sat in the hotel corridors, old friends and admiring strangers sought him out, to shake his hand and enjoy his genial presence. It was impressive to observe his kindly courtesy and simple modesty when receiving such attentions. He always rose to accept an extended hand, and stood while his visitor stood, even when the physical effort strained his feeble strength. No amount of attention, on any occasion, ever affected his simple modesty.

For many years a generous hospitality was dispensed at his home. Distinguished visitors were entertained there, friends were entertained at functions large and small, and to have a few to dine, or take tea, was of almost daily occurrence. He entertained as he did everything, without display but with elegance. A family of nine children were reared and educated, each fitted to take a useful position in life. He gave pecuniary aid to every worthy public cause, whether of religion, charity, benevolence, education or for public development. After meeting all such, and other, living expenses, the income from his practice was sufficient to give him an ample competency. And in this connection, it may be stated that his scale of charges for professional services was very reasonable, and his methods of collecting fees lenient.

His general learning was vast and profound, and his research extended to every subject of human interest and to every branch of literature.

In jurisprudence, his research embraced the civil and common law systems, and he had a general understanding of the systems in force in the principal continental countries. He was a jurist in the true sense; he had the instinct of justice, enlightened by research and matured by use and meditation.

Learning was not used as an ornament to adorn his oral or written discourse; but all his acquirements were placed together in the

crucible of his mind, and fused into a composite that constituted his sum of available knowledge; and what he used was the product of his own consciousness, refined by his own processes, not loose jewels taken from others.

Books were not the only source of his learning, but it was his custom for many years to spend his summers in travel, for the double purpose of relaxation from his regular pursuits and of extending his knowledge of peoples and countries. His travels covered this country and extended into many foreign countries. He visited the places where Nature has displayed its resources, its beauties, its wonders or its grandeur in striking form; and where the works of man best exhibited his skill and enlightenment in the various stages of his advancement. He learned the characteristics of different nationalities, types of mind and religious belief, and there were few things that entertained him more than his visits to the stall or shop of an humble peasant, to inspect interesting or curious wares, especially good old books.

But neither travel nor books satisfied his quest for knowledge, and he sought and obtained from association, contact with neighbors, friends, clients and people generally, in the various attitudes and relations of life, much, perhaps most, of his wisdom. He felt a deep concern in whatever affected the comfort, well-being or happiness of others, and he mingled with the people, came in touch with them and took part with them in dealing with the various things that affect their lives, whether of a business, social, political or other public character. It gave him an insight into the minds and characters of real, living men of flesh and blood, and gave him also the wisdom to adapt learning to their needs and conditions. If reading gave him extent of learning, and travel accuracy and thoroughness, association with men humanized it and fitted it for practical uses.

However much we may esteem him as a lawyer, or for his general learning and culture, those who knew him well will esteem most his lovable personality, the perfect blending of all his excellencies into an evenly developed, perfectly poised, rightly adjusted, strong and lovable manhood. Into it entered all the mental attributes, a brilliant intellect, sound reason, a strong will, faultless morals, refined tastes, a kind heart and a sunny nature. Of course, he had the cardinal virtues, such as truth, honor and respect for obligations, and he practiced them instinctively, because to disregard them was impossible to his nature. But he displayed the rarer virtues, that grow only in natures rich in humanities, and warmed by a kind heart.

A spirit of broad benevolence and philanthropy directed his conduct in all things, and gave tone to his demeanor always. As it determined his attitude upon general public questions, according as they were of general benefit, so, within the narrower circle of his own as-

sociation, the same spirit prescribed a course of action that regarded and protected the feelings and interests of every one within the circle of its influence.

In manner, he was gentle, courteous, agreeable and modest, and there was about his presence the genial glow of good humor and a kind heart, which was always pleasing.

He was patient and uncomplaining with others, and never showed irritation or found fault. If he ever gave offense or wounded the feelings of anybody, it is not known; and certainly the instances were rare and unavoidable. He made no enemies, for there was in his demeanor always so plain a display of good purpose, and such an absence of ill-will, that no one could take offense at what he did.

He was perfectly candid, always—often when the candor of most men would have given offense. But he was so gentle, so ingenious, so genuinely free of bad motive, and so considerate of the feelings of others, that what he did seemed a matter of course and was accepted without anger. At times, he seemed a consummate tactician, when in fact he did no more than exercise candor in the spirit of kindness. This was well illustrated, at times, when his support was sought by candidates for office whose qualifications he thought deficient. He never supported anybody under those circumstances, and he could decline a request candidly and promptly, yet with such obvious right purpose as made the applicant feel good. It has seemed, at times, that he could please a man more by his manner in declining to support him, than most of us could by giving our support.

The desire to give pleasure was shown by him, alike, in important and in apparently trivial affairs. When away on his travels, many friends were pleased by receiving some slight token of his thought of them. The courtesy due to invitations was never overlooked, and was often acknowledged by attendance at functions that he could not have enjoyed. He was thoughtful of his social and friendly calls, particularly calls of condolence or congratulation, or to bid adieus or extend a welcome; and his heart beat quick in the joys and the sorrows of friends, and he was sure not to omit a delicate expression of his sympathies. These incidents apply to what are regarded as the small things of life, which busy men are prone to neglect; but Judge Rose was punctilious in his thought of them, even after the decline of his strength afforded an excuse for neglecting them, if he had been willing to avail of one. Those little things are referred to, because it is the little things that indicate the real character.

A charm in which he was never excelled was his delicacy in all social and friendly intercourse. It was instinctive and never absent from his conduct. Whatever he did, or sought to do, for another, was undertaken with such delicacy, that one felt under no obligation

on accepting it, but rather, that it was a mere trifle that should be accepted to please him.

He appreciated his talents and what they signified, but he was the perfection of modesty, without a trace of arrogance or wish to make a display. He used his faculties to accomplish some end which he deemed worthy, but never to attract attention. Publicity was never needed to quicken his virtues to activities. A more unselfish nature never existed, and he was unselfish, equally, in affairs material and in the more delicate matters that immediately concerned himself. The highest distinctions to which men attain were not beyond his deserts, and he would have adorned any position; but he modestly did his work without asking recognition as a reward, content, apparently, to abide the results, and too modest to allege his own merit as the basis of advancement.

A kinder heart never beat, and it invested him with a pleasing, genial presence, the delight of any company and the joy of a small circle of congenial friends. He enjoyed those functions that brought neighbors and friends together for social intercourse, and his presence at them was much sought, since no company was dull to which he belonged. But the small circle of a few friends, enjoying a mild cigar, saw him at his best, and afforded him great enjoyment. In it, wit, humor, varied learning, bright repartee, apt comparison and striking illustration, sparkled in his conversation, while his demeanor bespoke good fellowship, a genial disposition, tender consideration of others, and supreme modesty. The effect of an evening so spent with him was an elevation of spirits, such as is felt on seeing a clever actor or listening to beautiful music.

For the unfortunates of the world he felt the most profound compassion, and met them with good humor and kindness. The destitute and needy found their way to his office almost daily, and he never refused to help them, or poisoned his gifts with intimations that they were unworthy. To a suggestion that it might be they put his gifts to bad uses, he replied that he did not know that, and would rather help the undeserving than refuse help to the deserving.

He was perfectly approachable to all who had any occasion to see him, and never embarrassed any one with a feeling of restraint. Persons often visited him to ask for information that interested them, but about which he had no concern; they were made to feel at ease and given the information if within his power. His lawyer friends will be unable to recall an instance when they called at his office and were not pleasantly received, invited to be seated and entertained during their stay, without any show of impatience from him; and he never turned to writing or reading or any other matter while their visits lasted. But while he was approachable to all, and cordial toward friends, he was reserved to a proper degree, particularly so about

himself and his achievements, and he had the dignity of deportment that becomes great characters.

His usual pursuits were serious, and he went about them in a serious manner; but in the intervals of leisure the light of his good humor came out, and the busy man appeared, in a moment, the pleasing associate. Pleasing good humor was his dominent mood when not at work.

In the rectitude of his own character, he viewed others most kindly. His judgment of men individually was charitable, though not blind; and he believed in the high average virtue of mankind, notwithstanding acts of personal offending, which he viewed as individual. Quite recently he said that, as he reviewed his long life, no reflection pleased him more than the fact that no man in whom he had put trust had ever proven to be unworthy of it. This is mentioned as indicating his kindly attitude.

Although charitable in his judgments, all his opinions of men or measures were formed carefully and deliberately, and by processes that were calm and free from prejudice. But when a conclusion was reached, it was firmly held, and not abandoned without convincing proof that it was wrong. He listened to the views of others who held different opinions, with great respect, but was influenced no further than he was convinced. He was, in fact, very independent and self-reliant in forming opinions, and seldom surrendered one. The calmness with which he maintained them was due to the general temper of his mind, and not to vacillation or lack of firmness, as all learned who ever tried to change him.

He was absolutely free from personal ill-will. He condemned misconduct, at times very strongly; but his condemnation was directed to the act and not to the doer of it.

As Judge Rose appeared, generally, so he was in the more intimate relations and stronger light of his own offices, throughout many long days of exacting labor. He was uniformly patient, good humored, courteous, kind, gentle, considerate of every one, and unselfish. He never inflicted pain or gave offense, and never showed dissatisfaction toward any one about him. This intimate asociation brought out in clear light his magnanimity and unselfishness. He never took to himself the credit of his own successes, or failed to commend the successes of others; and when defeat disappointed others, he did not overlook the tender office of extracting the sting of disappointment by the assurance that our part had been well done, and the result was due to causes beyond our control. And here, again, his tender concern for others was never wanting, even in the little things, but he was constantly smoothing the path of life by "small, sweet courtesies." He never failed to bid adieu or to express good wishes, to one leaving

the office, even for a few days; and, on the return, he uniformly came in to extend a welcome back.

I have spoken without extravagance of praise. None is needed in speaking of him; and in view of the delicacy of his nature and his regard for truth, none is admissible. What has been said, reflects opinions formed from an acquaintance of more than thirty years, during most of which we were partners and occupied adjoining rooms, with open door between. As those years are recalled and pass before me, not a single incident appears that derogates from the perfection of his kindness, gentleness or unselfishness. There is not a note of discord to mar the harmony of all his sweet associations. He stands out, the brightest intellect and the kindest, gentlest, most unselfish and lovable man I have known. And these are not the qualities of an amiable complacency, but of sterling virtues softened in the warmth of a humane heart, and directed by an exalted conscience.

His life was one of great activity, usefulness and distinction. His ideals were high, his conduct honorable. His impulses were generous, but perfectly controlled. He was the master of himself, and indulged no extravagances and did nothing small. His attitude was wholesome toward everything. He never entertained an unworthy purpose, or did a base act. A dishonorable impulse never moved his heart; a bad motive never inspired his action. There was no blemish on his character; there is no blot on his fame. He lived and died, true to his noble instincts and to every obligation to family, country and society.

In his marriage Judge Rose was exceptionally blessed. His wife brought, as a dowry, every attribute of womanly virtue and grace, the perfect complement of his own character. It would not be possible for two persons to be more congenial, and marriage was never blessed with more happiness. It was followed by almost sixty years of perfect companionship, and it seems impossible that he could have reached his ripe old age without her tender care, or that his faculties would have realized their full fruition without her gracious influence. For the completeness of his life and career, that remain as a legacy to all who succeed him, too much credit can not be accorded his good wife—a noble, saintly woman.

May It Please Your Honors, I now respectfully move that the resolutions of the Bar be spread upon the records of this court, as a perpetual testimonial of the virtues of one of its officers, whose illustrious career and spotless life gave renown to the State and add lustre to humanity.

II.

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