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IN THE

Supreme Court of Arkansas

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JUDGES AND OFFICERS

OF THE

SUPREME COURT

OF ARKANSAS

DURING THE PERIOD OF THIS VOLUME

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CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

DOKE, ADMINISTRATOR, *v.* BENTON COUNTY LUMBER COMPANY.

Opinion delivered July 6, 1914.

1. MECHANICS LIENS—HOW CREATED—NATURE—ENFORCEMENT.—Liens of mechanics and material men for work done or material furnished in the construction of an improvement are creatures of the statute creating them, and must be perfected and enforced according to its provisions.
2. MECHANICS' LIENS—NOTICE.—Ten days' notice before filing the lien must be given by any one seeking the benefit of the act establishing mechanics' liens.
3. MECHANICS' LIENS—LANDS IN HANDS OF ADMINISTRATOR.—The administrator of an estate is not the owner or proprietor of the lands of the estate, nor the agent of the heirs within the meaning of the statute relating to mechanics' liens.
4. ADMINISTRATION—RIGHT OF ADMINISTRATOR TO LANDS—FOR WHAT PURPOSE.—Lands and tenements are only assets in the hands of an administrator for the payment of the debts of the intestate, where the personal property of the estate is insufficient to pay the debts.
5. ADMINISTRATION—COMPLETION OF BUILDING CONTRACT—JURISDICTION OF PROBATE COURT.—Where deceased died leaving a building partially completed, the administrator is without authority to contract for the completion of the same, and the probate court is without jurisdiction to authorize the administrator to complete the building, and purchase materials therefor, upon which the material men could claim a lien upon the improvement.
6. MECHANICS' LIENS—MATERIALS FURNISHED ADMINISTRATOR.—There can be no material man's and laborer's liens upon an improvement, for material furnished and work done upon a contract with an administrator, made after the death of the intestate.
7. ADMINISTRATION—RIGHTS OF HEIRS—COMPLETION OF AN IMPROVEMENT—MECHANICS' LIENS.—The heirs have the right to the real property of an estate unless and until it is necessary to apply it to the payment of debts of the intestate, and it is not within the province

of the administrator to construct or complete buildings at the expense of the real estate, for which mechanics' liens can be fixed and enforced against it.

Appeal from Benton Chancery Court; *T. Hadden Humphreys,* Chancellor; reversed.

STATEMENT BY THE COURT.

This proceeding was begun to enforce liens for materials furnished for the building of a hotel on lots 123 and 124 in the city of Bentonville. Each of the appellees, the Benton County Lumber Company, the Builders' Supply Company and C. O. Mitchell, filed complaints on May 31, 1911, in the chancery court of Benton County, and upon hearing, the cases were consolidated.

R. D. Massey began the construction of a hotel in the city of Bentonville, and died November 7, 1909, before the building was completed. At the time of his death the building was enclosed, the walls finished, the roof on, rough floors laid, partition walls set and lathed, some plastering done, some of the tile floor was laid, and the work was progressing in different places. The heating plant and also the plumbing was virtually complete, and window frames were in and some of the sash.

W. J. Doke was appointed administrator of deceased's estate, and upon application for authority to do so, the court ordered "that W. J. Doke, administrator of the estate of R. D. Massey, deceased, be and he is hereby authorized and directed to carry out the construction contracts made by said deceased, for the benefit of said estate and to complete said building and to use and expend the funds in his hands for the purpose and in case the money in his hands is not sufficient to pay for said work, he is authorized and directed to borrow sufficient funds to complete the same and to pledge the assets of said estate for the payments thereof."

The Benton County Lumber Company alleged that it delivered and sold to the administrator between the 1st day of December, 1909, and the 4th day of May,

1910, certain lumber and building material to be used in the construction of a hotel building, for which a balance was claimed due on account of $1,227.25. The lien claim filed in the circuit clerk's office showed a like balance due for the materials furnished and the affidavit thereto stated that all the building material sold to Massey in his lifetime had been paid for up to December 1, and that the administrator was carrying out the contract of R. D. Massey to finish the hotel. Notice of the filing of the lien was given to W. J. Doke, administrator of the estate of R. D. Massey, and served upon him on the 26th day of May, 1910. On June 10, 1911, an amended complaint was filed making the heirs of Massey parties defendant, in which it was alleged that the plaintiff had sold certain materials to Massey during his lifetime to be used in the construction of a hotel, "and that after his death it sold and delivered to Doke, administrator of the estate of Massey, building material to complete the hotel, which material was sold between the 1st of December, 1909, and the 4th of May, 1910, being the same material as shown in the exhibit in the original complaint." It further alleged the death of Massey and appointment of Doke as administrator, and that the personal property of the deceased "is not sufficient to pay the debts of the estate, and the real estate was needed to pay such debts." Upon the filing of this complaint, a warning order was issued on June 10, 1911, against the heirs, made parties.

On July 15, 1911, the complaint was again amended to show that two of the heirs were insane persons without guardians or curators and others were minors without guardians.

Certain of the heirs appeared specially on August 28, 1911, and moved to abate and dismiss the action against them, and on that day service was quashed as to these heirs, and on November 27, 1911, moved to strike out the amended complaint, claiming it set up a new cause of action. The allegation of the amended com-

plaint that the administrator took charge of the real estate for the purpose of paying debts and that there was not sufficient personal property to pay the debts, was made December 2, 1911.

On January 13, 1913, the Massey heirs answered, admitting that defendants filed the lien set up in their complaint, but denied that it was properly verified, alleging that the affidavit was insufficient, and not in compliance with the statute, and that same was not filed within the time prescribed by the statute, and that suit was not commenced thereon against them until after the expiration of the fifteen months limited by law. Denied that the personal property was not sufficient to pay the debts and that the real property was needed for that purpose, and other allegations of the complaint.

The suit of the Builders' Supply Company was filed on the same day as that of the Benton County Lumber Company, with like allegations in its complaint; the materials being sold and delivered to the administrator between February 8, 1910, and May 6, 1910, and copy of the lien claim filed in the clerk's office was attached and also itemized account for $279.60. The same notice of lien as in the other case was served on the administrator, and the complaint was amended as in the other case, and the warning order issued for the defendants. The same proceedings were had as to the appointment of guardians, and motions to strike.

The suit of C. O. Mitchell was commenced on the same day as the other cases, and claims lien for work done and materials furnished for a balance due of $839.80. The lien claim filed in the clerk's office, made an exhibit to complaint, sets up that between November 1, 1909, and the 15th of June, 1910, at the instance of R. D. Massey, he performed labor and sold material for the construction of the hotel, as set out, itemizing it. He alleged the death of Massey and appointment of Doke as administrator, that he had carried out the contract with the deceased, and that he had given him ten days' notice

of his intention to file a lien. Subsequent proceedings were like those in the other two cases. The cases were consolidated upon hearing.

It appears from the testimony that R. D. Massey had begun the construction of a hotel during his lifetime, which was complete to the third story; that his brother, Frank, after his death, was in Bentonville, and they concluded it best to complete the hotel. The Benton County Lumber Company sold and delivered to the administrator the lumber for which it claims a lien for the amount set out in its account and complaint, charging it upon its books "The Massey Building, by W. J. Doke, Administrator."

No material was ordered by the administrator, but the dealings were had with Pace, who was superintendent of the construction of the building during Massey's lifetime, upon a basis of daily wages, and was continued by the administrator after Massey's death, upon the same terms.

A contract for the tile floors with C. O. Mitchell was in writing, and made July 5, 1909, during Massey's lifetime. Mitchell stated that he furnished the material and did the work according to the contract. Part of it was done before Massey's death and the remainder afterward. His account for the balance of $1,360.15 was presented and allowed February 18, 1910, by the administrator, and was presented, examined and approved by the probate court and classified as a fourth-class claim the 21st day of February, 1910.

The Builders' Supply Company sold Pace materials amounting to $286,45. There was no contract except as to some of the items, the others being ordered as they were desired and charged as furnished.

The administrator testified that he had known Massey for fifteen years during his lifetime, and had talked with him about the building of the hotel before it was commenced. He said he would build a hotel if the citizens would procure the lot, and did not expect any big

return for his money. That some of his relatives, his brothers and sisters, had written him admonishing him against it, but he said it was his money and nobody's business as to whether he invested in property that did not bring high interest. That Frank Massey, about the 17th of November, told him that he had been appointed administrator of R. D. Massey's estate in Missouri, and asked him to undertake the administration of the estate in Arkansas, which he agreed to do. Massey then suggested what lawyers he should have to advise him. Said further that it was the wish of the heirs that his brother's ideas be carried out as to the completion of the hotel. That after his appointment as administrator he proceeded to complete the building of the hotel and employed Mr. Pace, who superintended the work before Massey's death, to look after it. That Pace practically retained the same force he had, and he instructed him to go ahead as he had been doing.

The court decreed liens against the property for the amounts claimed, except in Mitchell's case, rendering judgment only for $40.60 therein, and from its decree the administrator and heirs appeal.

Ira D. Oglesby, for appellant.

Real estate is never assets in the hands of an administrator, and he has no authority to control it; neither has the probate court any authority to encumber it or permit its sale, except to pay debts when it is shown that the personal property is insufficient.

It is clear from the authorities that the administrator had no right to complete the hotel, and the probate court could confer no such right. No lien based upon claims for materials so furnished could be enforced. 52 Ark. 320; 74 Ark. 81; 83 Ark. 554; 102 Ark. 539; 27 Ark. 238; 73 S. W. 151; 81 S. W. 904; 128 Cal. 362; 56 Ark. 202; 43 Ala. 252; 39 Pac. 694; 30 Atl. 458; 4 N. H. 208; 2 Pac. 205; 144 Mo. 258; 36 N. J. Eq. 288; 62 Me. 305; 73 Cal. 335; 134 Cal. 220; Woerner on Administration, § 518.

No brief filed for appellees.

KIRBY, J., (after stating the facts). (1-2) The original complaints of the Benton County Lumber Company, the Builders' Supply Company and C. O. Mitchell, were filed May 31, 1911, and the affidavits filed in the clerk's office claiming liens stated that the materials furnished were sold to the administrator after the death of the intestate. Notice of claim of lien by the Benton County Lumber Company was given to the administrator on the 26th day of May, 1910, and the account and lien claim were filed with the circuit clerk on the 8th of June, 1910. Notice of claim of lien of the Builders' Supply Company was given the administrator on the 6th day of May, 1910, and their account for the amount claimed due was filed with the circuit clerk of Benton County on the 27th of May, 1910. The notice was given the administrator in the C. O. Mitchell case on the same day, and the lien claim filed with the clerk of the circuit court on the same day as in the Benton County Lumber Company case.

(3) Liens of mechanics and material men for work done or materials furnished in the construction of an improvement are creatures of the statute, and must be perfected and enforced according to its provisions. The work must be done or the materials furnished "under or by virtue of a contract with the owner or proprietor of the building or improvement or his agent, trustee, contractor or subcontractor," and every person except the original contractor, who would avail himself of the benefit of the mechanics' lien act, is required to give ten days' notice before the filing of the lien "to the owner, owners or agent, or either of them, that he holds a claim against such building or improvement, setting forth the amount and from whom the same is due." A just and true account of the amount claimed, containing a description of the property to be charged with the lien, is required to be filed with the clerk of the circuit court of the county in which the improvement is situated within ninety days after the work has been done or the materials furnished, and all actions to enforce the liens must be commenced

within fifteen months after the date of their filing with the circuit clerk. Kirby's Digest, § § 4970, 4976, 4981-84.

(4-5) The administrator of an estate is not the owner or proprietor of the lands of the estate, nor the agent of the heirs within the meaning of the statute relating to mechanics' liens. Lands and tenements are only assets in the hands of an administrator for the payment of the debts of the intestate when the personal property of the estate is insufficient to pay the debts. The complaints and the lien claims filed with the circuit clerk in two of the cases show that the materials for the completion of the improvement were furnished to the administrator after the death of the intestate, and upon contracts made with the administrator and not upon contracts with the intestate.

(6) The evidence is also virtually undisputed that the personal property of the estate was sufficient to pay the debts thereof at the time of the administrator's appointment, and the order of the probate court was made attempting to authorize him to complete the building. Under these conditions, notice to the administrator and the lien claim filed, showing the contract with him for the materials furnished, could not fix a lien against the improvement, and the administrator was without authority to contract and the probate court had no such power to authorize him to complete the building or improvement and purchase materials therefor, for which the furnishers could claim liens upon the improvement. Kirby's Digest, § 186; *Langston* v. *Canterbury,* 73 S. W. 151; Woerner on Administration, § 518; *Waldermeyer* v. *Loebig,* 81 S. W. 904; *Brackett* v. *Tillotson,* 4 N. H. 208.

(7) There was an attempt by amended complaint to allege a contract made with the deceased during his lifetime, but the claims for liens filed show that the materials were furnished to his administrator upon a contract with him after the intestate's death, and after the order of the probate court had been made attempting to authorize him to complete the building. The heirs have the right to the real property of an estate unless and until

it is necessary to apply it to the payment of the debts of the intestate, and it is not within the province of the administrator to construct or complete buildings at the expense of the real estate, for which mechanics' liens can be fixed and enforced against it.

Neither is C. O. Mitchell entitled to a lien against the improvement. The court below found that he did not file his claim and account for a lien with the circuit clerk within ninety days after the work was done and the materials furnished under his contract therefor made with the intestate, and dismissed his complaint without prejudice as to the amount due thereon, and this judgment was not appealed from. It also found that he had contracted with the administrator for and delivered materials to him which were used in the construction of the building, amounting to $40.60, for which it adjudged him a lien against the improvement. These materials were furnished upon the contract made with the administrator, and a lien was attempted to be fixed against the improvement by filing a claim therefor with the circuit clerk after giving the ten days' notice of his intention to do so. It falls within the rule already announced and the court erred in its decree.

None of the claimants were entitled to mechanics' or materialmen's liens against the improvement, and the court erred in not so holding. The decree is reversed and the cause remanded, with directions to dismiss the complaints for want of equity.

FROUG, SMULIAN & CO. v. OUTCAULT ADVERTISING COMPANY.

Opinion delivered July 6, 1914.

1. PRINCIPAL AND AGENT—UNAUTHORIZED ACT—SCOPE OF AUTHORITY—RATIFICATION.—A principal is not bound by the unauthorized act of his agent, where the agent acts outside the apparent scope of his authority; but he may ratify the agents' unauthorized act, and when he does so, he becomes as completely bound as if he had conferred upon the agent the authority to do the act in question.

2. PRINCIPAL AND AGENT—RATIFICATION.—The agent of appellant entered into a contract with appellee without authority to do so. Appellant, with knowledge of the existence of a contract, but without knowledge of its full terms, accepted some of the benefits of the contract. Appellant *held* to have ratified the whole contract.

Appeal from Pulaski Circuit Court, Third Division; *G. W. Hendricks,* Judge; affirmed.

STATEMENT BY THE COURT.

This was a suit by appellee against appellants on a written contract, dated September 9, 1909, for certain advertising cuts sold and delivered to them. Appellee relied upon its written contract for the sale of said cuts, which was signed by appellants "per Gavin," who was appellant's advertisement writer, but who had no authority to execute the contract, according to the evidence offered on behalf of appellants, and they further say the contract was never ratified by them.

The cause was tried by the court sitting as a jury and was heard upon substantially the following evidence:

A. Froug testified that he was a member of the defendant company, and that he did not make the contract, and the advertising man who made it had no authority to make it, and that he was unaware that it had been made until statements of the account were received, at which time Gavin advised him that appellee would furnish cuts for advertising for four weeks each month, but that they were to pay only for the cuts which were used, and that as the statements of account came in from plaintiff he would ask Gavin which cuts had been used and these had been paid for. Witness did not know whether the cuts were received at one time or at different times, but he received a statement each month from plaintiff, which statements included all the cuts furnished to the time of the rendition of the statement, and several remittances were made covering the cuts which had been used. Witness did not know there was a written contract until plaintiffs requested payment of the balance due, payment of which was refused, and a tender made of the cuts

which had not been used. Appellant's stenographer and bookkeeper also testified and substantially corroborated Mr. Froug.

It is not denied that appellants would be liable for the amount for which judgment was rendered, if the contract sued on was a valid and enforceable agreement, but appellant says they were not bound by the terms of this contract, because their employee who executed it had no authority so to do, and the contract was never ratified by appellants. Witness Froug admits the use of cuts after being advised of the existence of the contract, but it is insisted that there was no ratification, because Froug was misinformed as to its terms. Gavin was not in the employment of appellant at the time of the trial and did not testify.

The court found the facts to be, that Gavin had no authority to execute the contract, but appellants had knowledge that some of the cuts had been received and used in their business, and did not demand of or call upon appellee for a copy of the contract under which the cuts were sold and delivered, and that by their continued use of the cuts, and by their failure to disaffirm or deny the authority of their agent, they in effect ratified the contract made by him.

Under this finding of fact the court rendered judgment for the balance due upon the contract, and this appeal is prosecuted from that judgment.

Jos. Loeb, for appellants.

1. One who deals with an agent is bound to ascertain the nature and extent of his authority. A special agent must act within the scope of his powers. 55 Ark. 627; 92 *Id.* 315; 105 *Id.* 111; 81 *Id.* 202; 62 *Id.* 40.

2. Ratification of unauthorized acts of an agent, to be binding on the principal, must have been made with full knowledge of all the material facts in the case; ignorance of such facts render the alleged ratification invalid. 76 Ark. 563; 64 *Id.* 217; 11 *Id.* 189; 90 *Id.* 104.

Carmichael, Brooks, Powers & Rector, for appellee.

1. Appellant knew the cuts were being used, and having availed itself of the unauthorized purchase, there was a sufficient ratification to bind it upon the contract. 55 Ark. 240; 66 *Id.* 209; 31 Cyc., pp. 1257-8-9 and 60; 13 *Id.* 1257; 54 Ark. 240; 28 *Id.* 59.

2. There was no tender of the cuts, nor offer to return. 90 Ark. 530.

Jos. Loeb, in reply.

The question of tender was not raised below.

SMITH, J., (after stating the facts). (1-2) The principal, of course, is not bound by the unauthorized act of his agent, who acts without the apparent scope of his authority. But he may ratify his agent's unauthorized act, and, when he does so, he becomes as completely bound as if he had conferred upon his agent the authority to do the act in question. This is an elementary principle of the law of agency and requires no citation of authority to sustain it. Ordinarily, the principal is not held to have ratified the acts of his agent, if he is ignorant of his agent's action, but such lack of knowledge can not always afford immunity from liability, and does not do so at all, if with knowledge that an unauthorized contract has been made in his name, but without information as to its details, he permits its performance and enjoys its benefits. In 31 Cyc., p. 1257, it is said: "The lack of full knowledge (of all the facts), however, does not protect a principal who deliberately chooses to act without such knowledge, as where, knowing that he is ignorant of some of the facts, he has such confidence in his agent that he is willing to assume the risk and to ratify the act without making inquiry for further information than he at the time possesses, or where he deliberately ratifies without full knowledge, under circumstances which are sufficient to put a reasonable man upon inquiry." And again on the same page it was said: "Although a principal has an election either to repudiate or to ratify an unauthorized act of an agent, on his behalf, he can not

ratify in part or repudiate in part, but must either repudiate or ratify the whole transaction. He can not ratify the part which is beneficial to himself and reject the remainder; with the benefits, he must take the burdens. Thus, a principal can not ratify a contract made for him by an agent without also ratifying and becoming bound by the terms and conditions, although unauthorized, upon which it was made. * * *

"Accordingly, a ratification with full knowledge of part of a transaction in general operates as a ratification of the whole."

Appellants knew a contract had been entered into in their name and was being performed by appellee. A letter was introduced in evidence addressed by appellee to appellants, thanking them for their patronage, and this letter was notice that some kind of an order or contract had been made in their behalf, and that the cuts were being delivered in accordance therewith.

Upon being advised their employee had executed a contract in their name, without authority, appellants had the right to repudiate it; but they could not ratify it in part and repudiate it in part. *Daniels* v. *Brodie,* 54 Ark. 220.

Good faith required appellants to ascertain the terms of this contract, if they did not intend to repudiate it. A copy of it appears to have been left with appellants, but became misplaced, and another copy was promptly furnished upon a request therefor. Appellants say Gavin misinformed them as to the terms of the contract. Even if this be true, appellee was in no wise responsible for that fact. Gavin was never its agent and never undertook to act for it, but he became the instrumentality or agency by which appellant undertook to ascertain the extent to which he had contracted for them, and, under the circumstances, appellants must sustain the loss resulting from Gavin's deception or error. *Dierks Lumber Co.* v. *Coffman,* 96 Ark. 505.

Finding no error in the judgment, the same is affirmed.

PHILLIPS v. COLVIN.

Opinion delivered July 6, 1914.

HOMESTEAD—PURCHASE MONEY—EXECUTION.—C. purchased land from B., giving B. notes for the purchase price and moving upon the land and claiming it as his homestead. C. then borrowed from P. money with which he paid off B., giving P. notes for the amount borrowed. P. recovered judgment against C. on his notes and sought to levy execution on the homestead on the ground that the money borrowed from him was used in the purchase of the same. *Held*, the homestead was exempt from execution, the debt from C. to P. being merely a debt for borrowed money.

Appeal from Columbia Circuit Court; *W. E. Patterson*, Judge; affirmed.

STATEMENT BY THE COURT.

B. S. Phillips obtained judgment against J. C. Colvin in the circuit court in an action on debt for the sum of $253.18. Subsequently, an execution was issued upon the judgment and levied upon forty-seven acres of land belonging to Colvin. The latter, after giving due notice of his intention to do so, filed his schedule claiming said land as his homestead, thereby being exempt from execution. Upon the hearing, the circuit court sustained the schedule and issued a supersedeas. Subsequently, Phillips filed a motion in the circuit court to quash the supersedeas on the ground that the judgment upon which the execution was issued was for money loaned by Phillips to Colvin for the express purpose of paying the purchase price of the land levied upon, and that on that account the land was not exempt from execution as his homestead.

Colvin filed a plea of *res judicata*, in which he stated that Phillips had instituted an action against him in the chancery court to recover an amount of money which he alleged that he had loaned Colvin for the purpose of paying the balance of the purchase money due on his homestead, and in his complaint asked that he be given a lien on the land comprising the homestead of Colvin for the amount sued for.

The court sustained a demurrer to the complaint, and dismissed it for want of equity. No appeal was taken from the decree rendered. The present case was submitted to the circuit court on an agreed statement of facts, as follows:

The defendant, J. C. Colvin, purchased from H. A. Bryant forty-seven acres of land situated in Columbia County, Arkansas, and Bryant executed to him a warranty deed therefor. The consideration recited in the deed was two hundred dollars, evidenced by two notes for one hundred dollars each, due and payable some time thereafter, with interest at the rate of 10 per cent per annum. Colvin was unable to pay the purchase money when the notes became due, and he and Bryant and the plaintiff met together and Phillips loaned to Colvin the sum of $213 for the purpose of paying the purchase price of the land. Colvin at the same time paid the money to Bryant and executed to Phillips his note for $213, bearing interest at the rate of 10 per cent per annum. At the same time the note from Colvin to Bryant was destroyed. Colvin lived upon the land at the time he borrowed the money from Phillips and claimed it as his homestead.

The court overruled the motion of Phillips to quash the supersedeas, and from the judgment rendered Phillips has appealed.

W. H. Askew, for appellant.

1. Money borrowed of a third person for the purpose of purchasing a homestead and used for that purpose, is purchase money within the exception to article 9, section 3, Constitution. 66 Ark. 442-444, and cases cited; 10 Cal. 385, 70 Am. Dec. 740, 741; 99 Am. Dec. 571; 12 Kan. 570; 18 Kan. 521; 87 Am. Dec. 254; 39 Ga. 466; 13 Tex. 333; 46 Ga. 204; 53 Wis. 574-581.

2. The plea of *res judicata* can avail nothing in this case, unless the question raised in this case was raised or could have been raised in the former case tried in the equity court. The question in this case was raised for

the first time on the motion to quash the supersedeas. 76 Ark. 391; 62 Ark. 398; 36 Ark. 336, 343, 344.

Stevens & Stevens, for appellee.

The debt for which judgment was obtained was for money loaned, and not purchase money; hence, there could be no lien against the homestead. 72 Ark. 433. Authorities cited by appellant are not contrary to appellee's contention, but rather support it.

HART, J., (after stating the facts). Counsel for the plaintiff Phillips in his brief says that the sole question raised by this appeal is whether or not money loaned by a third person to the purchaser for the purpose of paying off the balance due on the purchase price of his homestead and used for that purpose is "purchase money" to such an extent as to come within the exception of section 3, article 9, of our Constitution? The section of the Constitution in question provides that "the homestead of any resident of this State who is married or the head of a family shall not be subject to the lien of any judgment or decree of any court or to sale under execution or other process thereon except such as may be rendered for the purchase money or for specific lien."

In the case of *Acruman* v. *Barnes,* 66 Ark. 442, Barnes borrowed from Acruman one thousand dollars for the purpose of purchasing a homestead and used it for that purpose, and the court held that money borrowed for the purpose of buying a home and so used is "purchase money" within the exception to article 9, section 3, of our Constitution.

In the present case, the facts are essentially different. Colvin executed his notes to Bryant for the purchase money of the land which subsequently became his homestead. When the notes became due he was unable to pay them, and borrowed the money from Phillips for that purpose. This was a debt for borrowed money, loaned, it is true, to pay for the land, but it is still a debt for borrowed money. The money was loaned by Phillips to Colvin to pay a pre-existing debt created for

the purpose of purchasing a homestead, and it was therefore a general loan. Phillips was not a party to the original transaction. This is the distinction made in the following cases: *Magee* v. *Magee,* 51 Ill. 500, 99 Am. Dec. 571; *Carey* v. *Boyle,* 53 Wis. 574; *Austin* v. *Underwood,* 37 Ill. 438, 87 Am. Dec. 254; *Eyster* v. *Hatheway,* 50 Ill. 521.

In the latter case, the court said:

"It was insisted that the money to secure which the deed of trust was given, was purchase money, and the premises, in any event, are liable to be sold for its satisfaction. If it were established that the money borrowed by appellant from appellee, was paid to Redick for the land, still it does not follow that it was purchase money. It appears that the premises were purchased of Redick, and the money for which this debt was incurred was paid on the last installment due on the purchase. The statute, in declaring that the homestead right should not be claimed against a debt due for the purchase money, obviously used the language in its ordinary and popular signification. All persons understand the term purchase money to mean the price agreed to be paid for the land, or the debt created by the purchase. It is not understood to mean a debt due another person than the vendor. In this case, the debt was created for money loaned and not for land purchased. Appellee sold no land to appellant, but he loaned him money. It could not matter, in this indebtedness, whether the money was subsequently paid for the same or other property. There is nothing in the case which shows the relation of vendor and vendee between these parties, and this provision of the statute only applies to parties occupying that relation, or those representing them, and for a debt created by the purchase of the homestead."

It is not contended by counsel for the plaintiff that he is entitled to be subrogated to the rights of Bryant under the principles of law decided in the case of *Rodman* v. *Sanders,* 44 Ark. 504, or *Carr* v. *Caldwell,* 70 Am.

Dec. 740, 10 Cal. 385, cited in their brief. Even, if this were a suit in equity and they made this contention, they could not successfully maintain it for the reason that it was within the issue involved in the chancery court instituted by the plaintiff against the defendant to have a lien declared on the land in question for the money loaned the defendant by the plaintiff. No appeal was taken from the judgment in that case, and, the plea of *res adjudicata* of the defendant would be a bar to the right of the plaintiff for subrogation.

It follows that the judgment must be affirmed.

PHOENIX INSURANCE CO. *v.* BANKS *et al.*

Opinion delivered July 13, 1914.

INSURANCE—FIRE INSURANCE—LIABILITY OF AGENT TO COMPANY—FAILURE TO COLLECT PREMIUM.—An agent of a fire insurance company accepted from the insured a lower premium payment than the insurance company authorized. The company directed the agent to collect the unpaid premium or cancel the policy; the agent did neither, and a loss by fire occurred. The company paid the loss to the insured. In an action by the company against the agent to recover the total amount of the loss, *held*, the company could collect from the agent only the amount of the unpaid premium which the agent failed to collect from the insured.

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

W. L. & D. D. Terry, for appellant.

1. The duty of an agent is to follow the instructions of his principal. 100 N. W. 526. Of course, an agent may show that the damages are nominal, or very small, but not by demurrer. Story on Ag. (8 ed.) 281. In this case, appellant had a right to show to a jury that, had its agents *demanded* the additional premium insisted on the appellant would not have remained bound upon this risk. 44 N. W. 372; 79 Ia. 245.

2. Where an agent violates, exceeds or neglects his instructions and loss results, he is liable. 92 N. W. 226; Story on Ag. (8 ed.), § § 217-219; 44 N. W. 372.

Wynne & Harrison, for appellees.

The instructions were equivocal, and the conduct of the agents was acquiesced in. If appellees are liable at all, they are liable only for the additional premium. 100 N. W. 526; Ostrander on Fire Ins. (2 ed.) 180; 71 Ia. 519.

McCULLOCH, C. J. The plaintiff, Phoenix Insurance Company, of Hartford, Connecticut, has been doing a general fire insurance business in the State of Arkansas, and defendants were its local agents at Fordyce, Arkansas, with authority to countersign, issue and deliver policies and contracts of insurance subject to the approval and instructions of the plaintiff.

Defendants issued to the Arkansas Lumber Company a policy of fire insurance in plaintiff company and delivered same with an endorsement thereon waiving, in favor of a certain railway company, a provision in the policy referred to as the subrogation clause. When the issuance of the policy with the endorsement thereon was reported to plaintiff, it wrote to defendants as its agents demanding that an additional premium of $30 be paid by reason of the endorsement of said waiver on the policy and that the policy be cancelled unless the additional premium be paid. The policy was not cancelled, nor was the additional premium paid. Repeated correspondence was pursued between plaintiff and defendants with reference to the transaction. The correspondence is set forth in the complaint in this action as part of the statement of facts, and shows that defendants were insisting that the additional premium be not charged for the reason that it would cause them to lose the patronage of that customer, and that plaintiff continued to insist upon the collection of the premium or the cancellation of the policy.

The policy was issued on December 22, 1911, and reported to the plaintiff shortly thereafter, and the insured property was damaged by fire which occurred on June 9, 1912, while the policy was in force.

The company made good the indemnity on account of the damage by fire, and this is an action instituted by plaintiff against defendants as its agents to recover the amount plaintiff was required to pay to the assured under the policy, and it is alleged in the complaint that the defendants wrongfully failed and refused to carry out the instructions of plaintiff as their principal and thereby caused loss to plaintiff in the sum paid out under the policy. The allegations of the complaint, after setting forth the facts as hereinbefore recited and the correspondence between the parties, are as follows:

"Notwithstanding the repeated instructions, given said defendants by and on behalf of said plaintiff, as aforesaid, said defendants negligently, wrongfully and wilfully failed to obey the same, and, believing that for them to demand or insist on any additional charge or premium for said waiver of subrogation, would mean the loss of that business, said defendants wholly failed to use due diligence to collect or demand any such additional charge or premium; and for purposes of their own, and in utter disregard of such instructions, negligently, wrongfully and wilfully failed to collect or demand any such additional charge or premium, or to endorse any such upon such policy, or cancel said policy, and thereby left said plaintiff bound upon said risk until said property was destroyed and damaged by fire on June 9, 1912, when plaintiff would not have been bound thereon, had said defendants obeyed said instructions or performed with due diligence their duty in the premises."

The defendants offered to confess judgment in the sum of $30, the amount of the additional premium demanded, and demurred to the complaint in so far as it sought to recover damages in excess of that amount. The court sustained the demurrer and rendered final judgment, from which the plaintiff has appealed.

The complaint undoubtedly states a case of wrongful act on the part of the defendants as agents of the plaintiff which caused injury; but the only question involved

in this case is as to what shall be the measure of the recovery.

The trial judge decided that the amount of the lost additional premium sought to be collected was the measure of recovery, and in this we think he was clearly correct.

It will be noted that the complaint does not state a case where the agent refused to comply with an unequivocal demand or instruction for cancellation of the policy, nor a case where the policy was wrongfully issued or permitted to continue on a prohibited risk; but the facts stated in the complaint are that the plaintiff demanded of the defendants that the additional premium of $30 be collected or that the policy be cancelled. This demand continued over a period of several months and until the fire occurred, nearly six months after the policy was issued. The plaintiff knew, according to the allegations of the complaint, that the policy was still outstanding and had never made an unconditional demand for its cancellation, but merely insisted upon the collection of the additional premium. In other words, the point of controversy between the plaintiff and defendants was concerning the collection of the premium and the violated instructions related to that point only. It is true, according to the allegations of the complaint, there was a demand that the policy be cancelled unless the premium should be paid, but that was only for the purpose of forcing the collection of the premium. Plaintiff did not desire the cancellation of the policy; if it had it could easily have insisted upon immediate cancellation as it had the right to do; but with the knowledge that the agent had neither collected the premium nor cancelled the policy, it continued to couple together the alternative demand for the collection of the premium or the cancellation of the policy.

It is argued that the plaintiff was entitled to show that, if the demand for the premium had been insisted upon, the assured would have refused to pay and would

have forfeited the policy, and that thereby the risk would have been avoided.

The answer to that is that, if cancellation had been sought, the more direct method would have been adopted of merely demanding unconditional cancellation of the policy.

Learned counsel for plaintiff rely upon the case of *State Ins. Co.* v. *Jamison,* 79 Ia. 245, as sustaining their position.

That case, however, announces a very different principle and one which has no application whatever to the facts of the present case. In that case, the defendant, an insurance agent, issued a policy but wrongfully or negligently withheld from the company a report which would have contained matter that afforded ground for cancellation. In other words, the matter contained in the withheld report made the risk a prohibited one. The plaintiff offered to prove that if the report had been made, disclosing that information, the policy would have been cancelled, and the court held that the proof should have been admitted and that it would have established the fact that the wrongful act of the agent was the proximate cause of the loss to the company under the policy, which it would have cancelled if it had known the facts, and that the agent was liable.

We have a very different case before us in the present one. This was not a prohibited risk, and it was one which the plaintiff, not only was perfectly willing to carry, but repeatedly expressed its willingness to do so in the correspondence.

By merely insisting on the collection of the additional premium under those circumstances, it would be carrying the rule of measuring damages beyond that which was reasonably within the anticipation of the parties to hold that the agent is responsible for a loss by fire which occurred during the continued existence of the policy.

Mr. Ostrander states the rule applicable as follows:

"Where a risk is of a class that a company is accustomed to write, but which it has accepted at a lower rate of premium than should have been paid, having been misled as to its true character by the representations of the agent, the measure of the agent's liability on the destruction of the property by fire is not the sum which the insurer will be required to pay claimant in settlement of the loss, but such sum as expresses the difference between the premium actually paid and such premium as might fairly have been demanded on a correct representation of the hazard." Ostrander on Fire Ins. (2 ed.) 180.

We are of the opinion that the court took the right view of the law applicable to the facts stated in the complaint and that the demurrer was properly sustained. Judgment affirmed.

BOAZ v. COATES.

Opinion delivered July 13, 1914.

1. STATUTES—IMPLIED REPEAL.—Act of March 3, 1913, providing for the publication of notices of public improvements does not expressly repeal act of January 30, 1913, which amended Kirby's Digest, § 5685, but being the last expression of the will of the Legislature on the subject, it operates as an implied repeal of those statutes.
2. MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENT—PUBLICATION OF ORDINANCE.—The act of March 3, 1913, p. 527, providing for the publication of notices relating to local improvement districts, *held*, to govern the publication of an ordinance levying assessments for improvements already constructed.
3. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENTS.—Where the proceedings for the laying of sidewalks by an improvement district in a city were regular up to the publication of the ordinance levying the assessments, the fact that the ordinance was invalid, will not prevent the city council from passing a new ordinance, and publishing it in accordance with the laws then in force.
4. MUNICIPAL CORPORATIONS—SIDEWALKS—ASSESSMENTS.—The assessment for laying a sidewalk, can not be defeated because the grade had not been established, although the property owners might by injunction have prevented the construction of the improvement.

Appeal from Lawrence Chancery Court, Eastern District; *Geo. T. Humphries,* Chancellor; affirmed.

John S. Gibson, for appellants.

1. The ordinance was not properly published according to the Ordinance No. 57. The Legislature never amended the section as to notice. Kirby's Dig. 5688; 110 Ark. 544. The act of 1913 did not legalize or cure acts of officers acting without authority under void ordinances of a city. 59 Ark. 544.

2. Kirby's Dig., § 5672, is mandatory. 97 Ark. 334-340. The objections were made in apt time. *Ib.* 344. It can not be ignored. The statute *requires* a *grade* for the work. See 83 Ark. 340; 68 *Id.* 273; 97 *Id.* 334; 67 *Id.* 30; 104 *Id.* 301; 59 *Id.* 344.

Cunningham & Blackford, for appellees.

Kirby's Digest, § § 5677-8-9 and 5680, settle the questions as to assessments, notice, etc. The grade was established as prescribed by law. 97 Ark. 334-340 settles the point conclusively.

McCULLOCH, C. J. Appellants were the owners of real property in the incorporated town of Hoxie, Arkansas, and this is an action instituted against them by the board of improvement of a district formed for the purpose of constructing sidewalks. The property of appellants is situated within the district and has been assessed, and the purpose of this action is to enforce the payment of the first assessment.

A similar suit between these parties was formerly here on appeal, and we held that the improvement district had been legally formed, but that the ordinance levying the assessments on the property was void on account of not having been published in accordance with the terms of the statute. *Gibson* v. *Incorporated Town of Hoxie,* 110 Ark. 544.

After that decision a new ordinance was passed levying the assessments, and it was published in accordance with the act approved March 3, 1913, which provides that

"where improvement districts are organized in any city or town in which no newspaper is regularly published, all notices required may be published in any newspaper that is published and has a *bona fide* circulation in the county." Act 125 of Acts of 1913, § 5, p. 527.

An earlier statute, approved January 30, 1913, contained a provision that "where no newspaper is published in such town or city, such publication may be made in some newspaper published in the same county and having a circulation in such town." Act 5 of 1913, p. 27.

(1-2) But the act of March 3, 1913, operated as an amendment of the former act, and is the last expression of the lawmakers on that subject. The latter act contains no express amendment or repeal of the act of January 30, 1913, nor of section 5685, which that act amends; but it contains the broad language that "all notices required may be published," etc., in the manner indicated; and that covers all notices necessary in the formation of districts and proceedings thereunder. The new statute in this respect related only to a method of procedure and applied to districts already formed. The act of March 3, 1913, must, therefore, control in the present case.

The fact that the work of the assessors was done prior to the passage of the ordinance which was held invalid in the former case and prior to the passage of the new act referred to herein does not affect the validity of the new ordinance and publication thereunder. The whole proceedings, so far as this record shows, were valid up to the publication of the former ordinance, and it was only the ordinance itself levying the assessment which was invalidated by reason of the failure to publish the same in accordance with the statute. The ordinance was merely void, and it did not affect the power of the city council to pass a new ordinance and cause it to be published in accordance with the statute in force at the time of its passage. It is shown by the affidavit of the editor that there was publication of the present ordinance in accordance with the terms of the new statute.

(3) The principal contention of appellants for reversal of the cause is that the ordinance was not properly published; but it is also urged that the assessments are not enforceable for the reason that there has been no ordinance of the town establishing the grades of the streets.

That question, however, is ruled by the case of *McDonnell* v. *Improvement District,* 97 Ark. 334. In that case we said:

"It is time enough for the property owners to complain when the work is about to be done, without reference to the establishment of a grade by the city."

(4) The property owners have the right to prevent construction of the improvement in violation of law and may seek injunctive relief from the chancery court where the commissioners are about to violate the law on that subject; but the mere fact that the grade has not been established does not afford any defense against the payment of assessments validly laid.

The other questions argued are not of sufficient importance to discuss.

The decree is affirmed.

INTERNATIONAL LIFE INSURANCE CO. *v.* VAUGHAN, RECEIVER.

Opinion delivered July 13, 1914.

1. PREFERENCES—INSOLVENT CORPORATIONS—"IN CONTEMPLATION OF INSOLVENCY."—In order to avoid a transfer or preference made by a debtor in contemplation of insolvency, within Kirby's Digest, § 951, the debtor must have been, in fact, insolvent under the terms of the statute at the time of the transfer, and there must have been in his mind an expectation or design that he would make an assignment or commence proceedings in insolvency.
2. PREFERENCES—INSOLVENT CORPORATION.—In order to avoid a preference under Kirby's Digest, § 951, the person to whom a preference has been given must have had reasonable cause to believe that the debtor was insolvent at the time.
3. PREFERENCES—CONVEYANCE BY INSOLVENT CORPORATION—KNOWLEDGE OF TRANSFEREE.—Appellant held a certificate of deposit in a bank and loaned the bank an additional sum, taking a deed of trust

covering the whole indebtedness. The bank was insolvent at the time the deed of trust was executed and delivered, but no one knew it except the managing officer of the bank. *Held*, the transfer was not a preference that could be set aside under Kirby's Digest, § 951, as the appellant acted in good faith and had no knowledge of the bank's condition.

4. CORPORATIONS—AUTHORITY OF OFFICERS—EXECUTION OF DEEDS.—A corporation will be bound by the deed of its officers when the evidence shows that the officers were in the habit of making such deeds, and the same was authorized by the by-laws.

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

STATEMENT BY THE COURT.

This suit was instituted by the appellee, as receiver of the Valley Savings Bank, against appellant and others to cancel certain conveyances which he alleged constituted an unlawful preference in favor of certain creditors of the defunct bank. The facts are substantially as follows:

The Valley Savings Bank was engaged in the banking and real estate business in the city of Argenta. The International Life Insurance Company held certificates of deposit of the bank amounting to $9,000. In June, 1913, W. W. Hurst, the president of the bank, applied to appellant for a loan of $10,000. He stated that a customer of his bank, who had on deposit large sums, intended to withdraw about $12,000. To supply the cash reserve with the necessary funds, the bank needed the additional amount which it sought to borrow from the appellant. Hurst, also fearing that the appellant would call for the amount of its certificates of deposit, was anxious to arrange with appellant to postpone demand for the amount of these certificates until the first of December, 1913. In order to induce the appellant to comply with this request of Hurst, he represented that the bank was perfectly solvent. The appellant sent representatives to Little Rock to look into the situation and to ascertain whether or not it would loan to Hurst the amount of money he desired and extend him the time for

the payment of the certificates of deposit as he requested. After discussing the matter with Hurst and other parties and making such examination as they could, and after satisfying themselves as to the security offered, the representatives of appellant agreed with Hurst that appellant would let the Valley Savings Bank have $5,000 cash, the bank to execute its obligation for the sum of $14,000, the said sum representing the total amount of the certificates of deposit, with interest, and the cash to be advanced. Hurst agreed to execute a deed of trust upon certain real property situated in Little Rock, Argenta and Hot Springs, which he claimed he owned in his individual right.

The note for this $14,000 was executed on June 14, and the deed of trust, conveying the property therein mentioned, was executed June 16, 1913. On the 20th day of June, 1913, one of the stockholders of the Valley Savings Bank instituted proceedings to have the bank declared insolvent and a receiver appointed to take charge of its assets, which was done.

The receiver brought this suit against the appellant and others, alleging the insolvency of the Valley Savings Bank, and that the appellant knew of such insolvency at the time the conveyance sought to be set aside was executed; that Hurst and Strickland, who were president and secretary, respectively, of the Valley Savings Bank, were also officers and directors of the appellant; that because of their interest in the appellant company they executed the deed of trust mentioned for the purpose of giving the appellant an unlawful preference over the other creditors of the defunct bank.

The appellant denied the allegation as to the insolvency of the bank at the time the deed of trust was executed, and alleged that if it was insolvent appellant had no knowledge thereof. Denied that Hurst and Strickland were officers and directors in the appellant company. Denied that it confederated or conspired with Hurst and Strickland, or any of the others mentioned, to obtain any unlawful preference to the prejudice of

other creditors of the bank. It denied that the sale and conveyance of the property mentioned in the deed of trust was executed for the purpose of obtaining any unlawful preference by it over other creditors of the Valley Savings Bank. It denied that the deed of trust was made in contemplation of the insolvency of the bank, and set up that the property described in the conveyance belonged to Hurst individually. It alleged that the conveyance was valid for the full amount mentioned and secured thereby, and prayed for judgment with costs.

The chancellor, after hearing the evidence, which is quite voluminous, decreed that the deed of trust was void so far as it attempted to secure the $9,000 evidenced by the certificates of deposit due from the bank to the appellant, but held that it was valid as to the $5,000 advanced to the bank at the time the conveyance was executed.

Other facts stated in the opinion.

Norwood & Grant, for appellant.

1. This suit was brought under section 951, Kirby's Digest. Appellant did not seek a preference, nor was the Valley Savings Bank seeking to give a preference to appellant *either in contemplation of insolvency or otherwise.* The extension of time of payment of a matured debt is sufficient consideration for a promissory note. 96 Ark. 105. The transaction was *bona fide,* and the chancellor erred in cancelling the conveyance. 98 Ark. 298. Prior to Kirby's Dig., § 951, preference of creditors was not prohibited. 21 S. W. 225. If the conveyance was in good faith it should not be cancelled. The burden was on appellee to show fraud. 92 Ark. 518; 14 *Id.* 79; 12 Ohio 315; 11 Atl. 31; 22 Cyc. 1289, and note; see 5 Thompson on Corp. 982; 79 N. Y. Supp. 444; 56 Atl. 717; 70 N. W. 149; 32 N. E. 855; Thompson on Corp. 6176, and note 109.

2. As long as a corporation is a "going concern" it has a right to borrow money and secure payment of same. 34 Pac. 629; 41 N. E. 185; 72 N. W. 749; 2 Thomp. on Corp., § 6178.

3. It was sufficient to prove the president's authority in the usual way. 2 Thomp. on Corp. (2 ed.) 515; 32 Ark. L. R. 943; 103 Ark. 283.

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

No preference of creditors is allowed among creditors of insolvent corporations. Kirby's Dig., § 949-951. The only question is, therefore, was the bank insolvent, and was the conveyance a preference. If so, it was unlawful. 61 Minn. 279; 63 N. W. 728; 48 Minn. 292; 51 N. W. 611; 36 Minn. 364; 31 N. W. 363. There is no error.

WOOD, J., (after stating the facts). It could serve no useful purpose to set out in detail the evidence bearing upon the issue of the alleged insolvency of the bank at the time of the execution of the deed of trust in controversy. This issue was purely one of fact. The chancellor found that the Valley Savings Bank, at the time the conveyances in controversy were executed by it to the Southern Trust Company, as trustee, "was then and had been for some time prior thereto wholly insolvent, and that it was known to be so by its president, W. W. Hurst; that said conveyances of said real estate were made in contemplation of insolvency, and were, therefore, an unlawful preference in favor of the International Life Insurance Company to the extent of $9,000 over other creditors of the Valley Savings Bank."

It suffices to say that we are convinced, from a careful examination of the testimony, that the chancellor was correct in his finding of fact; at least, his finding is not clearly against the preponderance of the evidence, that the Valley Savings Bank, at the time of the alleged preferential conveyances, was wholly insolvent, and that this was known to be so by its president, W. W. Hurst. But it does not follow from this finding that the chancellor was correct in his conclusion of law, that the conveyances constituted an unlawful preference in favor of the appellant.

Our statute provides as follows: "No preference shall be allowed among the creditors of insolvent corporations, except for the wages and salaries of laborers and employees." Kirby's Digest, § 949.

"Every preference obtained or sought to be obtained by any creditor of such corporation * * * and any 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." Sec. 951, *supra.*

Before the passage of the above statute known as the Insolvent Corporation Act, *bona fide* preferences in favor of creditors were valid under our laws. See *Smith* v. *Empire Lumber Co.,* 57 Ark. 222.

(1) Since the passage of the above act it will be observed that the preferences that are inhibited are those made in contemplation of insolvency.

The words, "in contemplation of insolvency," have been interpreted by various courts in States where such statutes exist. The meaning given to these words by these courts is very well stated in 22 Cyc., p. 1289, subdivision 2, as follows:

(2) "In order to avoid a transfer or preference made by a debtor in contemplation of insolvency within the usual inhibition of the statutes, the debtor must have been, in fact, insolvent under the terms of the law at the time of the transfer, and there must have been in his mind an expectation or design that he would make an assignment or commence proceedings in insolvency."

The cases are collected in a note to the text.

The same volume, under the head of "Creditor or Transferee," page 1290, says: "The rule is almost universal that, in order to avoid a preference under the insolvency laws, the person to whom a preference has been given must have had reasonable cause to believe that the debtor was insolvent at the time."

In all the States having insolvent laws the words, "in contemplation of insolvency" are used in the statutes, and the authorities are practically unanimous in their interpretation.

In *Barnes* v. *Natl. Bank of Oshkosh,* 97 Wis. 16, where a mortgage conveyance was attacked as invalid under the insolvency statute, the court held that the debtor, at the time of executing the mortgage, must have contemplated the institution of insolvency proceedings under the statute relating to the discharge of insolvent debtors. In that case the court said:

"But to avoid the transfer there must be in the mind of the debtor an expectation or design that he will do something else, and that thing is that he will make an assignment or commence proceedings in insolvency and by this means circumvent the statute against preferences." The court further said:

"'Contemplation of insolvency' means contemplation by the debtor of the institution of insolvency proceedings and does not mean mere expectation or apprehension of inability to meet business obligations or of failure in common parlance. Its purpose was to prevent preferences and not to prevent honest transfers in the hope of continuing in business."

In *Kells* v. *Webster,* 71 Minn. 276, the court had under consideration a conveyance that was alleged to have been made "in contemplation of insolvency." The court in that case used this language:

"While, on the one hand, it is not necessary, in order to avoid a conveyance as a forbidden preference that the purchaser shall actually know that the vendor is insolvent, yet it is not sufficient that he entertains a mere suspicion that the vendor may be insolvent. While he can not shut his eyes to suspicious circumstances which should put him on inquiry, yet he must have reasonable cause to believe that his vendor is insolvent."

This was the construction given to the provision in the Federal Bankrupt Act from which we borrowed it.

In *Stewart* v. *Redman,* 89 Me. 435-440, it is said:

"If the conveyance to the defendant (transferee) was made in contemplation of insolvency and with a view to put the property beyond the reach of creditors, and

the defendant had reasonable cause to so believe, the same may be avoided," etc.

In *Haskin* v. *James,* 96 Cal. 258, 31 Pac. 36, it is held:

"Where the transferee of valuable property of an insolvent firm did not know or have reasonable cause to believe that the transfer was made to prevent the property from coming into the hands of their assignee in insolvency or to defeat the object of the insolvent act, and paid full consideration in good faith, he is not liable to the assignee in insolvency appointed within a month after such transfer."

The authorities on the subject of the knowledge or intent of the creditor or transferee are collated in volume 28 of the American Digest, title, "Insolvency," § 89.

The authorities are too numerous to quote more extensively, but the excerpts above announce the principles upon which the case at bar must be decided.

(3) Applying these principles to the facts disclosed by this record, we are of the opinion that the evidence is not sufficient to show that the appellant, at the time of the execution of the conveyance in trust, knew that the Valley Savings Bank was insolvent, or that it had reasonable cause to believe that same was insolvent. The evidence is not sufficient to show that the appellant knew, or had reasonable cause to believe, that Hurst, in negotiating the transaction which was consummated in the conveyance which is sought to be set aside, was doing an act in contemplation of insolvency. Even none of the officers of the bank, except Hurst, seemed to know of its financial condition. Certainly, they did not know it was insolvent. Hurst, to all outward appearances, was conducting the affairs of the bank so as to create the impression that it was a prosperous institution and in a flourishing condition. The reports which were on file indicated that. It had, up to that time, so far as this record discloses, not failed in any particular to meet its obligations and was conducting its business in due course.

While the fact was that the bank was insolvent, Hurst, who was the controlling spirit of the institution, and, to all intents and purposes, the bank, so far as the management and conduct of its business was concerned, was the only individual who had knowledge, before insolvency proceedings were instituted, that the bank was insolvent. The cashier of the bank testified that he didn't know that it was insolvent. Likewise the secretary; and George W. Rogers, the cashier of the Bank of Commerce, with whom the Valley Savings Bank transacted its local business, testified that he didn't know that the bank, at that time, was insolvent. Judge Kavanaugh, president of the Southern Trust Company, testified that he "hadn't heard a word about its being in trouble of any kind." These gentlemen were prominent business men and bankers in the city of Little Rock. Hurst, so it appears, had so completely succeeded in covering up the real financial status of the institution of which he was president, that even other local banks and the people in the community with whom he did business were not advised of the financial straits in which the institution was found to be after it went into the hands of a receiver. Then, of course, the real situation was discovered. The representatives of the appellant who conducted the negotiations for the loan, and who inquired into the condition of the bank and the securities that Hurst was offering for the same, all testified that they knew nothing whatever of the insolvent condition of the bank or that Hurst was contemplating insolvency at the time the conveyance in controversy was executed. On the contrary, their testimony shows that Hurst made such representations to them as were calculated to induce them to believe that the bank was not insolvent, that while Hurst was negotiating to secure the loan, it was to protect the cash reserve of the bank in view of the contemplated withdrawal of a large deposit by one of the customers of the bank. Their testimony shows that Hurst represented that with this loan, and with an extension of time on the part of appellant

for the payment of the certificates of deposit, the bank would have ample funds with which to meet all of its obligations.

It is unnecessary to set out this testimony in detail. It shows that, upon inquiry of Rogers, Kavanaugh and others who were prominent in banking circles of the city, and after an examination of the property which Hurst was offering as security, they were led to believe that the institution was in a perfectly solvent condition and that Hurst, instead of contemplating insolvency by the loan he was making and which he was giving the conveyance in controversy to secure, was fortifying the bank of which he was president, against any financial stringency that would be contemplated in the ordinary course of business. Both Rogers and Kavanaugh assured the representatives of the appellant that the security Hurst was offering for the loan was more than ample.

If we divorce in our minds the condition in which the bank was shown to be after the institution was placed in the hands of a receiver, from the condition which it was represented to be in by Hurst and from the condition in which it appeared to be so far as the transaction of its business was concerned before the receivership, we can see clearly that the representatives of appellant had no cause to believe, at the time they were negotiating the loan to the bank for the additional five thousand dollars, that the same was in an insolvent condition or that the conveyance was being made to the appellant in contemplation of insolvency. Hurst had made application to appellant for a loan of $10,000 and appellant had a committee whose business it was to pass on loans and to examine into the securities offered.

Learned counsel for appellee insist that the fact that appellant sent three of its representatives hundreds of miles to look into the value of the security did not comport with the belief on its part that the bank was in a solvent condition.

But under the circumstances the sending of these representatives to Little Rock was but a natural and prudent business transaction. The bank was already indebted to appellant in the sum of $9,000, and Hurst was seeking an additional loan of $10,000; so it was but to be expected that the appellant would adopt usual and precautionary measures of prudent business to inquire into the value of the security offered, and as this was done through its committee for that purpose, the fact that this committee was sent to Little Rock does not tend to prove that appellant was advised at the time that the bank was in an insolvent condition. The appellant adopted a prudent method of ascertaining the value of the security which Hurst had offered, and the circumstances as disclosed by the representations of Hurst and other leading business men whom they consulted after they arrived on the ground and their examination of the property were well calculated to create the belief on their part that Hurst was sincere in his representations and that the institution of which he was at the head was solvent. Certainly, there was nothing in the surroundings, as we view the testimony, that would cause a reasonably prudent business man to believe that the Valley Savings Bank was insolvent or contemplating insolvency at the time of the execution of the conveyances in suit.

Because the representatives of appellant included the indebtedness represented by the certificates of deposit in the new loan which they were making to the bank and made the security cover also this pre-existing indebtedness did not tend to show that appellant believed that the bank was insolvent. It was nothing more than a purely business proposition which any prudent business man would have adopted under the circumstances, no matter however solvent he may have believed the debtor to have been. The wise creditor, as many of the witnesses, in effect, expressed it, would take all the security he could get.

In *Silas B. Dutcher, Assignee, etc., Respondent,* v. *Importers' & Traders' Bank,* 59 N. Y. 5, it was held that

payment by a bank, known by its managing officers and agents to be insolvent but continuing in business, of the check of a depositor wholly ignorant of its financial condition is not within the meaning of statutes declaring it unlawful for any incorporated company to make any transfer or assignment in contemplation of its insolvency, and such payment can not be recovered back by an assignee of the insolvent bank appointed under the bankrupt law of the United States.

(4) Now, here the negotiations between the appellant and the Valley Savings Bank was but an arrangement by which the appellant was securing its certificates of deposit that were already past due, but payment of which it had not demanded, and also securing an additional loan which the representatives of appellant were made to believe would meet the maturing obligations of the bank and would be sufficient for all its purposes. The bank at that time was a going concern and had the right to borrow money and to give security for the same. As is said by Mr. Thompson:

"It is very generally conceded by all the cases that even an insolvent corporation may mortgage or assign property sufficient to secure any personal advances or loans where these are used in good faith for the purpose of paying its debts." 5 Thompson on Corporations, § 6178.

Appellee contends that the president and secretary of the bank had no authority to execute the deed in controversy for the bank.

The testimony showed that the bank was also engaged in the business of buying and selling real estate. It was shown that the president and secretary had executed deeds for the bank from the time of its organization and that all the committees and officers of the bank had knowledge that they executed same. The secretary testified that his recollection was that the by-laws authorized the president and secretary to execute such convey-

ances. This testimony was sufficient to bind the bank. See *Wales-Riggs Plantations* v. *Caston,* 105 Ark. 641; *Merchants & Farmers Bank* v. *Harris,* 103 Ark. 283.

The court, therefore, erred in holding that the conveyances of the real estate in controversy were made in contemplation of insolvency and that the same constituted an unlawful preference under the statute in favor of the appellant to the extent of $9,000. The judgment is, therefore, reversed and the cause is remanded, with directions to enter a judgment in favor of the appellant for the full amount of its debt as secured by the conveyances in controversy, and for such other and further proceedings as may be necessary to enforce its rights under those conveyances, not inconsistent with this opinion.

STATE v. SCOTT.

Opinion delivered July 13, 1914.

1. INDICTMENTS—REQUISITE ALLEGATIONS.—An indictment must contain the title of the prosecution, specifying the name of the court in which the indictment is presented and the name of the parties, a statement of the acts constituting the offense in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended. Kirby's Digest, § 2243.

2. INDICTMENT—SUFFICIENCY.—An indictment is sufficient if it can be understood therefrom that it was found by a grand jury of a county, empaneled in a court having authority to receive it, and that the offense was committed within the jurisdiction of the court, at some time prior to the time of finding the indictment, and that the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment on conviction, according to the right of the case. Kirby's Digest, § 2228.

3. NIGHT RIDING—CRIME OF—SUFFICIENCY OF INDICTMENT.—An indictment which alleges that defendant and one W. banded themselves together and in the night time, being disguised and armed with guns, went forth to the house of H., and alarmed and frightened him by seeking to assault and punish him, and by threats of vio-

lence forced him to leave his home, held good on demurrer, as sufficiently charging the crime of night riding as denounced by Act 112, p. 315, Acts 1909.

4. NIGHT RIDING—SUFFICIENCY OF INDICTMENT.—An indictment which alleges that defendant and one W. banded themselves together, being disguised and armed with guns, and went forth to the house of one H., and, while assembled at the house of H., in the night time disguised and armed as aforesaid, they alarmed and intimidated two women (naming them) by threatening to return the next morning with a crowd of negroes, and by threatening to do violence to the said H., *held* to state sufficiently the crime of night riding as denounced in Act 112, p. 315, Acts 1909.

Appeal from White Circuit Court; *J. M. Jackson*, Judge; reversed.

STATEMENT BY THE COURT.

Appellee was twice indicted for the offense, commonly designated "night riding."

The first indictment is as follows, omitting the caption:

"The grand jury of White County, in the name and by the authority of the State of Arkansas, accuse Will Scott, Vine Williams, of the crime of night riding, committed as follows towit: The said Will Scott, Vine Williams, in the county and State aforesaid, on the 17th day of June, A. D. 1913, unlawfully and feloniously then and there, in the night time of said day, banded themselves together, being disguised and armed with guns, and go forth to the house of George Hardin in the night time disguised and armed, and did alarm, intimidate and frighten the said George Hardin by seeking to assault and punish him, the said George Hardin, and by threats of violence, force him, the said George Hardin, to leave his home, against the peace and dignity of the State of Arkansas."

The charging part of the second indictment was as follows:

"Did unlawfully and feloniously, in the night time of said day, did band themselves together, being disguised and armed with guns, and go forth to the house

of George Hardin, and while assembled at the said house of the said George Hardin, in the night time, disguised and armed as aforesaid, alarm and intimidate Mrs. Nina Hardin and Mrs. Ruth Isaacs, by threatening to return the next morning with a larger bunch or crowd of negroes, and by threatening to do violence to the said George Hardin, against the peace and dignity of the State of Arkansas."

Demurrers were interposed to each of these indictments, alleging various defects to exist in them, and the demurrers were sustained and the defendant ordered discharged. The State has appealed from this judgment of the court.

Wm. L. Moose, Attorney General, and *J. N. Rachels,* for appellant.

1. The indictment contains enough to charge in plain terms a violation of the act. Acts 1909, No. 112. *Holland* v. *State,* 111 Ark. 214; 163 S. W. 781.

2. The precise words need not be used, if the facts which constitute the offense are stated. 47 Ark. 488; 62 *Id.* 512; 77 *Id.* 321; Kirby's Dig., § 2241-2-3, 2228. No indictment is insufficient, nor can the trial, judgment or other proceedings be affected by any defect which does not tend to the prejudice of the substantial rights of defendant on the merits. Kirby's Dig., § 2229; 93 Ark. 406-408.

No brief for appellee.

SMITH, J., (after stating the facts). These indictments were returned under Act No. 112 of the Acts of 1909, page 315.

When this act is analyzed it is found that section 1 of it provides as follows:

"If two or more persons shall unite, confederate or band themselves together for the purpose—

(*a*) Of doing an unlawful act in the night time;

(*b*) Or for the purpose of doing any unlawful act while wearing any mask, white caps or robes, or being otherwise disguised;

(*c*) Or for the purpose of going forth armed or disguised for the purpose of intimidating or alarming any person, or to do any felonious act;

(*d*) Or if any person shall knowingly meet or act clandestinely with any such band or order, be it known by any name whatsoever, then any person who does any of these four things is guilty of a felony.

And by section 2 it is provided that:

"If two or more persons belonging to or acting with any such band or organization as defined in section 1,

(*a*) Shall go forth at night, or shall go forth at any time disguised, and shall alarm or intimidate or seek to alarm or intimidate any person by assaulting any such person, or by damaging or destroying property, or by seeking to assault or punish any person or by seeking or attempting to damage or destroy property;

(*b*) Or shall deliver, mail, post or have any letter, notice or other written or printed communication intended to, or which by its nature contents or superscription would naturally alarm, or intimidate, any person shall be deemed guilty of a felony."

Is a violation of law charged under these sections or either of them?

(1) The statute provides that an indictment shall contain the title of the prosecution, specifying the name of the court in which the indictment is presented and the name of the parties, a statement of the acts constituting the offense in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended. Kirby's Digest, § 2243. And it is further provided that the indictment is sufficient if it can be understood therefrom that it was found by a grand jury of a county impaneled in a court having authority to receive it, and that the offense was committed within the jurisdiction of the court, at some time prior to the time of finding the indictment, and that the

act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment on conviction, according to the right of the case. Kirby's Digest, § 2228.

(2-3-4) The first indictment alleges that appellant and one Vine Williams banded themselves together, and in the night time, being disguised and armed with guns went forth to the house of George Hardin and alarmed and frightened him by seeking to assault and punish him, and by threats of violence forced him to leave his home. One who did these things violated the first, second and third paragraphs of section 1 of the act above set out, and that violation is charged with sufficient certainty to meet the requirements of the statutes herein set out.

The second indictment charges that appellant and Williams banded themselves together, being disguised and armed with guns, and went forth to the house of George Hardin, and, while assembled at the house of Hardin, in the night time disguised and armed as aforesaid, they alarmed and intimidated Mrs. Hardin and Mrs. Isaacs by threatening to return the next morning with a crowd of negroes, and by threatening to do violence to the said George Hardin.

It is said that this second indictment was drawn under the provisions of the second section of the statute set out above, but whether the facts alleged constitute a violation of that section of it, they do constitute a violation of the first section.

The demurrers, therefore, were erroneously sustained, and the judgments to that effect will be reversed and the cause remanded, with directions to overrule them.

BONNER v. KIMBALL-LACY LUMBER COMPANY.

Opinion delivered July 13, 1914.

1. TRUSTS—CONSTRUCTIVE TRUSTS—HOW RAISED.—Defendant agreed to furnish the purchase price of certain timber land, that title should be taken in plaintiff's name, defendant taking a mortgage

for security. *Held*, when defendant took title in its own name, no trust *ex maleficio* was raised in favor of plaintiff.

2. STATUTE OF FRAUDS—CONTRACT TO BE PERFORMED WITHIN A YEAR.—A contract to purchase timber land, plaintiff to take title, and defendant to advance the purchase price, and take a mortgage as security, is not within the statute of frauds.

3. SPECIFIC PERFORMANCE—TIMBER CONTRACT.—Defendant agreed with plaintiff to furnish the purchase price for certain timber land, the title to be taken by plaintiff and a mortgage given defendant as security; plaintiff entered and cut timber, and delivered same to defendant under the agreement. *Held*, although defendant wrongfully took title in his own name, plaintiff was entitled to a specific performance of the contract, having partly performed the same.

Appeal from Arkansas Chancery Court; *John M. Elliott*, Chancellor; reversed.

STATEMENT BY THE COURT.

Appellant sued appellee, and alleged that appellee was a corporation engaged in buying and selling timber; that on the 7th day of March, 1910, appellant purchased of one Dave Moody certain timber lands in Arkansas County, and appellee agreed to advance the purchase money, same being $3,500; that the deed was to be made from the said Dave Moody to appellant, and appellant agreed to give appellee a mortgage on said land for the purpose of securing it in advancing the purchase money; that in accordance with said agreement appellant executed and delivered to appellee his certain promissory note and mortgage signed by himself and wife for the sum of $3,500; that appellee, without right or authority or knowledge of appellant, took the deed to said lands from Moody to itself; that when appellant learned that it had without authority taken title to the lands in itself, he requested appellee to execute a deed to the land to him and it refused so to do; that after the agreement appellant took possession of the land and cut the timber off of it and delivered the same to appellee, for which appellee had agreed to give him credit; that he delivered the timber from said land, and from other lands in Arkansas County, to appellee of the agreed value of $3,332.75 and appellant tenders the balance of $167.28, and he also

tenders a note for the unpaid purchase money, secured by a mortgage on the land in controversy, and he prayed the court by proper order and decree to compel appellee to execute to him a deed for the lands purchased from Moody.

Appellee demurred to the complaint because the agreement referred to was not in writing and was not to be performed within one year from its date; and because it did not state facts sufficient to constitute a cause of action. The demurrer was sustained and appellant declined to plead further, and his cause of action was dismissed, and he has prosecuted this appeal.

Rasco & Botts, for appellant.

1. Appellee holds the title as trustee *ex maleficio.* Pom. Eq. Jur. 39 L. R. A. (N. S.) 923; 91 Ala. 166; 3 Story, 181; 7 Fed. Cas. 266.

2. Part performance takes the case out of the statute of frauds. 36 Cyc. 654; 83 Ark. 403; *Ib.* 340; 76 *Id.* 363; 78 *Id.* 150; 21 *Id.* 137; 1 Ark. 418; 30 *Id.* 262.

3. The statute of frauds must be pleaded by answer. Bliss on Code Pl. 353; 96 Ark. 189.

4. The alleged agreement contains a contingency which may be performed within one year. 91 Ark. 153; 54 *Id.* 199; 56 *Id.* 632.

5. The demurrer was not proper and should have been overruled. 52 Ark. 378. The complaint stated a cause of action, but, if not, the cause should have been transferred to the law court. 108 Ark. 283; 34 *Id.* 70; Kirby's Dig., § 5991; 85 Ark. 208; 73 *Id.* 462; 74 *Id.* 484; 82 *Id.* 51; 85 *Id.* 208; 51 Ark. 259. It was error to dismiss.

6. Appellant was entitled to specific performance or reimbursement. 42 Am. Dec. 521; 35 Am. Dec. 403.

7. No misjoinder of parties. Kirby's Dig., § 6011.

F. M. Rogers, for appellee.

SMITH, J., (after stating the facts). Appellant argues that the facts alleged in his complaint are sufficient to create a trust *ex maleficio;* but we do not agree with

him. In the case of *Bragg* v. *Hartney*, 92 Ark. 55, the following language was quoted with approval from Pomeroy's Equity Jurisprudence, page 2033:

(1) "In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances, which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property, either in the hands of the original wrong-doer or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust. The forms and varieties of these trusts, which are termed *ex maleficio,* or *ex delicto,* are practically without limit. The principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrong-doer."

There is no allegation here of any agreement on the part of appellee to take the title to the land in himself for the benefit of appellant, or to reconvey to him when it had been so taken; but the allegation of the complaint is that appellee contracted to acquire the title for appellant, and in his name.

(2) The ground of demurrer that the contract was not to be performed within a year, and that therefore the contract was within the statute of frauds, was not well taken, because the contract was one which might have been enforced within the year and such contracts are not within the statute of frauds. *Friedman* v. *Schleuter,* 105 Ark. 580.

(3) We think the facts stated in the complaint, which we have recited, are sufficient to entitle appellant to a specific performance of his agreement with appellee, and that he is entitled to have this relief granted him rather than to have appellee declared a trustee *ex maleficio.* The rule in regard to specific performance of parol contracts is that the mere payment of money is not such part performance as will take the case out of the statute of frauds, because the remedy at law is adequate for its recovery, and such payments do not work an irrevocable change of position. *Fred* v. *Asbury,* 105 Ark. 499. But, under the allegations of the complaint here, there was not only a payment of the consideration, but there was an entry upon the land and the performance of the contract by cutting, selling and delivering to appellee the timber standing thereon. Appellant has performed his contract fully, except the payment of a small balance of the purchase money which he tenders with his complaint; and he also tendered a note for the unpaid purchase money and a mortgage on the land, and, under these circumstances, his right to the relief prayed for can not be defeated because his original contract was within the terms of the statute of frauds. In the case of *Robinson* v. *Wynne,* 97 Ark. 366, G. owned timber and had contracted to sell it to B. for an agreed price. C., acting upon B.'s authority and direction, entered upon the land and cut and removed the timber and the statute of frauds was there pleaded by B. against G., who sued to charge him with the contract price of the timber, but it was held that the statute was satisfied by the delivery of the timber to C., and the agreement of B. to pay the price. We think there has been such performance of the contract here as to take the case out of the statute of frauds. *Salyers* v. *Legate,* 93 Ark. 606; *Lee* v. *Foushee,* 91 Ark. 468.

It will be observed that the facts in this case are very similar to those in the case of *Tatum* v. *Bolding,* 96 Ark. 98, but a specific performance of the contract there sued on was refused because of the failure of proof.

No such difficulty arises here, as this case was disposed of on demurrer.

In the case of *Phillips* v. *Jones,* 103 Ark. 556, it was said: "A court of equity can not make a contract for parties and then decree its specific performance, in order to carry out its notion of what the abstract justice and right of the case as disclosed by the proof demands. The court will only decree specific performance when the contract itself is clearly established by a preponderance of the evidence." But here the court is not making a contract for these parties. It is merely ordering the enforcement of one made by the parties themselves. The agreement was that appellant should have the title to this land when he had sold and delivered appellee the timber thereon and had paid any balance of the purchase money which might then remain unpaid, or had executed a valid mortgage therefor, and appellant entered upon the land and commenced performance of his contract and has now substantially complied with it, and his right to a specific performance of this contract entitles him to a deed to the land. Appellee's undertaking was to procure this deed for appellant and that undertaking will be performed when appellee has delivered to appellant its deed conveying the land.

For error in sustaining the demurrer, the decree will be reversed and the cause remanded, with directions to overrule the demurrer.

KIRBY, J., dissents.

STATE *ex. rel.* WM. L. MOOSE, ATTORNEY GENERAL, *v.* FRANK.

Opinion delivered July 13, 1914.

1. MONOPOLIES—UNLAWFUL COMBINATIONS.—An agreement fixing the price for laundering, is not unlawful under section 1, Acts of 1905, p. 1, prohibiting combinations to fix the price of any commodity, convenience or repair.

2. MONOPOLIES—UNLAWFUL COMBINATIONS.—An agreement fixing the price of laundering is not included within the terms "any article or thing whatsoever," as used in section 1, Act 1905, p. 1.

3. STATUTES—PENAL STATUTES—CONSTRUCTION.—Act of 1905, p. 1, § 1, known as the anti-trust act, is highly penal in its nature, and therefore will be strictly construed.

Appeal from Pulaski Circuit Court, Third Division; *G. W. Hendricks,* Judge; affirmed.

STATEMENT BY THE COURT.

The complaint in this cause alleged that appellees were engaged in the laundering business in the city of Little Rock, some of the appellees being corporations, others being a copartnership and still others the individual business of the proprietors of the defendant laundries mentioned in the complaint. It was alleged in the complaint that appellees, in violation of the anti-trust law, have agreed with each other to fix prices to be charged their customers and that they carried on their business under said agreement, the effect of the agreement being to stifle competition and increase the prices of laundering. The second paragraph of the complaint alleged that the appellees, for the purpose of driving out competition in the city of Malvern, in this State, had unlawfully combined with each other to do laundering for the people of that city at prices less than those charged the people of Little Rock and other places. A large sum of money was demanded in each paragraph of the complaint as a penalty, against appellees, because of their alleged unlawful combination.

Separate demurrers were filed for appellees, and among other grounds of demurrer the act of the General Assembly of this State, under which the proceeding was brought, was attacked as unconstitutional; and in all the demurrers it was alleged that the complaint did not state facts sufficient to constitute a cause of action. The circuit court held that the complaint did not state a cause of action and sustained the demurrer and the State has prosecuted this appeal from that judgment of the court.

The suit was instituted under the authority of section 1 of the anti-trust act passed at the 1905 session of the General Assembly of this State (Acts 1905, page 1), as amended by Act No. 161 of the Acts of 1913. Section 1 of the act of 1905 reads as follows:

"Any corporation organized under the laws of this or any other State, or country, and transacting or conducting any kind of business in this State, or any partnership or individual, or other association or persons whatsoever, who are now, or who shall hereafter, create, enter into, become a member of, or a party to, any pool, trust, agreement, combination, confederation or understanding, whether the same is made in this State or elsewhere, with any other corporation, partnership, individual, or any other person or association of persons, to regulate or fix either in this State or elsewhere the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lighting or tornado, or to maintain said price when so regulated or fixed, or who are now, or shall hereafter enter into, become a member of, or a party to any pool, agreement, contract, combination, association or confederation, whether made in this State or elsewhere, to fix or limit in this State or elsewhere, the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy issued by any corporation, partnership, individual or association of persons aforesaid, shall be deemed and adjudged guilty of a conspiracy to defraud and be subject to the penalties as provided by this act."

Wm. L. Moose, Attorney General, *Bradshaw, Rhoton & Helm* and *E. L. McHaney*, for appellant.

1. The act is constitutional. 76 Ark. 303; 81 *Id.* 519; 212 U. S. 322, L. Ed. 530.

2. Our contention is that the agreement violates the anti-trust act by fixing the price of a "commodity," or an article of "*convenience*" or "*repair.*" As to the doctrine of *ejusdem generis,* see 95 Ark. 114. Words are given their obvious and natural meaning. 67 Ark. 566; 71 *Id.* 561. Words judicially interpreted are presumed to have been used by the Legislature in that sense. 84 Ark. 316; 123 Mass. 493; 12 *Id.* 252; 73 U. S. (16 Wall.) 632; 18 L. Ed. 904. A privilege is a commodity. 87 Mass. 428; 134 Mass. 419; 102 Ia. 602; 70 N. W. 107.

Morris M. & Louis M. Cohn, for appellees.

1. A combination to regulate the price of laundering does not come within the terms of the act. 95 Ark. 114; 159 Mo. 410; 81 Am. St. 368; 60 S. W. 91; 51 L. R. A. 151; 215 Mo. 421; 114 S. W. 997; 22 L. R. A. (N. S.) 607; 23 *Id.* 1284; 56 Neb. 386; 76 N. W. 900; 23 L. R. A. (N. S.) 1260; 45 *Id.* 355; 117 Fed. 570; 52 Atl. 326; 62 S. W. 481; 59 S. W. 916.

2. The act is unconstitutional. 58 Ark. 421; 29 L. R. A. 79; 22 *Id.* 340; 210 Fed. 173; 165 U. S. 578; 14 L. R. A. (N. S.) 361; 231 Ill. 340.

3. Laundering is not a "commodity." Cases, *supra.* 95 Ark. 114; 118 N. W. 276; 23 L. R. A. (N. S.) 1284; 86 Tex. 250; 22 L. R. A. 483; 24 S. W. 398; 231 U. S. 495-503; 52 Atl. 326.

SMITH, J., (after stating the facts). It is conceded by the State that an agreement to fix the price of laundering is not an agreement to fix the price of "any article of manufacture, mechanism or merchandise;" but it is contended that the facts here alleged constitute an agreement to fix the price of a commodity, convenience or repair. And it is not contended by the State that the business of laundering is included in the terms "any article or thing whatsoever." This last contention could not be sustained, because if the business of laundering is not a commodity, convenience or repair, then it would

not be embraced in the words "article or thing whatsoever." Such a construction would be precluded by the decision of this court in the case of *State* v. *Chicago, R. I. & P. Ry. Co.,* 95 Ark. 114. That case was a proceeding against that railroad for a violation of the anti-trust act of 1905 for entering into a pool, trust, agreement, combination, confederation, and understanding with certain domestic corporations, all owning and operating certain lines of railroads within the State, for the purpose of fixing rates to be charged for the service of carrying freight and passengers. In the opinion in that case, it was said: "Counsel for the State do not contend that freight or passenger rates are articles of merchandise, manufacture, mechanism, commodity, convenience or repair, or that they are products of mining; but they do contend that the words "or any article or thing whatsoever" include passenger and freight rates. We can not agree with their contention. This is a plain case for the application of the doctrine of *ejusdem generis.*

"The rule is 'when general words follow an enumeration of particular things, such words must be held to include only such things or objects as are of the same kind as those specifically enumerated.' 2 Lewis Sutherland on Statutory Construction (2 ed.), § 422."

(1-2) And it was there further said: "Our 'anti-trust act' does not in express terms attempt to deal with the questions of transportation by railroads or other carriers, or the fixing of rates therefor. It would be a violent presumption, indeed, to say that the Legislature in this vague and indefinite manner attempted to deal with a subject which so vitally affects the welfare of the people, and a proper solution of which has ever been one of the greatest concern and complexity. It seems evident to us that the framers of the act intended that the words 'or any article or thing whatsoever' should take their meaning from the things specifically mentioned before, and that, when so construed, the allegations of the complaint do not constitute a violation of the terms of the act."

(3) In construing this act, we must bear in mind that it is highly penal, and as such must receive a strict construction. *Hughes* v. *State,* 6 Ark. 132; *Grace* v. *State,* 40 Ark. 97; *Stout* v. *State,* 43 Ark. 413.

Discussing the original anti-trust act of the General Assembly of 1899, Mr. Justice RIDDICK, in *State* v. *Lancashire Fire Insurance Co.,* 66 Ark. 466, said: "Whatever the Legislature may have intended, such intention can have no effect unless expressed in the statute; for this, being a penal statute, can not be extended by implication. It would be in the highest degree unjust to punish conduct not clearly forbidden by the law itself."

Nor are we concerned with any consideration of the economic questions involved in this act. A study of its terms makes the fact plain that the Legislature has not included within the inhibition of this act agreements relating to the price of labor.

The question has several times been before the courts of various States as to whether a laundry was a manufacturing establishment or not, and so far as we are advised it has been uniformly held that it is not. In the case of *Downing* v. *Lewis et al.,* 76 N. W. 900, 56 Neb. 386, it was contended the sale of a laundry and an agreement entered into between the parties with reference thereto violated the anti-trust law of that State which prohibited any combinations or agreements where persons are engaged in the manufacture or sale of any article of commerce or consumption, or for any persons so engaged to enter into any combination or agreement relating to the price of any article or product of such manufacture, and the court there decided that a laundry was not a manufacturing establishment, and in so deciding that question it was there said: "It seems perfectly plain that a laundry, the business of which is to wash and iron linen, and other articles of wearing apparel and domestic use, which have become soiled in the service for which they were fabricated, is not a manufacturing establishment, within the meaning of the section quoted. In the

common understanding, the function of a laundry is to make clothes clean, rather than to make clean clothes."

In *Commonwealth* v. *Keystone Laundry Co.*, 52 Atl. 326, where a law of the State of Pennsylvania which exempted from taxation so much of the capital stock of a manufacturing corporation as was invested in the carrying on of manufacturing was under construction, a laundry company claimed the exemption of that act. It was held that the laundry company was not a manufacturing company, even though it manufactured soaps and dyes as incidental to its business; the court there used the following language: "Its principal business, as properly stated by the court below, is washing and ironing, and in carrying on the business it needs soaps and dyes, and even if it does manufacture these two articles for its own use, instead of buying them, such manufacture does not make the 'washing and ironing' concern a manufacturing plant and business as defined by statute, lexicon or judicial utterance."

Other cases to the same effect are *Muir* v. *Samuels*, 62 S. W. 481; In re *White Star Laundry Co.*, 117 Fed. 570.

In the case of *State ex rel. Star Publishing Co.* v. *The Associated Press*, 159 Mo. 410, 60 S. W. 91, which was a suit by mandamus to compel respondent, a press association, whose business it was to gather news to furnish relator with its service, relator, among other things, claimed that respondent was a member of a combination and monopoly consisting of an association of newspapers organized to fix the price for news service and so coming within the scope of the anti-trust law. The writ was denied, and it was there said: "The business is merely one of personal service; an occupation. Unless there is a 'property' to be 'affected with a public interest,' there is no basis laid for the fact or charge of a monopoly. (Citing authorities.) * * * There is one remaining point to be considered, and that relates to the anti-trust laws. * * * The law on the subject in this State prohibits 'any pool, trust, agreement, combination,' etc., 'to regulate or fix the price of any article of manufacture,

mechanism, merchandise, commodity, convenience, repair; any product of mining, or any article or thing whatsoever; or the price or premium to be paid for the insurance of property,' or to fix or limit the production of the things whose price may not be regulated or fixed. Nothing is discoverable in this section which is at all applicable to the business in which respondent is engaged. Whether we apply to the words of the statute the rule of *noscitur a sociis,* or that of *ejusdem generis,* the result must be the same, and there is a special reason why the ruling in this regard should be a strict one, and this is because the statute is highly penal."

The case of *Rohlf* v. *Kasemeier,* 118 N. W. 276, was a prosecution against a number of physicians for entering into an agreement to fix and maintain fees to be charged for their services. The section of the statute of that State under which the indictment was returned reads as follows: "Any corporation organized under the laws of this or any other State or county for transacting or conducting any kind of business in this State, or any partnership, association or individual, creating, entering into or becoming a member of, or party to, any pool, trust, agreement, contract, combination, confederation or understanding with any other corporation, partnership, association or individual, to regulate or fix the price of any article of merchandise or commodity or to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this State, shall be guilty of a conspiracy."

In its opinion the Supreme Court of that State said: "The first point to be decided is, do the acts charged constitute a crime under this section of the Code? It will be noticed that it forbids a combination, agreement or understanding to regulate or fix the price of any article of merchandise or commodity, or of merchandise to be manufactured, mined, produced or sold in this State. The primary inquiry is, Are the charges of a physician or surgeon for his medical skill or ability an article of merchandise or commodity to be produced or sold in this

State? For appellant it is contended that the word 'commodity' is broad enough to cover the charge made for professional services or skill, and that the trial court was in error in holding to the contrary.

"It must be remembered that the word is found in a criminal statute, and that in the interpretation of such statutes different rules apply from those which obtain in civil matters, or where contracts are involved. Nothing is to be added to such statutes by intendment, and, as a rule, they are to have a strict construction. * * * As already indicated, the word must be taken in connection with the others used in the statute, and it is manifest that the commodity referred to must have been such as could be manufactured, mined, produced or sold in the State, and the price was to be of an article of merchandise or commodity. If the contention of appellant be correct, the statute covers all kinds of personal labor, both skilled and unskilled, under the term 'commodity.' * * *

"The statute before us has nothing to do with commerce; nor does it have to do with restraint of trade, or commerce, as does the Sherman act. It has to do with pools and trusts organized in this State to fix or regulate the price of any particular commodity or to fix or limit the amount or quality of any article, commodity or merchandise to be produced or sold in the State. Surely, it has no reference to the amount or quality of labor to be produced or sold. Such a construction would be ridiculous. And, if it will not bear that interpretation, it follows that the word 'commodity,' when used with reference to prices, should not be held to include labor. No case has been cited which supports appellant's contention, and we have not been able to find any."

The Supreme Court of Texas, in the case of *Queen Insurance Co.* v. *State,* 86 Tex. 265, 24 S. W. 397, defined the word "commodity" as used in the anti-trust law of that State as follows: "The word 'commodity' has two significations. In its most comprehensive sense it means convenience, accommodation, benefit, advantage, inter-

est, commodiousness; but according to Webster's International Dictionary, the use of the word in this sense is obsolete. Page 286. The word is ordinarily used in the commercial sense of any movable or tangible thing that is ordinarily produced or used as the subject of barter or sale; and we think this was the meaning intended to be given to it by the Legislature in the statute in question."

If the business of laundering is not a commodity, then an agreement fixing prices for the performance of that service is not within the inhibition of the anti-trust act. No other word or term in that act could include that business. The act does use the word "repair," but it can not be seriously contended that this word is sufficient to embrace the business of laundering. It may be true, that to some extent laundries do repair the clothes which they wash; but it does this as a mere incident to that business; and by such service they merely "repair" the damage which they have done in performing their service of making the clothes clean. The business of laundering is a mere service done, whether performed by hand or by machinery, and an agreement to regulate the price to be charged therefor is in its last analysis merely an agreement to fix the price of labor, or services, and the Legislature of this State has not made such an agreement unlawful. *Lohse Patent Door Co.* v. *Fuewlle,* 215 Mo. 421, 114 S. W. 997; *Cleland* v. *Anderson,* 66 Neb. 252, 92 N. W. 306; *State* v. *Duluth Board of Trade,* 23 L. R. A. (N. S.) 1260.

The judgment of the court below sustaining the demurrer is, therefore, affirmed.

PRESCOTT & NORTHWESTERN RAILROAD COMPANY *v.* THOMAS.

Opinion delivered May 18, 1914.

1. EVIDENCE—INVOLUNTARY EXCLAMATIONS.—In an action for damages for personal injuries caused by negligence, evidence of involuntary exclamations made by plaintiff, indicating pain, is admissible, whether uttered at the time the injury occurred or afterward.

2. EVIDENCE—SELF-SERVING DECLARATIONS.—Statements by an injured party made merely by way of narrative are hearsay and inadmissible in an action for damages for personal injuries.

3. RAILROADS—INJURY TO PASSENGER—DEGREE OF CARE.—In an action for damages due to personal injuries caused by negligence of a railroad company, while plaintiff was alighting from a train, an instruction held proper, which told the jury that, in the operation and management of its trains, the defendant owes its passengers the highest degree of care which a prudent and cautious man would exercise, reasonably consistent with its mode of conveyance and the practical operation of its trains.

4. RAILROADS—INJURY TO PASSENGER ALIGHTING FROM TRAIN—DUTY OF CARE.—Plaintiff, a passenger on defendant railway's train, while debarking from said train, slipped on some cantaloupe seed on the step of the car, sustaining injuries. *Held*, the defendant owed the plaintiff a duty to provide a safe means of debarking from its train, and was liable for the damage resulting from its negligence in failing to remove the seed from the steps, its servants having had time to observe and remove the same.

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

McRae & Tompkins, for appellant.

1. Complaints made by the appellee concerning her injuries to visitors two weeks after the accident were not competent, and should have been excluded. In the *Jackson* case, 93 Ark. 125, relied on by appellee, the complaints were made immediately after the accident. Here they were too remote, and made, moreover, as the proof shows, after appellee had decided upon a suit against appellant. 105 N. Y. 294, 59 Am. Rep. 506; Jones on Evidence (2 ed.), § 349; 16 L. R. A. 436.

2. Instruction No. 1, given by the court, errs in requiring the highest degree of care. That rule applies only to appliances and machinery. See 65 Ark. 255; 111 N. Y. 488; 48 N. Y. Supp. 630.

3. There is no proof, nor any suggestion of proof, that cantaloupe seed on the steps of the car caused appellee's feet to slip, and there was therefore no evidence on which to base the fourth instruction. 88 Ark. 454; *Id.* 594; 89 Ark. 279; 5 Crawford's Dig., 1679, § 63, *et seq.*

4. The court erred in refusing to give instruction 8, requested by appellant. Without this instruction, an absolute duty was imposed on appellant to remove the seed. Surely, the jury ought not to have been left to infer that the mere presence of the seed on the steps would constitute negligence. 2 White on Personal Injuries, § 681; 64 N. J. L. 707, 50 L. R. A. 470, 46 Atl. 710; 159 Pa. 364, 28 Atl. 140; 113 Pa. 300; 11 Del. C. Rep. 242; 27 Ind. App. 500; 69 Atl. 338, 15 L. R. A. 523; 79 N. E. 1094; 35 L. R. A. (N. S.) 592; 179 Mass. 52, 22 Atl. 708.

5. It is the duty of train employees to exercise reasonable care to discover objects that may be placed on the steps of the coaches, but the carrier is not an insurer that such objects will not be placed or fall thereon. Constant inspection while a train is on a trip is not required, but such inspection only as the employees may reasonably give, consistent with their ordinary duties. Hutchinson on Carriers, § 957; 97 N. E. (Mass.) 624; 64 N. J. L. 702; White on Pers. Injuries, § 681.

J. O. A. Bush, for appellee.

1. The first question, the answer to which would tend to bring out any action or expression on the part of appellee tending to show pain, was asked by appellant's counsel. Testimony subsequently brought out by appellee, of the same character, can not now, even if incompetent, be objected to by appellant. 75 Ark. 251; 86 Ark. 489; 88 Ark. 489.

But this testimony was competent. 55 Ark. 258; 93 Ark. 125; 75 U. S. 397, 19 Law. Ed. 439.

2. Appellee's testimony as to how the accident occurred is not denied, neither is the testimony of Mrs. Alston that she saw a pile of cantaloupe seed on the step of the car disputed. It is patent that the injury occurred in the operation of appellant's train. It is liable *per se.* Kirby's Dig., § 6773; 63 Ark. 636; 33 Ark. 816; 49 Ark. 535; 57 Ark. 137; 80 Ark. 19; 73 Ark. 548. There is no error in the instructions.

McCULLOCH, C. J. The plaintiff, Mrs. Thomas, claims to have received personal injuries while she was

getting off one of defendant's trains, and sues to recover compensation for the injuries. She took passage on the train at Tokio and went to McCaskill, which was the station nearest to her home, and after the train came to a stop, while she was getting off, her foot slipped, and she fell against the step, injuring her back. The jury awarded damages in the sum of $500.

She testified that after the train came to a stop she walked out on the platform and down the steps and that as she went to step on the box which had been set on the ground by the porter or brakeman in a slanting position her foot slipped from the step of the car and that the box, proving to be an insecure or unstable footing, she fell against the steps and injured her back.

Another witness, who was present and saw her get off, said that there was a bunch of cantaloupe seed on one of the steps and that Mrs. Thomas slipped and fell.

The defendant made no serious contention that the plaintiff did not slip and, perhaps, receive some slight injury; but it denied the charge of negligence, and also denied that the plaintiff received any substantial injuries. Most of the proof was directed to the last mentioned question concerning the extent of the injuries. There is an assignment of error in the admission of testimony directed to that issue. It is contended that the court erred in permitting a witness to testify concerning complaints made by the plaintiff two weeks after the alleged injury.

(1-2) The law is settled, we think, by the authorities cited on the respective briefs of the parties that involuntary exclamations indicating pain are admissible, whether uttered at the time the injury occurs or afterward. They are in the nature of verbal acts which go to the jury for what they are worth. On the other hand, it is equally well settled that statements of the injured party merely by way of narrative are purely hearsay, and come within the rule against the admissibility of self-serving declarations.

(3) When the testimony of the witness is examined as a whole, it is clear, we think, that she testified to the plaintiff's "complainings" merely as involuntary exclamations of pain and, as such, they were competent to be considered by the jury in determining the extent of plaintiff's suffering.

Another assignment relates to an instruction given by the court, as follows:

"You are instructed that in the operation and management of its trains the defendant owes its passengers the highest degree of care which a prudent and cautious man would exercise reasonably consistent with its mode of conveyance and the practical operation of its trains."

It is contended that ordinary care is the requirement with respect to a passenger getting on or off a train.

But we have held otherwise in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Woods,* 96 Ark. 311, where it was said:

"The higher degree of care is exacted only during the time in which the passenger has given himself wholly in charge of the carrier, while on the train or getting on or off, for then only is the passenger subjected to the peculiar hazards of that mode of travel against which the carrier must exercise the highest degree of skill and care."

That, indeed, amounts only to ordinary care, which increases in proportion to the danger. *Railway Co.* v. *Sweet,* 60 Ark. 550.

Error is assigned in refusing to give Instruction No. 8, which reads as follows:

"Unless the greater weight of the evidence shows that the defendant's trainmen knew of the presence of the cantaloupe seed on the steps of defendant's car, and negligently failed to remove them within a reasonable time after such knowledge, or that the seed had been on the steps of said car for a sufficient length of time as that such trainmen, acting as reasonably prudent persons, ought to have discovered them within the time they had been there, you should find for the defendant on the alle-

gation that the defendant negligently allowed cantaloupe seed to be on its steps."

(4) That instruction lays down the correct rule for measuring the degree of care; but we are of the opinion that there was no prejudice in refusing to give the instruction, for the reason that there was no attempt to show that cantaloupe seed had been on the steps for so short a time that the trainmen had no opportunity to discover its presence there. The box step had been placed there by some of the trainmen immediately before the plaintiff debarked and the opportunity of the trainmen to discover the presence of the seed was entirely within their knowledge. If it had been shown that the seed were on the steps so short a time that warranted the jury in finding that there was no negligence in failing to discover the condition, then this instruction would have been applicable; but in the present state of the case we do not see how it could have affected the verdict. The refusal to give it was, therefore, not prejudicial.

Another assignment relates to refusal of the court to give an instruction (No. 11) as to the burden of proof being on the plaintiff.

But the refusal to give the instruction was not prejudicial, because the court gave another instruction at the instance of defendant, telling the jury that "unless the plaintiff has shown by a greater weight of the evidence that she was injured by the negligence of the defendant, your verdict should be for the defendant."

In view of that instruction, which is as favorable as the defendant could have asked, it is unnecessary for us to determine where the burden of proof rests in case of injury to a passenger under circumstances indicated in this record.

Judgment affirmed.

CARTER v. GOODSON.

Opinion delivered June 22, 1914.

1. EVIDENCE—TITLE TO LAND—TITLE FROM STATE—POSSESSION—PRESUMPTION.—Where appellee and her grantors have held possession of land for fifty years, improving the same and paying taxes thereon, under the evidence, *held*, a finding by the court that a grant of the land had been made by the State to appellee's grantor, was justified.
2. TITLE—GRANT—POSSESSION—PRESUMPTION.—The presumption of a grant from long continued possession is one of fact, and it is for the jury or court trying the case to determine the effect of the evidence in support of the presumption.

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

STATEMENT BY THE COURT.

This is an action of ejectment by E. L. Carter against A. L. Goodson, Jacob Goodson and Mrs. Laura West, to recover the possession of the northwest quarter of the northeast quarter of section 6, township 4 north, range 20 west, 47.41 acres of land, in Yell County, Arkansas. The facts are as follows:

The land in controversy was originally swamp land, and a patent therefor was executed by the United States to the State of Arkansas. The plaintiff, Carter, purchased the land from the Commissioner of State Lands and obtained a deed from the State for the land on September 27, 1911.

Richard Ellison, for the defendants, testified: I knew Eppy White in 1856, and he lived on the land in controversy. In 1857 White sold the land to one Jeffreys, and Jeffreys then moved on it. At that time there was a house and some improvements on the land. The house remained there until it was destroyed during the latter part of the Civil War. After the war Jeffreys sold the land to my father, John J. Ellison, but father never moved on the land. At the time Jeffreys sold the land to my father, he sold another tract, containing forty acres. When my sister, Laura West, married, my father gave the land to her, and she and her husband moved on it and have resided there ever since. Neither my father,

my sister, nor her husband could read or write. My father and my sister together have paid the taxes on the land since the Civil War. I was accustomed to looking over my father's papers for him, and my recollection is at one time I saw a patent from the State of Arkansas to Eppy White for the land in controversy. I also saw a deed from White to Jeffreys, and my recollection is the deed called for both the northwest quarter of the northeast quarter and the northeast quarter of the northeast quarter of section 6, township 4 north, range 20 west. Jeffreys conveyed both of these tracts of land to my father. None of these deeds were ever recorded, and they were in possession of my father or sister when I last saw them.

The defendant, Laura West, testified that her father gave her the land when she married, in 1866, and that she has lived on it and cultivated it ever since. She testified that she recollects seeing deeds which were delivered to her as deeds to the land in controversy; that she can not now find the deeds; that her husband at one time assorted out some papers in his trunk and burned some of them; that this is the only way she can account for the absence of the deed now.

Other witnesses for the defendants testified that Mrs. Laura West had resided on the land since her father gave it to her until the present time.

Eppy White, Jeffreys, John J. Ellison, and the husband of Laura West were all dead when this action was commenced. It was also shown that there was in the county clerk's office a record book containing a certificate from the State Auditor of lands, dated November 24, 1868, showing that the northwest quarter of the northeast quarter of section 6, township 4 north, range 20 west, 47.40 acres, was entered by Eppy White and was subject to taxation.

On the part of the plaintiff, the Commissioner of State Lands testified that the records in his office showed that there was an application by Eppy White, numbered 41, and dated August 13, 1857, for the purchase from the

State of the northeast quarter of the northeast quarter of section 6, township 4 north, range 20 west, and also that the records of his office show that a patent was issued to him for said land, and that both in the application and the record showing the sale of the land, the number of acres was described as 47.41 acres. He also stated that the original plat book was still in the land office and that the northwest quarter of the northeast quarter of section 6, township 4 north, range 20 west, the land in controversy, is marked "S;" that the practice was, when a subdivision of lands was sold by the State, to place the letter "S" on the subdivision sold; that in his judgment the placing of the letter "S" on the northwest quarter of the northeast quarter of the section in question was a clerical error because the records of the land office contained no other evidence of the sale of the land to any one except the sale made to Carter in 1911. He also stated that the records in the State Land Office showed that the northeast quarter of the northeast quarter of section 6, township 4 north, range 20 west, was purchased by Oscar Winn on December 15, 1904, and that a refunding certificate was issued to Winn for said land on September 22, 1911. Other evidence shows that suit was commenced by him for the possession of the land so purchased by him against Mrs. Laura West and that the suit was settled by compromise between the parties.

The case was tried before the court sitting without a jury, and judgment was rendered in favor of the defendants. Plaintiff has appealed.

Samuel Frauenthal and *John B. Crownover,* for appellant.

1. Any presumption that could possibly arise by reason of possession is entirely overcome by record proof in State Land Office.

2. The statute of limitation by adverse possession would not run against the grantee of the State until after 1911.

3. Upon loss of the deed, the highest secondary evidence was the original certificate of purchase, application to enter and the record of the deed in the land office. 76 Ark. 400; 2 Wigmore on Ev. 1239, and notes, pp. 1484-8. But there is no testimony that a deed ever issued to Eppy White. 4 Ark. 574.

4. The patent to appellant was an official act, and the law presumes it was rightfully and duly performed. 31 Ark. 609; 39 *Id.* 121; 94 *Id.* 221.

5. The statute of limitations does not run against the State nor its grantee. No length of time or possession gives title against the State. 95 Ark. 70; Coke, Litt. 57; 3 Cruise, 558; 115 U. S. 408; 92 *Id.* 343; 95 Ark. 70; 132 U. S. 239; 22 S. E. 997; 22 So. 542; 72 S. W. 443; 1 Alaska, 81; 21 Mich. 24; 46 Cal. 661; 27 Am. Dec. 661; 50 Mich. 367; 7 Ga. 387.

Priddy & Chambers and *J. F. Sellers,* for appellee.

1. The bill of exceptions does not show it contains all the evidence. 81 Ark. 427; 75 *Id.* 82; 74 *Id.* 553.

2. After long, undisputed actual possession a grant will be presumed. 81 A. 997; 233 Pa. 121; 141 S. W. 574; 66 Atl. 362; 117 S. W. 307; 33 Am. Dec. 720; 27 S. W. 409; 15 N. H. 344; 39 Am. Dec. 658; 2 Sneed (Tenn.) 215; 205 W. 152; 1 Greenl. Ev. (16 ed.), § 45-a; 90 Fed. 187; 138 Fed. 772; 23 So. 79; 53 N. E. 1008; 2 Chamberlain on Ev., § 1163-a; 161 S. W. 64; 120 U. S. 534; 52 S. W. 123; 50 Ark. 155.

3. There is testimony to prove an *actual* grant.

Samuel Frauenthal and *J. B. Crownover,* in reply.

The bill of exceptions is sufficient if it appears therein that *all* the evidence is brought up. 105 Ark. 53; 92 *Id.* 148; 49 *Id.* 364; 36 *Id.* 496. See 81 Ark. 327; 75 *Id.* 82.

HART, J., (after stating the facts). Counsel for defendant seek to uphold the judgment upon the doctrine of the presumption of a grant after a long lapse of time. In discussing this question, in the case of *Fletcher* v. *Fuller,* 120 U. S. 534, at page 545, Mr. Justice Fields, speaking for the court, said:

"When possession and use are long continued they create a presumption of lawful origin; that is, that they are founded upon such instruments and proceedings as in law would pass the right to the possession and use of the property. It may be, in point of fact, that permission to occupy and use was given orally, or upon a contract of sale, with promise of a future conveyance, which parties have subsequently neglected to obtain, or the conveyance executed may not have been acknowledged, so as to be recorded, or may have been mislaid or lost. Many circumstances may prevent the execution of a deed of conveyance, to which the occupant of the land is entitled, or may lead to its loss after being executed."

Again, at page 551 the learned judge said:

"The general statement of the doctrine, as we have seen from the authorities cited, is that the presumption of a grant is indulged merely to quiet a long possession which might otherwise be disturbed by reason of the inability of the possessor to produce the muniments of title, which were actually given at the time of the acquisition of the property by him or those under whom he claims, but have been lost, or which he or they were entitled to have at that time, but had neglected to obtain, and of which the witnesses have passed away, or their recollection of the transaction has become dimmed and imperfect. And hence, as a general rule, it is only where the possession has been actual, open and exclusive for the period prescribed by the statute of limitations to bar an action for the recovery of land, that the presumption of a deed can be invoked. But the reason for attaching such weight to a possession of this character is the notoriety it gives to the claim of the occupant; and, in countries where land is generally occupied or cultivated, it is the most effective mode of asserting ownership."

In *United States* v. *Chaves,* 159 U. S. 452, Mr. Justice Shiras, after discussing the question of fact as to whether or not the evidence was sufficient to show affirmatively that the claimant obtained title from the Mexican

Government, said, in reference to the power of the court to presume a grant upon proof of long continued possession, the following:

"It is scarcely necessary for us to consider such a question, because, as we have seen, there is ample evidence from which to find that these settlers were put in juridical possession under a grant from the Governor of New Mexico, who, under the laws then in force, had authority to make the grant. However, we do not wish to be understood as undervaluing the fact of a possession so long and uninterrupted as disclosed in this case. Without going at length into the subject, it may be safely said that by the weight of authority, as well as the preponderance of opinion, it is the general rule of American law that a grant will be presumed upon proof of an adverse, exclusive and uninterrupted possession for twenty years, and that such rule will be applied as a *presumptio juris et de jure,* wherever, by possibility, a right may be acquired in any manner known to the law. 1 Greenleaf, Ev. (12 ed.), § 17; *Ricard* v. *Williams,* 7 Wheat. 59, 109; *Coolidge* v. *Learned,* 8 Pick. 503.

"Nothing, it is true, can be claimed by prescription which owes its origin to, and can only be had by, matter of record; but lapse of time accompanied by acts done, or other circumstances, may warrant the jury in presuming a grant or title by record. Thus, also, though lapse of time does not, of itself, furnish a conclusive bar to the title of the sovereign, agreeable to the maxim, *nullum tempus occurrit regi;* yet, if the adverse claim could have a legal commencement, juries are advised or instructed to presume such commencement, after many years of uninterrupted possession or enjoyment. Accordingly, royal grants have been thus found by the jury, after an indefinitely long continued peaceful enjoyment, accompanied by the usual acts of ownership. 1 Greenl. Ev., § 45."

(1) The presumption of a grant from long continued possession is one of fact, and it is for the jury or court

trying the case to determine the effect of the evidence in support of the presumption.

(2) It is contended by counsel for plaintiff that the records of the State Land Office conclusively show, as a matter of law, that no deed could have ever been issued by the State to Eppy White; but we do not agree with them in this contention. It was admitted by the Commissioner of State Lands that there was some confusion from the records in his office as to whether the entry by Eppy White was for the northwest quarter of the northeast quarter or the northeast quarter of the northeast quarter. It is true, he states that in his opinion the letter "S" was placed on the northwest quarter of the northeast quarter by mistake and should have been placed on the northeast quarter of the northeast quarter. He gave his opinion that this was a mere clerical error, because there was no other record in the land office tending to show that Eppy White had entered the land in controversy; that on the other hand there was a record in the land office showing that Eppy White had made application to purchase the northeast quarter of the northeast quarter and that the same had been sold to him. He admits, however, that it was the practice in the land office to place the letter "S" on the original plat on the subdivision of land when it was sold by the State, and that pursuant to this custom the letter "S" was placed on the northwest quarter of the northeast quarter. He also admits that by reason of this confusion of the records one of the clerks in his office sold the northeast quarter of the northeast quarter of said section 6 to Oscar Winn. Then, too, the Auditor of State Lands, pursuant to statute, certified to the county clerk of Yell County, in which the lands were situated, that the northwest quarter of the northeast quarter, or the land in controversy, had been sold to Eppy White and was subject to taxation. The date of this certificate is 1868. Therefore, we are of the opinion that the circuit court might reasonably have inferred that the record of the State Land Office did not show, as a matter of law, that the land in controversy

had not been sold to Eppy White. When we consider the further fact that the land has been in possesison of Eppy White and his grantees ever since the year 1857, and that these parties have cleared the land, made improvements on it, cultivated it, and paid taxes on it, we think the circuit court was justified in finding that a grant had been made to Eppy White. In addition to this, Richard Ellison testified that he had seen, among the papers of his father, a deed to this land from the State to Eppy White. Eppy White and his grantees have been in the exclusive and uninterrupted possession of the land for over half a century, and they are all, except the defendant, Laura West, now dead. She was too young to remember anything about the original entry; and when all the facts and circumstances adduced in evidence are considered, we are of the opinion that the court was justified in finding that a grant of the land had been made by the State.

It follows that the judgment must be affirmed.

BOONE v. BOONE.

Opinion delivered June 22, 1914.

1. WILLS—TESTAMENTARY CAPACITY—OLD AGE.—Old age, physical infirmities, and even partial eclipse of the mind, will not prevent a testator from making a valid will, if, at the time he executed the same, he knew what he was doing, and if he could retain in his memory without prompting, the extent and condition of his property and comprehend to whom he was giving it, and at the same time was capable of appreciating the deserts and relation to him, of others, whom he excluded from participation in his estate.
2. WILLS—TESTAMENTARY CAPACITY—SUFFICIENCY OF EVIDENCE.—Testator, a man past seventy years, by will left the bulk of his property to his wife, but devised a tract of thirty acres to a city for a public park. In an action by testator's heirs to have the will declared void for lack of testamentary capacity, *held*, under the evidence, that the testator had testamentary capacity to make the will.
3. WILLS—SIGNATURE—SPELLING.—In an action contesting the validity of a will, where no contention is made that the testator did not intend to, or did not sign the will, where the will consisted of sev-

eral typewritten sheets, the fact that the testator, whose name was Emanuel, omitted the "n" in his name in writing his signature on one sheet of the will, will not affect its validity.

4. WILLS—DESIGNATION OF BENEFICIARY—NAMES.—The designation in a will of the testator's son's son, as his nephew, instead of his grandson, will not affect the validity of the will, when he gave the names of both, the error being merely clerical.

5. WILLS—NAMES OF DESCENDANTS—OMISSION.—In an action contesting a will on the ground of lack of testamentary capacity of the testator, when the testator neglected to mention the name of one granddaughter, it is not error for the court to refuse to submit to the jury the question of the rights of said granddaughter, where no contention is made by any one that the will was not ineffectual as to her.

6. APPEAL AND ERROR—FAILURE TO INSTRUCT JURY ON CERTAIN ISSUE.—When appellant failed to ask the court to instruct the jury upon a certain issue, it can not, on appeal, complain of the court's failure to do so.

7. WILLS—CONTEST—FAILURE OF DEVISE.—In an action contesting a will for lack of testamentary capacity in the testator, the question of the capacity of a certain devisee to accept a gift, is not an issue properly before the court.

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

Mehaffy, Reid & Mehaffy, and *Carmichael, Brooks & Powers,* for appellants.

1. Supporting the proposition that the evidence does not sustain the verdict and that the court should have directed a verdict for the contestants, counsel say:

(*a*) The will indicates that the deceased did not appreciate the relationship of those dependent upon him. He was suffering from *senile dementia,* lacked mental capacity and disposing memory, and was not capable of executing a valid will. 64 Ark. 351.

(*b*) He could not retain in his memory, without prompting, the extent and condition of his property, nor comprehend to whom he was giving it.

(*c*) There is such indefiniteness and uncertainty about the will as to stamp it as the product of a disordered mind, as, for example, his inability to spell his name correctly; in bequeathing the land for park purposes, although it almost borders the corporate line of

the city of Argenta, that city is not named, and his mania for the use of the letter E as an initial, naming his son, Joseph *H.* Boone, as Joseph *E.* Boone, and referring to Sarah *E.* Abeles and Sarah *E.* Boone, both names referring to the same person, and the initial E not being a part of her name at all.

(*d*) The other evidence conclusively establishes the mental incapacity of the testator. 87 Ark. 243.

2. The court erred in holding that the city of Argenta had the legal capacity to take and hold, for *park purposes,* property situated without its limits. Kirby's Dig., § § 5442, 5449, 5530. Section 5436, which authorizes municipalities to possess and hold real and personal property, has reference to property within the city limits, except where express authority is given to go beyond the limits.

See also 3 Dillon, Mun. Corp. (5 ed.), § 980; 99 Ark. 704; 58 Ark. 270; 52 Ark. 541; 83 Ark. 275; 113 Am. Rep. 1056; 40 L. R. A. 829; 118 Ga. 590; 118 Wis. 298; 48 L. R. A. 331; 36 Mich. 474.

3. The court erred in refusing to instruct the jury that deceased died intestate as to his granddaughter, Lucy Russel, who was not mentioned in the will, and as to the property attempted to be conveyed to the city of Argenta.

J. W. Blackwood and *Fred McDonald,* for the city of Argenta; *Bradshaw, Rhoton & Helm,* for the executrix.

1. The questions involved in this case were questions of fact, and, the jury having passed upon them against the contentions of the contestants and in favor of the validity of the will, their verdict is final and conclusive.

The small mistakes in the wording of the will, and isolated acts or conduct on the part of the testator, enlarged upon by counsel in subdivisions A, B and C of their brief, are entirely reconcilable with a sound and disposing mind and memory.

On the question of testamentary capacity as applicable to the deceased under the evience, see 47 Am. St.

354; 28 Am. & Eng. Enc. of L. 74; 3 Wash. (U. S.) 585. Old age and feebleness are not sufficient to destroy testamentary capacity where the testator's mind meets the test of competency. 40 Am. & Eng. Enc. of L. (2 ed.) 87; 13 S. W. (Ark.) 1098; 47 Ala. 221.

"The test is integrity of the mind, not the body." 22 Tex. App. 22; 49 Ark. 369.

An imperfect or illegible signature may be valid as the testator's mark, where there is no doubt of testamentary intent. The omission of the letter "n" from the name of Emanuel, does not tend to invalidate the will, since there is no contention that deceased did not intend to sign his proper name to the will. 40 Cyc. 1107; 148 Pa. St. 55; 35 L. R. A. 103; 28 S. W. 151.

Courts will reconcile apparent inconsistencies and repugnant provisions of a will in order to carry out the testator's intent as to the disposition of his estate. 30 Am. & Eng. Enc. of L. (2 ed.) 685; see also *Id.* 682; 1 Paige (N. Y.) 291; 3 Redf. (N. Y.) 31; 31 Wash. 643.

2. A city may properly accept a devise of land for park purposes. 3 Dillon, Mun. Corp. (5 ed.), § 980; 29 Mo. 574; 170 Mass. 160; 161 Mo. 34; 205 Mo. 656; 118 Wis. 298; 69 Miss. 887; 76 N. Y. 487; 69 N. Y. 569. See also 70 Ark. 455; 100 Ark. 588; 47 Ark. 269; 67 Ark. 36; Acts 1913, p. 323.

3. It was conceded that as to Lucy Russell, the testator died intestate. The court correctly refused to place her claims before the jury. Her rights, as a matter of law, were preserved in the judgment.

KIRBY, J. This is a contest of the will of Emanuel Boone. The testator gave to his children and grandchildren, named in the will, $5 each, and to Emanuel Boone, the son of William H. Boone, designated in the will as his nephew, $100, and left the bulk of his estate to his widow, Sarah Boone, who was named executrix of the will. He disposed of his home place, containing thirty acres, by paragraph 4 of the will as follows: "I hereby devise and bequeath my home place, containing thirty (30) acres, more or less, to my wife, Sarah Boone,

to be held by her for her sole use and benefit during her natural life, and at her death I desire that said land be turned over to the proper authorities of the city nearest to said land for the purpose of a public park (and that the same be maintained as a public park) under the name of "Boone Park," for the use and benefit of the public, forever, by said city; but I desire that they do not disturb the natural outlines of the land more than is necessary to make driveways through and over said land." In the seventh paragraph, he devised thirty-five (35) acres of land to his wife so long as she should remain single, authorizing her to sell it, or any part thereof, during her widowhood after it was first appraised by three persons, naming them, and directing that out of the proceeds, after paying the expenses, she should retain one-third and divide the other two-thirds equally among his heirs, named in section 2 of the will.

W. H. Boone *et al.* filed a contest, alleging as grounds therefor:

First. That the testator was without testamentary capacity, and not of sound and disposing mind and memory.

Second. That he was unduly influenced by his wife and Charles Vestal and others unknown.

Third. Denied the capacity of the city to take and hold the land proposed to be granted for a park under the laws of the State, and alleged other inconsistent provisions of the will.

The will was admitted to probate by the probate court, and upon appeal to the circuit court a trial by jury resulted in favor of its validity, and from the judgment this appeal is prosecuted.

The testimony is voluminous, and, upon the question of testamentary capacity, conflicting and contradictory.

Upon the part of the contestants, children, relatives and heirs, it tends strongly to show that the testator was weakened in mind and body with the weight of years; that he had suffered two strokes of paralysis along about 1903 and 1904, which further impaired his mind, and that

the effect of the last was decidedly noticeable by the drawn condition of his face and the twitching of the muscles. That his memory was impaired to the extent that in June, 1904, he failed to recognize one of his children, Mrs. McClellan, on Main Street until after she had shaken hands with him and called him "father," and "He recognized me then and cried and wiped the tears from his eyes" and said that he failed to recognize another on another occasion, and that he had forgotten and did not recognize a grandchild until she called his attention to her identity.

Some of these witnesses stated that the Faucettes, who had been mayors of Argenta, were frequent visitors at the house of the testator before the making of the will, and often dined with him, and that their pictures were found in the rooms of his home.

Mrs. Ray Williams, a granddaughter, said that after her grandfather had a stroke of paralysis in 1903, "I noticed a twitching of his lips after the stroke, and he was quick to cry about things. I have seen him sob all alone in the room, and would be twirling his hands and would be chuckling to himself, and would cry when no one was around him or doing anything to hurt him, and no one was talking to him. I think it was in 1904 he had the second stroke. He seemed to be worse then than before, and I noticed that grandma cared for him very, very closely." This witness overheard a conversation, in 1904, between W. H. Boone, who was at the testator's home with his wife, in which the testator was praising his home property and asking his son how he thought it would do for a park. It was shown that he had also mentioned to many others that parks were good things for the people and ought to be provided by cities.

Most of the children testified that he was not competent to transact business after the second stroke of paralysis, and that, although he could do the little chores about the house, they did not regard him competent to attend to matters of any importance.

Two experts testified upon hypothetical questions submitted to them that the testator was not of sound and disposing mind and memory.

On the other hand, his banker, his groceryman, and the merchants with whom the testator did business, testified that he was a gardener and truck farmer, and others of his friends and neighbors testified that there was no drawn condition of his face nor twitching of the muscles noticeable, and that while he had grown old and was getting feeble, that his mind and memory were not materially impaired, if at all. His widow stated that she did not know of his ever having had a stroke of paralysis, and also a woman who had been his nurse in a time of sickness.

A. J. Mercer, one of the witnesses to the will, and cashier of the Peoples Savings Bank since 1902, stated he had known the testator from 1896 to his death, that he was a customer of the bank from 1902; that he had done some business for him as an abstracter before that time; that "he kept an account with our bank from 1902 and a little before that, until his death." The account was not very large. "I witnessed his will at his request. The will is undated, but judging from records in the bank it was signed on May 22, 1905. The other witness, Mr. Stevenson, who was at the time paying teller in the bank, said he talked to him about making the will. He was probably in the bank five or six times in regard to it. I wrote out the draft of the will myself. There was more than one draft of it made. He discussed with me how he wanted to distribute his property. He came in first and gave us a general idea of what he wanted. I think he was perfectly intelligent and rational at the time. He took a draft of the will which I had prepared and went off with it and afterward brought it back and talked over what changes he wanted made. My recollection is there was no material change. Afterward I copied it as he decided he wanted it, and as it is now. I considered him rational at the time from my dealings with him and from my conversation with him. I couldn't say now whether

he gave the name to me 'Joseph H.' and I wrote it 'Joseph E.' Boone. The first consideration was that he stated that his children had never done anything for him and they had been provided for most of them during their lifetime, and a hesitance in not signing the first will was that he was not sure of the names of his grandchildren. He afterward brought these corrected names. He gave me a list of them and seemed to want to take a list and see whether the names were correct. In the second paragraph where he mentions 'my nephew, Emanuel, son of Will H. Boone,' he might just have said he was a child of so and so; I expect I didn't hear any better than that. I didn't stop to think, I guess."

R. E. Stevenson, the other witness to the will, stated that after it was executed he heard a great deal of talk about the testator. "His son, Will Boone, came to me several times and asked me if I didn't think the old gentleman of unsound mind, or words to that effect. I told him that I didn't think so at the time he signed the will, and I don't think so yet. I told him that he appeared to be getting kind o' old, and I don't remember the exact words I used—I think a little bit senile—but I didn't say that I wouldn't have witnessed the will. The testator was back and forth probably a month discussing the making of his will, and it was all in typewritten form and ready for signature when I was called in to witness it."

W. E. Lenon stated that he had known testator for about fifteen years and knew him while engaged in the abstract business. Saw him in their bank frequently from 1904 to 1906. He was a depositor. "I never noticed any twitching in his face. He was an elderly gentleman, and a little feeble, but nothing more than ordinary for a man of that age. He drew checks on the bank. I knew his signature. His book shows last balance, $669.49, on October 6, 1907." His account was continued in the name of Mrs. Boone as executrix. "A few months before he made his will he talked to me about making it. At that time I noticed nothing in his speech or conduct

to indicate that he was not a perfectly rational man and knew what he was doing. In all my conversations with him, I never noticed anything except that he was just an elderly gentleman, in feeble condition and yet very rational. I had that same opinion about his sanity when he talked to me about making the will. * * * I don't recollect whether he discussed with me about giving this land to the city of Little Rock or Argenta for a park."

Mrs. Underwood knew the testator three or four years before his death, and assisted his wife in nursing him when he was sick. She said: "His ability to get around and walk and carry on the affairs of life were good. He was never sick during that time, to my knowledge, except a little cold or something of that kind. He attended to all his business, did not limp, there was nothing the matter with his arm. His face was not the least bit drawn and I never saw any twitching of the muscles; I saw him every day and sometimes two or three times a day for a year; lived just across the street from him for a year, two or three years before his death. I talked with him, visited back and forth; his speech was distinct and his conversation intelligent, very much so; he read the papers and kept posted on current events and was an intelligent conversationalist."

J. G. Vogel, a merchant in Argenta for twenty-eight years, who bought vegetables and berries from the testator and sold him groceries until a short time before he died, said: "He certainly was able to attend to his business in every respect, and to take care of his own interest at any and all times. The last time he was in my store was about thirty days before he died. He bought five gallons of oil and I started to pick up the can and take it out and he said, 'No, no; I can get into the buggy;' and he got into the buggy unassisted. There was nothing the matter with him that I could see in any shape, form or fashion; he was getting along in years naturally. I think he was better preserved mentally and physically than one out of a great many thousand men who reach the age of seventy-eight or seventy-nine. I could observe

nothing wrong with his mind or his conversation or his demeanor. Never noticed any twitching or drawing of his face. Sometimes he would come to my place of business every day, in the fall maybe two or three times a week. When he would come across the river he would stop in my store. I never knew any one that was more industrious and thrifty."

Others who had known him long and traded with him never noticed that his face was drawn or that the muscles twitched, and regarded him at the time of his death a rational man of good sense.

C. J. Kramer stated he had been in the grocery business in Little Rock for thirty years, and was acquainted with the testator for about ten years and had business with him for five or six years, up to the time of his death. "He seemed to always know what he was doing. He would leave the goods there, go on Fifth Street, come back and we would settle the price at whatever they gave him on Fifth Street. He seemed rational. I spent a good deal of time talking to him, but not about making his will. He was always sane with me so far as the transactions and discussions I had with him. I never heard there was anything the matter with him until I was summoned here as a witness at the first trial."

The widow testified that testator had never had a stroke of paralysis; that he sometimes got overheated in the fields, came in warm and would sit down a while. He was never sick any time until his last illness. He took sick on August 5 and died on the 22d, 1906. Never talked to her about making his will. Neither side of his face was drawn and there was no twitching of the muscles of it. She knew both Will and Jim Faucette by sight, but neither of them had ever been in the house prior to Mr. Boone's death. She did not know Mr. Faucette until he called to see her when the trial was set for November.

J. P. Faucette, the present mayor of Argenta, stated he was not acquainted with testator during his lifetime, never had seen him that he knew of, nor had any con-

versation with him. Was never on his place during his lifetime; he had seen it frequently—knew where it was. He never gave a picture of his to any of the Boone family, and, if they had one, he knew nothing whatever of it.

W. C. Faucette stated that he was mayor of Argenta from April, 1904, until January, 1911; that he was not acquainted with the testator, never had any conversation with him about this will, nor any other subject, was never at his residence during his lifetime, and that there was no picture of his in his house. Didn't know anything about the will until he read it in the newspapers, that he never saw his own picture in the newspaper, although they had a good deal to say about him.

Charles Vestal testified he lived on the property adjoining the testator, his nearest neighbor, and knew him well. "I must have known him over thirty years. I thought he had a good mind and entirely sane. I never talked to him about giving any part of his property to the city."

The testator, shortly after his last marriage, had had some litigation with his children and heirs about some property they claimed had belonged to their mother. This litigation was compromised and the property divided.

(1-2) The jury found upon conflicting testimony in favor of the validity of the will, and there is ample evidence to sustain their verdict. The decided preponderance of the testimony of witnesses not interested in the result and acquainted intimately with the testator, shows that he was of sound and disposing mind at the time of the execution of the will, and there is no testimony whatever tending to show that there was any undue influence exerted by Charles Vestal and Sarah Boone, the Faucettes or any one else, in procuring the execution of the will. The testator was old and he gave valuable property that his children expected would come to them to the city nearest which it was located for a park to be named "Boone Park," and kept for the benefit of the public and in commemoration of the donor. His disposition to

benefit his fellow-man and to erect a monument to his own memory in passing through this life was stronger than his inclination to take care of and further provide for his own children, who had long been away from his home and established families of their own. He had a right to do this, if his capacity was sufficient in law. In *McCulloch* v. *Campbell,* 49 Ark. 367, the court said that old age, physical infirmities, and even partial eclipse of the mind would not prevent the testator from making a valid will, if he knew and understood what he was doing—if he could retain in his memory without prompting the extent and condition of his property and comprehend to whom he was giving it and be capable of appreciating the deserts and relations to him of others whom he excluded from participation in his estate. *Ouachita Baptist College* v. *Scott,* 64 Ark. 351; *Hall* v. *Perry,* 47 Am. St. 354, 28 A. & E. Enc. of Law, 74; *Leeper* v. *Taylor,* 47 Ala. 221.

It is apparent that the testator retained in his memory the condition and extent of his property without prompting from any one and without any suggestions as to the disposition thereof. He went to the cashier of his bank, with whom he had long dealt, and told him he desired to make a will and what disposition he expected to make of his property. He discussed it with him several times, and a rough draft of the will was then made, which he took away with him and kept for a time and then returned and suggested such further amendments and corrections as he wanted made. He knew he was giving the bulk of his estate to his wife and intended to do so, and doubtless preferred to perpetuate his name in the gift to the city of the home place for a park to be called "Boone Park," instead of to provide further for his children, all of whom were grown and had long since gone from his home and established homes of their own, and who had also sued him to prevent the disposition of certain property that they claimed belonged to them as heirs of their mother. His mind doubtless was not as good as in the days of his youth and vigorous manhood, but the most that could be gathered from the testimony rela-

tive to the impairment of his mind was here and there an instance of absent-mindedness, if the testimony of the contestants had been believed.

(3) The fact that the testator omitted the "n" in his signature in writing his first name, Emanuel, on one of the sheets of the will, in no wise affects its validity, for there is no contention even that he did not intend to and that he did not sign the will. The whole testimony on that point shows that he intended to and did sign it. 40 Enc. 1107; Plates' Estate, 148 Pa. St. 55; *Sheehan* v. *Kearney,* 35 L. R. A. 103; *Word* v. *Whipps,* 28 S. W. 151.

(4) Neither did the designation of his son's son in the will as his nephew instead of his grandson affect its validity, for he gave the names of both and showed that one was the son of the other, and the mistake was a clerical error easily apparent and the beneficiary was sufficiently designated.

(5-6-7) It is earnestly contended also that the court erred in not instructing the jury that the will was void as to one of the contestants, a granddaughter, whose name was omitted therefrom, and also that it was the court's duty to instruct the jury that the city of Argenta, the nearest to the property devised for the park, was incapable of taking under the will under the laws of the State. There was no necessity for the court to submit to the jury the question of Lucy Russell's, a granddaughter whose name was not mentioned in the will, rights thereunder, since there was no contention made by any one that the will was not ineffectual as to her. The fact was in evidence to the jury, and contestant had whatever benefit might arise from it in the argument. The instruction to the jury would only have been confusing and would not have conduced to any clearer understanding of the issues involved. Contestants did not ask the court to instruct the jury that the city of Argenta could not under the law hold this property and maintain it as a park under the provisions of the will, and can not, therefore, complain of the court's failure to do so if such was the law. It could make no difference in the question of the testator's ca-

pacity and the validity of the will if the city was without power to take the benefit of the gift, which we do not decide, and make a park upon the lands devised for the purpose, for if it had had no such power and could not have held them, then they would have reverted to the heirs of the testator, these contestants, in any event, because of the failure of the devise to the city.

We do not consider the other objections urged of sufficient importance to discuss them at length, it being sufficient to say that the issues were submitted to the jury on proper instructions and we find no prejudicial error in the record. The judgment is affirmed.

LANDRUM v. LINDSEY.

Opinion delivered June 29, 1914.

1. CONFLICT OF LAWS—DEBT CREATED IN ANOTHER STATE—ENFORCEMENT.—Where a contract entered into in Missouri is void under the laws of that State, it can not be enforced in Arkansas.
2. SALES—SALE ON CREDIT.—Where goods were sold by appellant to appellee's intestate, and a running account kept, for a number of years, goods being charged to deceased, and payments credited thereon, the sales will be held to have been made on credit.

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

STATEMENT BY THE COURT.

This is an action by appellant against the appellee, administrator of the estate of August Peterson, deceased, to collect a claim for the balance due on account for intoxicating liquors sold to his intestate.

Appellant, a licensed retail liquor dealer and dram shop keeper at Poplar Bluff, Mo., sold liquors to August Peterson, appellee's intestate, who resided at Corning, Arkansas, upon orders sent by Peterson to Poplar Bluff by mail, telegraph and telephone. The liquors were shipped on receipt of the orders, by express and delivered to Peterson at Corning between the dates of October 16, 1905, and July, 1910. An account was kept of shipments by appellant and credit given for all payments

made. Peterson died in January, 1911, and appellee was appointed administrator of his estate. Appellant presented a claim of balance due of $178.50 on account for liquors sold to the intestate, which was disallowed, and on trial in the probate court decided against appellant, and likewise on appeal to the circuit court. The answer in the probate court set up that the liquor was sold in violation of the law and the Missouri statute, making all sales on credit void.

F. G. Taylor, for appellant.

There is no proof that the sales made were for cash or credit. The rule is general that where there is no provision for credit, the presumption will be that the sale is made for cash. 35 Cyc. 325; 104 Me. 62, 71 Atl. 69; 106 Mass. 422; 59 Minn. 144; 33 Minn. 111; 58 Vt. 455.

J. S. Jordan, for appellee.

The Missouri statute making sales by dramshop keepers on credit, void, and the debt thereby attempted to be created not recoverable at law, is valid and constitutional, and not objectionable as interfering with interstate commerce. 72 Ia. 223.

The validity or invalidity of a contract made valid or invalid by statute, must be determined by such statute. 9 Cyc. 666 (5); 27 Md. 420; 97 Am. Dec. 641.

The parties to the contract in question will, in the absence of proof to the contrary, be held to have intended that it should be construed according to the laws of Missouri, where the sale was consummated. 9 Cyc. 667, and cases cited.

KIRBY, J., (after stating the facts). The statute of Missouri, relied upon in defense of the suit, Revised Statutes of 1909, § 7189, is as follows:

"No dramshop keeper shall keep such shop at more than one place at the same time, nor shall the license of a dramshop keeper be assignable or transferable; and all sales made by him on credit are declared void, and of no effect, and the debt thereby attempted to be created shall not be recoverable at law."

(1-2) The sales were made at Poplar Bluff, Missouri, where the orders for the liquor were accepted and the shipments made, and under the laws of that State all sales made by a dramshop keeper on a credit are declared void and the debt attempted to be created by the sale not recoverable at law. The contract being void in the State where made is void everywhere, and the seller can not maintain an action for the balance claimed to be due in this State where the goods were finally received. 23 Cyc. 335-337; *Howcott* v. *Kilbourn,* 44 Ark. 213. It is not contended that the sales were not made in Missouri, but only that they were not sales on credit and that they were made in interstate commerce, which can not be regulated by a statute. Unquestionably the sales were made upon credit for a running account was kept, showing the transactions for about five years, liquors being charged to the deceased and the amounts paid by him credited thereon. If they had been sales for cash there could have been no debt created, and if it was the intention of the liquor dealer to sell for cash, it could make no difference in the result, since the liquors were charged upon account and the payments therefor credited thereon. There is no question of attempted regulation of nor interference with interstate commerce in this case.

The judgment is affirmed.

EVATT v. MILLER.

Opinion delivered June 29, 1914.

1. HUSBAND AND WIFE—SUBSEQUENT BIGAMOUS MARRIAGES—DOWER.—Where a man and woman are legally married, the woman continues to be the man's wife, although she subsequently contracts a bigamous marriage with another man, and upon the death of her lawful husband, the wife is entitled to her rights as his widow.
2. HUSBAND AND WIFE—BIGAMOUS MARRIAGE—RIGHTS OF WIFE.—Where a man is already lawfully married, and subsequently contracts a bigamous marriage with another woman, upon his death the latter has no rights in, and can not share in, his estate.
3. LEGITIMACY—CHILDREN OF VOID MARRIAGE.—Kirby's Digest, § 2640, which provides that the issue of all marriages deemed null in law,

or dissolved by divorce, shall be deemed and considered as legitimate, is limited to the issue of marriages, and does not include children born of persons whose relationship is merely that of persons who are illegally cohabiting together as man and wife.

4. MARRIAGE—MARRIAGE IN ANOTHER STATE—VALIDITY.—A marriage contracted in Texas, and valid under that law, will be treated as valid in this State. Kirby's Digest, § 5177.

5. MARRIAGES—CONFLICT OF LAWS—COMMON-LAW MARRIAGE.—A common-law marriage, contracted in Texas, and valid under that law, will be treated as valid in Arkansas.

6. DESCENT AND DISTRIBUTION—CHILDREN OF VOID MARRIAGE.—The children of a marriage, void, because the husband and father had a former wife living, are nevertheless legitimate and entitled to share in their father's estate, under Kirby's Digest, § 2640, which provides that the issue of a marriage null in law, shall be deemed legitimate.

Appeal from Scott Chancery Court; *W. A. Falconer*, Chancellor; reversed in part, and affirmed in part.

STATEMENT BY THE COURT.

A man named Frank Mier, or Miller, died intestate in Scott County, Arkansas, on April 11, 1911. He had been a resident of that county for a number of years prior to his death, and, during all the time of his residence in that county, he lived with a woman named Lidmilla Miller, who was reputed to be his wife, and there was nothing in their relationship which aroused even a suspicion to the contrary. In addition to his reputed wife, he was survived by four children, one an adult daughter, who had married, and three minor children, and these children never suspected there was any question about their legitimacy until after the death of their father and the institution of the litigation involving his estate. Although Miller appears to have owned considerable land and personal property at the time of his death, his estate was largely involved, and after the qualification of appellant, J. M. Evatt, as administrator of his estate, various debts were probated. Among other demands filed for probate was a judgment in favor of M. C. Miller, a brother of the intestate, and this brother, M. C. Miller, also had a mortgagee's deed, which he received upon the foreclosure of a mortgage executed to

him by his brother, Frank. The administrator instituted a suit for the benefit of the heirs and creditors, in which it was alleged that this deed executed pursuant to the mortgage foreclosure, was fraudulent and had been executed for the purpose of cheating and defrauding various creditors in the collection of their just demands, and also for the purpose of placing the property beyond the reach of a probable judgment creditor, who at the time of the execution of the original mortgages, had a suit pending against the intestate for a considerable sum of money. That cause of action, however, appears to have been disposed of without the rendition of any judgment against the intestate.

A number of interventions were filed in this cause by various persons, who were made parties to that litigation. Among others, one Annie Miller filed an intervention in which she alleged that she and the intestate were married on the 16th of February, 1885, in Brazos County, Texas, and that about one year after their said marriage a son named Antone Frank Miller was born to them, and that shortly thereafter her husband deserted her and ran away with her sister, Lidmilla, with whom he had thereafter lived until a short time before his death, when he and the said Lidmilla separated and ceased to live together during the remainder of his life.

Antone Frank Miller was made a party, and alleged that he was the only heir at law of the intestate. Lidmilla and her adult daughter filed separate answers for themselves, and a guardian was appointed for the minor children of Lidmilla, who answered for them. In the answer of Lidmilla and her children the allegations contained in the petition of Anna were denied, and it was alleged that Lidmilla was the lawful wife, and her children the lawful heirs of the said intestate. They alleged also that the mortgages which were foreclosed and under which M. C. Miller claimed title, as well as the judgment in favor of the said M. C. Miller, were executed for the purpose of defrauding creditors, and of defeating them

in the assertion of their rights in the estate of the intestate.

The principals in this case were Bohemians, and resided originally in Brazos County, Texas. The evidence is to the effect that Frank Miller had courted the two sisters, Anna and Lidmilla, who was the younger; but that there was a Bohemian custom to the effect that a younger daughter should not marry while her elder sister was single, and Lidmilla testified that she became angry at the attempt of the members of her family to compel Frank to marry her sister and left home and moved to a point about one hundred miles distant, where she lived for something more than a year, when Frank came there and told her that he had married her sister but that he had been divorced from her, and she says that thereafter they went to his camp, where he was engaged in working timber, and they were married; and that soon thereafter they removed to Talihini, I. T., where they lived for a short time, after which they removed to Scott County, Arkansas, and lived together as man and wife until the time of their separation, about a year before the death of her husband. After Anna had been deserted by her husband she lived for some years with a man named Cooper, and, although she denies she was ever married to Cooper, the evidence discloses the contrary to be the truth. After living for some years with this man Cooper, by whom she had a child, she lived for some years with a man named Richardson, by whom she had other children, and it appears she also married this man Richardson, although she denied that that was a fact. There was no proof that either Anna Miller or her husband, Frank Miller, ever secured a divorce.

The chancellor found that Frank and Anna Miller were lawfully married in Texas and that Frank died intestate in Scott County, Arkansas, without ever having been divorced from Anna, and that Antone Frank Miller was his only child and lawful heir, and that all the property descended to the said child, subject to the payment of the intestate's debts and the dower and homestead

rights of the said Anna. The court decreed that the judgment in favor of M. C. Miller was a valid demand and that one of the mortgages had been assigned to the said M. C. Miller for a valuable consideration, and that the other mortgage was given to secure the payment of money which had been used in the purchase of the land described in the mortgage, and the court decreed that on that account the lands there described were not subject to the dower rights of the widow.

The administrator and Lidmilla and her children have duly appealed from that decree.

A. G. Leming, for J. M. Evatt, administrator.

1. "A deed made with intent to delay creditors in the collection of their just demands may be set aside on application of the executor or administrator of the fraudulent grantor 'for the use and benefit of the heirs at law.'" 74 Ark. 276. See also 67 Ark. 232; 72 Ark. 58; 64 Ark. 505; 68 Ark. 162; 74 Ark. 186; 76 Ark. 509; 73 Ark. 174; 64 Ark. 372.

2. "If a marriage in fact is established by evidence or admission, it is presumed to be regular and valid, and the burden of adducing evidence to the contrary rests on the party who attacks it." 26 Cyc. 877.

This presumption of regularity would apply equally to Anna in her marriage to Cooper and to Lidmilla in her marriage to Miller; and we think that the children of each by Miller are entitled to recognition as his heirs at law.

Roberts & Kincannon, for Lidmilla Miller *et al.*

1. One who attacks the validity of a marriage on the ground that one of the parties had previously been married to another person, does not fully discharge the burden of proof resting upon him by showing that there was a former valid marriage, but must go further and show affirmatively that the marriage had not been dissolved either by the death of the other party or by a decree of divorce. Tiffany's Persons & Domestic Relations, 41, 42, and cases cited, note 139.

The presumption of law being that a marriage is legal, the burden to show its illegality is upon the party who attacks it. 67 Ark. 278.

As to what constitutes marriage, see Bishop on Marriage & Divorce, § 437; 82 Ark. 81.

Where the validity of a marriage is questioned because of a former marriage of one of the parties, and it appears that at the time of the second marriage the former spouse was alive, it will be presumed that the former marriage was dissolved by divorce, and this presumption will be strengthened, if, after the separation, the other party to the first marriage also remarries. 8 Enc. of Ev. 463, notes and cases cited; 77 S. W. 1122; 25 Ky. Law Rep. 1356.

2. The court erred in holding that the children of Frank Miller by his marriage with Lidmilla Miller were not his legal heirs and were not entitled to inherit any of the property of his estate. Under our law they are entitled to inherit and share in his estate. Kirby's Dig., § § 2536, 2640.

Carmichael, Brooks, Powers & Rector, for appellees, M. C. Miller, Annie Mier and A. F. Mier.

1. As to M. C. Miller, the findings of the chancellor upon the evidence will not be disturbed unless clearly contrary to the weight of the evidence. 93 Ark. 277; 103 Ark. 473; 97 Ark. 537; 92 Ark. 30; 98 Ark. 328; 100 Ark. 370; 90 Ark. 40; 86 Ark. 212; 98 Ark. 459; 102 Ark. 102.

2. The court found that Frank Miller and Annie Mier, or Miller, were lawfully married in the State of Texas, and that they were never divorced, and the record and the testimony bear out these findings. The record and the testimony also bear out the court's finding that Frank Miller and Lidmilla were never married.

The court's finding that Annie Mier, or Miller, was the legal widow of Frank Miller, entitled to dower and homestead rights in his estate, is sustained by the evidence. 28 Ark. 21; 97 Ark. 272; 88 Ark. 196; 12 L. R. A. 50.

3. Recognizing that a construction of section 2640 of Kirby's Digest, and the question of the right of the children of Lidmilla and Frank Miller to inherit his estate is one of first impression in this State, counsel cite as supporting their right to inherit 5 Call (Va.) 143; 90 Va. 390; 18 S. E. (Va.) 841; Long on Dom. Rel. (2 ed.), § 244, and cases cited; 80 Va. 636, 56 Am. Rep. 601; 218 Ill. 220, 1 L. R. A. (N. S.) 773; Peck on Dom. Rel., § 104. As opposed to their right to inherit counsel cite *Sams* v. *Sams,* 85 Ky. 396, and say that this court, in the case of *Furth* v. *Furth,* 97 Ark. 275, has indicated a disposition to adopt the view headed by the *Sams* case, rather than that headed by *Stones* v. *Keeling,* 5 Call. (Va.) 143.

SMITH, J., (after stating the facts). (1-2) We think the chancellor's findings of fact are not contrary to the preponderance of the evidence. The proof shows that Anna and Frank Miller were lawfully married, and there was no proof they were ever divorced, except Lidmilla's statement that Frank had told her he had secured a divorce, and this evidence was, of course, incompetent and proved nothing; and, notwithstanding her own subsequent bigamous marriages, Anna continued to be, and at the death of Frank Miller was, his lawful wife, and entitled to her rights as such. The chancellor decreed that as Frank Miller was indebted for money which he had previously borrowed from his brother, M. C. Miller, to pay the purchase price of the lands sold to M. C. Miller, at the mortgage foreclosure, that there were no dower rights in these lands in favor of Anna Miller, although she did not join in the execution of the mortgage. But as Anna has not appealed from this decree, we are not called upon to review the correctness of that decision.

We think that the chancellor's finding that the judgment and mortgages in favor of M. C. Miller were based upon transactions had in good faith is not against the clear preponderance of the evidence. We think, too, that his holding that Lidmilla's marriage was null and void is correct, and she, therefore, has no rights in this estate,

but we do not agree that her children are excluded from the right to participate in the division of that estate.

(3) The decision of that question involves the construction to be given section 2640 of Kirby's Digest, which reads as follows: "The issue of all marriages deemed null in law, or dissolved by divorce, shall be deemed and considered as legitimate." So far as we are advised, this section has never been construed in any case decided by this court. It will be observed that this section was brought forward from the Revised Statutes, and appears in the chapter on Descents and Distributions. It will be observed, too, that the protection of this statute is limited to the issue of marriages. It does not apply to the mere progeny of illicit intercourse, nor to children born of persons whose relationship is merely that of persons who are illegally cohabiting together as man and wife; it shields only children born to parents, who undertake to marry, and do marry, but whose marriage for any cause is null in law.

In the case of *Furth* v. *Furth,* 97 Ark. 272, it was said that "even if it can be said that a present contract of marriage between a man and a woman followed by cohabitation, is valid under the common law, we hold that the common law in this respect has never obtained in this State," and the reason for that holding was there stated to be, that, before the common law was adopted in this State, statutes had been enacted which regulated marriages, and which prescribed the manner and form in which they might be solemnized, and that before the adoption of the common law, as a part of our jurisprudence, marriage was regarded as something more than a contract between the parties to be formed by present words of agreement to live together as husband and wife, and that such contract could not be entered into without being solemnized by some person authorized by statute to do so, and these statutes regulating and prescribing the manner and form in which marriages may be solemnized are mandatory and not directory merely. The point involved and there decided was "that the doctrine of so

called common-law marriages has never obtained or become a part of the laws of this State." But the marriage there sought to be upheld, as a common-law marriage, was one contracted in this State. The question was not involved and it was not decided in that case that such marriages would not be regarded as valid in the courts of this State, if valid in the State where contracted. Upon the contrary, section 5177 of Kirby's Digest provides that "All marriages contracted without this State, which would be valid by the laws of the State or county in which the same are consummated, and the parties then actually resided, shall be valid in all the courts of this State." It is true, Lidmilla gives a very unsatisfactory account of her marriage to Frank Miller, and her evidence is very similar to that given in the case of *Darling* v. *Dent,* 82 Ark. 76. As in that case, so in this, the wife was unable to state the name of the town where she was married, or the names of any person present. She did not know whether a license had been procured, but testified that a ceremony was performed by a priest, who had a book in his hand from which he read. But in this case of *Darling* v. *Dent, supra,* there was quoted the language by Judge Cooley in delivering the opinion of the Supreme Court of Michigan in *Hutchins* v. *Kimmell,* 31 Mich. 130, as follows: "Whatever be the form of the ceremony, or if all ceremony was dispensed with, if the parties agree presently to take each other for husband and wife and from that time on live professedly in that relation, proof of these facts would be sufficient to constitute proof of a marriage binding on the parties, which would subject them to legal penalties for a disregard of its obligations." And that case expressly held that the alleged marriage there considered, which occurred in the State of Texas, would be valid without formal ceremony, or the procurement of a marriage license, because common-law marriages were valid in Texas.

(4-5) But it does not follow that because Lidmilla's marriage was contracted in Texas, where common-law

marriages were valid, that she is entitled to the rights which inure to a lawful wife. The marriage was an unlawful one, because it was bigamous, and we quote again from the case of *Darling* v. *Dent, supra,* "While it is true that if it be shown that the relations between Darling and Mrs. Williams were illicit in the beginning the burden is upon those asserting a valid marriage agreement to show that such an agreement was afterward entered into, still there is no presumption that the relationship continued to be illicit or whether it was changed to a legal or moral status." In case of *O'Neill* v. *Davis,* 88 Ark. 196, the facts were that the parties, whose marriage was there questioned, had lived together before the man was divorced from a former wife and continued to live together after the man secured a divorce from this wife, and in the opinion by Justice BATTLE it was there said: "The continued cohabitation after the divorce does not prove that they changed their intent, which was to live together without being married. The concomitants of their illicit relations are not sufficient, by their unasserted probative force to prove that when they were at liberty to marry they embraced the opportunity. As Chief Justice Beasley said of such evidence in *Collins* v. *Voorhees,* 14 L. R. A. 364, "to treat evidence which was in all respects and to the utmost degree in accord with the original purpose, as proving, *proprio vigore,* a change of such purpose appears to be not only inadmissible according to the legal rules, but as being in logic ridiculous." And we have said there was no proof here that Frank Miller was ever divorced from Anna.

(6) At the common law all children, except the issue of lawful marriages, were illegitimate and remained so; but the harshness of this rule has been much relaxed until now, in most if not in all American States, statutes have been enacted which provide that the issue of a void or voidable marriage shall be legitimate, notwithstanding the invalidity of the marriage. Long on Domestic Relations (2 ed.), § 244, and cases there cited.

One of the earliest States to enact a statute to this effect was Virginia, where in 1785 a statute was passed which reads as follows: "The issue of marriages deemed null in law, or dissolved by a court, shall nevertheless be legitimate." The case of *Stones* v. *Keeling,* which was decided at the May term, 1804, of the Court of Appeals of Virginia, 5 Call 143, involved the construction of this statute, and the syllabus in that case is as follows: "The issue of a woman by a second marriage, which took place during the lifetime of her husband, are legitimate after the death of their father." It was the unanimous opinion of the court in that case that the issue of the second marriage were legitimate, and in a concurring opinion by Roane, Justice, it was said: "The second marriage, therefore, was not lawful; it was even void; but we can not in this case say that it was criminal. Circumstances may exist, such as a belief of the death of the first husband, or a seven years' absence by him, which may render the second marriage even innocent. We are bound to consider this marriage innocent, for we can not, in this proceeding, inquire into its guilt. But if it were otherwise, if the Legislature should even be supposed to consider every second marriage, living a first husband or wife, as criminal, wherefore should they visit the sins of the parents upon the innocent and unoffending offspring? But this was not the temper of the Legislature. In the case of incestuous marriages, where the parties with full knowledge of the everlasting bar which does and ought to exist between them, enter into this contract, and produce an innocent offspring, in defiance of laws human or divine; where you can not suppose a circumstance of excuse, except the scarcely possible one of an ignorance of the consanguinity which exists between the parties, their offspring is not bastardized by our laws, on the contrary it is expressly provided (New Code 195, § 13) that the nullification of such marriages shall not be construed to render the issue illegitimate. * * *

"It was said by one of the appellee's counsel, that the construction I adopt is inadmissible, as tending to

encourage bigamy. It was well said in answer, by one of the appellant's counsel, that considerations of this kind, in relation to the offspring, form no part of the inducements to marriage. But this is not all. The Legislature itself has given the answer. That Legislature certainly meant not to encourage fornication, or incestuous marriages, and yet it has expressly legitimated the offspring of both."

This section of the Virginia Code remained unchanged and was again construed by the Court of Appeals of that State in 1894 in the case of *Heckert* v. *Hile's Admr.*, 18 S. E. 841, where it was said: "The controversy in this case is between the children of Peter Hile by a lawful wife, who left her husband and went to the State of Michigan, and the children of said Peter Hile by another woman, married by him during the lifetime of his first wife, who were born before the dissolution of the marriage of the first wife. The circuit court decreed that the first marriage was lawful and the children legitimate; that the second marriage was null, but that the children of this null marriage were legitimate—made so by our statute (section 2554, Virginia Code), * * * and that the second set of children, being legitimate, inherited from the father as the first set, the issue of the legal marriage. There can be no doubt of the correctness of this decision. The case comes within the plain provision of the statute cited above, which is of ancient date in this commonwealth, and was carefully considered and construed in 1804 in this court, in the case of *Stones* v. *Keeling,* 5 Call, 143—a decision under which we have since rested. In that case the law was considered in every aspect under which it should be regarded, and was sustained and made effective. But it is contended by counsel for the appellants that a recent case in this court has substantially overruled *Stones* v. *Keeling,* and they cite *Greenhow* v. *James,* 80 Va. 636, but we do not so regard it. That was the case of illegitimate children of a white person by a negro, who left the State and were married abroad. The distinction is sufficiently drawn in

the opinion in that case; and in the case of *Stones* v. *Keeling, supra,* Judge Roane, who delivered one of the opinions in that case, does the same on page 148, saying: 'The law concerning marriages is to be construed and understood in relation to those persons only to whom that law relates, and not to a class of persons clearly not within the idea of the Legislature, when contemplating the subject of marriage and legitimacy.' The case of *Greenhow* v. *James* does not affect this case, nor the case of *Stones* v. *Keeling,* and the last named case is a distinct authority on this case, and we think, upon the plain terms of the law, and the reason of the Legislature in enacting the same, is correct. We therefore affirm the decree of the circuit court of Rockingham County."

This section of the Virginia Code was enacted by the Legislature of Ohio, and the Supreme Court of that State adopted the construction of the Virginia court in *Ives* v. *McNicoll,* 59 Ohio Stat. 402, and in the opinion in that case it was there said: "The statute of Ohio is a transcript of the statute of Virginia on the same subject; passed in 1785, and entitled, 'An Act concerning the course of descents.' The bill was drafted and reported by a committee, of which Thomas Jefferson was one, after some years of deliberation, and was adopted by the Virginia Legislature, omitting the exception of the civil law, and the law of Scotland, as to adulterine bastards, and disregarding the common law of England, which prevented all bastards from becoming legitimated.

"The statute of Virginia did not follow nor adopt any of the European laws as to bastards, but enacted a new statute on the subject, to be construed and enforced by reference to the words used in the statute itself, untrammeled by the rules of the civil law. The courts of Virginia, both before and after the adoption of our statute, construed the statute of that State as having abrogated the exception of the civil law as to adulterine bastards. *Stones* v. *Keeling, supra; Browne* v. *Turberville,* 2 Call, 390; *Templeman* v. *Steptoe,* 1 Munf. 339; *Davis* v. *Rowe,* 6 Rand. 355; *Garland* v. *Harrison,* 8 Leigh, 368.

When we adopted in this State the Virginia statute as to bastards, we adopted with the statute the construction placed upon it by the courts of Virgina, and at each reenactment of the statute we acquiesced in the constructions up to that time placed upon the statute by the courts of Virginia, no construction having in the meantime been placed upon the statute by our own courts. * * * When the Legislature of this State adopted the Virginia statute, in 1805, it was familiar not only with the Virginia statute, but also with the civil law, the law of Scotland, the common law of England and the Code of Napoleon, and the omission of the exception of adulterine bastards was not in ignorance of those laws, but was with the purpose of wiping out the exception and doing justice to the innocent offspring."

A very similar question to the one here under consideration was involved in the case of *Leonard* v. *Braswell*, 99 Ky. 528; 36 L. R. A. 707. A number of authorities were there reviewed and the syllabus of that case is as follows: "The offspring of a bigamous marriage contracted in Illinois, where it is void, may, as legitimate heirs, inherit lands in Kentucky, where the parents lived, by virtue of the Kentucky statute declaring that the issue of an illegal or void marriage shall be legitimate."

It is seen that our statute is practically a copy of the Virginia statute, and we conclude therefore that a proper construction of section 2640 of Kirby's Digest requires us to hold that the children of this second marriage are legitimate and are entitled to share as such in the division of the estate of Frank Miller.

A fee of one thousand dollars had been allowed by the chancellor to the attorney for the appellants, but later an order was made setting aside the order allowing the fee. This fee should not have been allowed, and we approve the order disallowing it. *Gardner* v. *McAuley*, 105 Ark. 439.

The decree of the chancellor will be affirmed in all respects, except in the particular indicated, as to which it is reversed, and the cause will be remanded with directions to the chancellor to amend his decree accordingly.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. OVERTON.

Opinion delivered July 6, 1914.

1. RAILROADS—INJURY TO PASSENGER ON FREIGHT TRAIN—DUTY OF CARE.—Although a passenger riding on a freight train is deemed to have assumed all the risks usually and reasonably incident to travel on such trains, yet when the railroad company undertakes the carriage of passengers on freight trains, it owes such passengers the same high degree of care to protect them from injury as if they were on passenger trains.
2. RAILROADS—INJURY TO PASSENGER ON FREIGHT TRAIN—DUTY OF CARE.—In an action for personal injuries received by a passenger on a freight train, the liability of the railroad must be determined in the light of the mode of conveyance, and the manner of the practical operation of the train. Liability depends upon whether or not the railroad company failed to exercise the degree of care which the law requires, towit, the highest degree of care which a prudent and cautious person would exercise under similar circumstances, to avoid the injury.
3. RAILROADS—INJURY TO PASSENGER ON FREIGHT TRAIN—LIABILITY.—A railroad company will be liable for an injury, caused by negligence, to a person who boards a caboose attached to a freight train, when the plaintiff entered, intending to become a passenger, and the employees in charge of the train permitted plaintiff to enter the car, although the same was not yet ready for the reception of passengers.
4. DAMAGES—PERSONAL INJURIES—FUTURE SUFFERING.—Where there is evidence that plaintiff, who was injured by the negligent acts of the employees of a railroad company, will have pain and suffering in the future, due to the injury, it is proper to submit the question of future pain and suffering to the jury, for their consideration in assessing damages.
5. DAMAGES—PERSONAL INJURIES—AMOUNT.—A verdict of one thousand dollars held not to be excessive under the evidence in an action against a railroad for damages due to negligence in causing a car in which plaintiff was a passenger to be jerked so that plaintiff sustained a painful injury to her head.

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

STATEMENT BY THE COURT.

Pauline Overton, through her next friend and father, J. S. Overton, instituted this suit against the appellant for personal injuries. The facts, as they might have

been found by the jury, giving the evidence its strongest probative force in favor of the appellee, are substantially as follows:

On the morning of June 28, 1913, Mrs. Overton, the mother of Pauline, went with Pauline and other children to the station of Brinkley for the purpose of going on appellant's local freight train to visit her father, who lived on a farm about seven miles south of Brinkley, near Keevil. Appellant ran a daily mixed local freight and passenger train from Brinkley to other points along its line, including Keevil. The caboose or coach for passengers had been placed at or near the place where it usually stood when passengers took passage thereon. J. S. Overton and his wife and the children went into the coach which at the time was not connected with the engine and other portions of the train. The coach had seats running crosswise in the train similar to the seats in a regular passenger coach. The seats were cushioned, but at the top of the seats there was a strip of wood four or five inches in width. Overton was sitting facing north and his daughters, Pauline and Margaret, were also facing north. His wife was on the back seat, facing south. They had been thus seated in the car four or five minutes. He had purchased a ticket for his wife. He did not intend to go with them to Keevil. After they had been seated a little while two men passed through the coach and one of them asked if the Overtons had tickets. Overton replied that he had the ticket for his wife, but that he himself was not going, that he was just putting his wife and children on the train. About the time these men passed out of the car the engine backed into the coach. The jar threw Overton out of his seat and down on the floor in the aisle. It threw his wife into the seat where he had been sitting. It threw Pauline over backward and struck her head, cutting a place to the bone on the back of her head. Overton, at the time of the impact, had his baby in his arms and was trying to quiet it. When he first noticed Pauline after the jar she was sitting in her seat with her eyes closed. She sat that way

for quite a while, and then looked up and said, "Papa, my head hurts me." The injury was back of the right ear. She had thick heavy hair and had on her straw hat.

Overton ran to the store and 'phoned to the doctor at Keevil, informing him that his wife and children were coming on the local. He then called Doctor McKnight, and they went in McKnight's car down to his wife's father's, where his wife and children had gone. When they arrived there Pauline was complaining of her head hurting her. The doctor forbade the parents bringing Pauline back home with them. She remained at her grandfather's until the following Monday. The injury occurred on Saturday before. Doctor McKnight brought her back in his car. He treated her five or six weeks. Prior to the accident she was in good health, and since then she had had chills and fevers, was very nervous, especially at night, frequently getting up at night crying, saying that some one was breaking into her room. She was always complaining of her head hurting her. Often at night she would wake up and go to her parents' bed, crying and screaming. These spells had continued up to a week before the trial. She never had such spells before the accident. The first three or four weeks after the accident she had spells of crying and screaming two or three times a week. After that the spells were less frequent, being sometimes two or three weeks apart. She had not grown or developed any since the accident. She was five and a half years old at the time of the accident. Since the accident she was not as rational as she used to be. Before the accident she appeared to be a very bright and active child, but after the injury she was very sluggish. When the other children were out at play she would drop her head and close her eyes like she was in a deep study about something. A younger playmate noticed that there was something wrong with Pauline. She was no longer the leader in their play as she was before the accident.

It was alleged in the complaint that the employees of the appellant negligently ran other cars upon the ca-

boose and suddenly stopped its train while going at a rapid speed, "all of which acts were done with such force and violence as to knock plaintiff off her seat," causing the injury (which she describes) "to her damage in the sum of three thousand dollars."

The answer denied the negligence as alleged. It admitted that in the coupling of its cars plaintiff was knocked down, but denied that she was injured to the serious extent she claims. The answer also alleged that the injury was the result of the careless conduct of plaintiff's parents in permitting her to occupy a place where she could be injured by the coupling of the cars.

The employees of the appellant testified that the coupling at Brinkley at the time of the alleged accident was an ordinary coupling and such as is usually made by freight trains. They were backing up to make the coupling with two coal cars next the engine and some four or five freight cars next to the caboose. The employees did not know that Mrs. Overton and her three children were in the coach at the time the other cars were coupled onto it. The cars had automatic couplings. The witnesses did not notice any jar of the caboose. There was no occasion to make a severe coupling. It was not usual for couplings to be made with such force as to throw passengers from their seats. It was not safe for people to stand up in freight cars when couplings were being made.

The conductor testified that it was not the custom to allow passengers to get on the train until they were ready to start. He had notified passengers not to get on, but had not notified Mrs. Overton not to get on. The brakemen were making up the train, and there was no one to look out for passengers except the witness.

Among others, the court granted the following prayer at the request of appellee:

"(1) You are told that, while the plaintiff in taking passage upon a mixed train assumed the risk of necessary and usual jolts and jars, this did not relieve the railroad company from exercising the same high degree of care in the handling of its train as if she was riding

on a regular passenger train, to avoid injuring her. The risk of usual jolts and jars assumed by plaintiff is the risk incident to the mode of conveyance, and does not relax the rule as to the high degree of care to be exercised by the servants of the defendant to avoid injuring passengers. So in this case, if you believe that the plaintiff was without fault and would not have been injured if the defendant's servants had exercised such high degree of care, your verdict should be for the plaintiff."

The appellant objected to the granting of the above prayer, and especially to the words, "this did not relieve the railroad company from exercising the same high degree of care," and also the words, "and does not relax the rule as to the high degree of care to be exercised by the servants of the defendant to avoid injuring passengers." The court overruled the objections, to which appellant duly excepted.

Appellant requested the following prayers for instructions:

"(3). If you find plaintiff, Pauline Overton, was injured from an unusual and extraordinary jerk or jar of the train while being coupled together at Brinkley, before you find for her you must find that she was a passenger on that train, and that she or some one for her paid or offered to pay her fare from Brinkley to Keevil. The fact that her mother had a ticket would not entitle Pauline to ride with her, unless payment of her fare was made or tendered.

"(4). You are instructed that if you find from the evidence that the plaintiffs boarded the caboose before the local freight train was made up and coupled together, and that neither the engineer nor the brakeman, clothed with the duty of coupling the train together, knew that plaintiffs or other passengers were aboard the train, and that it was not the custom at that point for passengers to board the train before it was coupled, the plaintiffs can not recover in this action for injuries resulting from the jars and jolts in the coupling of the train."

The court refused the foregoing prayers, and appellant duly saved its exceptions.

The court granted the following prayer for instruction at plaintiff's request, to which appellant saved exceptions:

"(3). If you find for the plaintiff, you will, in assessing her damages, take into consideration the injury sustained by her and the physical and mental pain and anguish endured by her on account of the injury, together with such as she will necessarily endure in the future, resulting from her injury, if any, together with all other facts and circumstances in the case, and assess her damages at such sum as you believe from the evidence will fully compensate her for her injury."

There was a verdict in favor of the appellee in the sum of $1,000, and judgment was entered in her favor for that amount. Other facts stated in the opinion.

S. H. West and *J. C. Hawthorne,* for appellant.

1. Railway companies are only required to use such high degree of care in the handling of mixed trains as is consistent with practical and prudent conduct on the part of their employees. 52 Ark. 524; 57 Ark. 287; 60 Ark. 550; 55 Ark. 248.

2. Since the plaintiff, Pauline, had not paid fare, the only duty the appellant owed her was not to knowingly or wilfully injure her. Appellant was entitled to an instruction to the effect that before the plaintiff could recover the jury must find from the evidence that she was a passenger on the train and that she or some one for her had paid or offered to pay her fare, as requested in instruction 3. The court also erred in refusing to give instruction 4, requested by appellant. This court in numerous cases has held that a railway company is not liable for injuries to persons upon its cars without the knowledge of its employees. 45 Ark. 246; 49 Ark. 257; 50 Ark. 477; 57 Ark. 464; 58 Ark. 318; 90 Ark. 284.

3. The third instruction given at plaintiff's request was erroneous in authorizing the jury to assess damages for future suffering.

4. The verdict is shockingly excessive, in view of the testimony of two skilled physicians who examined the child in the presence of, and after consultation with, her attending physician, and stated that they found nothing abnormal about her, nor anything to indicate that she would suffer in the future; and in view of the manifest effort of her father and grandfather to magnify her injury as much as possible. 82 Ark. 61; 87 Ark. 111; 89 Ark. 9; 102 Ark. 499.

Manning, Emerson & Morris, for appellee.

1. The evidence shows that appellant was negligent, since it clearly shows that an unusual shock and jar resulted from the coupling.

The effort of appellant to show contributory negligence, by the statement that she was not tall enough to have received the injury had she been sitting in the seat, is not supported by any of the testimony. Moreover, it is not negligence *per se* to stand up in a mixed train. 95 Ark. 220-5.

2. Instruction 1, requested by appellee, is correct, as this court has heretofore declared. 94 Ark. 75-78. And the same opinion, page 78, approves instruction 3, on the measure of damages, objected to by appellant.

3. Instruction 3, requested by appellant, was properly refused. 98 Ark. 507-14.

Appellant's objection to the refusal to give instruction 4, requested by it, is fully answered by this court in *Kruse* v. *Railway Company,* 97 Ark. 137, 142; see also 95 Ark. 220.

4. The verdict is not excessive. 163 S. W. (Ark.) 1157; 86 Ark. 587; 88 Ark. 12; 90 Ark. 108; 67 Ark. 531.

WOOD, J., (after stating the facts). The appellant contends that the court erred in granting appellee's prayer for instruction No. 1. An instruction in this form was approved by this court in *Ark. S. W. Rd. Co.* v. *Wingfield,* 94 Ark. 75. In that case Mrs. Wingfield sued for personal injuries alleged to have been received by her from a sudden jar caused by the coupling of a mixed freight and passenger train on which she had taken her

seat as a passenger. Two seats were turned facing each other in the coach which she entered and she and her husband sat in one of them. While waiting in the yards the engine came back with such unusual force as to throw her forward against the seat in front and back against the seat in which she was sitting. The essential facts upon which the instruction in that case and the one in this case are based are similar. The court held in that case that the instruction was in accord with the law as announced by this court in *St. Louis, I. M. & S. Ry. Co.* v. *Brabbzson,* 87 Ark. 109, where we said: "It is well settled that, though a passenger riding on a freight train must be deemed to have assumed all the risks usually and reasonably incident to travel on such trains, yet, where the railroad company undertakes the carriage of passengers on freight trains, it owes such passengers the same high degree of care to protect them from injury as if they were on passenger trains." And further: "But, as it is not practical to operate freight trains without occasional jars and jerks calculated to throw down careless and inexperienced passengers standing in the car, 'the duty of the company is therefore modified by the necessary difference between freight and passenger trains and the manner in which they must be operated; and, while the general rule that the highest practicable degree of care must be exercised to protect passengers holds good, the nature of the train and necessary difference in its mode of operation must be considered; and the company is bound to exercise only the highest degree of care that is usually and practically exercised and consistent with the operation of a train of that nature.' "

(1-2) The instruction as a whole was not misleading and was in conformity with the law as announced in the above cases. The first part of the instruction told the jury that the plaintiff, in taking passage upon a mixed train assumed the risk of the necessary and usual jolts and jars, and in the second paragraph the instruction informed the jury that the plaintiff assumed the risk of usual jolts and jars incident to the mode of conveyance. The necessary

meaning of the court's charge was that the company owed to its passengers the same high degree of care in handling their train to avoid injury as it should exercise in handling a regular passenger train. In other words, the degree of care which the company owes the passenger to avoid injuring him is the same whether he be riding on a mixed freight and passenger train or on a regular passenger train. *St. Louis, I. M. & S. Ry. Co.* v. *Hartung,* 95 Ark. 220. But in determining whether or not the company has exercised that high degree of care which it owes its passengers the jury must take into consideration the difference in the modes of conveyance and the different methods employed in the operation of the trains; that degree of care which the company owes its passengers on either train is the highest degree of care which a prudent and cautious person can exercise reasonably consistent with these modes of conveyance and their practical operation. *Railway Co.* v. *Sweet,* 60 Ark. 550.

While the instruction is not happily worded, yet, when it is considered as a whole, and in connection with appellee's prayer No. 2,* and also appellant's prayer No. 2,† both of which were granted, the jury could not

*Appellee's prayer for instruction No. 2: (2) You are instructed that passengers riding on local freight trains assume the risk of the ordinary customary jerks and jars resulting from their being coupled together, incident to their starting and stopping.

†Appellant's prayer for instruction No. 2: (2) You are instructed that a passenger while riding upon a freight train assumes the risks and hazards that are incident to the operation of a freight train, yet, it is the general duty of the carrier to use due care for the safety of the passengers and a freight train carrying passengers can not be operated carelessly without subjecting the company to liability any more than a passenger train, and the operatives in charge of a freight train can not any more overlook the due care of their passengers than can the operatives of a passenger train, and, although plaintiff in this case was a passenger upon a freight train, yet, if you find from the evidence that defendant's operatives in charge of said train failed to use due care for plaintiff's safety or negligently or carelessly operated said train or moved the caboose connected therewith in which plaintiff was a passenger, and that by reason thereof she was injured, your verdict should be for the plaintiff.

have been misled, and there was no prejudicial error in granting the prayer in the form as presented.

(3) The difference in the particular modes of conveyance and in the manner of their practical operation are to be considered in determining whether or not the company is negligent in any given case; that is, whether or not it has failed to exercise the degree of care which the law requires, towit, the highest degree of care which a prudent and cautious person would exercise under similar circumstances to avoid injury.

There was no error in refusing appellant's prayers for instructions numbered 3 and 4. These were predicated upon the idea that there was testimony tending to warrant a finding that the appellee was not a passenger and entitled to the degree of care due a passenger at the time of her injury. The court was correct in refusing to submit to the jury to find whether or not appellee was a passenger on appellant's train at the time of her injury. The undisputed evidence showed that she went upon appellant's train for the purpose of taking passage thereon. The coach was standing at or near the place where it usually stood for the reception of passengers at the time appellee boarded the same. It was not her fault that she boarded it without the knowledge of appellant's employees. It was their duty to see that passengers did not enter upon the train before the same was made up and ready for passengers to enter thereon. The brakemen and the conductor were charged with this duty, and the conductor stated that he did not notify Mrs. Overton not to get on. He also stated that the brakemen were making up the train and there was no one to look out for the passengers except himself.

It thus appears that if the appellee was on the train before the proper time for her to take passage it was the fault of the appellant's employees, and appellant could not complain that appellee was not a passenger under these circumstances.

In *Kruse* v. *St. Louis, I. M. & S. Ry. Co.*, 97 Ark. 137, we said: "Since there is a statute compelling railroads

to carry passengers on local freight trains, when a person is permitted to enter a freight train as a passenger, there is no presumption arising that he is not a passenger."

The conductor testified that "the caboose was set in there for passengers." Under such circumstances the trainmen were bound to anticipate that passengers might go upon the coach. See *St. Louis, I. M. & S. Ry. Co.* v. *Hartung, supra.*

The appellant contends that the court erred in telling the jury that if they found for the plaintiff they should take into consideration, in assessing her damages, the pain and anguish that she will necessarily endure in the future, if any.

(4) There was testimony to warrant the jury in finding that there would be future pain and suffering to the appellee on account of the injury. The testimony on her behalf showed that at the time of the trial she was still suffering as the result of the injury. Her father, on this point, testified as follows: "Since the accident we have had a great deal of trouble with her. She is very nervous, especially at nights. She is always complaining of her head hurting her. She is not as bright and active as she was. Very often she will wake up at night and come to our bed crying and screaming. She had one of those spells not over a week ago. She does not weigh as much now as before the injury."

Her mother testified as follows: "She is always complaining of suffering with her head. She is very nervous. At night she cries out in her sleep. She complains of being scared and wants to get in bed with us. She had always been a very strong, healthy child before the accident. She has not been well since, although she is some better now. She has these spells twice a week and sometimes oftener."

Doctor McKnight, appellee's attending physician, testified that the injury caused her to be in the physical condition as detailed by her father and grandfather; that

it is probable that the injury will affect her for several years.

Doctor Gilbrech, after the condition of the child before and since the accident was set forth in a hypothetical question, stated: "It is possible that she would not recover for an indefinite period of time.'

The above testimony was sufficient to justify the court in submitting to the jury the issue as to whether or not appellee was entitled to damages for future pain and suffering. In *St. Louis, I. M. & S. Ry. Co.* v. *Bird,* 106 Ark. 177, we held "that where the evidence shows that the plaintiff will suffer considerable pain in the future the jury may consider future suffering in fixing the amount of damages." Submitting to the jury the issue of future suffering, where there is testimony to warrant that issue, is an entirely different matter from submitting the issue of damages as for a permanent injury where there is no testimony to show that the injury was permanent. See *St. Louis, I. M. & S. Ry. Co.* v. *Bird, supra.*

Here the instruction only submitted to the jury to find as to whether or not there would be future pain and suffering as the result of the injury. The court did not err in submitting that issue.

The verdict is not excessive. The testimony of the attending physician tended to show that the wound on appellee's head was a serious one. He says: "I found her suffering with a lacerated and contused wound on the back of her head that extended through the tissue and down to the bone. The wound was bleeding profusely and her clothes were bloody. She did not seem to be able to stand alone. She appeared to be dazed as if she had some concussion of the brain."

The doctor was asked a hypothetical question in which was stated the mental and physical condition of the appellee prior to the injury and also the condition which the evidence tended to prove she had been in since the injury, and he was asked what, in his opinion, "was the cause of that trouble?" and answered that "it was the

injury." He also stated that "it was probable that the injury would affect her for several years, but that he could not say whether it would or not."

Another physician was asked the following: "If a child is not nervous up to the time of five years of age and then receives an injury that causes concussion of the brain and then is very nervous, would you say that the injury is the cause of it?" and answered, "Well, with those premises, I would have to say that the injury was the cause of the trouble."

The physician who gave the above testimony was a witness on behalf of appellant.

True, physicians who were called in by consent of the parties to examine the appellee during the progress of the trial, and who were advised by the attending physician of the condition in which he found the little girl at the time of the injury, testified that they did not find anything wrong with the child except a small scar on the right side of her head; that if there were any injurious results from the wound they could not tell it from their examination. They reached their conclusion from what they saw of the child. They had never treated the child.

Another physician testified that he lived a short distance from appellee's home; that he had seen her playing in the street a few days after the accident, and saw her frequently playing with other children, and that he could not tell that there was anything the matter with her. He could not tell that there was any difference in the way she acted before and after the accident.

(5) The question for us is not what we would have found as the amount of damages to appellee had we been on the jury, but, giving the evidence its strongest probative force in favor of the appellee, was it sufficient to sustain the verdict. The jury might have found from the evidence that this child, who was a strong, bright and healthy child before the injury, had, by reason of the shock, suffered not only very serious bodily injury, but also an injury that had affected her mind as well. Her condition, as described by her parents and her grand-

father, shows that she, up to the time of the trial, had endured great pain and suffering, and that such was likely to continue for some time in the future. Her physical health had been greatly impaired, and her mind was also perceptibly affected. It was the province of the jury to weigh this testimony, in connection with the other evidence. They have accepted it, and we can not say that the amount of the damages assessed by their verdict as the result of the injury is excessive.

The judgment is affirmed.

HARRELL v. TAYLOR.

Opinion delivered July 6, 1914.

FIXTURES—SALE OF LAND—UNATTACHED CHATTELS.—Appellee sold land to appellant; *held*, fence posts brought by appellee onto the land from another place, and never fixed in the ground, and a sprayer and harrow on the land were not fixtures, and did not pass to the purchaser with a sale of the land.

Appeal from Crawford Chancery Court; *William A. Falconer*, Chancellor; affirmed.

J. E. London, for appellants.

C. A. Starbird, for appellee.

HART, J. Appellee instituted this action against appellants to recover an amount due for the purchase price of a tract of land in Crawford County and to foreclose a vendor's lien therefor. A decree was entered by the chancellor in favor of appellee, and, to reverse that decree, this appeal is prosecuted.

The facts are as follows:

Appellee entered into a written contract with the appellants whereby he sold them a tract of land for $1,500. In accordance with the contract, he executed to the appellants a deed and delivered to them possession of the premises. Appellants refused to pay all of the purchase money, and claim they are entitled to a deduction of fifty dollars for certain property on the place when they purchased it which was used or destroyed by

appellee. The property in question consisted of an orchard sprayer and harrow which appellee took away from the premises and some fence posts which he burned up. The fence posts had been brought by appellee from another place to the one in question and had never been fixed in the ground. The sprayer and harrow were used by him in his orchard when he thought necessary. None of these articles were fixtures and did not pass by a sale of the land by appellee to appellants. Therefore, he had a right to remove them from the premises or to do anything else he pleased with them.

The decree will be affirmed.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY v. FUQUA.

Opinion delivered July 6, 1914.

1. RAILROADS—PLATFORMS—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.—A passenger on one of defendant's trains, while debarking from a train, caught her foot on a retaining wall which projected above the platform, fell and sustained injuries. *Held*, it will not be held that the passenger was negligent, as a matter of law, for not seeing the projection.
2. RAILROADS—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.—The question of the contributory negligence of a passenger, who fell by reason of catching her foot on a projection on the station platform, is for the jury.
3. EVIDENCE—PRIVILEGED COMMUNICATIONS—ATTENDING PHYSICIAN.—A physician may not testify as to any information which he has acquired from his patient, while attending him in a professional character, and which information was necessary to enable him to prescribe as a physician.
4. INSTRUCTIONS—ONE ISSUE.—The trial court is not required to multiply instructions upon the same point.
5. RAILROADS—INJURY TO PASSENGER—DAMAGES.—Where deceased fell and was injured by reason of a defect in defendant's station platform, and suffered great pain, a verdict of $1,500 damages in favor of her administrator, is not excessive.
6. EVIDENCE—CONFLICT—QUESTION FOR JURY.—Where fair-minded men might honestly differ as to the conclusion to be drawn from facts, whether controverted or uncontroverted, the question should go to the jury.

7. EVIDENCE—SCINTILLA RULE—QUESTION FOR JURY.—A scintilla of evidence is not sufficient to support a verdict, and the verdict of a jury can not be based upon surmise and conjecture.

8. EVIDENCE—CIRCUMSTANTIAL EVIDENCE—QUESTION FOR JURY.—Any issue of fact in controversy may be established by circumstantial evidence, where the circumstances adduced in evidence are such that reasonable minds might draw different conclusions therefrom.

9. RAILROADS—INJURY TO PASSENGER—SUFFICIENCY OF THE EVIDENCE.—Deceased, a passenger, sustained an injury by falling, due to a defect in defendant railroad company's platform. *Held*, the evidence was sufficient to show that an injury received thereby, resulted in subsequent and continued suffering for a period of eleven months, until her death, for which defendant was liable in damages.

Appeal from Desha Circuit Court; *Antonio B. Grace*, Judge; affirmed.

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

1. Doctor Smith should have been permitted to answer the questions propounded to him, the first three of which did not call for any information acquired from the patient while attending her in a professional capacity and necessary to enable him to prescribe for her; and as to the fourth question, whether it should have been answered or was privileged, depends upon whether it would disclose such information as was necessary to enable him to prescribe. Kirby's Dig., § 3098; 40 Cyc. 2384; 31 Ark. 684.

2. The court erred in not giving instruction 4, requested by appellant, because the instruction 4 given by the court on the same point was too involved and obscure in its terms.

3. The court ought to have directed a verdict in favor of appellant, because the evidence shows that if Mrs. Fuqua had been keeping a proper lookout she could have discovered the alleged defect in the floor of the platform, and could have avoided stumbling over it. The defect, if any existed, was open and patent, and no emergency is shown which would have prevented her from taking proper precaution to avoid stumbling. 11 S. E.

991; 12 L. R. A. 293. A carrier is not an insurer of a passenger against injury after he has reached his destination. With reference to depot accommodations, including platforms, the duty of the carrier is to exercise ordinary care to keep them in a reasonably safe condition for the benefit of any who have occasion to go there. 90 Ark. 70; 70 Ark. 136; 96 Ark. 32; *Id.* 315; 37 Ark. 516; *Id.* 519; 46 Ark. 182. See also 19 L. R. A. 460; 58 Ill. App. 130; 79 Ark. 437; 95 Ark. 477; 44 Ark. 524; 46 Ark. 555; 3 Labatt, Master & Servant, § 1032; 4 Wall. 189.

4. From the evidence and the circumstances of this case, it is patent that the verdict is excessive.

E. E. Hopson, for appellee.

1. The court properly refused to admit the testimony of Doctor Smith. Kirby's Dig., § 3098; 98 Ark. 352, 136 S. W. 651.

2. Since appellant admits that the court's fourth instruction was correct, it was certainly not error to refuse to give the same instruction in different form.

3. Appellant's contention that the trial court should have directed a verdict in its favor, can hardly be taken as intended seriously, in view of the degree of care required of a passenger at a railway station as defined by this court in *Railway Company* v. *Barnett,* 65 Ark. 255, 45 S. W. 550. There was abundant evidence on which to send the case to the jury, and it is sufficient to sustain their verdict. 90 Ark. 103; 86 Ark. 608; 85 Ark. 195; 82 Ark. 375; 65 Ark. 125; 76 Ark. 327; 57 Ark. 577; 47 Ark. 196.

4. So far from the verdict being excessive, the appellant, under the evidence, is rather to be congratulated because the amount returned was no greater.

HART, J. J. W. Fuqua, as administrator of the estate of Mrs. Ida Fuqua, instituted this action against the St. Louis, Iron Mountain & Southern Railway Company to recover damages on account of the alleged negligence of said railway company in failing to provide a safe platform for its passengers. The railway company de-

nied negligence, and alleged contributory negligence on the part of Mrs. Ida Fuqua. The facts proved by appellee, briefly stated, are as follows:

The depot platform of the railway company at Arkansas City is made of cinders and clinkers and the platform is about five feet higher than the surrounding land and has a retaining wall around it constructed of wooden beams. On the 7th day of September, 1911, Mrs. Ida Fuqua and one of her daughters debarked from one of appellant's passenger trains at Arkansas City and started across the platform. Just as they arrived at the top of the steps, Mrs. Fuqua fell. Her daughter at the time had hold of her arm and they both stumbled and fell together.

Mrs. Fuqua was a small woman, weighing about ninety-three pounds, and her daughter held her up so that neither of them fell flat to the ground. They both stumbled and fell down the steps, and Mrs. Fuqua was wrenched in the fall. The daughter stated that as they went to step off the platform down to the steps there was a projection of the retaining wall four or five inches higher than the cinders which composed the platform and that her mother stumbled over this projection and that caused her to fall.

Mrs. Fuqua and her daughter went about two blocks from the depot to the office of Mr. Fuqua. Mr. Fuqua then assisted his wife home and placed her in bed. She began to have hemorrhages from the womb a day or two after that and continued to have them until her death, about eleven months thereafter. She was never able to leave the house after she was injured and suffered intense pain most of the time thereafter until she died.

On the other hand, it was shown by the railway company that there was no projection of the retaining wall above the floor of the platform and that the platform was safe in every particular.

It is contended by counsel for appellant that the railway company was not guilty of negligence in construct-

ing and maintaining its platform and that Mrs. Fuqua was guilty of contributory negligence.

In the case of the *Arkansas Midland Railway Company* v. *Robinson*, 96 Ark. 32, the court held: "It is the duty of a railway company to exercise ordinary care to keep its platform in a safe condition for the use of its passengers and others who have a right to go there."

In that case there was testimony tending to prove that plaintiff went upon defendant's platform for the purpose of taking passage upon the cars, that her heel caught in a small hole in the platform steps, that she lost her balance, fell, and was injured. A finding that the defendant was negligent and that plaintiff was not guilty of contributory negligence was sustained. See, also, *St. Louis, I. M. & S. Ry. Co.* v. *Barnett,* 65 Ark. 255.

(1) It will be noted in the present case that the evidence for appellee shows that the depot platform was about five feet higher than the surrounding land and that steps were constructed leading up to the platform; that a retaining wall was constructed around the platform and that it projected four or five inches above the floor of the platform where the steps were. Mrs. Fuqua and her daughter debarked from the train and started to go down the steps of the platform, when Mrs. Fuqua's foot was caught on the projection above the platform which caused her to stumble and fall. We can not say, as a matter of law, that she saw, or should have seen, the projection above the platform, and was, therefore, guilty of negligence.

As was said in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Barnett, supra,* "Passengers are invited by railroads upon their station platforms for the purpose of making entrance to and exit from their trains. There is always more or less noise and confusion incident to the running of trains. Then the jostling and scurrying to and fro of the crowds, passengers and others, coming and going, altogether, make the circumstances quite unpropitious for passengers to make minute or extended investigations for their own safety. They do not have

to do so. They may naturally and properly expect that the railroad has used every reasonable and prudent precaution to make their platforms safe, and may rest upon that assurance, only exercising ordinary care to prevent injury to themselves in the use of them."

(2) The jury were the judges of the credibility of the witnesses and the weight to be given to their testimony, and, under the facts and circumstances adduced in evidence, we think the questions of the negligence of the railway company and the contributory negligence of Mrs. Fuqua were properly left to the jury as questions of fact.

(3-4) Counsel for appellant offered to prove by a physician who had attended Mrs. Fuqua that she was afflicted with cancer and died of that disease. The court held that the testimony was incompetent, and the ruling of the court was correct. The excluded testimony was objected to by counsel for appellee because under section 3098 of Kirby's Digest a physician may not disclose any information which he may have acquired from his patient while attending him in a professional character and which information was necessary to enable him to prescribe as a physician. See *Missouri & North Arkansas Railroad Co.* v. *Daniels,* 98 Ark. 352; *Mutual Life Ins. Co. of New York* v. *Owen,* 111 Ark. 534; 164 S. W. 720.

Counsel for appellant asked the court to instruct the jury that if it should find from the evidence that by the exercise of ordinary care for her own safety Mrs. Fuqua could have prevented the injury, then it was the duty of the jury to find for the railway company. The instruction asked was fully covered by another instruction given by the court and there was no error in refusing to give it. We have repeatedly held that the court is not required to multiply instructions upon the same point. Counsel for appellant admit that the instruction given by the court covered the point, but claim that the instruction given was not in as simple and plain language as that asked by them. We do not agree with them in this contention. We have examined the instructions given by the court on this point, and think the jury could not have

misunderstood its meaning. It, therefore, was not necessary for the court to repeat the instructions in another form at the request of appellant.

(5) Finally, it is insisted by counsel for appellant that the verdict is excessive, and this we consider the most serious question in the case. Appellee recovered judgment in the sum of $1,500. Mrs. Fuqua died about eleven months after she was injured, and during the whole time suffered intense pain. If her suffering, as contended by appellee, was caused by falling down the steps of the railway company's platform, then, of course, the verdict is not excessive.

It is contended by the railway company, however, that her suffering and death were not caused by the fall but resulted from cancer, with which she was afflicted at the time she received the injury. They admit that she received a slight injury, but say it was only temporary and for a brief space of time, and contend that her subsequent suffering resulted from the cancer with which she was afflicted at the time she was injured.

One of the daughters of Mrs. Fuqua testified that the attending physician told her that her mother was afflicted with cancer and that she was dying of that disease. Physicians introduced by the defendant testified that the discharges from a woman suffering with uterine cancer are very offensive and have a very peculiar odor; that there is always a sloughing off of the womb which is caused by the hemorrhages; that the patient will probably have frequent headaches; that one of the early symptoms of cancer of the womb is headache and that the hemorrhages always relieve the headache temporarily; that cancerous headaches come from the enlargement of the uterus, and usually first affect the patient in the back part of the head and then extend all over the head.

The mother-in-law of Mrs. Fuqua testified that on the day Mrs. Fuqua received her injury and was brought home she looked to be in a very bad condition; that she was pale and had to be helped up the steps of the front

porch and up the stairs in the house; that she was not able to get up the steps without assistance; that after she was undressed her underclothing was spotted around the bottom; that she suffered intensely from that time until she died; and that she was never able to get out of her bed any more except to be wheeled around in a chair. She stated that she was with her constantly after she received her injuries and that she never saw any one suffer more pain than she did during the eleven months she lived after receiving the injury; that a physician examined Mrs. Fuqua about two weeks after the accident; that during the time before the examination was made Mrs. Fuqua constantly had hemorrhages from her womb; that she assisted the physician in making the first examination; that she did not see any sloughing condition of the womb; that it looked like a cut or split; that at first she did not discover any odor at all; that she first began to discover an odor about two or three months after the injury was received; that at this time the condition of the hemorrhage changed; that there was then more mucous than anything else mixed with the blood; and that after that time, for the most part, there was no odor when she had a hemorrhage.

One of the daughters of Mrs. Fuqua testified that her mother was a small woman and had never been robust, but that she had been in fairly good health prior to the time she received her injuries, and that she had been subject to headaches all her life. She was examined, cross-examined and re-examined as to the violence with which her mother fell, and we think it may be fairly inferred from all her testimony that she said, in effect, that though her mother did not fall flat to the ground because she held her up, she did fall with considerable force down the steps and would have fallen heavily to the ground had she not been held up by her.

(6) The rule is that where fair-minded men might honestly differ as to the conclusion to be drawn from facts, whether controverted or uncontroverted, the question at issue should go to the jury. Direct testimony that the

subsequent suffering of Mrs. Fuqua resulted from the fall, such as testimony from physicians to that effect, is not essential, but it is sufficient if the circumstances be such as to fairly permit the inference that the suffering of Mrs. Fuqua, as testified to by witnesses for appellee, was caused by the injury which she received.

(7) We have not adopted the rule that a scintilla of evidence is sufficient to support a verdict and that for that reason the verdict of the jury can not be based upon surmise and conjecture. While this rule is not to be ignored, it is equally well settled that any issue of fact in controversy may be established by circumstantial evidence where the circumstances adduced in evidence are such that reasonable minds might draw different conclusions therefrom. See *St. Louis, I. M. & S. Ry. Co.* v. *Hempfling,* 107 Ark. 476.

(8-9) It will be noted that the physician testified that in cases of cancer of the womb there was always a sloughing and also a very peculiar odor from the hemorrhages. The mother-in-law of Mrs. Fuqua, who was with her constantly, testified that she was present when Mrs. Fuqua was examined about two weeks after receiving her injuries and assisted the physician in making the examination and that there was then no sloughing of the womb, but that there appeared to be a cut at the edge of the womb. She also stated that there was no peculiar odor from the womb, such as comes from cancer, and that she discovered no odor whatever from the hemorrhages until about two or three months after Mrs. Fuqua received her injuries, and then only for a short time, and that thereafter, at very infrequent intervals, she discovered the same odor.

When we consider these facts, and the further fact that Mrs. Fuqua was able to walk about before she received her injuries and was afterward unable to walk at all, we think it was for the jury to say whether or not the injury she received caused her subsequent suffering and death.

As above stated, though she did not fall flat to the ground, she did stumble down the steps which extended up to the platform, the floor of which was five feet higher than the adjacent ground, and the jury might have inferred that she would have fallen heavily to the ground had she not been held up by her daughter. She was a frail woman, and might have been severely wrenched in her stumbling or falling down the steps, and when all the facts and circumstances are considered in their light most favorable to appellee, we think the jury were warranted in finding that Mrs. Fuqua sustained injuries which resulted in her subsequent suffering when she stumbled and fell from the platform.

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

KING v. CRONE.

Opinion delivered July 6, 1914.

1. DEED—DEED AS MORTGAGE—PREVIOUS TRANSACTIONS.—Where the evidence shows that K. sold certain land to C., giving a bond for title for the same and taking purchase money notes from C., the transaction will be held to be a sale, irrespective of previous transactions between the parties, whereby K. acquired title from one H. by a method which C. declares constituted a mortgage between himself and K.
2. VENDOR AND PURCHASER—SALE OF LAND—RESCISSION.—The voluntary rescission of a contract and surrender of a bond for title and the possession of the land for the unpaid purchase money notes, releases all the rights that a purchaser had in the land.
3. APPEAL AND ERROR—FINDINGS OF CHANCELLOR—REVERSAL.—Where the findings of the chancellor are against the decided weight of the testimony, the decree will be reversed.

Appeal from Cleburne Chancery Court; *George T. Humphries,* Chancellor; reversed.

STATEMENT BY THE COURT.

J. M. Crone brought this suit to have a deed from Hammock to King declared a mortgage, alleging that he had purchased the land, 138 acres, from Hammock and

borrowed money from King with which to pay for it; that Hammock executed the deed to King, which was intended only to secure the repayment of the money to him, and that on the same day King executed to plaintiff a bond for title for the east portion of the land containing seventy acres, and also executed to one Arthur Harkey a bond for title for the west portion, containing sixty-eight acres, and took their notes for the payment. One tract of this land was transferred to three different people, but afterward deeded again to King, on January 2, 1908, who sold it to appellee Crone, giving him bond for title for the entire tract, to which he agreed to execute a deed upon the payment of $950 on January 1, 1909, with interest at 10 per cent. It was alleged that the deed from Hammock to King was intended as a mortgage to secure the payment of the money advanced, and the prayer was that it be so declared and that the court ascertain the amount due from plaintiff and declare the same a lien upon the land.

Appellant King denied that Crone purchased the land from Hammock and borrowed the money from him with which to pay for it, and that the deed executed by Hammock to him was intended as a security for money advanced to plaintiff. Alleged the sale of the eastern portion of the land to plaintiff and execution of bond for title therefor, and the sale of the western portion to Arthur Harkey and execution to him of a bond therefor, and alleged that on January 2, 1908, he executed a bond for title to plaintiff for the entire tract of land, agreeing therein to convey it upon the payment by him of $1,200, of which $250 was due in November, 1908, and $950 on January 1, 1909, for which notes were executed by the plaintiff; that the notes were never paid, and thereafter the trade was cancelled, and he surrendered the purchase money notes to the plaintiff, who surrendered the bond for title and turned over the possession of the land to him. That the plaintiff then rented the lands and gave his note in payment of the rent therefor, until 1912,

when he rented the lands to one Boyd, with the knowledge of plaintiff and without any objection on his part.

We do not deem it necessary to go into the contention about whether this was a sale to Crone with the purchase money borrowed from King and the deed made from Hammock to him as security therefor, since both parties agree that the entire tract of land was sold by King to appellee Crone on January 2, 1908, and the bond for title executed to convey same upon the payment of the purchase money notes. When these notes for the purchase money became due, the appellee did not pay them, and surrendered the bond for title to the appellant upon the delivery to him of the purchase money notes. These facts are undisputed.

Appellant testified that Crone was unable to pay the purchase money notes and proposed to surrender the bond for title for them and cancel the trade, that he agreed to this, and that it was done. That he thereafter rented the lands to Crone for the years 1910-11-12 for $200 a year, and the notes taken each year therefor, recited that it was for rent of the lands. That he rented the lands to Boyd in 1913 with Crone's knowledge and without any objection from him.

Edwards testified that he heard a conversation between the parties, in which Crone told King it appeared he could never get in any better shape, and that if it suited him he would rather surrender his bond for title to the place and take his notes back, that King replied he preferred to have the money but would do this, and turned over the notes to Crone, who gave him the bond for title. That Crone then said he would be glad to rent the place for a year, and King told him he might have it. Heard Crone say he would like to rent the place after King had surrendered the notes to him, and he had surrendered the bond for title, and he understood that Crone did rent the place. He heard nothing said about the bond for title being surrendered for a new one.

Crone stated that he gave the notes, $950 due January 1, 1909, and $250 due November 1, 1908, for the pur-

chase money, and took the bond for the conveyance upon the payment of the last note. That on January 1, thereafter, the bond for title was extended twelve months. He did not claim to have paid anything whatever on the $950 note, nor all the $250 note, which recited that it was given for rent, and Crone only claimed that $50 of it was for purchase money. He said, "I made a trade with Mr. King and gave him my note for $950 as purchase money of the land, and a rent note for $250. Fifty dollars of this money was a part of the $1,000 of purchase money, and $200 of that was rent or interest for the year 1908; and he gave me a bond to convey the title upon the payment of the note due January 1, 1909."

Crone admitted that he surrendered the bond for title upon the delivery to him of the $950 purchase money note, and that King also surrendered to him at the same time his note for $200, which had been given for the rent of 1911. He claims that after he surrendered the bond for title, he went to get a new bond and King told him that his word was as good as his bond. That was about two weeks after the surrender of the bond when he went to King for a renewal of it. He paid the taxes on the land until it was rented to Boyd.

Boyd, to whom the land was rented for 1913, testified that he had a conversation with Crone in which he asked if he had rented the land from King, and he told him he had, and understood from him that King owned the land. This conversation occurred after he moved on the place. Crone said he was indebted to King and told him to come up the following Saturday and bring the two rent notes and he would pay them. Said the notes were for rent of the place. Said he paid some of them, but had not paid either of them in full. One was for 1911 and one for 1912. That Crone knew when he went on the land and raised no objection nor said anything about his having any claim thereto. Was present when King showed the rent notes which he held to the plaintiff, who said they were all right. When he took possession of the

lands, the fences had fallen down and the place was going to waste.

Joseph M. Boyd also testified that Crone asked him from whom his father had rented the place and was told from Mr. King, and in this conversation he asked Crone who owned the place and was told that Mr. King owned it. Witness stated that the fences were in bad condition, and he did not notice any improvement on the place that appeared to have been made during the past four or five years.

King stated that Crone paid the taxes, but that he had either loaned him the money with which to pay them, or allowed him credit therefor.

The court found that Crone had purchased the lands from Hammock and borrowed the money from King with which to pay therefor, and that the deed executed by Hammock to King conveying them was as security for the money and in the nature of a mortgage, made a statement of the account between the parties and declared a lien upon the lands for the amount still due, and from the decree this appeal comes.

W. R. Casey and *Sam Frauenthal,* for appellant.

1. Before a conveyance which is absolute on its face will be declared to be a mortgage, the evidence that it was intended by the parties to be a mortgage must be clear, unequivocal and convincing. 88 Ark. 299; *Id.* 236; 75 Ark. 551; 87 Ark. 527; 105 Ark. 314.

Where a chancellor's findings are made upon conflicting testimony which is not clear, convincing and beyond reasonable controversy as required by law, such findings will be set aside on appeal. 104 Ark. 475.

2. The evidence, as shown by the testimony both of the appellant and appellee, is clear that the notes given for the land on January 2, 1908, were surrendered by appellant to appellee, and that the bond for title given on that date was surrendered by appellee to appellant, whereby that contract for the conveyance of the land was cancelled. A bond for title to convey land may be rescinded by the voluntary surrender or cancellation of

the written instrument with that intent. 42 Mich. 518; 28 Pa. St. 426.

3. Appellant denies that he made any agreement to redeliver a bond for title; but if such agreement was made, it was oral and not in writing, and was within the statute of frauds. 20 Cyc. 227; Kirby's Dig., § 3064.

4. There is no evidence that appellee made any tender of any alleged sum due by him to appellant before the institution of the suit, nor attempt to make any tender good by bringing it into court; therefore, in no event was he entitled to judgment for costs. 33 Ark. 340; 34 Ark. 582; 90 Ark. 206; 96 U. S. 580; 72 Ark. 210; 84 Ark. 521; 85 Ark. 30.

Wm. T. Hammock, for appellee.

1. Counsel reviews the testimony at length, and urges that the chancellor's finding rests upon evidence that is clear, convincing and beyond reasonable controversy; also that a chancellor's finding of fact will not be disturbed on appeal unless clearly against the preponderance of the evidence. 67 Ark. 200; 73 Ark. 489; 89 Ark. 318; 105 Ark. 460; *Id.* 663; 103 Ark. 478; 90 Ark. 173; 91 Ark. 70; *Id.* 555; 92 Ark. 35; 95 Ark. 487.

2. Where a deed which is absolute on its face is executed as security for the payment of a debt, it will be construed to have only the force and effect of a mortgage. 5 Ark. 321; 40 Ark. 149; 106 Ark. 169; 106 Ark. 587; 103 Ark. 493, 494.

If Crone borrowed money from King to pay Hammock for the land, and caused the latter to execute a deed to King as security therefor, the conveyance was a mortgage. 27 Ark. 404; 40 Ark. 149.

"Every instrument intended to secure the payment of money, whatever its form, is in equity a mortgage." 2 Summer, 533; Story's Equity, § 1017; 20 Ohio 469; 3 Pick. 484; 15 Ill. 505; 51 Ark. 438; 103 Ark. 493, 494.

3. The evidence shows that the bond for title of 1908 was surrendered by Crone on King's promise to renew the same. If this surrender was on an agreement

of King's to renew the same, contemporaneous with such surrender, it does not fall within the statute of frauds.

4. A tender was rendered impossible by the act of King in refusing to give appellee a statement of indebtedness and his refusal to settle with appellee, and a tender was not necessary.

KIRBY, J., (after stating the facts). (1) It is contended that the chancellor's finding is clearly against the preponderance of the testimony, and with this contention we agree. The evidence is undisputed, without regard to the nature of the first transaction between Hammock and King, that King thereafter sold the land, on June 2, 1908, to Crone and executed a bond to convey the title upon the payment of the purchase money notes, that these notes were not paid, that the bond for title was extended for twelve months and at the end of that time that the trade was cancelled and the bond for title surrendered to King, the maker, who at the same time delivered to Crone the unpaid purchase money notes. That the possession of the land was also delivered to King and that Crone thereafter rented it from King, giving his notes for the rent, which specified they were for the rent thereof. It is true that Crone says that a week or two after the transaction of the surrender of the bond for title that he asked King to renew the bond and make him another bond for title, and was told that his word was as good as his bond, and that he continued in the belief that the bond would be executed, until after the lands were rented to Boyd in 1913. He does not deny that he became a tenant of King after the surrender of the bond for title and executed notes for the rent of the land, some of which he paid. The voluntary rescission of the contract and surrender of the bond for title and the possession of the land for the unpaid purchase money notes released all right that appellee had theretofore. *Friar* v. *Baldridge,* 91 Ark. 140; *Sullivan* v. *Dunham,* 42 Mich. 518; *Raffensberger* v. *Cullison,* 28 Pa. St. 426.

(2) If appellee had surrendered the bond for title on condition, contending that a new one should be executed,

of course, it would not have had effect to release his interest, but, according to his own statement, it was a week or two after the transaction of the surrender of the bond before he asked for a renewal of the bond, and appellant denied that he ever agreed to renew the bond or made any statement at all about his word being as good as his bond, that indicated any intention to renew it, and if he had at a later time made such an agreement to redeliver the bond to convey the title, it would have been within the statute of frauds, and there was no writing to bind him to its performance. 20 Cyc. 227.

(3). The findings of the chancellor are against the decided weight of the testimony, and the decree is reversed and the cause remanded with instructions to enter a decree dismissing appellee's complaint for want of equity.

HUNTER v. FEILD.

Opinion delivered July 6, 1914.

1. TRUSTS—CONSTRUCTIVE TRUSTS—SUFFICIENCY OF THE EVIDENCE.—The evidence to establish the existence of a constructive trust in lands, must be clear, positive and satisfactory, and a mere preponderance of the evidence is not sufficient to engraft a trust upon property conveyed by deed containing no recognition of the trust.
2. TRUSTS—CONSTRUCTIVE TRUSTS—SUFFICIENCY OF THE EVIDENCE TO ESTABLISH.—Appellant purchased lands at a foreclosure sale which belonged to the heirs of deceased mortgagor, and the heirs sought to have a constructive trust declared, on the ground that appellant purchased the property for them; *held*, the evidence was not sufficient to establish a constructive trust.
3. TRUSTS—CONSTRUCTIVE TRUSTS—HOW CREATED.—A constructive trust can not be raised, so as to divest the legal estate of the grantee of land, or his heirs, by the subsequent application of the funds of a third person to the satisfaction of the unpaid purchase money.

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

STATEMENT BY THE COURT.

Appellees were plaintiffs below in a suit brought to enforce a trust against certain lands in Pulaski County,

formerly owned by their father, Silas Feild, who died in September, 1897, leaving him surviving, in addition to the plaintiffs certain other children and grandchildren. At the time of his death, Silas Feild was the owner of considerable real estate situated in Pulaski, Desha and other counties in this State, indeed he was described as being "land poor," and such appears to have been the case, as he was heavily involved and his lands produced but little income. The complaint alleged, and there was proof tending to show, the following facts: The heirs of Silas Feild agreed that the eldest son, O. B. Feild, should administer upon the estate of his father, and this son duly qualified and acted as such administrator, until the estate had been administered upon and the administrator discharged. That it was agreed the administrator should serve without pay, and that appellant, who was a son-in-law of the intestate, should assist the administrator in all clerical matters and in making the settlements, and that he, too, should serve without pay, yet the administrator appears to have been allowed the statutory commissions. That at the death of the said Silas Feild the lands involved in this litigation were under mortgage to one B. J. Brown, who was demanding the payment of his money. That appellee W. A. Feild applied to his father-in-law, C. Luchesi, and obtained a loan to be made appellant with which he should buy in as trustee for the benefit of his wife, and the other heirs of Silas Feild, the property which was about to be sold under the decree ordering the foreclosure of the Brown mortgage; and, that, pursuant to this agreement, the property was sold by the commissioner of the court to appellant; and that although appellant took the title to the land in his name individually, his purchase and the conveyance to him was as trustee. This sale took place February 6, 1899. That upon the discharge of the administrator, appellant took charge of and exercised general supervision over the affairs of the estate, including lands not embraced in the Brown mortgage, and made sales of these lands and paid the taxes thereon, and the complaint further alleged that appellant

has made no proper settlement of the money he has received and disbursed, and now repudiates his trust and claims to own individually the lands bought by him at the foreclosure sale.

The answer was a general denial of the material allegations of the complaint, and the case presents several sharply defined questions of fact. There are a number of minor contradictions in the testimony, but the record is voluminous, and we shall discuss only those features of the evidence which we regard as controlling in determining the relationship of the parties to each other.

In addition to the evidence stated, appellees offered evidence to the following effect: That the said Luchesi, who was the father-in-law of W. A. Feild, loaned the appellant the money with which to purchase the land, and loaned it upon the understanding that the land should be purchased by appellant as trustee, that after this purchase, certain taxes on the property there sold appellant were paid by the administrator and heirs of the Feild estate, and that appellant stated from time to time he only wanted his money returned with interest thereon and compensation for his trouble in managing the affairs of the estate. And it was testified that appellant explained that he bought the land and took the title to himself individually, and not as trustee, because some of the Feild heirs were minors, and he could dispose of the property to better advantage by taking the title in his own name.

The moving spirits in this litigation appear to have been W. A. and O. B. Feild, who invited all the other heirs to join with them in the institution and prosecution of this lawsuit, but only two of the heirs accepted this invitation, the others declined to take part in it, and were not joined as defendants, and the case proceeded to final decree between appellant and the heirs who were plaintiffs. The case of the plaintiffs depended chiefly upon the testimony of O. B. Feild and W. A. Feild and his father-in-law, Mr. Luchesi, and the other heirs who testified, derived most of their information from these two brothers.

It is undisputed that the loan to Mr. Brown had been past due for some time, and the Feild heirs had defaulted in the payment of interest, and application had been made to several agents, who made loans on real property, for a loan to repay the Brown mortgage, but all of them had declined to make a loan on the lands described in the Brown mortgage in a sufficient sum to pay that mortgage. A few days before the sale, according to the evidence of appellant, he announced his purpose to W. A. and O. B. Feild to make the land bring the debt it secured, or to buy it in himself at the sale, and that his purpose in so doing was to save the remainder of the real estate from a sale under an execution which would issue on the deficiency judgment, if the land failed to bring the debt. Appellant discussed the question of a loan with Mr. Luchesi, and he declined to make the necessary loan on the property described in the Brown mortgage. Luchesi appears to have gone with appellant to the cashier of the Pulaski Trust Company, and to have discussed the loan with that officer, but the point is in dispute as to how the loan was negotiated. Mr. J. F. Lenon, the cashier of the bank, testified that as representative of Coffin & Ragland, he made the loan to appellant, and that later Luchesi bought this loan and had the mortgage transferred to him, and he further testified that he made the loan directly to appellant, and that there was no intimation that he was borrowing the money to use as trustee. A strong circumstance which supports appellant's contention is that he was unable to raise the money to pay off the mortgage by the use of property belonging to the Feild estate, and his loan was made upon the security of the mortgaged property, and the home of appellant in the city of Little Rock, in which the Feild heirs had no interest whatever, and he repaid this loan out of his own funds. Moreover, the negotiations for this loan show the purpose for which it was being made, it being explained that appellant intended to see that the mortgaged property sold for enough to pay the mortgage debt, and that if this was done, and some one else became the pur-

chaser, appellant would not desire this loan made. When the sale was made, appellant was not the purchaser of all the lands. O. B. Feild purchased a small tract of the land, but assigned his certificate to appellant for the amount of the bid, and the second wife of Silas Feild bid on and bought a portion of the land. The commissioner executed his deed to appellant for the lands purchased by him and testified that no intimation was given to him that appellant was not purchasing for his own account. After this, appellant negotiated the sale of lands belonging to the estate, not embraced in the mortgage, and there appears now to be no question that he fairly accounted for all of the money so received, notwithstanding the allegations of the complaint to contrary. Immediately after his purchase appellant declared his willingness to permit the heirs to redeem from him, and this purpose appears to have been reiterated frequently thereafter, except that, long before any controversy arose about the title, appellant announced his intention of not according this privilege to a branch of the family referred to as the Hobbs heirs.

Appellant testified that just before the suit was begun, the attorney for appellees requested a conference with him, at which time the attorney stated to appellant that W. A. Feild would testify he took the money to appellant at the courthouse to pay for the land. Feild denied making the statement, but his denial was not unequivocal, while the attorney did not deny at all that he had told appellant that Feild had made this statement to him; and no one now contends that Feild did this. After considerable negotiations among a number of the members of the Feild family, appellant sold to Mrs. Crockett, one of the plaintiffs, and to Miss Nannie Feild, her sister, who did not join in the suit, the city residence bought at the sale. These two sisters had occupied this property for some time before purchasing it, and had paid the rent thereon very irregularly, and it is conceded that the property was sold to them at considerably less than its market value, but in none of the negotiations for the

sale of this property was appellant's title and right to convey questioned and the deed was executed on April 24, 1907.

Appellant sold a portion of this Feild land in January, 1902, and another portion in October, 1904, and sold a right-of-way for a levee in 1907, and no one questioned his right to execute these conveyances. And finally on May 18, 1911, he contracted with W. A. Feild to sell him certain portions of this land, and took notes for the purchase money, and this suit was filed two days before the first of these notes matured.

A letter from appellant to O. B. Feild, dated April 1, 1904, was introduced in evidence, a portion of which read as follows:

"Referring to our conversation as to the amount I am out on the property purchased by me at Brown mortgage sale, I estimate that after giving credits, I am shy about $2,000, and if the heirs could pay that amount cash, I would deed the property to them, provided it was done by April 6, as I have a note due on that date which I do not want to renew."

It appears, however, that certain of the Feild heirs contributed to the payment of the taxes for the years 1908, 1909 and 1910, but no such contributions were made by either O. B. or W. A. Feild. Appellant admits the receipt of these contributions on account of taxes, but says at that time he was still extending to certain of the heirs an option to buy back the lands, and these contributions were treated as payments for this option.

Two grandchildren of Silas Feild, who were twins, and were thirty-two years old when their depositions were taken, testified that appellant's purchase had been the subject of numerous family conferences, and that no one claimed for a number of years after his purchase that he had bought as trustee, but that it was understood that he had repeatedly offered the heirs the privilege of repaying him his money and taking the title to the land, but this offer had never been accepted.

This suit was begun on May 17, 1912, and the court found that appellant, in buying the lands, sold under the Brown mortgage, acted as and under the obligations and duties of a trustee for the Feild heirs, and decreed that he held the title as trustee, and confirmed all contracts and sales made by him and ordered an accounting of all his transactions in the matter before the clerk as master. This accounting was had and the master made his report.

John M. Rose and *Marshall & Coffman,* for appellant.

1. To establish a trust in the land in favor of the heirs, the evidence must not only preponderate, but must be so positive as to leave no doubt on the subject. This the evidence wholly fails to do. 48 Ark. 168; 11 Ark. 82; 104 Ark. 312; 75 Ark. 446; 105 Ark. 318, and cases cited; 159 S. W. (Ark.) 1111; 101 Ark. 451; 45 Ark. 482; 42 Ark. 503; 41 Ark. 393.

2. Plaintiffs are barred by reason of their long delay in bringing suit. 145 U. S. 368; 143 U. S. 553; 195 U. S. 309; 60 Ark. 50; 25 Cyc. 1155; 58 Ark. 84; 46 Ark. 25.

3. The decree is erroneous because of want of necessary parties. In a suit like this to establish and enforce a trust, all the beneficiaries are necessary parties, and if any refuse to become plaintiffs, they must be made defendants. 39 Cyc. 611-616; 98 Ark. 446.

O. D. Longstreth, for appellees; *Grover C. Morris,* of counsel.

1. The evidence is full, clear, decisive and positive that Hunter was acting as the agent of the heirs and administrator, and leaves no doubt of that fact. As such agent he could only purchase for his principals. 73 Ark. 338; 61 Ark. 344; 61 Ark. 575; 42 Ark. 25.

The evidence shows that the money was obtained from Luchesi by arrangement of the heirs and administrator for the specific purpose of purchasing this property for the estate, and that appellant used the money for that purpose. He is a trustee. 19 Ark. 39; 20 Ark. 272.

Hunter's intention at the time he made the purchase will control; and since the evidence shows that that intention was to act for the heirs, he must be declared a trustee. 40 Ark. 62, syl. 5; 12 Am. & Eng. Ann. Cases, 800; 9 *Id.* 248; 5 *Id.* 253.

By levying taxes on the heirs and beneficiaries, and by written reports, appellant continued to recognize them as owners until this suit was brought, thereby allaying suspicion that he was claiming adversely, and thus perpetrating a fraud for which his claims are barred. 73 Ark. 310; 26 Ark. 341; *Id.* 445; 53 Ark. 191.

Finally, it is shown throughout the testimony, both by appellant's admissions and by many exhibits that he repeatedly asserted that when the heirs should pay back the money, he would surrender his claim. 52 Ark. 378.

2. Appellees are not barred by laches. In making this claim counsel overlook appellant's long concealment of his intentions, and that the first notice appellees had that he claimed ownership of the land was in the fall of 1910; that when O. B. Feild took the matter up with him, appellant claimed that "he wanted to do right about it," suggested that he talk to the other heirs, indicated that a compromise could be reached, and that suit was brought in 1912 only after the impossibility of a compromise was demonstrated. None of the cases cited by appellant are analogous to this case on the facts, yet this case falls well within the exception intimated by the court in *Patterson* v. *Hewitt,* 195 U. S. 309, 49 L. Ed. 214, see page 219. In contending that the statute of limitations began to run from the time Hunter bought the land, or the recording of his deed, counsel overlook the doctrine of fraud. 73 Ark. 310-313.

3. The decree is not erroneous for want of necessary parties. All necessary heirs were parties to the suit, either as plaintiffs, defendants or interveners. The failure to abstract the intervention of Helen E. Hobbs and others, and the testimony given under it is alone sufficient to bar appellant's raising the question here. 100 Ark. 328.

If there were heirs not made parties, the decree could only be reversed as to them, and would stand as to the others. 83 Ark. 196; 75 N. Y. S. 70; 70 Ark. 197.

SMITH, J., (after stating the facts). Appellant insists there was a defect of parties in that the court undertook to render a final decree both as to the title to the property, and the accounting for the rents, when a number of the Feild heirs were neither parties plaintiff nor defendant. Appellant also says this action is barred by laches. But we find it unnecessary to consider either of these questions, as we think the chancellor's finding that there was a trust in the land in favor of the heirs of Silas Feild is contrary to the preponderance of the evidence.

Appellees insist that appellant was the agent of the heirs and the administrator, and that as such he could purchase only for his principals, and that the proof shows the money used in the purchase of the lands was secured from Luchesi by an arrangement between the parties for the specific purpose of purchasing for the estate, and that the money was used for this purpose, and that the purchase with this intention made with money raised by appellees for that purpose constituted appellant a trustee, and that he holds the title as such. The reported cases all hold that evidence to establish the existence of such trust must be clear, positive and satisfactory, and some cases say that the evidence must be so clear and positive as to leave no doubt; and all the cases agree that a mere preponderance of evidence is not sufficient to engraft a trust upon property conveyed by deed containing no recognition of the trust. And we think this evidence is not sufficient to meet that requirement. In our opinion as much as can be said of this evidence and its sufficiency (and we do not decide even that), is that appellant proved recreant to his promise to convey this title to the Feild heirs, or to distribute the proceeds of the sale of this property among them.

(1-2-3) The agreement between these parties, if the facts were as appellees contend, is not enforceable as con-

stituting an express trust for the reason that the entire agreement rests in parol. Nor can the evidence in this case be said to constitute a resulting trust because the purchase money was furnished by appellant, and was raised by him through a mortgage which he gave on his own home. This was done after the administrator and heirs had failed in their efforts even to raise the money with which to pay the interest on the mortgage debt. Every one, including Luchesi, to whom application was made for the loan of money, declined to make it upon the security offered, and the entire Feild estate appeared to be imperiled. The mortgage indebtedness, exclusive of interest and costs of suit, was $4,000, and appellant bought only a portion of the property sold at the foreclosure sale, and the property which was bought by him for $2,615, together with the other property sold, brought the amount of the mortgage indebtedness, including the costs and interest, and at the sale there was competitive bidding, and a large part of the property was bought by the widow of Silas Feild, who was also the widow of one of his sons, and the mother of several of the heirs interested in this estate. The exact amount of money which appellant would require could not be known, and was not known until after the sale, when he borrowed from the Pulaski Trust Company the money with which to make his payment. This loan was made to appellant individually upon the use of his individual property as security, and even though an agreement might have existed at the time of this sale to hold the property as trustee for the Feild heirs, such an agreement would not constitute a resulting trust. Discussing this question in the case of *Grayson* v. *Bowlin,* 70 Ark. 145, Mr. Justice BATTLE, speaking for the court, said: "This court, in *Sale* v. *McLean,* 29 Ark. 612, and in *Duval* v. *Marshall,* 30 *Id.* 230, said, in effect, that, in order to create a trust of this nature (resulting trust), payment of the purchase money must be made at the time of the purchase. By this it was meant that the trust must arise, if at all, from the original transaction at the time it takes place, and at no other time; and

that it can not be mingled with any subsequent dealings. Some of the cases use the language, 'at the date of the payment of the purchase money;' others, 'at the time of the execution of the conveyance.' But all of them mean the same thing, namely, that it is impossible to raise a resulting trust, so as to divest the legal estate of the grantee or his heirs, by the subsequent application of the funds of a third person to the satisfaction of the unpaid purchase money. *Botsford* v. *Burr,* 2 Johns. Ch. 406; *Rogers* v. *Murray,* 3 Paige, 390; Leading Cases in Equity, *supra,* 338. The trust arises out of the circumstances that the money of the real purchaser, and not of the grantee in the deed, formed the consideration of the purchase, and became converted into land." And that opinion quoted with approval the following language from the case of *Bland* v. *Talley,* 50 Ark. 71: "Now, a parol agreement that another shall be interested in the purchase of lands, or a parol declaration by a person that he buys for another, without an advance of money by that other, falls within the statute of frauds, and can not give birth to a resulting trust." Nor can it be said that a trust *ex maleficio* arose from the facts of this transaction. The essentials of such a trust were discussed in *Spradling* v. *Spradling,* 101 Ark. 451, in which case it was said: "* * * There is no testimony indicating that the husband fraudulently induced the wife to have the deed made to him by reason of a promise that he would convey the land to, or hold it for, the children. There is no testimony that he acquired the title by any intentionally false or fraudulent promise, so that it could be said that a trust *ex maleficio* arose from the transaction. To create such a trust, the mere verbal promise, and its breach, is not sufficient. There must be some element of fraud practiced whereby the execution of the deed is induced; and in the case at bar, there is not a tittle of testimony indicating that any such fraud was practiced by the husband upon the wife in obtaining this deed. 3 Pomeroy Eq. Jur., § 1056."

Discussing the proof necessary to establish a trust *ex maleficio,* Mr. Justice RIDDICK, in the case of *Ammonette* v. *Black,* 73 Ark. 313, 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 statute of frauds would apply."

Both of the opinions of this court quoted from, cite with approval section 1056, 3 Pomeroy, Equity Jurisprudence, which reads as follows: "The foregoing cases should be carefully distinguished from those in which there is a mere verbal promise to purchase and convey land. In order that the doctrine of trusts *ex maleficio,* with respect to land, may be enforced under any circumstances, there must be something more than a mere verbal promise, however unequivocal, otherwise the statute of frauds would be virtually abrogated; there must be an element of positive fraud accompanying the promise, and by means of which the acquisition of the legal title is wrongfully consummated. Equity does not pretend to enforce verbal promises in the face of the statute; it endeavors to prevent and punish fraud, by taking from the wrong-doer the fruits of his deceit, and it accomplishes this object by its beneficial and far reaching doctrine of constructive trusts."

It follows from what we have said, the chancellor erred in his finding that appellant held the interest to the property in question as trustee, and in his directions that an accounting be had of the proceeds of the sale and disposition of the trust property, and his decree to that effect will therefore be reversed and the cause remanded with directions to the chancellor to dismiss the complaint for want of equity.

KIRBY, J., dissents.

COLYAR v. LITTLE ROCK BOTTLING WORKS.

Opinion delivered July 6, 1914.

1. NEGLIGENCE—DEFINITION.—Actionable negligence is a breach of a duty, resulting in an injury to some person to whom that duty is legally owing.
2. NEGLIGENCE—PERSONAL INJURIES—LIABILITY OF VENDOR OF MANUFACTURED ARTICLE—DUTY OF CARE.—A vendor of charged drinks sold in glass bottles owes a duty not merely to charge a bottle so that its contents may not be wasted, but also to exercise that care which an ordinarily prudent person would use to avoid the infliction of an injury which might reasonably be expected to follow the failure to use this degree of care.
3. NEGLIGENCE—VENDOR OF CHARGED DRINKS—DUTY OF CARE—EXTENT OF LIABILITY.—The vendor of charged drinks sold in glass bottles owes a duty of care that the same will not cause injury by explosion, not only to the vendee of the same, but to the employees of the vendee who perform the service which the parties must have contemplated as necessary to be performed, when the sale was made.
4. PRINCIPAL AND AGENT—KNOWLEDGE OF AGENT.—A principal, who is a manufacturer of charged drinks, is chargeable with the knowledge of his agents who did the work, that bottles have been improperly charged.
5. NEGLIGENCE—INJURY DUE TO NEGLIGENCE—QUESTION FOR JURY.—Appellee was the manufacturer of charged drinks sold in glass bottles. Appellant's husband purchased a case of the same, and while appellant was handling one of the bottles, in the course of business, while working in her husband's store, the bottle burst, causing her an injury. *Held*, under the evidence the cause should be submitted to the jury, on the issue of whether appellee was negligent in charging the bottle, and whether that negligence was the proximate cause of the injury.

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

STATEMENT BY THE COURT.

Appellants sued appellees alleging they were partners engaged in business in the city of Little Rock, manufacturing and selling soda pop and kindred articles; that plaintiff and her husband sell soft drinks in said city, and that about October 21, 1913, they bought from the defendants a case of their goods, and after same was delivered at her place of business, she lifted one of the bottles from the case, and was carrying it to the ice box, and, while so

doing, in the exercise of due care, the said bottle, without coming into contact with anything, exploded and so injured her left eye that it had to be removed, whereby she not only lost the sight of her eye, but suffered great disfigurement and untold physical pain and mental anguish and incurred large expense for medical attention and nursing.

A demurrer to the complaint was filed and overruled and upon motion appellant elected to proceed in her name alone, her husband having been joined with her at the institution of the suit.

Appellees answered, denying the allegations of the complaint, and stating that they purchased the bottles used by them from a reputable, well known and reliable bottle manufacturer and filled them with due care, and, if plaintiff was injured by one of them, it was not due to their negligence, but to that of appellant in handling and using same.

Appellant testified that she was engaged in running a little grocery and confectionery store in the city of Little Rock, and that she handled cold drinks, and that the business was owned by herself and her husband; that as she took a bottle of soda pop from the case in which it had been delivered to put it in the ice box, having picked it up with her right hand, the bottle exploded and put her eye out. That she handled the bottle carefully and did not strike it against anything, yet it exploded and blew glass all over the floor where she was standing. She testified that she had purchased this soda pop from appellees and was taking it out of the case in which it had been delivered at the time of her injury. She further testified that she had been engaged in this business for some years, during which time a number of bottles had broken, and that sometimes these bottles would break in the case and at other times they would break on the ice.

A witness, R. E. Sallie, testified that he had worked for appellees for a period of three and one-half years, during which time he had been engaged in the delivery of bottled drinks to the appellee's customers, and that it

was rather a common occurrence for these bottles to burst while he was handling or hauling them, and that he had had them burst on his wagon without any cause of which he was aware, and that some had exploded by being struck against something, while others broke while he was handling them; that he had had customers tell him of the soda pop bottles bursting, and that it was his duty to take up these bursted bottles, as he had instructions to replace the broken ones with other bottles containing soda pop; that they broke through being overcharged, or from the bottles being defective, and that you could not tell by looking at the bottles whether they would break or not. He further testified that he cautioned appellee that too many bottles were bursting, and that they would have trouble about it; that they were charging the bottles with too much gas, and that the overcharge was sufficient to burst them and was the cause of their bursting.

A witness, Anderson, testified that he was engaged in the distilled water and soda water business, and had been in the latter business for seven years, and knew the methods of charging such bottles; that unless a bottle was cracked, it could not be told whether it was defective or not; but that charging the bottle was the usual test to discover that fact, and that if the bottle was not defective it would not ordinarily explode, if it was properly charged; that cold water will absorb at moderate pressure a great deal more of the carbonic acid gas, with which it is charged, than it will when the water is warm. He further testified that his experience has been that some bottles would burst without any apparent cause, and that the bottles used by appellees were bought from a factory which is considered one of the largest and best glass companies in the world.

At the conclusion of appellant's evidence, the court, upon motion of appellees, directed the jury to return a verdict in appellee's favor, which was done, and this appeal is duly prosecuted from the judgment rendered upon that verdict.

Bradshaw, Rhoton & Helm, and *Marshall & Coffman,* for appellant.

1. The case of *Nelson* v. *Armour,* 76 Ark. 352, was decided solely on the want of privity of contract, without considering the question of negligence raised by the pleadings. It is not in point here because this action is by the original vendee of the article. But that case recognizes the principle that where articles of food are sold for immediate use there is an implied warranty of soundness and fitness for use as food and that the vendee can sue for its breach. The same principle would apply where the article sold is a drink. There is the further warranty that the article sold is free from latent defects growing out of the process of manufacture. 35 Cyc. 401. The proof is clear that there was a breach of warranty, and the evidence is sufficient under this view alone, at least, to send the case to the jury. 15 L. R. A. (N. S.) 850; *Ib.* 884.

2. Aside from the question of warranty, there is sufficient evidence to send the case to the jury upon the question of negligence of the appellees. While most cases hold that where there is no privity of contract between the parties, and where the article sold is not intrinsically dangerous, proof of knowledge is necessary to a recovery for injury on account of a defect in the article, there appears to be no dissent from rule that where the immediate vendee of the defendant brings suit, proof only of negligence is necessary. 1 L. R. A. (N. S.) 1178; 11 *Ib.* (Ky.) 238; 28 *Ib.* (N. C.) 949; 23 *Ib.* (Wis.) 876; 18 *Ib.* 726; 15 L. R. A. (Minn.) 818; 68 L. R. A. (Mich.) 342.

This court recognizes the rule *res ipsa loquitur* in proving negligence. 89 Ark. 581-588, and cases cited. See, also, Labatt, M. & S., § 843; 29 L. R. A. (N. S.) 537; 43 *Ib.* 599; 61 L. R. A. 583; 12 Lea (Tenn.) 232; 11 Fed. 438; 29 L. R. A. (Cal.) 718.

Proof of the accident alone ought to raise the presumption in this case that if proper care had been exercised, the accident would not have happened, because the evidence shows that the bottle was charged by the de-

fendants, hauled by them in a case to the plaintiff and exploded in her hand when she took it out of the case carefully and properly.

Carmichael, Brooks, Powers & Rector, for appellees.

1. W. H. Colyar was the real vendee and there is no privity of contract between appellant and appellees. Husband and wife can not be partners in a mercantile business in this State. 56 Ark. 277.

2. The complaint and proof show clearly that there was no privity of contract between appellees as vendors, and appellant as vendee; but, if privity of contract existed, the injury complained of does not fall within any class of warranty recognized by law.

The case of *Nelson* v. *Armour,* 76 Ark. 352, was decided on the implied warranty that what the vendor sells is fit for the vendee to use; but that case did not involve the question of an inherent defect, and one, too, that was impossible to prevent.

There was no sale of bottles in this case, but only of the contents thereof, the bottles, as is shown, were to be returned when emptied. The injury, therefore, was not caused by anything that was sold.

3. There can be no liability for the injury to appellant, unless appellees had knowledge of the particular defect which caused the injury, and could, by the exercise of reasonable diligence, have prevented the accident. 71 N. Y. S. 942; 106 Ark. 574; 93 Ark. 154; 51 N. Y. S. 476, *syllabus;* 122 N. Y. 118; 46 Ohio 386; 128 N. Y. 103, *syllabus;* 9 Watt. & Serg. 32; 99 Am. St. Rep. 932; 138 Mich. 567; 5 Am. & Eng. 178, *syllabus;* 76 Ark. 353; 1 Am. & Eng. Enc. of L., 755, note; 15 L. R. A. (Mo.) 821; 51 N. Y. 494, 10 Am. Rep. 639; 111 Cal. 39; 52 Am. St. Rep. 146; 1 L. R. A. (N. S.) 1178, and note; 122 Ga. 695; 50 N. E. 974.

The burden of proving negligence is on the plaintiff. 72 Ark. 572. And the negligence can not be proved without proving the particular acts constituting the negligence. 63 Ark. 563; 94 Ark. 353.

4. The doctrine *res ipsa loquitur* does not apply in a case of this kind.

SMITH, J., (after stating the facts). It is urged there can be no recovery here because of the lack of privity between appellant and appellees, and the case of *Nelson* v. *Armour,* 76 Ark. 352, is cited to sustain that position. The facts in that case were that plaintiff had purchased from a dealer a can of lunch tongue, which the dealer had purchased from the Armour Packing Company, the defendant, and the court held in that case that a demurrer to the complaint was properly sustained, because there is no privity of contract between the vendor in one sale and the vendees of the same property in the subsequent sale; and that each vendee must resort as a general rule only to his immediate vendor. No reference was made in the opinion in that case to the allegations of the complaint that the packing company had been guilty of negligence in putting up the meat for sale.

(1) If appellees are liable at all under the evidence in this case, a recovery on account of that liability can not be defeated because of the lack of privity. The proof is that the bottles were sold to and delivered to the appellant, who was engaged in business with her husband, although so far at least as the bottles in question are concerned, the business was in her charge and under her control. It was urged that the business being conducted by her could not be hers, nor could she be a partner therein on account of the interest of her husband, as the wife can not engage in a partnership business with her husband. But whatever her relationship to her husband, in regard to this business may have been, the fact remains that she was in charge of it and was injured while handling one of the bottles in the usual and necessary course of business. This handling of the bottle by the vendee, or his employee, was necessarily within the contemplation of the parties when the sale was made, and if privity is essential to a recovery where negligence is alleged on the part of the vendor, there is such privity here as is necessary to sustain a recovery. If the vendor is to be

held liable at all for his negligence, in cases of this character, there is no reason for limiting that liability in favor of the vendee individually, who may never personally be exposed to the danger resulting from this negligence. Actionable negligence has been defined as a breach of duty resulting in injury to some person to whom that duty is legally owing, and the duty here is not merely to so charge a bottle as that its contents may not be wasted, but also to exercise that care which an ordinarily prudent person would use to avoid the infliction of an injury which might reasonably be expected to follow the failure to use this care; and that duty is owing not only to the vendee, but also to his employees who perform the service which the parties must have contemplated as necessary to be performed when the sale was made.

(2-3-4-5) There is a case reported in 138 Mich. 567, the style of which is *O'Neill* v. *James,* where the facts are strikingly similar to the facts in the instant case, except that the party injured by the explosion of the bottle was an employee of the owner of the business, and there was no proof of knowledge upon the part of defendant that the bottle which exploded had been improperly charged with the gas. In that case the plaintiff had recovered a substantial judgment which was reversed on appeal because of the insufficiency of the evidence to sustain the allegations of the complaint, which allegations were held sufficient to support a recovery. The court, in reviewing the contentions of the parties and the evidence offered in support of these contentions recited that there was testimony on the part of experts, without objection on the part of defendant, that champagne cider, manufactured in the usual way, with the ordinary pressure, was safe. There was also testimony that if the pressure was increased beyond a certain limit, then the article became dangerous, and dangerous because of the likelihood of an explosion. The experts also testified that an explosion would not occur under the circumstances detailed in that case, unless the bottle had been overcharged and would be likely to occur had the bottle been overcharged. And

that while the testimony of the defendant and of his bottler was positive that no champagne cider had ever been bottled for sale at a higher pressure than that which was shown to be ordinarily safe, it was stated that if there were other testimony in the case from which a jury might reasonably infer that this pressure had been exceeded, the question became one which ought to be submitted to the jury for its decision. There was opposed to this testimony, on behalf of the defendant, the testimony of experts in which they maintained that the explosion could have occurred for no reason other than an overcharge; but there was no proof of an overcharge except this expert evidence. The court held with reference to the question of negligence that the court was right in holding that in view of the testimony in that branch of the case, the issue should have been submitted to the jury; but following this statement, the court said: "There is, however, a much more serious question in the case. The testimony on both sides is that champagne cider, bottled in such bottles as were used by defendant, at a pressure of sixty pounds or under, is a harmless ordinary article of commerce, usually kept for sale where soft drinks are sold. The record also discloses that defendant did not himself charge the bottle which did the mischief. There is nothing to indicate that he ever saw it. The testimony of the bottler is that it was charged in the usual way, and sent out in the usual course of trade, and that he had no knowledge that it was improperly charged. Indeed, his testimony is that it was not improperly charged. There is no testimony tending to establish that defendant had any knowledge that the bottle was overcharged when it left his place of business, or from which an inference could be properly drawn that he had such knowledge. Under this state of facts, counsel for defendant claim:

"The point we raise is that where one is engaged in the manufacturing and selling of an article of commerce harmless in itself, as the proofs show that champagne cider is, when manufactured and bottled in the ordinary

manner, he can not be held liable to a third person, who stood in no privity of contract with him, because perchance one bottle did, for some reason, burst, in the absence of proof of knowledge of vendor of the defect."

After reviewing a number of authorities, the opinion concluded with the statement that "The plaintiff knew that champagne cider, as ordinarily manufactured and sold, was charged with a gas. As we have before stated, there is no proof from which the inference might be drawn that the defendant had knowledge that the bottle was improperly charged. The proof offered on the part of plaintiff, as well as that offered on the part of defendant, is that the apparatus used by the employees was a proper one. Under the facts disclosed by the record, a verdict should have been directed in favor of defendant."

The instant case, however, is distinguishable from the *O'Neill* v. *James* case, *supra,* because there is proof here tending to show that the bottles were improperly charged and that appellees were aware of that fact, or were at least in possession of such knowledge and information on that subject as would impute knowledge to them of that fact. The ordinary law of principal and agent would charge appellees with any knowledge possessed by their employees, who were actually engaged in charging the bottles.

The evidence in this case presents no issue for submission to the jury upon the question of the use of defective bottles, as the proof shows the bottles were purchased from a manufacturer whose bottles were of standard grade and quality, and the only theory upon which a recovery could be sustained is that appellees were guilty of negligence in charging the bottle, and that this negligence was the proximate cause of the injury.

We think the proof is sufficient to require the submission of that issue to the jury and the judgment of the court below is therefore reversed and the cause remanded with directions to that end.

STATE v. BREWER.

Opinion delivered July 13, 1914.

1. LIQUOR—SELLING IN PROHIBITION TERRITORY.—The purpose of Act 135, Acts 1907, making it a crime to solicit orders for liquor in prohibition territory, is meant primarily to prevent licensed liquor dealers and their agents, from soliciting orders for intoxicating liquors in prohibition territory, and from even accepting such orders when voluntarily tendered.
2. LIQUOR—SOLICITING ORDERS IN PROHIBITION TERRITORY—AGENT.—Under Act 135, Acts 1907, making it a crime to take orders for the sale of intoxicating liquors in prohibition territory, a person may be convicted without it being shown that he was in fact acting as agent of a liquor dealer, where he solicited or received an order for intoxicating liquors, for the statute makes it an offense for any person to solicit or even receive orders in prohibition territory and transmit the same.
3. LIQUOR—SOLICITING ORDERS IN PROHIBITION TERRITORY.—The mere solicitation of an order without the same being filled is sufficient to make out the offense, denounced in Act 135, Acts 1907, and the mere acceptance and transmission of such an order, when it is accepted and filled by the dealer, constitutes the crime named.
4. LIQUOR—SOLICITING ORDERS IN PROHIBITION TERRITORY—CRIME OF—RIGHT OF LEGISLATURE.—The Legislature has the right to declare it a crime to solicit orders for liquor in prohibition territory, or to receive orders and transmit the same to a licensed dealer elsewhere.
5. LIQUOR—SOLICITING ORDERS IN PROHIBITION TERRITORY.—Defendant will be held guilty of the crime denounced in Act 135, Acts 1907, where the undisputed evidence shows that he received an order in prohibition territory, and, in person, transmitted it to a liquor dealer, who filled the order.
6. LIQUOR—SOLICITING ORDERS—VERBAL ORDER.—Under Act 135, Acts 1907, making it a crime to solicit "orders" for intoxicating liquor in prohibition territory, the term "order" held to mean merely a proposal or request, and that the same, to come within the statute, does not need to be in writing.

Appeal from Lee Circuit Court; *J. M. Jackson*, Judge; reversed.

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

Under the act of 1901, there was an exception in favor of a person who bought for a friend, but there is no exception in the act of 1907. 102 Ark. 16, does not apply.

Roleson & McCulloch, for appellee.

1. The word "order" is correctly defined in 29 Cyc. 1509. The agreed statement of facts does not support the indictment. Defendant never solicited any order. 102 Ark. 16 does not apply.

2. The act is highly penal and should be strictly construed. 53 Ark. 334.

McCULLOCH, C. J. In the indictment in this case the defendant is charged with soliciting an order from another person for intoxicating liquors in prohibition territory, and also with receiving such an order in prohibition territory and transmitting said order to a licensed liquor dealer at another place who accepted and filled the order.

The case was tried upon an agreed statement of facts before the court sitting as a jury, and the court found in favor of the defendant, and the State appealed.

The statute on which the indictment was based reads as follows:

"Sec. 1. It shall be unlawful for any liquor dealer, firm or corporation, engaged in the sale of intoxicating liquors in this State, to in any manner, through agents, circulars, posters or newspaper advertisements, solicit orders for such sales of intoxicating liquors in any territory in this State wherein it would be unlawful to grant a license to make such sales. *Provided,* that the term 'newspaper advertisements,' as used in this section, does not refer to liquor advertisements in papers published within licensed territory, unless such papers are sent into prohibition territory by the saloon keeper, or their agents, for advertising purposes.

"Sec. 2. The presence of any such liquor dealer, firm or corporation, through agents or otherwise, in such prohibition territory, soliciting or receiving orders from any person therein, shall constitute a violation of this act, and on conviction thereof shall be fined not less than two hundred dollars, nor more than five hundred dollars, for each such offense. Provided, that the term 'agent,' under this section, shall mean any person who receives an order from another for intoxicating liquors in prohibi-

tion territory and transmits the same in person, by letter, telegraph or telephone, or in any other manner, to some dealer in intoxicating liquors who accepts and fills the same." Act No. 135, of the Acts of 1907.

It was agreed that the defendant had received an order in prohibition territory for four quarts of whiskey; that he carried that order, and money with which to pay for the whiskey, to a licensed dealer at Helena, Arkansas, and brought back the liquor and delivered it to the person who gave him the order in prohibition territory.

(1-2) The purpose of the statute is, primarily, to prevent licensed liquor dealers and their agents from soliciting orders for intoxicating liquors in prohibition territory, and from even accepting such orders when voluntarily tendered. In order to carry out that design, the Legislature doubtless deemed it necessary to put in a provision which would prevent evasions, and to do so, they declared that the terms agent "shall mean any person who receives an order from another for intoxicating liquors in prohibition territory, and transmits the same in person, by letter, etc., * * * to some dealer in intoxicating liquors who accepts and fills the same."

Now, it is not necessary, in order to convict a person under this statute, to show that he was, in fact, acting as agent of a liquor dealer when he solicited or received an order for intoxicating liquors, for the effect of the statute is to make it an offense for any person, whether, in fact, the agent of a dealer or not, to solicit orders in prohibition territory or to receive such orders and transmit the same. The mere solicitation of an order without the same being filled is sufficient to make out an offense, or where, as in this case, the order is not solicited, the mere acceptance and transmission of the order to any dealer is sufficient if the order is accepted by the dealer and filled.

(3-4) It is said that under the facts in this case, the defendant was merely acting for accommodation to the person who gave him the order, and was the agent of the purchaser, and not of the seller.

That, however, does not afford an avenue for escape from the terms of the statute, for it unmistakably declares that any person who receives an order and transmits it to a dealer who fills it is guilty of an offense.

The statute, in that view of it, is a very drastic one, but with the policy of it we have nothing to do. The Legislature has power to declare such an act to be a criminal offense. This is manifestly what the Legislature meant by the language incorporated in the statute, and its drastic effect is not sufficient to lead us into a plain disregard of the legislative mandate.

The decisions of this court in *State* v. *Earles,* 84 Ark. 479, and *Van Valkinburgh* v. *State,* 102 Ark. 16, clearly indicate this interpretation of the statute.

A similar thought was expressed by the Supreme Court of the United States in the case of *New York ex rel. Silz* v. *Hesterberg,* 211 U. S. 31, in passing upon the constitutionality of a New York statute for the protection of wild game in that State, and which made it a criminal offense for any person to have possession of such game within the closed season. The court, speaking through Mr. Justice Day, said:

"It is contended, in this connection, that the protection of the game of the State does not require that a penalty be imposed for the possession out of season of imported game of the kind held by the relator. It is insisted that a method of inspection can be established which will distinguish the imported game from that of the domestic variety, and prevent confusion in its handling and selling. That such game can be distinguished from domestic game has been disclosed in the record in this case, and it may be that such inspection laws would be all that would be required for the protection of domestic game. But, subject to constitutional limitations, the Legislature of the State is authorized to pass measures for the protection of the people of the State in the exercise of the police power, and is itself the judge of the necessity or expediency of the means adopted. In order to protect local game during the closed season it has been

found expedient to make possession of all such game during that time, whether taken within or without the State, a misdemeanor."

The statute was held to be valid.

The facts are undisputed that defendant received an order in prohibition territory, and, in person, transmitted it to a liquor dealer, who filled the order, and he is guilty under the statute quoted.

The indictment in this case charges both soliciting an order and receiving and transmitting such order.

The two offenses, or, rather, the two methods of committing the same offense, should have been incorporated in different counts of the indictment, but no question was raised as to the form of the indictment.

(5) The evidence does not show that the defendant solicited the order, but, as before stated, it does show that he received the order and transmitted it to a dealer who filled it.

In the *Earles* case, *supra,* we held that the indictment, which was similar to the indictment in this case, charged the defendant with soliciting and transmitting the order, but that the evidence showed that he sold the liquor, and that that constituted a variance, which prevented a conviction in that case. The facts in that case were that defendant, after soliciting orders, purchased the liquor in packages of five gallons from a distiller, and then filled the orders which he had received, and that in that case he was guilty of selling liquor, instead of receiving and transmitting the orders. In other words, the facts in that case were that he purchased the liquor and resold it, and was guilty of a sale, and not of the receiving and transmitting of the order; whereas, in the present case, the defendant did not purchase the liquor and resell it in prohibition territory, but he received an order in that territory and transmitted it, which made him guilty under the statute quoted.

Our conclusion is that the court erred in its finding, and the judgment is reversed and the cause remanded for a new trial.

SMITH, J., dissents.

ON REHEARING.

McCULLOCH, C. J. It is urged that we erred in the assumption of fact that the defendant received and transmitted an "order" for whiskey. The recital of the agreed statement of facts is that at the time and place named, the defendant "was about to take a train to Helena, Ark., and that James Hobart approched him and requested that he purchase for him, the said James Hobart, in Helena, four quarts of whiskey," and the defendant went to Helena, purchased the whiskey from a licensed liquor dealer, and carried it back to Marianna and delivered it to Hobart.

(6) An order, speaking in commercial terminology, is merely a proposal or request, and that is the sense in which the word is used in the statute. One of the definitions given by Webster is: "A commission to purchase, sell or supply goods." The request of Hobart therefore amounted to an order. The statute does not require that the order be in writing. In fact, the language of the statute, read as a whole, excludes the idea that the order must be in writing before there can be a violation of law. Under any other interpretation of the word, the liquor dealer himself would not be guilty of any violation by receiving a verbal order for whiskey in prohibition territory. If the request to purchase liquor would not amount to an order within the meaning of the statute, then that clause of the statute is meaningless and without any force whatever, for the preceding clause makes it unlawful for one who is in fact the agent of a liquor dealer to solicit or receive an order in prohibition territory. The purpose of the statute is to prohibit subterfuge by declaring one who receives an order to be the agent of any dealer to whom the order may be transmitted. Thus the law of agency is changed by the statute and the statutory

definition of the word "agent" is applied to the circumstances described.

We adhere to our former conclusion that the facts stated in the opinion make out a case against the defendant for receiving an order in prohibition territory.

Rehearing is denied.

STATE *ex rel.* KIMBERLITE DIAMOND MINING & WASHING COMPANY *v.* EARLE W. HODGES, SECRETARY OF STATE.

Opinion delivered July 13, 1914.

1. CONSTITUTIONAL LAW—REMOVAL OF CAUSES—DUE PROCESS—FOREIGN CORPORATIONS.—The act of 1907, Act 313, p. 744, providing that the Secretary of State shall revoke the license to do business in this State, of any foreign corporation which shall remove to the Federal court any cause of action brought against it in the State courts is not in violation of the Federal Constitution which provides that "No person shall be deprived of property without due process of law."
2. FOREIGN CORPORATIONS—LICENSE TO DO BUSINESS.—A foreign corporation which was licensed to do business in the State after the passage of Act 313, Acts 1907, which provides for a forfeiture of its license for the removal of a cause from the State to the Federal court, is a part of the condition upon which the corporation took its license, and the revocation of its license for a violation of the statute, is not in violation of art. 12, § 11, of the Constitution of 1874, which provides that as to contracts made or business done in the State, that a foreign corporation shall be subject to the same rights and liabilities as a domestic corporation.
3. FOREIGN CORPORATIONS—RIGHT TO DO BUSINESS IN THE STATE—COMPLIANCE WITH THE LAW.—A foreign corporation which violates the terms of the act under which it is admitted to do business in this State, and after it has failed to comply with the conditions under which it alone is permitted to do business, is not entitled to the protection of the law guaranteed to persons who are conducting their business in compliance with the laws under which they exist, and are permitted to do business.
4. FOREIGN CORPORATIONS—RIGHT TO DO BUSINESS IN THE STATE—REVOCATION OF LICENSE.—A foreign corporation which has violated the provisions of the law under which its license was granted, and which provisions, upon a failure to comply therewith, require the revocation of its license, can not, after such revocation, claim to be a person within the jurisdiction of the State and entitled to the equal protection of the State's laws.

5. FOREIGN CORPORATIONS—RIGHT TO DO BUSINESS—CONTROL OF STATE.—The State has the absolute power to prevent foreign corporations, not engaged in interstate commerce, from doing business therein.
6. CONSTITUTIONAL LAW—CONSTRUCTION OF STATUTES.—In construing a statute all doubts will be resolved in favor of its constitutionality.
7. STATUTES—INVALIDITY—BURDEN OF PROOF.—The burden of proof is upon the party attacking the constitutionality of a statute.
8. PLEADING—DEMURRER.—A demurrer to the answer, tests the sufficiency of both the complaint and answer.

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

STATEMENT BY THE COURT.

The plaintiff (appellant here) filed its complaint in the Pulaski Circuit Court, alleging that it was a corporation under the laws of Missouri, and that the defendant (appellee here) was the Secretary of State; that the plaintiff, having complied with the requirements of the statutes to that end, was, on the 26th day of May, 1911, granted a license to do business in Arkansas; that thereupon it established a place of business in Pike County, and began the business which it was authorized to do; that since that time, and prior to October 2, 1913, it had expended more than $35,000 in establishing its business in Arkansas; that it had acquired large and valuable real property and had erected a large mechanical plant or mill in Arkansas; that on the 2d of October, 1913, the Secretary of State arbitrarily and without warrant of law undertook to cancel and revoke its license to do business in Arkansas, by which act it was deprived of the enjoyment, use and benefit of its property in the State, of the right to make and enforce future contracts, and also the benefit of contracts already made by it; that it was subjected to the alternative of suffering the entire suspension of its business in the State, or incurring the harsh and unreasonable penalty of $1,000 per day, for all of which it had no adequate remedy by ordinary procedure; that great prejudice and damage would result to it unless the writ of mandamus was issued compelling the Secretary of State to revoke his act cancelling appellant's license.

The defendant entered his appearance, waived the issuance of the alternative writ and answered, admitting that the plaintiff had been licensed to do business in Arkansas; that it had prosecuted its business in this State and had expended large amounts of money, and had acquired large property interests, as alleged in the complaint. He admitted the cancellation of the license, and set up that the same was done under the provisions of Act No. 313, approved May 13, 1907; that in September, 1913, the plaintiff, having been sued in the Pike County Circuit Court by M. M. Mauney, a citizen of Arkansas, removed the cause to the United States District Court for the Western District of Arkansas against the wish and consent of the said Mauney, and that defendant, as Secretary of State, being so informed, forthwith cancelled and revoked the plaintiff's license to do business in Arkansas.

The act referred to provides, in part, as follows:

"And if any company (foreign corporation) shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any Federal Court, or shall institute any suit or proceeding against any citizen of this State in any Federal Court, it shall be the duty of the Secretary of State to forthwith revoke all authority to such company and its agents to do business in this State and to publish such revocation in some newspaper of general circulation, published in this State; and if such corporation shall thereafter continue to do business in this State, it shall be subject to the penalty of this act for each day it shall continue to do business in this State after such revocation."

The plaintiff demurred to the answer, on the ground that Act No. 313, approved May 13, 1907, p. 744, is void under the Constitution of Arkansas and the Constitution of the United States, and the Fourteenth Amendment thereto. The court overruled the demurrer and entered judgment dismissing the appellant's complaint, and this appeal has been duly prosecuted.

George B. Webster, for appellant.

1. The sole question is the constitutionality of the "Wingo Act." The act is unconstitutional, because:

(1) It takes and destroys licenses to do business in this State, which is a property right; (2) it denies to a foreign corporation the protection and equality guaranteed by § 11, art. 12, Constitution State; (3) it denies due process and equal protection of the laws under Amendment 14, Constitution U. S.; (4) it confines or restricts the jurisdiction of the Federal courts in violation of art. 6, U. S. Constitution. See Constitution 1874, art. 2, § 8; 96 U. S. 101, Brannon, Fourteenth Amendment, p. 8, 167 U. S. 417; 157 *Id.* 383, 17 Wall. 438; 167 U. S. 417.

A corporation is a person within the meaning of the due process clause. 164 U. S. 578; 86 Ark. 412; 94 *Id.* 27. Property includes the right to own and dispose of property and to make contracts. 169 U. S. 391; 165 *Id.* 591. A corporate franchise is property. 24 Ark. 96; 50 O. St. 568; 9 Gill & J. (Md.) 366.

Foreign corporations can not be subjected to any different liabilities than those imposed upon domestic corporations. 204 U. S. 113 l. c.; 155 Fed. 797.

2. The equality clause protects corporations as well as natural persons. 169 U. S. 466; 165 *Id.* 154; 118 *Id.* 396; 216 *Id.* 400; 94 Ark. 27; Constitution U. S., art. 6, ¶ 2, and art. 2, § 2; 25 Stat. at Large, 434. States can not restrict or limit the jurisdiction of the Federal courts. 170 U. S. 100; 156 Fed. 15; 171 *Id.* 487; 34 U. S. Sup. Ct. Rep. 333; 218 U. S. 135.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, *J. C. Pinnix* and *W. C. Rodgers,* for appellee.

The act, May 13, 1907, is not unconstitutional. "Due process of law," "equal protection of the law," "confiscation," etc., have been repeatedly construed by our highest courts. 94 U. S. 535; 29 Sup. Ct. Rep. 527; 119 Ky. 321-7; 72 U. S. 475; 123 U. S. 123; 148 *Id.* 657; 18 Wall. 29. The courts hold that a State may impose upon

foreign corporations *as a condition of coming into or doing business* within its borders such terms, conditions and restrictions as it may deem proper, not repugnant to the Constitution or laws of the United States. 94 U. S. 535, and cases *supra.* A mere license is always revocable. *Ib.;* 72 U. S. 475.

The mere fact that some property right may be injured does not change the rule. 123 U. S. 123; 148 *Id.* 657; 18 Wall. 29.

It is provided in the organic law that even the *charters* of *all* corporations may be altered or repealed. Art. 12, § § 6-11, Const.; 58 Ark. 407; 202 U. S. 248. The mere licensing a foreign corporation to do business is not a contract. 203 U. S. 151; 212 *Id.* 322. Our law does not take away the right of removal to a Federal Court, it simply reserves the right to revoke the license. 34 Sup. Ct. Rep. 15-18, 333.

To pursue a statute is due process of law. 81 Ark. 519-544; 62 U. S. 25; 105 *Id.* 470. The State can *exclude* foreign corporations entirely or permit them to enter on terms. Cases *supra.* By accepting the license, the corporation agreed to abide by and obey our laws.

WOOD, J., (after stating the facts). 1. The appellant contends that the part of the act quoted violates that part of the due process clause of the State and Federal Constitutions which provides that "no person shall be deprived of property without due process of law."

The act itself is due process. It does not deprive the appellant of any property right or deny to the appellant the right to be heard in court as to any of its property rights. The act only requires the Secretary of State to revoke the authority of a foreign corporation or company to do business in the State when the facts exist making it his duty to exercise the power conferred upon him to revoke. If he exercises or attempts to exercise this power in the absence of the actual existence of the facts authorizing him to do so, his acts would be void and would not affect the authority of the foreign corporation to do business in the State. Such corporations could ignore

all such unauthorized acts on his part, and the courts would be open to them to restrain him from any threatened revocation or to annul as void any pretended revocation that he might make that was not based upon the existence of facts calling for the exercise of the authority. The act, therefore, does not deprive any foreign corporation of an opportunity to be heard concerning any right of property, and is not violative of the due process clause.

The demurrer admitted the existence of the facts alleged in the answer which made it the duty of the appellee, under the statute, to revoke appellant's license. Therefore, if it be conceded that appellant's license to do business is in the nature of a property right, if the statute is otherwise valid, appellee was authorized and required by it to revoke appellant's license to do business in this State, and in doing so has not deprived the appellant of any right of property without due process of law.

2. Section 11, article 12, of the Constitution of Arkansas, provides that foreign corporations "as to contracts made or business done in this State shall be subject to the same regulations, limitations and liabilities as like corporations of this State."

This provision of the Constitution has reference, of course, to foreign corporations who have been licensed to do business, and who are making their contracts and conducting their business in pursuance of this license. In other words, to foreign corporations who are properly within the State in pursuance of its laws, and who have not forfeited their right to do business in the State by a violation of the law under which they were admitted. When a foreign corporation has ignored or violated the conditions of the act under which it is admitted, and under which it is permitted to conduct any business in the State, and for which violation its license is required to be forfeited under the statute, then such corporation in the sense of the above provision can not thereafter be said to be doing business and making contracts within the State, and is not within the protection afforded by the above provision to foreign corporations who have been

admitted and who are conducting their business according to the requirements of the statute under which they were admitted. In other words, a foreign corporation which has violated the provisions of the statute prescribed as conditions upon which it has been permitted to enter the State and to conduct its business is not in an attitude to set up the unconstitutionality of the very law upon which is based the only right it has to be in the State at all.

The appellant was licensed to do business in the State after the passage of the act under consideration and the provisions of the act must be treated as a part of its license. Appellant took its license subject to the conditions which the statute imposes upon it. It accepted the license burdened with the concomitant conditions upon which a forfeiture of the same should be declared, and, having confessedly violated those conditions, will not be permitted to say, "that part of the act which granted me the license to enter the State is valid, but that part which imposes conditions, which I accepted, is unconstitutional and void."

In *American Smelting Co.* v. *Colorado,* 204 U. S. 103-111, it is said: "Undoubtedly, if the corporation violated the laws of the State properly applicable to it, or if otherwise, it gave just cause for its expulsion, it could not insist upon such a contract as a defense."

Moreover, if the appellant could be considered a foreign corporation doing business in the State after it had violated the conditions of the act under which it was admitted, and after the revocation of its license, nevertheless, that act is not in conflict with the provisions of the Constitution under discussion, for it will be observed that the same "regulations, limitations and liabilities" therein mentioned relate to "contracts made or business done." The institution of a suit or the removal thereof is neither the making of a contract nor the doing of business. See, *Alley* v. *Bowen-Merrill Co.,* 76 Ark. 4.

The act therefore did not prescribe any regulations, limitations and liabilities "as to contracts made or business done" by foreign corporations in this State. The

constitutional provision, therefore, does not inhibit the enactment of a law prescribing regulations for instituting suits, or removing the same when instituted against them, applicable to foreign, but not to domestic, corporations.

3. Learned counsel for appellant insists that the act violates the equality clause of the Constitution, which provides, in part, "that no State shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws."

A foreign corporation can not claim the benefit of the above provision after it has failed to comply with the conditions prescribed by the act under which it was admitted into the State, and under which it is permitted to do business. Such foreign corporation, when it violates the terms of the act under which it is admitted, and after it has failed to comply with the conditions under which it alone is permitted to do business, is no longer entitled to the protection of the law guaranteed to persons who are conducting their business in compliance with the laws under which they exist and are permitted to do business. A foreign corporation which has violated the provisions of the law under which its license was granted, and which provisions, upon a failure to comply therewith, require the revocation of its license, can not, after such revocation, claim to be a person within the jurisdiction of the State, and entitled to the equal protection of her laws.

4. It is last contended by the learned counsel for appellant that the right of removal of a cause granted under the acts of Congress in pursuance to the provisions of the Constitution conferring judicial power, is a right vested in and to be enjoyed by every corporation, "anything in the Constitution and laws of any State to the contrary notwithstanding," and that the provisions of the act in question in regard to the removal of causes are violative of the Constitution of the United States, and the laws concerning the removal of causes passed in pursuance thereof.

The basic and fatal error of this contention is that it fails to recognize that the State has the absolute power

to prevent foreign corporations not engaged in interstate commerce from doing business therein. It may exclude them entirely or it may permit them to come in under any terms which it sees proper to prescribe. Section 11 of article 12 of our Constitution provides as follows: "Foreign corporations may be authorized to do business in this State under such limitations and restrictions as may be prescribed by law."

The provisions of the act under review, in regard to the institution and the removal of suits, are conditions upon which appellant was licensed to do business in the State, and upon a failure to comply with these conditions, appellant's license was revoked and appellant thereby excluded from doing business in the State.

Chief Justice White, in his concurring opinion in *Pullman Co.* v. *Kansas,* 216 U. S. 56-65, speaking of the State's power to exclude foreign corporations, says: "In cases where this power is absolute, the States may affix to the privilege such conditions as are deemed proper, or, without giving a reason, may arbitrarily forbid such corporation from coming in. When, therefore, in a case where the absolute power to exclude obtains, a condition is affixed to the right to come into the State and a foreign corporation avails of such right, it may not assail the constitutionality of the condition because, by accepting the privilege, it has voluntarily consented to be bound by the condition. In other words, in such case the absolute power of the State is the determining factor, and the validity of the condition is immaterial." And he quotes from *Horn Silver Mining Co.* v. *New York,* 143 U. S. 305, as follows: "Having the absolute power of excluding the foreign corporation, the State may, of course, interpose such conditions upon permitting the corporation to do business within its limits as it may judge expedient." And, further, "This doctrine has been so frequently declared by this court that it must be deemed no longer a matter of discussion, if any question can ever be considered at rest."

The Chief Justice then says: "In addition, the following cases, either directly, expressly, or by fair implication, must be taken as sustaining the right of the State, where it has the absolute power to exclude, to affix whatever condition it deems proper to the right of a foreign corporation to come in and the consequent inability of such corporation, after accepting the privilege, to assail the constitutionalitiy of the condition." And he cites: *Paul* v. *Virginia,* 8 Wall. 168; *Postal Telegraph Co.* v. *Charleston,* 153 U. S. 692; *Hooper* v. *California,* 155 U. S. 648; *Waters-Pierce Oil Co.* v. *Texas,* 177 U. S. 28; *Pullman Company* v. *Adams,* 189 U. S. 420; *Allen* v. *Pullman Company,* 191 U. S. 171; *Security Mutual Ins. Co.* v. *Prewitt,* 202 U. S. 246; *National Council* v. *State Council,* 203 U. S. 151.

In *Security Mutual Ins. Co.* v. *Prewitt, supra,* the court had under consideration an act containing the same provisions as the act now called in question. Indeed, the present act, in this respect, was copied from the Kentucky statute. The court, in that case, concludes its opinion as follows: "The mere enactment of a statute which, in substance, says, 'If you choose to exercise your right to remove a cause into a Federal court,. your right to further do business within the State shall cease, and your permit shall be withdrawn,' is not open to constitutional objection."

In *Doyle* v. *Continental Ins. Co.,* 94 U. S. 535, the court had under consideration a statute of Wisconsin which declared "that if a foreign insurance company shall remove any cause from its State court into the Federal court contrary to the provisions of the act of 1870, it shall be the duty of the Secretary of State to cancel its license to do business within the State." The court said: "The effect of our decision in this respect is that the State may compel the foreign company to abstain from the Federal courts or to cease to do business in the State. It gives the company the option. This is justifiable, because the complainant has no constitutional right to do business in that State. That State has the authority

at any time to declare that it shall not transact business there. This is the whole point of the case, and, without reference to the injustice, the prejudice, or the wrong that is alleged to exist, must determine the question. No right of the complainant under the laws or Constitution of the United States, by its exclusion from the State, is infringed; and this is what the State now accomplishes. There is nothing, therefore, that will justify the interference of this court."

As we understand, from a somewhat exhaustive examination of the decisions of the Supreme Court of the United States, there are at least two lines of cases where statutes similar to the one in question have been reviewed and passed upon by that court. In cases where the foreign corporation has been admitted to do business in the State upon conditions, such as are prescribed in the statute under consideration, and where such corporation is engaged in business that is purely local or intrastate, if the corporation violates the conditions under which it is permitted to come into the State and to do business therein, its license may be revoked and the State may thus exclude such corporation from doing business of a purely local character within its borders. These cases hold that a State may impose upon a foreign corporation as a condition of coming into and doing business within its territory any conditions it may see proper, provided they are not repugnant to the Constitution and laws of the United States, and that conditions such as are prescribed by the present act are not repugnant to the Constitution or laws of the United States. The cases holding this view are *Security Mutual Ins. Co.* v. *Prewitt, supra, Doyle* v. *Insurance Co., supra,* and others.

Other cases hold that where the foreign corporation has been admitted and permitted to do business in the State, if such corporation, although transacting a local business, is also engaged in interstate commerce of the character mentioned therein the license of such corporation can not be revoked upon conditions such as those prescribed in the act.

The latter cases hold that such provisions as those prescribed in the act are repugnant and contrary to the Constitution of the United States and the laws made thereunder, and that as to corporations doing an interstate business, they attempt to restrain and penalize the assertion of a Federal right. Such are the cases of *Harrison, Secretary of State of Oklahoma,* v. *St. Louis & S. F. Rd. Co.,* 232 U. S. 318; *Herndon* v. *Chicago, R. I. & P. Ry. Co.,* 218 U. S. 135; *Western Union Tel. Co.* v. *Kansas,* 216 U. S. 1, and other cases referred to in those.

The cases last mentioned note the distinction between them and the *Doyle* and *Prewitt* cases, *supra.* For instance, in *Harrison* v. *St. Louis & S. F. Rd. Co., supra,* Chief Justice White, speaking of the *Doyle* and *Prewitt* cases, said: "Those cases involved State legislation as to a subject over which there was complete State authority, that is, the exclusion from the State of a corporation which was so organized that it had no authority to do anything but a purely intrastate business, and the decisions rested upon the want of power to deprive a State of its rights to deal with a subject which was in its complete control, even though an unlawful motive might have impelled the State to exert its lawful power."

And in *Herndon* v. *Chicago, R. I. & P. Ry. Co., supra* it is said: "Moreover, this is not a case where the State has undertaken to prevent the coming of the corporation into its borders for the purpose of carrying on business. The corporation was within the State, complying with its laws, and had acquired, under the sanction of the State, a large amount of property within its borders, and thus had become a person within the State within the meaning of the Constitution, and entitled to its protection."

While the cases of *Doyle* v. *Insurance Co.* and *Security Co.* v. *Prewitt, supra,* are confined and limited to an extremely narrow scope, yet they are clearly distinguished from the later cases referred to, and certainly have not been overruled by them. The case we have in

hand comes strictly within the narrow limits of the *Prewitt* case, *supra.*

In construing the statute, of course, familiar rules must be observed. All doubts are resolved in favor of its constitutionality. Appellant having made the attack upon it, has the burden to show its invalidity. The demurrer to the answer tests also the sufficiency of the complaint. There is no allegation in the pleadings that would authorize the inference that appellant was doing any other than a purely intrastate business. There is no allegation to the effect that it was engaged in interstate commerce or doing an interstate business. The complaint therefore fails to state a cause of action, and the judgment of the circuit court dismissing the same and denying the appellant the relief sought is correct, and it is affirmed.

TEDFORD *v.* CHICK.

Opinion delivered July 13, 1914.

1. APPEAL—EVIDENCE—IDENTIFICATION.—On an appeal from a decree in chancery, testimony which is not identified as that taken before the chancellor, nor authenticated, in any manner, will not be considered, not being properly brought into the record.
2. APPEAL AND ERROR—DECREE—PRESUMPTION.—Where the evidence in a chancery cause is not properly brought into the record, there is a conclusive presumption that the same sustains the decree.

Appeal from Pulaski Chancery Court; *Jno. E. Martineau,* Chancellor; affirmed.

James A. Comer, for appellant, W. L. Tedford.

1. Appellant was a *bona fide* holder of the note and mortgage, in the usual course of business for a valuable consideration before maturity and without any knowledge of any defense that could be made. *Swift* v. *Tyson,* 16 Peters 1; 85 Ill. 439; Acts 1903, No. 81, § § 57-8-9; 62 Ark. 595; 4 A. & E. Enc. Law, 221; 20 How. (U. S.) 343.

2. The chancellor relied on 62 Ark. 595, but overlooked the act of 1903, No. 81. The assignment was not

without recourse, nor did it destroy the negotiability of the instruments. *Neeley* v. *Black,* 80 Ark. 212; Dan., Neg. Inst. (5 ed.), § 700; 39 Mo. 536; 36 L. R. A. 117; 86 Mich. 307.

J. A. Watkins, for F. M. and Carrie Chick.

Tedford took only such interest as McIntosh had under the assignment. Any defense appellees had against McIntosh could be pleaded against Tedford. 62 Ark. 595. There should have been no personal judgment against the Chicks. The commission was excessive.

W. C. Adamson, for Lillie Beeber.

The cases of 62 Ark. 595, and 39 Mich. 171, settle this case. 80 Ark. 212, is not in point. The decree is fully sustained by the evidence, and should be affirmed.

HART, J. Lillian Beeber, Francis M. Chick and Carrie L. Chick instituted this action in the chancery court against R. E. Chambers, R. R. McIntosh and the Tedford Auto Company. The object of the suit was to set aside and cancel a note and mortgage for eight hundred dollars given by Francis M. and Carrie L. Chick to R. R. McIntosh. The complaint alleges substantially the following state of facts:

Carrie L. and Francis M. Chick owned certain real estate in the city of Little Rock, upon which there was a mortgage for six hundred dollars. They listed the property for sale or exchange with the defendant McIntosh, a real estate agent, at twenty-seven hundred dollars. Lillian Beeber owned certain country property which she listed for sale or exchange with the defendant R. R. McIntosh at thirty-five hundred dollars, and there was a mortgage on this property for six hundred dollars. The defendant McIntosh arranged an exchange of the Chick property for the Beeber property, and this exchange was consummated by the execution of deeds between the parties. The Chicks executed a mortgage to R. R. McIntosh for eight hundred dollars on their property. It is alleged in the complaint that McIntosh procured an exchange of

the property by means of fraudulent representations, which we do not deem necessary to set out.

The Tedford Auto Company and Tedford answered and filed a cross-complaint, asking for a foreclosure of the eight hundred dollar mortgage. They allege that McIntosh transferred the note and mortgage to the Tedford Auto Company, and it, in turn, transferred them to Tedford. They allege that Tedford is a *bona fide* holder, for value, before maturity, in the usual course of business.

The plaintiffs denied that either Tedford or the Tedford Auto Company were *bona fide* holders, for value, before maturity of the note and mortgage, and allege that the sale and transfer of them to the auto company and to Tedford was a pretended and simulated transfer.

The chancellor, after hearing the evidence, entered a decree cancelling and setting aside the eight hundred dollar mortgage, but found that the Chicks owed to McIntosh the sum of three hundred and fifty dollars as commission for exchanging their property and decreed that this amount should be a lien on their real estate.

The defendant Tedford alone has appealed.

(1) The decree recites that the cause was heard on the complaint, the substituted answer, the cross-complaint of the Tedford Auto Company and W. L. Tedford and the testimony of certain named witnesses. This recital shows that the testimony of witnesses was heard in the cause not in the form of depositions. *Murphy* v. *Citizens Bank of Junction City,* 84 Ark. 100. There is copied in the transcript what purports to be this testimony taken down by a stenographer and afterward reduced to writing by him. It is not even authenticated by the stenographer. But, as said in the case of *Rowe* v. *Allison,* 87 Ark. 206, even if it were, that would be insuffiicent to preserve oral testimony in a chancery case unless the same was treated as depositions and filed and identified as such. An examination of the purported testimony, as it appears in the transcript, shows that it was taken before the court at the trial of the case by a stenographer and was afterward reduced to writing by him. No bill of exceptions

has been signed by the chancellor or filed with the clerk. The purported testimony does not even show it was filed with the clerk. There is nothing whatever to show that the testimony was ever filed and made a part of the record in the case. There is nothing to identify the testimony as that heard by the chancellor on the trial of the case. It is not authenticated in any manner. In the case of *Beecher* v. *Beecher,* 83 Ark. 424, the court said:

"If oral testimony was taken before the court, it could be reduced to writing and filed as depositions, like depositions taken before any other officer; then it would be identified, and reference to the depositions in the decree would make certain the evidence upon which it rested. Or it may be reduced to writing afterward and brought into the record by bill of exceptions. In this case neither course was pursued, and hence this unauthenticated testimony which is in the transcript can not be considered. It is no part of the clerk's duty to certify to oral testimony, and his certificate to it necessarily goes for naught."

(2) Therefore, we hold that the oral testimony was not properly brought into the record, and is not now before the court. There is a conclusive presumption that the evidence sustains the decree of the court so far as it is possible for a decree based on the complaint to be sustained by the evidence.

It follows that the decree will be affirmed.

RUSH v. CITIZENS NATIONAL BANK.

Opinion delivered July 13, 1914.

1. APPEAL AND ERROR—FINDINGS OF FACT BY COURT.—Where a cause is tried before a court sitting as a jury, the findings of fact made by the court are as binding on appeal, as is the verdict of a jury.
2. BANKS AND BANKING—DEBT DUE BY DEPOSITOR—RIGHT TO APPROPRIATE DEPOSIT.—Where, at the maturity of a debt due a bank from a depositor, the latter's deposit is sufficient to meet the obligation, and it has not been specifically ordered by the depositor to be held for a different purpose, the bank may apply such deposit to the payment of the debt.

3. BANKS AND BANKING—DEPOSITOR'S DEBT—SUIT AGAINST DEPOSITOR.—A bank may appropriate to itself the amount of a general deposit of a debtor, on the debt, and bring an action against the depositor for the balance of the debt.

Appeal from Garland Circuit Court; *C. T. Cotham*, Judge; affirmed.

STATEMENT BY THE COURT.

The Citizens National Bank of Hot Springs instituted this action against C. C. Rush, C. G. Bryan and L. D. Cooper to recover the balance alleged to be due on a promissory note amounting to $1,532.58, with the accrued interest.

The facts are as follows:

The defendant Bryant and one Jacobs were partners engaged in the saloon business in the city of Hot Springs. They executed a note to the plaintiff bank in the sum of five thousand dollars. The note was renewed several times and partial payments were made on it. The defendant Rush finally bought out Jacobs' interest in the saloon business, and Jacobs was released from the note. On April 9, 1913, there was a balance due on the note of thirty-five hundred dollars, and on that day C. G. Bryan and C. C. Rush executed to the Citizens National Bank their note for the sum of thirty-five hundred dollars, which was due and payable on June 18, 1913. This note bore the endorsement of L. D. Cooper. At the time the note became due, the defendant Rush had on general deposit the sum of $2,045 in the bank, which was by the bank credited on the note. Afterward the bank instituted this action to recover the balance due on the note, which amounted to $1,532.58, with interest. Bryan and Cooper appeared in court at the time of the trial and acknowledged the indebtedness. According to the testimony of the plaintiff, Bryan and Rush executed the note as principals, and Cooper endorsed it for them. According to the testimony of the defendant Rush, he only signed the note as surety. He stated that he sold his interest in the saloon business to Bryan and that it was thereafter

agreed that he should only sign the note as accommodation for Bryan and Cooper, and should only be liable as surety thereon. According to the testimony of Cooper and the cashier of the bank, Rush signed the note as principal, and no agreement was made that he should only be held liable as surety.

Other facts were testified to by Rush, but we do not deem it necessary to set them out, for the testimony which we have recited is sufficient for a determination of the issues of law raised by the appeal.

The case was tried before the court, sitting as a jury, and the court made the following findings of law and fact:

"1. That so far as the plaintiff was concerned, the defendant C. C. Rush is a joint maker, with C. G. Bryan, of the note in controversy.

"2. That the deposit of $2,500 made by or for the defendant C. C. Rush on June 18, 1913, was a general and not a special deposit, nor was it a deposit in trust.

"3. That the plaintiff, under its bankers' lien, had a right to apply said deposit of $2,045 in payment of the note in controversy.

"4. That so far as the defendant C. G. Bryan and L. D. Cooper are concerned, the defendant C. C. Rush was an accommodation maker of said note.

"5. That all the defendants are jointly and severally liable to the plaintiff for the balance due on the note sued on."

Judgment was accordingly rendered for the plaintiff, and the defendant Rush has alone appealed.

R. G. Davies, for appellant.

The bank had no lien and no right to apply Rush's money as a payment of the note. The question is merely one of set-off. Cooper was a joint maker and a principal. The note was endorsed before delivery. 80 Ark. 285. Rush never consented to appropriate his funds to the payment of the note. 5 Ark. 283; Daniel on Negotiable Instr., § 326b, p. 409; Morse on Banks, etc., 324-326; 66 Miss. 678; 46 Ark. 540; 125 N. C. 503; 3 Cal. 350; 121 N. C. 43;

3 L. R. A. 273; 87 Tenn. 369. 34 La. Ann. 605; 4 L. R. A. 112; 98 Ark. 298; 12 *Id.* 378; 7 *Id.* 334.

Rector & Sawyer, for appellee.

The bank had a lien and the right of set-off. Kirby's Dig., § § 6098-6101; 4 Ark. 602; 14 *Id.* 668; 56 Ark. 499-510; 98 Ark. 294; 1 Morse on Banks and Banking (4 ed.), § 326. The bank's lien is coextensive with the right of set-off. Cases *supra.*

HART, J., (after stating the facts). (1) The court found that on June 18, 1913, the defendant Rush had a general deposit in the bank of plaintiff of twenty-five hundred dollars. This finding of fact is sustained by the evidence and its correctness is not disputed by the defendant Rush. It will also be noted that the court found that so far as the plaintiff bank was concerned, the defendant Rush was a joint maker with C. G. Bryan on the note in controversy. This finding is sustained by the evidence of the cashier of the bank. It is true his testimony to that effect was contradicted by the defendant Rush, but it is well settled that where a case is tried before a court sitting as a jury, the findings of fact made by the court are as binding on us on appeal as is the verdict of a jury. Therefore, it may be taken as settled that the defendant Rush was a joint maker with the defendant Bryan on the note in controversy. The bank, when the note became due, applied $2,045 on the amount deposited with it by Rush as a part payment on the note in controversy. The right of the plaintiff to do this is challenged by Rush in this appeal.

(2) Where, at the maturity of a debt due a bank from a depositor, the latter's deposit is sufficient to meet the obligation, and it has not been specifically appropriated by him to be held for a different purpose, the bank has a right to apply such deposit to the payment of the debt. 5 Cyc. 550, and cases cited; and case-note to 2 A. & E. Ann. Cas. 206, and case-note to 19 A. & E. Ann. Cas. 487.

Among the cases cited is that of *Cockrill* v. *Joyce,* 62 Ark. 216. In that case, Mr. Justice RIDDICK, speaking for the court, in discussing the rule, said:

"The law on this subject is well settled, and is thus stated by a recent writer: 'A banker has a lien on all securities of his debtor in his hands for the general balance of his account, unless such a lien is inconsistent with the actual or presumed intention of the parties. The lien attaches to notes and bills and other business paper which the customer has entrusted to the bank for collection, as well as to his general deposit account.' "

(3) It is contended by counsel for the defendant Rush that in order for the bank to have this right the same mutuality must exist between the parties as is required in other cases of set-off, and in support of his position he cites the case of *Trammell* v. *Harrell,* 4 Ark. 602, where the court held: "A debt or demand, to be a set-off, must be due from the sole plaintiff or all the plaintiffs to the sole defendant or all the defendants." This case and other cases to the same effect were overruled by the case of *Leach* v. *Lambeth,* 14 Ark. 668, where the court held that a debt due from the sole plaintiff to one of several defendants may be pleaded, under the statute, as a set-off by the defendant to whom such debt is due. And the court further held that the case of *Trammell* v. *Harrell, supra,* is overruled as to this point. The court, in overruling the case, adopted the reason of the Chief Justice in a dissenting opinion in the case of *Trammell* v. *Harrell,* and reference to the opinion is made for the reasoning of the court, which we do not deem it necessary to repeat here. To the same effect, see *Burke's Admr.* v. *Stillwell's Exr.,* 23 Ark. 294, and *Wilson* v. *Exchange Bank,* 122 Ga. 495, 2 A. & E. Ann. Cas. 597, and case note. In the case of *Wilson* v. *Exchange Bank,* the principles of law applicable to cases like this are thoroughly discussed, and the court, after criticising the opinion in the case of *Trammell* v. *Harrell,* 4 Ark. 602, said:

"And in the subsequent opinion of *Leath* v. *Lambeth,* 14 Ark. 668, the principle laid down in *Trammell* v. *Harrell* was overruled, and by a unanimous decision, the views expressed by the Chief Justice in his dissenting

opinion in that case were adopted as the law applicable to the subject under discussion."

Rush deposited $2,500 with the bank as a general deposit, and, therefore, the bank became indebted to him for that amount. When the note of Bryan and Rush to the bank became due, the bank had a right to apply the whole or any part of this deposit toward the payment of the note, Rush not having directed its application to any other indebtedness due by him.

The judgment should be affirmed for another reason. The bank only brought suit against Rush and Bryan for $1,532.58. The testimony showed that the defendants owed the bank the $3,500 note, and the defendant Rush did not deny his indebtedness on that note. He does not claim to have paid any part of it, and, inasmuch as the bank only brought suit for $1,532.58, the balance of the note which was due after it had been credited with the sum of $2,045, which Rush had on general deposit in the bank, it is immaterial whether or not the bank credited the note with the deposit so far as the present suit is concerned.

In short, the bank had a right to sue the defendant for the amount alleged to be due it, and the defendant Rush can not complain that suit was not brought for the whole amount of it. The fact that the bank credited the note with a part of the general deposit of the defendant, Rush, would be no defense to a suit by the bank to recover on the remaining amount alleged to be due the bank on the note, and which the undisputed evidence shows has not been paid.

The judgment will be affirmed.

COWLING v. BRITT.

Opinion delivered July 13, 1914.

1. CROSS APPEALS—WHEN MAY BE TAKEN.—Where plaintiff filed his transcript and obtained an appeal from the clerk of the Supreme Court, the whole record is brought before the court, and the defendant may pray and obtain a cross appeal at any time before the cause is submitted for decision.

2. LIENS—MORTGAGEE AND PURCHASER—MERGER.—B., the owner of lands, executed a deed of trust to same on April 12, 1909, to P. On August 14, 1909, an execution upon the same was given to the sheriff and levied thereon in favor of a judgment-creditor. At a sale under the execution, C. purchased the land. On September 9, 1910, B. deeded the lands to P. *Held*, the deed to P. did not destroy his lien under the mortgage to him.

3. LIENS—MERGER—MORTGAGE AND DEED.—Where a mortgagee receives a conveyance of the equity of redemption, his estate under the mortgage will not merge, in the absence of a showing of an intent to the contrary.

4. SUBROGATION—DOCTRINE OF.—Subrogation is a doctrine of purely equitable origin, and in its operation is always controlled by equitable principles.

5. EXECUTION SALE—VALIDITY.—The sale of real estate under an execution, after the return day, is without authority and void.

6. SUBROGATION—PURCHASER AT VOID EXECUTION SALE—RELIEF.—B. owned land and mortgaged it to P. Thereafter the land was sold at a void execution sale under the claim of a judgment-creditor and purchased by C. *Held*, P.'s lien was superior to that of the execution-creditor, but C. is subrogated to the lien of the judgment-creditor, and the land may be sold to reimburse him for the amount paid under the void execution sale, and upon payment of the mortgage to P., C. will be subrogated to P.'s right, and the land may be sold for that purpose.

Appeal from Columbia Chancery Court; *James M. Barker*, Chancellor; reversed in part, affirmed in part.

STATEMENT BY THE COURT.

J. T. Cowling instituted an action in ejectment in the circuit court against W. W. Britt, Cleveland Britt and E. N. Payne to recover possession of a certain tract of land in Columbia County, Arkansas.

W. W. Britt and Cleveland Britt filed an answer in which they denied that W. W. Britt was in possession of the tract of land in controversy, and said that Cleveland Britt was in possession of the same as a tenant of the defendant, E. N. Payne. They denied that either of them claimed any right or title to the land, and also denied that the plaintiff is entitled to possession of the same.

E. N. Payne filed a separate answer in which he denied that he was in the unlawful possession of the tract

of land in controversy, but stated that he was in possession of the same as the rightful owner thereof.

On motion, the case was transferred to equity and was heard and determined there. The facts are as follows:

Both parties claim from a common source of title. R. J. Stanley recovered judgment in the Supreme Court against W. W. Britt in the sum of $613, with interest thereon from January 21, 1908, until paid, and also for the sum of $153.30, as his costs in that suit expended. On the 10th day of August, 1909, Stanley ordered an execution to be issued upon said judgment by the clerk of the Supreme Court. The execution was directed to the sheriff of Columbia County and came into his hands on the 14th day of August, 1909. The sheriff levied the execution on the lands in controversy, and on the 22d day of September, 1909, duly advertised them for sale on the 15th day of October, 1909. On the latter day the land was sold by the sheriff to J. T. Cowling for the sum of $760.30, he being the highest and best bidder therefor.

After twelve months had elapsed, viz., on the 13th day of March, 1911, the sheriff executed to J. T. Cowling a sheriff's deed for said land, in which the above facts were recited.

On the part of the defendant Payne, it was shown that on the 12th day of April, 1909, W. W. Britt and his wife executed a deed of trust to him on said land to secure the sum of $500, evidenced by the note of W. W. Britt of that date, due and payable on the 1st day of January, 1910, with 10 per cent interest from date until paid. The deed of trust was duly filed for record on the 13th day of April, 1909.

On the 9th day of September, 1910, W. W. Britt and his wife executed a deed to said land to the defendant Payne. The consideration recited in the deed was $800, and consisted of the debt secured by the deed of trust and an additional indebtedness of Britt to Payne.

The chancellor found that the defendant Payne had a lien on the lands in controversy to secure the indebtedness of $500, and the accrued interest recited in the deed of trust given by Britt to him on the lands in controversy, and that the plaintiff, Cowling, was the owner of the lands, and was entitled to immediate possession thereof upon the satisfaction of Payne's lien. It was, therefore, decreed by the court that the plaintiff, Cowling, have and recover from the defendants the lands in controversy, and that said plaintiff have a writ of possession directing the defendants to deliver to him possession of the aforesaid lands upon his payment to the defendant Payne the amount of his lien as above stated.

Both the plaintiff and the defendant Payne prayed an appeal to the Supreme Court, which was granted by the chancery court.

C. W. McKay, for appellant.

1. The cross-appeal should be dismissed. 86 Ark. 561; Kirby's Dig., § § 1194-1225; 71 Ark. 318; 86 *Id.* 530.

2. The court did not err in decreeing the title to the lands to be in appellant. He paid the full price in cash and no motion was made by Britt to set aside the sale or return of the sheriff, as was done in 27 Ark. 20. Appellee received the benefit of the purchase price of the land without objection, and thus validated the sale, even if made after the return day of the execution. 47 Ark. 226; 1 Rawle 174; 2 Pa. St. 479; 53 *Id.* 348; 38 N. Y. 266; 21 Iowa 488; Freeman on Ex., § § 340, 286; 31 Ark. 260; 41 *Id.* 372; 106 *Id.* 344.

3. Payne never obtained his deed in satisfaction of any lien. No debt existed. 106 Ark. 344. Britt had neither a legal nor equitable title when the deed was made to Payne. The deed would not amount to a foreclosure of the deed of trust nor a satisfaction of it. 31 Ark. 429.

4. Appellant had the legal right to possession under his purchase at sheriff's sale. 98 Ark. 30. It was error to require him to pay the $500.

Stevens & Stevens, for appellee.

1. The deed of trust introduced gave Payne a lien superior to Cowling's claim. 49 Atl. 45; 71 Me. 583; 3 Gray 517.

2. The most plaintiff could claim was the right to redeem. No fraud is shown. 63 Ark. 16. Appellee was in possession under a deed. If the deed were void, he would be a mortgagee in possession. 45 Ark. 376. But the deed was valid. 45 Ark. 376; 32 Ark. 488-9.

3. A sale after the return day of the execution is void. 56 Ark. 45; 23 S. W. 539; 54 *Id.* 1054; 15 Am. Dec. 519; 55 *Id.* 729; 27 Ark. 20.

4. After the date of the sheriff's deed, Payne obtained the legal title. This gave him a paramount title. 32 Ark. 488-9; 45 Ark. 376.

5. To redeem, appellant should have been required to pay the mortgage debt. 53 Ark. 71; 57 *Id.* 536; 84 *Id.* 527. He should be required to pay the $800 and interest. 53 Ark. 71.

6. Title shown in a third party defeats ejectment. 82 Ark. 262.

HART, J., (after stating the facts). The cause was heard and determined before the chancellor at the April term, 1913, of the Columbia Chancery Court. Neither the plaintiff Cowling, nor the defendant Payne, perfected the appeal granted to the Supreme Court by the chancery court. But on the 8th day of April, 1914, the plaintiff, Cowling, obtained an appeal from the clerk of the Supreme Court. Subsequently, the defendant Payne prayed a cross-appeal, which was granted.

(1) When the plaintiff filed his transcript and obtained an appeal from the clerk of the Supreme Court, this brought the whole record before the court and the defendant, under our statute, had a right to pray and obtain a cross-appeal at any time before the cause was submitted to us for decision. *Beidler* v. *Beidler,* 71 Ark. 318; *Howell* v. *Jackson,* 86 Ark. 530.

It will be noted from the statement of facts, that the deed of trust from W. W. Britt and wife on the lands in

controversy to secure the defendant E. N. Payne for an indebtedness of $500 and the accrued interest, owed him by Britt, was executed on the 12th day of April, 1909, and that the execution under which the plaintiff purchased was delivered to the sheriff of Columbia County on the 14th day of August, 1909. Subsequently, on the 9th day of September, 1910, Britt and wife conveyed the land to Payne in satisfaction of his indebtedness secured by the deed of trust, and for other indebtedness owed by Britt at that time to Payne.

It is conceded by counsel for plaintiff that the deed of trust gave Payne a prior lien on the land in controversy to the lien of the execution under which plaintiff purchased, but it is the contention of counsel for plaintiff that there was a merger when Britt conveyed the lands to Payne in September, 1910, and that this made the execution a prior lien on the land.

It will be remembered that the case was transferred to equity and tried there. "Where a mortgagee takes a conveyance of the land from the mortgagor or from a grantee of the mortgagor, if the transaction is fair, the presumption of an intention to keep the security alive is very strong. It is generally for the interests of the party in this position that the mortgage should not merge, but should be preserved to retain a priority over other encumbrances. As the mortgagee acquiring the land is not the debtor party bound to pay off either the mortgage or the other encumbrances on the land, there is nothing to prevent equity from carrying out his presumed intent, by decreeing against a merger." Pomeroy's Equity Jurisprudence (3 ed.), vol. 2, § 793.

In 27 Cyc., page 1381, the doctrine is stated as follows: "Where a mortgagee receives a conveyance of the equity of redemption, his estate under the mortgage will not merge, but will be kept alive to enable him to defend under it against all liens of third persons, whether by mortgage, judgment, or otherwise, attaching between the execution of the mortgage and the giving of the deed, if his intention to that effect is shown, or if there is noth-

ing to rebut the presumption that his intention corresponded with his interest."

Many cases are cited in support of the rule, and among them is the case of *Cohn* v. *Hoffman,* 45 Ark. 376. In that case the court held: "The purchaser of mortgaged land at a sale under execution issued upon a judgment rendered against the mortgagor since the recording of the mortgage, acquires only the mortgagor's equity of redemption, and can not maintain ejectment against the mortgagee in possession after the breach of the condition of the mortgage. His remedy is by bill in equity to redeem."

In the case of *Neff* v. *Elder,* 84 Ark. 277, the court said that the doctrine of the merger of the mortgage lien with the legal title when they are united in the same person has no application in a case where the principles of equity demand that they be treated as separate.

(2-3) In the application of this doctrine to the facts in the present case, it may be said that the lien created in favor of Payne by the execution of the deed of trust on the lands in controversy to him by Britt is not extinguished in equity by the subsequent conveyance of the land to him by Britt, so as to let in a junior lienor in preference to him. The mortgage will be treated as existing, and the land, in the hands of Payne, is not liable to any greater extent to the payment of the lien acquired by the issuance and levy of the execution than it would have been if the land had remained in the hands of Britt. The judgment is subordinated to the lien of the mortgage and the junior lienor may redeem.

It follows that the chancellor did not err in holding that the plaintiff could acquire possession of the premises only by paying off the $500 and the accrued interest which was secured by the deed of trust executed by Britt to Payne.

In reference to the issues raised by the cross-appeal, it may be said that the statement of facts shows that the land was sold under the execution after the sixty days within which the sheriff had to return the execution had

expired. In the case of *Hightower et al.* v. *Handlin & Venneys,* 27 Ark. 20, it was held: "The sale of real estate, under an execution, after the return day, is without authority and void."

In the subsequent case of *Huffman* v. *Gaines,* 47 Ark. 226, the court held that a debtor may waive an improper notice of the sale of his property under execution, and does waive it when he suffers the execution to be satisfied, and accepts the surplus of the proceeds of the sale and retains them, after notice of the irregularity. The court further said: "It has been held that even where the sale is void, receiving the purchase money by the debtor would make it valid."

In the present case, there was no surplus arising out of the sale under execution and consequently the execution debtor did not receive any of the proceeds of the sale under execution. But the land was purchased for the amount of the judgment against the execution-debtor, and was applied to the satisfaction of the judgment, and, as far as the record shows, no objection was made thereto by the execution-debtor. In other words, Cowling bid in the land for the amount of the judgment and costs against Britt, and paid that amount to the sheriff, which was applied in satisfaction of the judgment.

In the case of *Neff* v. *Elder, supra,* the court held that a purchaser of land whose money was used in discharging a valid mortgage lien thereon, upon failure of his title, will be subrogated to such lien as against the intervening rights of another.

In the case of *Bond* v. *Montgomery,* 56 Ark. 563, Mr. Justice BATTLE, speaking for the court, said: "Upon the right of purchasers at void execution or judicial sales to subrogation to the rights of creditors to the payment of whose claims the purchase money paid by them has been appropriated, courts are not agreed. Many consider them as volunteers acting without compulsion and for no purpose of protecting any interest of their own, and under a mistake of law, and therefore not entitled to the protection of courts of equity. On the other hand, others

hold that the doctrine of subrogation rests upon the natural principles of equity and justice; that purchasers at such sales who are entitled to the benefit of subrogation are not volunteers that they purchase at a sale made under the coercive process of law, under the honest belief that they are getting the property sold, and their money is actually applied to the benefit of the owner in paying his debts or removing charges or liens upon his property; and that it would be in the highest degree inequitable and against good conscience to permit the owners, the administrators or creditors, as the case may be, to hold or enjoy at the same time the benefit of the property sold, and the money of the purchaser without recompense, and that, in order to prevent this injustice and wrong, they should be subrogated to the rights of the creditors, or to the benefit of the liens or charges, to the payment of whom or which their money has been applied. According to the latter view, it is the belief of the purchaser that he is getting the property sold, and the actual application of the money to the benefit of the owner in paying his debts in removing a charge or lien on his estate, which constitute the equity. There is no conflict between this view and the maxim of *caveat emptor*. That maxim applies where there is a failure of title, 'because of a want of ownership in the property by the defendant in the execution or in the intestate,' or testator, 'but it does not apply to the defects in the title of the purchaser occasioned by a failure of the sale to pass the title of the defendant's intestate,' or testator. The later view has been adopted by this court, and is sustained by the decided preponderance of authority.'' (Citing authorities.)

(4-5-6) Subrogation is a doctrine of purely equitable origin, and in its operation is always controlled by equitable principles. In the application of the doctrine to the facts in the present case we are of the opinion that Cowling is entitled to be subrogated to the lien of the judgment-creditor in the case of *Stanley* v. *Britt, et al.*, and is entitled to have the land sold for the repayment of the amount to him of the purchase money paid by him for the

land under the execution sale, and, upon the payment of the amount of the mortgage debt of $500, and the accrued interest to Payne, he will be subrogated to Payne's rights under the mortgage, and will be also entitled to have the land sold for that purpose.

It follows that so much of the decree as holds that the lien of Payne for the sum of $500 and the accrued interest, secured by the deed of trust executed to him by Britt, was a prior lien on the land will be upheld. And, in the application of the doctrine of subrogation, if the plaintiff, Cowling, elects to discharge this debt of Britt to Payne and redeem from the mortgage, he will be entitled to be subrogated to the rights of Payne and to have the land sold for that purpose.

As above stated, he will be subrogated to the rights of the judgment-creditor, and will be entitled to have the land sold for the purpose of repaying him the amount he paid under the execution sale for the land.

The decree will therefore be reversed and the chancellor directed to enter a decree in accordance with this opinion.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY v. WASHINGTON.

Opinion delivered July 13, 1914.

1. MASTER AND SERVANT—NEGLIGENT ACT OF SERVANT—DYNAMITE.—Where a railroad company, through its engineer, causes dynamite to be used in blowing up piling, it will be liable in damages for an injury sustained by appellee, who was hit and injured by a falling substance, thrown by the explosion.
2. NEGLIGENCE—INJURY TO PLAINTIFF—DYNAMITE—LIABILITY.—Where a railroad company is actually engaged in removing piling for a drainage ditch through its right-of-way, it is liable for an injury occasioned by an explosion of dynamite used in removing the piling, and it makes no difference whether or not the railroad was doing the work in pursuance of an agreement with the ditch contractors that it do the same.

Appeal from Jefferson Circiut Court; *Antonio B. Grace,* Judge; affirmed.

STATEMENT BY THE COURT.

This suit is for damages for a personal injury to Chas. A. Washington, alleged to have been caused from the explosion of dynamite used in blasting out some piling from the railroad's right-of-way in constructing a ditch or canal through it. Hahn & Carter, in March, 1913, were contractors digging a public drainage ditch, which was planned to cross the right-of-way of the St. Louis, Iron Mountain & Southern Railway Company a short distance from a trestle about one mile south of Tamo. A dredge boat equipped with a steam shovel was used in its construction, and it was necessary that the track of the railway company be moved in order to let this boat pass over the right-of-way. As the ditch neared completion to the track, the ditch contractors asked a conference with the railway company relative to the crossing. In reply, Mr. Clayton, an assistant engineer, was sent to the point of proposed crossing, and a conference was held by him with Mr. Carter, one of the contractors, Mr. Franklin, one of the commissioners of the district, and Mr. Reynolds, its engineer. Clayton objected to the location of the ditch as planned for the district, and asked that it be changed so that it would pass under the trestle already maintained by the railway company and at right angles, and agreed it was said that if such change was made, the railway company would remove the piling from the trestle for the purpose. The arrangement was consented to and the location of the ditch was changed accordingly. Clayton made a written report to his superior officers, stating only that the conference was held and that the parties in charge of the ditch construction were agreeable to changing its location so as to cross the right-of-way at right angles under the trestle.

Shortly before the dredgeboat was ready to cross, Carter, one of the contractors, went to McGehee at the request of the general roadmaster, to confer with him and other officials of the railway relative to the time and manner of crossing. The testimony is in conflict as to what was said at the time about removing the piling, but

Carter testified that they were talking about the piling, and he told them that it was out of the question for him to pull it, for he could do nothing with it, and the officials said that they would send the wrecker. It was agreed at this conference that the dredgeboat should be let through the railroad bridge on Sunday, March 30.

On that day, the railway company sent a wrecking crew and a bridge gang to the bridge where the ditch was to cross the railroad. The railroad employees under the direction of the superintendent of the bridge and building department removed the track, and then work was begun to take out the piling. The testimony is in hopeless conflict about its removal. It appears that the dredgeboat crew dug the dirt away from the piling and the wrecking crew of the railroad attempted to pull it out, and succeeded but poorly. Sometimes, the piling would break, and oftener the chains around them. After the work had continued for some time, and not much headway had been made, the chains and piling having broken so often, the superintendent of the bridge and building department suggested that dynamite should be used. The testimony is in sharp conflict as to who used the dynamite. Mr. Marel Franklin testified that Mr. Land, the superintendent of the bridge and building department of the railway company, asked for dynamite, and also to know if there was any one who could shoot it, and that he (Franklin) procured the dynamite for him, and also at his request, called for a negro in the crowd, who prepared the charge and fired it. Franklin said that one of the railroad men asked for dynamite, whom he afterward identified as Mr. Land. "He asked me if we had any, and I said we had some on the ditch, and he said, 'Can you get it?' and I sent a negro down to get it for him. The negro put it at the side of the track at the north end of the trestle and told him it was there. I saw the charge fixed there. They were endeavoring to get the canal through the railroad. The railroad company had been working at that job prior to the dynamiting; they had been trying to pull the piling out with the wrecker. The negro was doing the

work of preparing the charge under the supervision of the railroad company. I don't know who employed the negro; he was working for the railroad company that day, but before that he had been working for Mr. Carter. I suppose that the negro did the work under the direction of the bridge foreman." He said further that Mr. Land seemed to be bossing the job. "The dynamite, I guess, belonged to Hahn & Carter. I had no authority to send and get it, but I did so. I did not see anybody directing the negro in fixing the dynamite. The same fellow who asked for the dynamite asked for the negro. I told him the negro was out there in the crowd. I hallooed and asked if the negro was there, and asked him to come up, that we had some shooting for him to do. The negro was in the crowd of onlookers."

Land testified that under directions from the general roadmaster, instructing him to open the bridge 510 for the purpose of letting the dredgeboat through, he instructed one of his foremen, Lamb, to go to the bridge with sufficient material to make a cord or stringer to carry trains across. That he went down there about 10 o'clock Sunday morning, and took the deck off the bridge. "After we got through our work, they made two or three attempts at pulling the piling, and could not do anything with it; the dredge men were trying to get the piling out. They were trying to dig it out and lift it with the shovel. After they pulled and pulled, I think I made the remark that if I was engineering that thing, or words to that effect, I would put dynamite in there. The remark was made to everybody around there generally. They placed dynamite in there; some colored man put it there. He was not working for the railway company. I did not know him. I had nothing to do with the dynamiting. I had nothing to do with the removal of the piling. The wrecker had already pulled some of the piling, and broke some chains in pulling it. I don't remember about getting angry about not being able to pull the pilings. I think I said that if I was managing or running the thing, I would get some dynamite. I disclaim being manager.

As far as I know, the drainage people were managing; it was their business. I think they put the negro to shooting the dynamite. We were trying to help them out. I suggested that they blow them out as a matter of accommodation. I saw the negro place the dynamite."

The drainage contractors and their crew testified that it was the railroad's business to remove the piling, and that their crew had nothing to do with it at all, and were only assisting in its removal for accommodation to the railroad company and to expedite the work, and the railroad employees swore also that it was not their business to remove the piling, that they did not undertake to do it at all, and what work they did in this connection was done to accommodate the dredging outfit and facilitate the work.

Several witnesses, who did not belong to either crew, testified that both the ditch crew and the railroad company were working together in removing the piling, the dredgeboat crew digging the dirt away from the piling, and the railroad wrecking crew pulling and attempting to pull them out with the wrecker. Some of them say that Land, the railway bridge superintendent, appeared to be bossing the job.

There was testimony introduced, which was objected to, that Clayton, the railroad engineer, in the conference about crossing the railroad track with the ditch, suggested the change in the route of the ditch, and that it cross the track at right angles under the old trestle, and that the railroad company would remove the piling if this plan was agreed to. The railroad officials, having the authority to make such an agreement, denied any authority of Clayton to make an agreement of the kind, or that one had been made, and his written report, suggesting that it was agreeable with the drainage contractors to cross the railroad right-of-way under the trestle, was read and contained no suggestion that the railroad company was to remove the piling because of the change.

The negro used a piece of steel pipe in fixing the charge of dynamite, and when the explosion occurred, it

was hurled two or three hundred yards, struck through the edge of the roof of a negro cabin, and struck the little negro who was playing in the yard, fracturing his skull so that his brains oozed out. He suffered for several weeks, and though apparently well now, he seems to be dull at times and a kind of stiffness comes over him. "A piece of his skull is gone and the membrane and skin are bulging, creating a hernia at the point of fracture." Doctor Breathwitt said: "There is no muscular tissue over this point from which this bone has been removed, and its thinness is almost alarming to feel. There is scar tissue there. It is not true skin. The hernia is here (indicating). You can see it pulsate every time the heart beats. Here is the depressed fracture back of it. The covering of the brain there is perhaps one-sixty-fourth of an inch. If the head were held down, it would make more of a hernia. That injury is necessarily permanent. A part of the skull is entirely gone. The skull will never grow over that point. There may, and could easily come about, an irritation of the membranes here, or, as they come in contact here, producing an inflammatory adhesion of cystic condition, either one of which would prove fatal. The decided thinness of the covering necessarily carries with it a hazard. It is a constantly dangerous menace to the child."

The court instructed the jury, and it returned a verdict for $3,000 damages against the railroad company for the appellee, and from the judgment it appeals.

E. B. Kinsworthy, R. E. Wiley and *T. D. Crawford,* for appellant.

1. It is error to submit to the jury issues upon which there is no evidence to support a finding. 63 Ark. 177.

2. If the job was Hahn & Carter's, they had control of the manner of doing the work, and were liable. "*Respondeat superior.*" 105 Ark. 477; 156 N. Y. 75.

3. The railroad company was not required to remove the pilings or soil in order to permit the passage of the dredgeboat. It was required to build its own bridge

and track after the ditch was dug. 200 U. S. 561, L. Ed. 596.

4. The facts are undisputed and a verdict should have been directed for appellant.

Coleman & Gantt, for appellee.

1. There is no error in the court's charge. Where an act complained of was incidental to the discharge of the functions covered by the servant's general authority, the master can not avoid liability on the ground that he did not specifically authorize the commission of that particular act. 6 Labatt, Master and Servant, § 2277; Wood on Master and Servant, § 559.

2. There is ample testimony to justify the jury in finding that the explosion was incidental to the work of appellant's employees. Wood on Master and Servant, § 585.

3. Absence of negligence on appellant's part would not excuse it from liability if it committed the act. 55 N. E. 923. One who aids or co-operates with another in a trespass is liable. 38 Cyc. 1038-41; 15 Ark. 452.

4. The company was liable for the acts of its employees even though contrary to its instructions, if within the scope of their employment. Labatt on Master and Servant, § 2277; 21 Am. Rep. 597; 113 S. W. 429; 50 Am. Rep. 102; 11 *Id.* 405; 7 Id. 293; 99 Ind. 519; 50 Mo. 104; 134 N. W. 578.

5. One who causes dynamite to be exploded in the performance of a lawful undertaking whereby one who is lawfully in a place where he had a right to be is injured is guilty of trespass and liable. 2 N. Y. 159; *Ib.* 163; 35 *Id.* 520; 58 *Id.* 416; 67 *Id.* 267; 55 N. E. 923; 20 S. W. 435; 48 So. 374; 55 S. E. 778; 935 W. 853.

6. The doctrine of *res ipsa loquitur* is peculiarly applicable here. 86 Ark. 76; 127 La. 309; 53 S. E. 575.

KIRBY, J., (after stating the facts). The appellee's right to recover does not appear to be seriously controverted, but appellant contends strenuously that it is not liable for the injury. It insists that the testimony of the

witnesses relating to the conference with Clayton and the alleged agreement by him for the railroad company to remove the piling and allow the dredge boat to cross under the trestle, if the ditching contractors would change the line of the ditch to a right angle and cross there instead of as surveyed, was incompetent and prejudicial. It is true the officials of the railroad company, having the authority to make such an agreement, testified that Mr. Clayton, the engineer who held the conference with the ditching contractors relative to the crossing of the railroad track, was without any authority to agree for the railroad company to remove the piling in consideration for having the ditch or canal put through the railroad right-of-way at right angles rather than as planned, but all admit that the conference was held and that Clayton reported that the ditching contractors had agreed to the suggestion of putting the ditch or canal through the right-of-way at right angles and under the trestle. In any event, on the day which was agreed upon by the general superintendent, at McGehee, with Mr. Carter, of the ditching contractors, Sunday, March 30, the railroad company had its wrecking and bridge crews on hand to assist in the crossing of its track by the dredge boat. It removed the deck of the bridge, and, in fact, engaged under the direction of its superintendent of the bridge and building department in helping to remove the piling with its wrecking outfit, and it is not material whether it had agreed to remove the piling or not, since it was there engaged in the work. Both the defendants, Hahn & Carter and the railroad company, were engaged in the work of removing the piling at the time of the explosion and injury to the appellee, and both deny having caused it. Each insists that it was the other's duty, and that the other alone was engaged in removing the piling, and that it was assisting for accommodation purely.

(1) It does not appear to us important whether there was an agreement on the part of the railroad company to remove the piling or not, for it sent its bridge and wrecking crew out there for the purpose of allowing the dredge-

boat to go through, and these crews were engaged in the actual work of removing the piling, and it was within the scope of their employment to use any method chosen by them as best suited for the purpose, and whether the railroad company agreed beforehand to remove it or voluntarily undertook to do it after it became apparent that it was necessary to facilitate the work, can make no difference in appellee's right to recover, if they were responsible for the wrongful act which caused his injury.

(2) Mr. Land, the railroad company's superintendent, admits that he suggested that dynamite should be used, and, although he denies having directed its use, no one else suggested it, and Franklin swears that Land asked for the dynamite, which he procured for him, and then asked if he could get some one to shoot it, and that Franklin, at his suggestion, called for Jones, the negro shot-firer, who "was standing in the crowd of onlookers with his Sunday clothes on," to come and do the shooting. It is undisputed that Jones took the dynamite and prepared the shot that caused the injury, with the help of another negro, and fired it. Whose servant was he? He had been shooting dynamite for Hahn & Carter for some days before this, and afterward he was in their employ, but these facts alone could not make them responsible for the injury resulting from the explosion. The negro Jones did not volunteer to use the dynamite, took it after it had been procured at the request of the bridge superintendent, and also was asked to shoot it at his request. Franklin's statement was denied by Land, and it was the province of the jury to decide the question, and they could have found that the railroad company was engaged in removing the piling whether on its own account or in assisting Hahn & Carter to facilitate the passing of the boat through its right-of-way, and that the dynamite was exploded by the direction of its superintendent, and that it was liable for the injury caused thereby. The man who fired the dynamite being at work under the direction of the railroad company at the time determines its liability. *Arkansas Natural Gas Co.* v. *Miller,* 105 Ark. 477.

Instruction numbered 4, complained of, told the jury that if the person in charge of the railroad employees and machinery undertook the work of removing the piling, and in so doing used dynamite by the direction of the servant of the railroad company, they should find it liable; but if the jury did not find this fact, as it could have done from the testimony, then to find in favor of the railroad company, and thus submitted fairly the issue to the jury. Under the circumstances, it could not have been influenced, and it did not make any difference whether there was an agreement by Clayton, the engineer of the company, with Hahn & Carter, the ditch contractors, to remove the piling or not, because its servants were actually engaged in the work of removing it, which was within the scope of their employment, and used the dynamite, the explosion of which caused the injury, in furtherance of that purpose.

Other questions are raised, but we do not find it necessary to discuss them. We find no prejudicial error in the record, and the judgment is affirmed.

WESTERN UNION TELEGRAPH COMPANY *v.* COMPTON.

Opinion delivered June 8, 1914.

1. TELEGRAPH COMPANIES—NEGLIGENCE—RIGHT OF ADDRESSEE TO SUE.—The addressee of a telegraph message is a party to the contract, which is made for his benefit, and he may sue for a breach thereof.
2. TELEGRAPH COMPANIES—INTERSTATE MESSAGE—NEGLIGENCE—LIMITED LIABILITY.—A telegraph company may by contract limit its liability for negligence in the delivery of an interstate telegraph message.

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

Rose, Hemingway, Cantrell & Loughborough, for appellant.

1. Mental anguish damages are not recoverable in Oklahoma, where the default occurred. 2 Okla. 235; 115 Pac. 879; 77 Ark. 351; 92 *Id.* 219; 93 *Id.* 415; 94 *Id.* 89.

2. The provisions for a reduced rate are binding. 53 Ark. 434; 154 U. S. 1; 227 U. S. 639; 226 *Id.* 491; 35 A. L. R. 119; 191 U. S. 477.

3. Telegraphing between States is interstate commerce. Congress is supreme; its action is exclusive. The State is superseded. 24 Stat. L. 379-384; *Ib.* 444-5, 546; 96 U. S. 1; 105 *Id.* 460; 122 *Id.* 347; 127 *Id.* 640; 132 *Id.* 473; 162 *Id.* 650; 218 *Id.* 406; 222 *Id.* 424; 218 *Id.* 406; 139 *Id.* 240; 162 *Id.* 650; 227 *Id.* 248-265; 226 *Id.* 426-435.

3. The act of Congress covers the *whole field* and renders the States impotent. 204 U. S. 426; 215 *Id.* 481; 222 *Id.* 481-436-440-442; 227 *Id.* 265; 226 *Id.* 426; 227 *Id.* 248; 222 *Id.* 370; 191 *Id.* 477; 226 *Id.* 491; 227 *Id.* 639; *Ib.* 657; 228 *Id.* 593; 204 *Id.* 426; 53 Ark. 434.

4. According to the law of this State, the valuation clause in consideration of a reduced rate as to carriers was held unreasonable (89 Ark. 154, and *W. U. Tel. Co.* v. *Hearn,* ms. op.), but the United States Supreme Court holds that Congress having acted, the State must give way.

5. The State's mental anguish statute is superseded. 122 U. S. 347-358; 226 *Id.* 426; 227 *Id.* 248; 226 *Id.* 426; 222 *Id.* 424-444; 227 *Id.* 653.

6. The Arkansas mental anguish statute is necessarily a burden on interstate commerce. 92 Ark. 219; 122 U. S. 650; 214 *Id.* 274; 220 *Id.* 364.

7. Our mental anguish statute denies telegraph companies the equal protection of the law. 118 U. S. 356; 165 *Id.* 150; 174 *Id.* 96; 183 *Id.* 79; 184 *Id.* 540.

8. The singling out and classification of telegraph companies as the brunt-bearers of damages for mental anguish is arbitrary and unconstitutional. 60 N. E. 674; 157 Ind. 37; 40 S. E. 618.

U. A. Gentry and *McMillan & McMillan,* for appellee.

1. The case of 92 Ark. 219, settles the right to sue in Arkansas for a tort. 53 Ark. 434; 161 S. W. 1027; 218 U. S. 406.

2. The Arkansas statute is not a burden on commerce, and does not deny telegraph companies the equal protection of the law. 162 U. S. 650; 172 *Id.* 557.

3. Our statute is not superseded. 162 U. S. 653, L. Ed., 40, pp. 1105-9; 122 U. S. 347-9; 218 *Id.* 406.

4. Congress has not acted on this question. 161 S. W. 1027; 191 U. S. 477; 187 *Id.* 137.

5. Until Congress passes a statute, the Arkansas act is valid. 40 U. S. (L. Ed.), 1108; *W. U. Tel. Co.* v. *James,* 162 U. S. 653.

McCULLOCH, C. J. Plaintiff was the addressee of a telegraph message sent over defendant's line from Nashville, Arkansas, to Hugo, Oklahoma, acquainting him of the critical illness of his child, and there was negligent delay at the point of destination in the delivery of the message, which prevented plaintiff from reaching the bedside of his child before its death, and plaintiff thereby suffered mental anguish.

The trial jury awarded damages in a sum which is not claimed to be excessive under the testimony.

According to the statutes of this State, mental anguish is an element of recoverable damages for negligence in transmitting or delivering telegraphic messages; but it is not an element of damages in the State of Oklahoma, where the negligent delay occurred.

We have held that under those circumstances there may be a recovery of such damages in this State. *Western Union Tel. Co.* v. *Griffin,* 92 Ark. 219.

(1) Plaintiff was the addressee and was, therefore, a party to the contract which was made for his benefit. *Western Union Tel. Co.* v. *Short,* 53 Ark. 434.

It is conceded that the evidence is sufficient to warrant the finding as to negligence of the servants of the defendant in the delivery of the message, and that plaintiff suffered mental anguish on account of the delay; but it is insisted that under the contract limiting liability of the company to the sum of $50, there can be no recovery in excess of that amount.

The message was written upon a form containing the following stipulations, which became a part of the contract, towit:

"To guard against mistakes or delays, the sender of a message should order it repeated, that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeated message rate is charged in addition. Unless otherwise indicated on its face, *this is an unrepeated message, and paid for as such,* in consideration whereof it is agreed between the sender of the message and this company as follows:

"1. The company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery of any UNREPEATED message, beyond fifty times the sum received for sending the same, *unless specially valued;* nor in any case for delays arising from unavoidable interruption in the working of its lines; *nor for errors in cipher or obscure messages.*

"2. In any event, the company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the nondelivery of this message, whether caused by the negligence of its servants or otherwise, beyond the sum of fifty dollars, at which amount this message is hereby valued, unless a greater value is stated in writing hereon at the time the message is offered to the company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent hereof."

(2) This court has held that a telegraph company is a public carrier, and can not stipulate for immunity from liability on account of negligence of its servants in handling a message. *Western Union Tel. Co.* v. *Short, supra.*

The same thing was held in the recent cases of *Western Union Tel. Co.* v. *Hearn,* 110 Ark. 176, and *Western Union Tel. Co.* v. *Alford,* 110 Ark. 379.

It is contended, however, that since the statute enacted by Congress in 1910 (act of June 18, 1910, 36 Stat. L. 544, Fed. Statutes Ann. Supp. 1912, vol. 1, p. 112), amending the interstate commerce act so as to include

telegraph companies, and giving the Interstate Commerce Commission authority to regulate the rates and practices of such companies, the decisions of this State are no longer applicable, and that the enforcement of liability in disregard of the stipulation in the contract would be a forbidden interference with interstate commerce.

The statute of this State, making mental anguish, caused by negligence in handling a telegraphic message, an element of damages, is not a regulation of the transmission and delivery of such messages. It does not impose any new duties on telegraph companies, nor does it define what shall constitute actionable negligence. In fact, it does not create any new right of action at all. It merely amounts to a legislative declaration as to what are the elements of damages to be recovered. *Western Union Tel. Co.* v. *Griffin, supra.*

There is some conflict in the authorities over the question of mental anguish being an element of damages, and this court took position with what was conceived to be a majority of the courts of the country, that there could be no recovery for mental anguish independent of physical injury. *Peay* v. *Western Union Tel. Co.,* 64 Ark. 538.

Subsequently, the Legislature passed a statute declaring that telegraph companies "shall be liable in damages for mental anguish or suffering, even in the absence of bodily injury or pecuniary loss, for negligence in receiving, transmitting or delivering messages." Act March 7, 1903, Kirby's Digest, § 7947.

There is still a conflict upon this subject in the laws of different States, and, however much uniformity is to be desired so far as concerns interstate messages, the only method by which it can be attained is through an act of Congress fixing the measure of damages. Thus far there has been no Federal legislation on that subject, and the only power given to the Interstate Commerce Commission is, as we understand, to regulate rates and classification of messages of telegraph companies.

The act of Congress is, of course, exclusive, and, in effect, deprives the States of any power to burden that class of interstate commerce with any kind of regulation; but it leaves the laws of the State in force so far as concerns elements of recoverable damages. This is necessarily so, for otherwise there could not be any damages recovered, as Congress has failed to declare the elements of damages.

It is unimportant whether those elements of damages are expressly declared by statute in the States or result from the application of common-law principles. *Pa. Rd. Co.* v. *Hughes,* 191 U. S. 477; *Western Union Tel. Co.* v. *Commercial Milling Co.,* 218 U. S. 406.

"It is to the laws, whether part of the common law or found in the statutes of the State," said the Supreme Court of the United States in the case last cited, "that we look for the validity and extent of a contract between persons. They constitute its obligation. How far this principle is limited by the commerce clause of the Constitution of the United States may be illustrated by several cases cognate to the one at bar."

The main question, therefore, in this case, is, whether or not, under the act of Congress bringing the business of telegraph companies into the field of operation controlled by the Interstate Commerce Commission, and the decisions of the Supreme Court of the United States bearing thereon, a telegraph company may, by contract, exempt itself from liability which would otherwise be imposed on account of negligence of its servants in receiving, transmitting or delivering messages.

The act of Congress does not itself confer any right to stipulate for such an exemption, nor do we find anything in the decisions of the Supreme Court of the United States which would justify the exercise of any such right.

In the recent case of *Kansas City So. Ry. Co.* v. *Carl,* 227 U. S. 639, the court said:

"Is the contract here involved one for exemption from liability for negligence and therefore forbidden? An agreement to release such a carrier for part of a loss

due to negligence is no more valid than one whereby there is complete exemption. Neither is such a contract any more valid because it rests upon a consideration than if it was without consideration. A declared value by the shipper for the purpose of determining the applicable rate, when the rates are based upon valuation, is not an exemption from any part of its statutory or common-law liability. The right of the carrier to base rates upon value has been always regarded as just and reasonable. The principle that the compensation should bear a reasonable relation to the risk and responsibility assumed is the settled rule of the common law."

It is contended by learned counsel that the decision of the Supreme Court of the United States in *Boston & Maine Rd. Co.* v. *Hooker,* 233 U. S. 97, establishes the right to contract against liability for negligence under certain circumstances.

But a careful consideration of the opinion in that case convinces us that the court did not mean to do more than to follow the rule laid down in the *Carl* case, *supra,* and in the case of *Adams Express Co.* v. *Croninger,* 226 U. S. 491, and to apply the principles announced in those cases to a rate classification by a carrier of passengers and baggage. Nothing found in the opinion indicates an intention on the part of the court to hold that a public carrier can, upon a valid consideration or without one, stipulate for exemption from liability for negligence, or a limitation of liability, which, to that extent, amounts to the same thing. The controlling idea of those cases is that, under the Federal statutes, interstate carriers have the right to fix reasonable rates, based upon estimated value of the articles to be transported, and to establish regulations concerning the same, and that, when approved by the Interstate Commerce Commission, the States are deprived of authority to burden the carriers with any other regulations with respect thereto.

The limitation as to the amount of baggage is a part of the contract in fixing the rates, which the carrier had the right to base upon valuation of the articles to be

transported. The regulation was upheld, not as an exemption from liability, but as an agreement concerning value upon which the rate was fixed.

That principle can have no controlling force here concerning telegraphic messages, for in the very nature of things the rate can not be fixed upon valuation. A telegraphic message has no value in itself. It is not susceptible to an estimate of value in advance so as to afford a basis for fixing rates. Any attempt, therefore, to place a limitation upon the amount to be recovered as damages for negligence in handling messages constitutes nothing less than an exemption from liability, and is not enforceable.

Our conclusion, therefore, is, that, giving full force to the Federal control which has been assumed over telegraph companies as instrumentalities of interstate commerce, nothing is found which would justify the exemption from liability for negligence, as this stipulation plainly is.

It should be observed that this case has nothing to do with that feature of the stipulation which relates to repeated or unrepeated messages, for the liability is not based upon inquiry which might have been averted by repetition of the message, but the injury resulted entirely from delay in delivering the message. This case, in other words, presents purely the question whether, or not, under the Federal statutes, a telegraph company has the right to exempt itself from liability arising from negligence of its servants in delivering a message; and we are of the opinion that such stipulation is void.

The judgment is, therefore, affirmed.

ON REHEARING.

McCULLOCH, C. J. Since this case was decided by the court, an opinion of the Supreme Court of the United States was handed down in a suit to recover damages on account of negligent failure to deliver, in the District of Columbia, a telegram sent from South Carolina; and that court, after deciding that there could be no recovery of damages on account of mental anguish because the

Federal laws in force in the District, where the act of negligence occurred, do not authorize recovery of such damages, said:

"What we have said is enough to dispose of the case. But the act also is objectionable in its aspect of an attempt to regulate commerce among the States. That is, as construed, it attempts to determine the conduct required of the telegraph company in transmitting a message from one State to another or to this District by determining the consequences of not pursuing such conduct, and in that way encounters *Western Union Tel. Co.* v. *Pendleton,* 122 U. S. 347, a decision no way qualified by *Western Union Tel. Co.* v. *Commercial Milling Co.,* 218 U. S. 406." *Western Union Tel. Co.* v. *Brown,* 234 U. S. 542.

It is insisted that the statement quoted above was unnecessary to a decision of the case, and was mere *dictum.* It is true that the decision was based primarily on another ground not applicable to the case now before us, but it could have been decided entirely on the ground stated above; therefore, the statement must be treated as a decision of the court upon the law of the case. The question involved being one which rests with the Supreme Court of the United States as the final arbiter, we must yield obedience to it.

The defendant claims in the pleadings only the right to enforce the limitation of its liability down to the sum of fifty dollars. A rehearing is therefore granted, and the judgment of the circuit court is reduced to the sum named in the contract.

QUINN, BEST AND KEEL *v.* STATE.

Opinion delivered June 22, 1914.

1. CRIMINAL LAW—CONVICTION FOR LESSER CRIME.—Upon an indictment for a felony, the accused may be convicted of a misdemeanor, where both offenses belong to the same generic class, and when the commission of the higher may involve the commission of the

lower offense, and when the indictment for the higher offense contains all the substantive allegations necessary to let in proof of the misdemeanor.

2. ASSAULT—SUFFICIENCY OF INDICTMENT.—The allegations of an indictment charging assault with intent to kill, *held* sufficient to embrace all the essentials of the offense of aggravated assault, and to warrant a conviction for the latter crime.

3. ASSAULT—SUFFICIENCY OF EVIDENCE.—Where defendants were indicted for the crime of assault with intent to kill, evidence held sufficient to warrant a finding of guilty of an aggravated assault.

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

Phillips, Hillhouse & Boyce, for appellants.

The indictment does not charge the necessary elements of an aggravated assault. Kirby's Digest, § 1587; 41 Ark. 350; 100 Ark. 195. Instruction No. 11 was prejudicial error.

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

1. Rule 9 has not been complied with. 4 Crawf. Dig., p. 60, § 73-a.

2. The question of aggravated assault was properly submitted to the jury on the evidence. One charged with assault with intent to kill may be convicted of aggravated or simple assault, or assault and battery. 76 Ark. 366; 89 *Id.* 213-217; 53 *Id.* 34; 22 Cyc. Ind. and Inf., p. 474, note 14; 27 Cent. Dig., Ind. and Inf., § 586.

McCULLOCH, C. J. The three appellants were jointly indicted by the grand jury of Jackson County for the crime of assault with intent to kill, and on trial of the case, they were convicted of aggravated assault, a misdemeanor.

It is charged in the indictment that appellants "unlawfully, wilfully and feloniously, and with malice aforethought, and after deliberation and premeditation, did make an assault upon the person of a certain negro sometimes called 'Slim,' but whose Christian and surname is unknown to the grand jury, with a deadly weapon, namely, a gun, by then and there shooting the said 'Slim'

* * * with a gun then and there loaded with gunpowder and leaden bullets * * * with intent then and there to kill and murder him," the said person named.

The first contention is that the allegations of the indictment are not sufficient to describe the offense of aggravated assault, and that there could be no conviction for that offense under the indictment.

The statute defining aggravated assault reads as follows:

"If any person assault another with a deadly weapon, instrument or other thing, with an intent to inflict upon the person of another a bodily injury where no considerable provocation appears, or where the circumstances of the assault show an abandoned and malignant disposition, he shall be adjudged guilty of a misdemeanor, and, on conviction, shall be fined in any sum not less than fifty, nor exceeding one thousand dollars, and imprisoned not exceeding one year." Kirby's Digest, § 1587.

(1) In the early case of *Cameron* v. *State,* 13 Ark. 712, it was held "that, upon an indictment for a felony, the accused may be convicted of a misdemeanor, where both offenses belong to the same generic class, where the commission of the higher may involve the commission of the lower offense, and where the indictment for the higher offense contains all the substantive allegations necessary to let in proof of the misdemeanor."

It is insisted that the indictment does not describe the offense of aggravated assault, because it contains no allegation that there was no considerable provocation, or that the circumstances of the assault showed an abandoned and malignant disposition.

This court held, in *Guest* v. *State,* 19 Ark. 405, that under an indictment for maiming, the defendant might be convicted of aggravated assault, the two offenses being of the same generic class, and the former including the latter.

The court has in many cases held that under an indictment for murder, the accused could be convicted of

manslaughter. *McPherson* v. *State,* 29 Ark. 225; *Brown* v. *State,* 34 Ark. 232; *Fagg* v. *State,* 50 Ark. 506.

There are many cases where, on examination of the testimony here, we have found it insufficient to support a conviction of murder, and have reduced the judgment to the lower degree of manslaughter. *Darden* v. *State,* 73 Ark. 315.

(2) We think that the allegations of the indictment for assault with intent to kill and murder were sufficient to embrace all the essentials of the offense of aggravated assault. The indictment alleges that the assault was made with a deadly weapon with intent to kill, which necessarily includes the charge that it was done to commit bodily injury. The allegation that the act was done "with malice aforethought, and after deliberation and premeditation," constitutes a negation of the fact that there was considerable provocation.

It is also insisted that the evidence is insufficient to warrant the conviction of appellants for any offense.

One of the appellants was the contractor of the county convicts of Jackson County, and he maintained a stockade for the confinement of the prisoners on or near his farm in that county. The negro, 'Slim,' was a convict in custody of the contractor, and was treated as a trusty, being permitted to work as a servant around the contractor's dwelling. A lot of jewelry was missed from the dwelling, and the negro was accused of the theft. He was locked up in the stockade, and in the early part of the night, all three of the appellants, and another person, went to the stockade, handcuffed the negro and took him out and carried him down in the woods or thicket. When they returned to the house with the negro, he had been shot through the arm with a gun or pistol. The State proved by a convict that, when the negro was taken out of the stockade one of the appellants (the contractor himself), said to the negro, "I will learn you how, you d— s— of a b—, to tell lies about things." There is testimony to the effect that this witness had not been convicted at that time, and was not in the stockade. That

made a question for the determination of the jury, and we must treat the testimony in the light most favorable to the State's side of the case. One of the members of the party had a Winchester rifle. Another witness stated that when the party returned to the house with the negro, they had pistols and guns in their hands, and there was a rope around the negro's neck. This was after the negro was shot in the arm. There was other testimony to the effect that several shots were fired while the party was down in the woods with the negro, that at the time of the shooting, the voices of the negro and some of the appellants were heard, and that somebody in the party said don't shoot any more, that his arm is broken.

The contention of appellants, as reflected by their testimony, was that the negro confessed to complicity in the theft, told where the jewelry was hidden, and was accompanying the party out to the place to show it to them, when he attempted to make his escape, was seized by one of the party, whose pistol fell out of his pocket during the scuffle, and was accidentally discharged, the bullet striking the negro's arm.

(3) Now, the testimony shows pretty clearly, we think, that there was no intention to kill the negro, and the jury properly acquitted the appellants of assault with intent to kill; but we are of the opinion that there is enough evidence to justify the jury in convicting the appellants of aggravated assault. The jury did not accept the theory of appellants as correct, but it is manifest from the verdict that the jury found that appellants, or some of them, fired shots at the negro without intent to kill him, but with intent to do him bodily harm. We will not undertake to determine for ourselves where the preponderance of the evidence lies, for it is sufficient to sustain the conviction here if we find evidence of a substantial nature tending to establish the essential elements of the offense of which appellants were convicted.

Our conclusion, therefore, is that the evidence sustains the conviction, and as there is no other assignment of error, the judgment must be affirmed.

HALL v. HUFF.

Opinion delivered June 22, 1914.

1. EQUITY—JURISDICTION FOR ALL PURPOSES.—Where the chancery court assumes jurisdiction of a cause for any purpose, it is proper for it to proceed to determine all the rights of the parties in the subject-matter of the controversy.
2. ATTORNEY'S FEES—COMPROMISE—CONSENT OF ATTORNEY.—Kirby's Digest, § 4457, does not give an attorney a right of action for his fee against his client's adversary, when the litigants have compromised the cause with said attorney's consent.
3. ATTORNEY'S FEES—AGREEMENT—COLLUSIVE DECREE—COMPROMISE.—B. agreed with his attorney, H., to transfer to H. one-third of whatever was recovered in certain litigation. A collusive decree was entered in favor of B. for a life estate in certain lands, the matter having already been compromised by plaintiff and defendant, before the rendition of the decree, and H., having consented to the compromise, can not proceed against B.'s adversary to collect his fee, but must look to B. for the same.
4. ATTORNEY'S FEES—BASIS OF RECOVERY.—The measure of the recovery by an attorney of his fees is not a speculative or contingent fee, but one that is reasonable, considering the importance of the litigation, the benefit secured by it, the amount and character of the attorney's services, and his learning, skill and proficiency.

Appeal from Garland Chancery Court; *S. W. Leslie,* Special Chancellor; reversed.

Davies & Ledgerwood and *Scott Wood,* for appellant.

1. One who comes into a court of equity must do so with clean hands. An administrator can not purchase at his own sale. 27 Ark. 637; 55 *Id.* 85; 33 *Id.* 575; 34 *Id.* 63; 46 *Id.* 451; 58 *Id.* 84.

2. An administrator and his attorney can not buy claims against the estate. 40 Ark. 393.

3. His hands must be clean. He is a trustee. 7 Ark. 516-19; 33 *Id.* 294; 53 *Id.* 150; 47 *Id.* 311.

James E. Hogue, for appellee.

McCULLOCH, C. J. This is an action instituted by the plaintiff, C. Floyd Huff, against the defendant, J. H. Hall, to recover possession of an undivided one-third of a certain tract or lot of real estate in the city of Hot Springs, described as lot 1, of block 60, of the city of Hot

Springs, as platted by the United States Hot Springs Commission, and also to recover one-third of the rents and profits of said property.

Defendant demurred to the complaint, but it does not appear that the court ever ruled on the demurrer, and the defendant filed an answer, and also a cross-complaint, in which he asked that his title to the lot described in the complaint be quieted and that the instrument under which plaintiff claims an interest in the property be cancelled as a cloud on his title.

(1) Conceding that the allegations of the complaint were not sufficient to give the chancery court jurisdiction, the allegations of the cross-complaint were sufficient for that purpose, and the court having assumed jurisdiction for any purpose, it correctly proceeded to determine all the rights of the parties in the subject-matter of the controversy.

Plaintiff claims an undivided interest in the property for and during the life of one B. F. Cooley, and bases that claim upon a contract or a deed executed to him by Cooley. The property was owned by one Bina Cooley, a colored woman, who died in the city of Hot Springs in the year 1907, leaving no children surviving, and the title descended to her collateral heirs.

Defendant, J. H. Hall, acquired title by purchase from those heirs.

B. F. Cooley was formerly the husband of Bina Cooley, but the evidence shows that several years before her death, they were divorced by a decree of the chancery court of Garland County.

Bina Cooley left a considerable estate, composed of real estate in the city of Hot Springs, and at the request of B. F. Cooley, the plaintiff became the administrator of the estate of said decedent and took possession of all the real estate and received the rents and profits.

Defendant purchased the interest of the heirs of Bina Cooley in and to the lot involved in this controversy, and commenced, in the chancery court of Garland County, an action against B. F. Cooley to cancel the latter's as-

serted claim to a life estate by reason of being the surviving husband of Bina Cooley.

B. F. Cooley employed plaintiff, Huff, as an attorney, to represent him in that case, and in any other proceedings which might be instituted "to recover any share or part of the estate of said Bina Cooley, deceased," and executed to said plaintiff a contract or deed, whereby he conveyed to him an undivided one-third interest "in any and all property, of whatsoever kind or character, whether real, personal or mixed, that may be recovered for me from the estate of said Bina Cooley." In the instrument executed by Cooley, plaintiff, Huff, was expressly authorized to bring suits and other legal proceedings in connection with said estate, "to sue for and recover such property or to defend any suits in reference to the same, and to collect, receive, recover and receipt for any such property in or out of court as in his judgment may be necessary to settle said estate," and that "upon the recovery of any such property, I will promptly make him proper conveyance for one-third interest in accordance with this agreement."

Plaintiff appeared for B. F. Cooley in the action brought against the latter by defendant, Hall, and asserted the claim of Cooley for a life interest in the property as surviving husband of Bina Cooley. While that cause was pending, a compromise was negotiated between the parties, the same being conducted by plaintiff, Huff, for his client, whereby it was agreed that Cooley should convey to defendant, Hall, his life estate in the lot involved in this controversy, but that said cause should proceed to final decree. Pursuant to that agreement, plaintiff, Huff, prepared, and his client executed, a deed, with full covenants of warranty, to defendant, Hall, whereby he conveyed the life estate of B. F. Cooley in the property in controversy. That deed was executed on August 29, 1908. The litigation, notwithstanding the conveyance, proceeded to a final decree, which was rendered on October 6, 1908, whereby Cooley's life estate as tenant by the curtesy was declared. Plaintiff testified that the

purpose of his client in entering into this compromise and conveying his interest in this lot to defendant, Hall, was to induce the latter to "lay down" on the suit and permit a final decree to go so as to establish Cooley's right to other property left by his former wife. Defendant, Hall, denied this, but stated that he was advised by his attorney that it would be better to let the suit proceed to final decree, notwithstanding the compromise.

The testimony of defendant shows that there had been a decree for divorce of Bina Cooley from B. F. Cooley, rendered by the Garland Chancery Court several years prior to Bina Cooley's death; that the decree was omitted from the record, but that subsequent to the commencement of the litigation just described the decree was entered *nunc pro tunc*. This does not appear to have been denied, and it establishes the fact that B. F. Cooley was not entitled to a life estate in the property of Bina Cooley, and the court should not have so decreed if defendant had properly brought out the merits of that controversy. That, however, is not a matter that is material to the present suit, for this is not an effort to set aside the decree in the former litigation between B. F. Cooley and the defendant, Hall.

There is a serious conflict in the testimony, which we do not deem it necessary to attempt to reconcile, for our conclusion is that, even upon the plaintiff's own statement of the facts, he is not entitled to recover anything, or to assert a lien against the property in the hands of defendant, Hall. The instrument executed to him by Cooley—call it either a contract or a deed of conveyance—does not purport to convey any particular property, but only an undivided third interest in whatever might be recovered in any litigation concerning the property belonging to the estate of Bina Cooley. The instrument amounts only to a sale and transfer, according to the terms of the statute then in force (Kirby's Digest, § 4457), of the causes of action of said B. F. Cooley in and to the property belonging to the estate of said decedent. Plaintiff, therefore, under that instrument, was only en-

titled to one-third of whatever might be recovered. Now, there was a decree in favor of Cooley whereby he recovered a life estate in this lot, but, according to the testimony of the plaintiff himself, that decree was collusive and the subject-matter thereof was settled by compromise between the parties long before the rendition thereof. According to plaintiff's own testimony, that suit was prosecuted to a final decree for ulterior purposes. So the recovery under that litigation was not the lot itself, but the consideration which passed from defendant, Hall, to Cooley, and since the plaintiff consented to the compromise he must, for obvious reasons, look to his client, and not to his client's adversary, for his part of the recovery. The statute provides that "in case the plaintiff and defendant compromise any suit * * * where the fees or any part thereof to be paid to the attorney for plaintiff or defendant are contingent, the attorney for the party plaintiff or defendant receiving a consideration for said compromise, shall have a right of action against both plaintiff and defendant for a reasonable fee, to be fixed by the court or jury trying the case." Kirby's Digest, § 4457.

(2) This statute, of course, is not intended to give a right of action where the cause of action is compromised with the consent of the attorney; and it is undisputed in this case that plaintiff, Huff, not only consented to it, but that he actually negotiated the settlement for his client and prepared the deed.

(3-4) Moreover, the statute does not, in case of compromise without consent of the attorney, give a right of action to recover the contingent fee stipulated for in the contract. The measure of recovery in such case is "not a speculative or contingent fee, but one that is reasonable, considering the importance of the litigation, the benefit secured by it, the amount and character of the attorney's services, and his learning, skill and proficiency." *Rachels* v. *Doniphan Lumber Co.*, 98 Ark. 529.

There is considerable testimony in this case, and, as before stated, it is of a conflicting nature. Defendant,

Hall, was, according to the testimony, interested in the property with his father, W. H. Hall, or, perhaps, the testimony establishes the fact that the title was merely taken in the name of defendant, Hall, for his father's use. That is immaterial in this case. Other property of the estate of Bina Cooley was purchased by W. H. Hall, and there was a controversy between the parties as to other transactions and rights alleged to have grown out of them concerning the purchase of the other property by W. H. Hall.

Plaintiff's contract with, or conveyance from, B. F. Cooley, was not filed for record until after Cooley executed the conveyance to defendant, Hall, and there is a controversy whether either of the Halls had information as to this contract. We deem it immaterial whether they knew it or not, for it is not claimed that there was any express contract that either of the Halls should pay the plaintiff any fee for his services in representing Cooley.

We held in the case of *Kansas City, F. S. & M. Rd. Co.* v. *Joslin,* 74 Ark. 551, that actual notice of the existence of a contract with plaintiff's attorney was sufficient to render the defendant liable for a reasonable fee, even though the contract was not filed; but, as we have already said, plaintiff was only entitled to one-third of the recovery in the original action, which was the amount received in the compromise, and this is so even though defendant had actual knowledge of the existence of the contract. Where the case was compromised, his only remedy was that of recovering a "reasonable fee," according to the terms of the statute, and this even he is precluded from recovering by his participation in the compromise and his consent thereto.

The decree is, therefore, reversed, and the cause remanded with directions to dismiss the complaint for want of equity.

GREER v. MERCHANTS & MECHANICS BANK.

Opinion delivered July 6, 1914.

1. CONSTITUTIONAL LAW—PERMANENT OFFICE—LEGISLATIVE DETERMINATION.—Under the Constitution, the Legislature is the sole judge of whether an office which it creates is permanent, and it has the power to declare whether an office to be created is permanent or temporary.
2. BANK DEPARTMENT—VALIDITY OF ACT CREATING.—Act 113, page 465, Acts 1913, creating the State Bank Department "for and during a period of twelve years," *held* not to be in violation of art. 19, § 9, Constitution 1874, which provides that "the General Assembly shall have no power to create any permanent State office not expressly provided for by this Constitution."
3. BANK DEPARTMENT—INSOLVENT BANKS—CHANCERY JURISDICTION.—Act 113, Acts 1913, page 465, authorizing the bank commissioner to take charge of insolvent banks, *held* not to constitute an invasion of the power of the chancery courts to appoint receivers.

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

Carmichael, Brooks, Powers & Rector, for appellant.

The act in question violates art. 19, § 9, of the Constitution, and is therefore void. Every word and phrase of a Constitution must be construed as adding something to the meaning of the instrument. 2 Ark. 250; 102 Ark. 218. It is not competent for the Legislature to limit its own powers. 48 Ark. 515; 44 Ark. 273. The word "permanent" does not always embrace the idea of absolute perpetuity. 8 Barb. 185; 2 N. J. E. 155; 136 U. S. 104. A wooden sidewalk which lasted eleven years is a "permanent" sidewalk. 60 Mass. 223. A thing may be "permanent," and yet not be everlasting. 58 S. W. 814; 42 N. Y. S. 1097; 74 U. S. 290; 24 Miss. 9; 39 Ala. 546. The Legislature is without power to limit the jurisdiction of the chancery court. 6 Ark. 318; 95 Ark. 620; nor to enlarge it. 80 Ark. 145. The jurisdiction of the chancery court is fixed by the Constitution. 44 Ark. 377; 57 Ark. 528; 80 Ark. 145; 93 Ark. 389; 95 Ark. 399.

Moore, Smith & Moore, for appellee.

1. The act creating the office of Bank Commissioner is not in violation of art. 19, § 9, of the Constitution.

"Permanent office," as used in the Constitution, means an office necessary to the continued existence of some business of the State. Should there be a doubt as to the validity of the statute, it should be resolved in its favor. 99 Ark. 1; 93 Ark. 612.

2. The act does not attempt to limit the jurisdiction of the chancery court. It merely supersedes the necessity of the appointment of a receiver. The appointment of a receiver is merely ancillary to the administration of the estate. 63 L. R. A. 791; 47 Atl. 758; 25 S. W. 947. High on Receivers, § 6. There must be grounds for equitable interference before the court can take property out of the hands of assignee and turn it over to a receiver. 53 Ark. 81.

McCULLOCH, C. J. Appellant, in bringing this action, challenges the validity of an act of the General Assembly of 1913 creating the State Bank Department and the office of commissioner in charge of that department, the contention being that the act is violative of section 9, article 19, of the Constitution, which provides that "the General Assembly shall have no power to create any permanent State office not expressly provided for by this Constitution."

The language of that part of the act which creates the bank department, reads as follows:

"That for and during the period of twelve years from the time this act goes into effect, there is hereby created and established at the seat of Government in this State, a department to be known as the State Bank Department." Section 1, of Act 113, of Acts of 1913, p. 465.

Another section creates the office of Bank Commissioner, fixing the term of office at four years and the salary at $3,000 per year. Other officers are provided for in the act, such as inspectors, etc.

Learned counsel on each side of the case concede that, after diligent search, they have been unable to find a similar provision in the Constitution of any other State, and, therefore, have not found any discussion in the text-

books or adjudged cases throwing any light on the question.

We also have searched in vain for authorities which throw light on the subject, and have concluded that it is a question of first impression. The decision of the case must, therefore, be reached by the application of general principles in the interpretation of this provision in its relation to the whole framework of our organic law.

In the case of *Lucas* v. *Futrall,* 84 Ark. 540, we held that the constitutional mandate to the Legislature "to provide for the education of the blind necessarily carried with it the power to create what offices the Legislature might deem necessary to carry out the power conferred," without offending against the provision just quoted against the creation of permanent offices.

That case, however, did not involve the decision of the question now before us, but was a mere declaration of the principle that the Constitution contained a mandate to create the particular office then under consideration, and did not, for that reason, if for no other, fall within the provision we are now inquiring into.

It is insisted by those who challenge the validity of the act that the banking business is necessarily one of a permanent nature, that the creation of this department is necessarily permanent, and that it amounted to a clear subterfuge for the Legislature to attempt to make it otherwise than permanent by thus limiting its duration to a given period of time.

Attention is called to the fact that the General Assembly, at the same session, created several other new departments, one to last for fifty years, and that that was done upon the theory that the legislative declaration made it a temporary, and not a permanent, office.

It is urged that these were mere attempts on the part of the Legislature to evade a plain mandate of the Constitution by calling offices temporary which are in fact permanent in their nature and which are designed to embrace permanent fields of activity.

The argument is not without force.

On the other hand, it is urged by learned counsel for appellees who seek to defend the statute that the framers of the Constitution having divided the Government into three branches, which were deemed necessary to the continued existence of Government and of handling the business of the State, that the words "permanent office" referred to those things which were then deemed to be the permanent functions of Government, and that the banking department, as organized under this statute, is not of those branches of Government, and that it necessarily falls outside of the term "permanent office," as expressed in the Constitution.

We find ourselves unable to agree with either side in the reasoning upon the proposition involved, but conclude that the inquiry turns in another direction.

(1) The framers of the Constitution obviously did not intend to place an absolute prohibition against the creation by the Legislature of offices not expressly provided for. The prohibition only reaches to the creation of *permanent* State offices. That being true, the question arises, who is to be the judge of the question of permanence of an office, or the necessity for its temporary existence. The answer to this question, we think, results in the solution of the difficulty presented in this case. Observing the general rules of interpretation in determining whether a given constitutional provision is mandatory, or whether it is merely directory and cautionary to the Legislature, we are of the opinion that this provision falls within the latter class. The command is to the Legislature itself, and it necessarily involves the power to determine the necessity for creating a temporary office, and to determine whether the work to be done is of a temporary or permanent nature. It falls, we think, within the class of provisions like that which forbids the Legislature to enact a special law where a general law can be made applicable (Constitution, § 24, art. 5), and we have held that class of provisions to be directory and merely cautionary to the Legislature. *Davis* v. *Gaines,* 48 Ark. 370; *Carson* v.

St. Francis Levee District, 59 Ark. 513; *Powell* v. *Durden,* 61 Ark. 21.

On this subject, Judge Cooley, in his work on Constitutional Limitations, spoke, as follows:

"The important question sometimes presents itself, whether we are authorized in any case, when the meaning of a clause of the Constitution is arrived at, to give it such practical construction as will leave it optional with the department or officer to which it is addressed to obey it or not, as he shall see fit. In respect to statutes, it has long been settled that particular provisions may be regarded as *directory* merely; by which is meant that they are to be considered as giving directions which *ought* to be followed, but not as so limiting the power in respect to which the directions are given that it can not effectually be exercised without observing them." Cooley's Constitutional Limitations, p. 109.

Now, there are many undertakings which can readily be called to mind in the performance of particular tasks, such as building a State Capitol, or constructing a certain highway, and the like, where it would be plain to any investigating tribunal that the work to be undertaken was temporary, even though it stretched over a considerable period of time; but there might be many border line cases where it would be more difficult to determine whether the work was temporary or permanent; and we are of the opinion that this command is one necessarily addressed to the Legislature itself, and that that branch of Government must determine how far it can exercise its powers without disobeying that command.

We attach little, if any, importance to the provision of the statute limiting the time to twelve years, for we think that the Legislature has the power to determine whether an office to be created is permanent or temporary, whether expressly declared in the act or not. If it is created as a temporary office, we must assume that the Legislature found it to be such. The creation of the office implies a determination that it is temporary, and not permanent.

There can be no irrepealable laws which depend for existence entirely upon the legislative will, and any office created by the Legislature is temporary in the sense that it is subject to the legislative will, and may be abolished at any time.

Those who take such temporary offices as may be created by the Legislature do so with notice of the insecure tenure and the acceptance of the office creates no contract with the State. *Humphrey* v. *Sadler,* 40 Ark. 100.

(2-3) We are of the opinion, therefore, that this provision of the Constitution, when rightly interpreted, constitutes a command to the Legislature, with authority to determine when temporary offices are needed, and that the determination of that question by the Legislature will be observed by the courts. It would be an usurpation of power by the courts to assume authority which had been delegated to the Legislature itself.

The fears expressed by learned counsel that this interpretation of the constitutional provision leaves it within the power of the Legislature to create new offices, *ad libitum,* even to the extent of providing for a Deputy Governor, another Auditor or Secretary of State, or additional courts, is entirely unfounded; for the Constitution itself exhausts the power of creating offices which are provided for in that instrument, and the implication is sufficiently manifest that no more are to be created.

Again, it is said that the statute, in attempting to authorize the Bank Commissioner to take charge of insolvent banks, is unconstitutional as an invasion of the power of the chancery court to appoint receivers.

We think that the original jurisdiction of the chancery courts as preserved by our Constitution does not prevent the Legislature from entering upon the supervision of any matters which fall within the police power. This act does not attempt a redistribution of judicial power, but it provides for a system of supervision which has nothing to do with the judicial function.

The chancery court was correct in sustaining a demurrer to the complaint and the decree is therefore affirmed.

KIRBY, J., dissents.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY v. PYLES.

Opinion delivered June 29, 1914.

1. RAILROADS—INJURY TO SERVANT—RIGHT TO RIDE ON FREIGHT TRAINS—INVITATION.—Although plaintiff, an employee of defendant railway company, had a pass entitling him to ride on all its trains, including fast freight trains, the right to board a freight train at any place, *held* not to imply an obligation on the part of the company to furnish him a safe place and opportunity to board said freight train at any point in the company's yards.
2. RAILROADS—RIGHT TO BOARD FREIGHT TRAINS—INJURY TO SERVANT.—The servant of a railway company, although having the right to board and ride on freight trains, does board such a train, away from the station, and at a tank or coal chute, at his own risk, unless the servants of the company were guilty of some negligence in the operation of the train which resulted in his injury.
3. NEGLIGENCE—INJURY TO LICENSEE—DUTY OF CARE.—The bare permission of the owner of private grounds to persons to enter upon his premises does not render the owner liable for injuries received by such licensee on account of the condition of the premises.
4. RAILROADS—INJURY TO LICENSEE—LIABILITY.—Where an employee of defendant railway company, in order to board a freight train, upon which he was entitled to ride, but upon which it was not his duty, nor was he invited by defendant to ride, and was injured while walking through defendant's yards, by falling over a pile of coal in a footpath, he will be held to be a mere licensee upon defendant's premises, and to have undertaken to board the train at his own risk.

Appeal from White Circuit Court; *J. M. Jackson*, Judge; reversed.

E. B. Kinsworthy, P. R. Andrews and *W. G. Riddick*, for appellant.

1. Appellee was a bare licensee. There is nothing to indicate an invitation to an employee to use the path.

The use was merely permissive, and those who used the path, took the privilege with its concomitant peril. 103 Ark. 226; 83 *Id.* 300; 33 Cyc. 758; 112 Ga. 668; 122 Ia. 360; 66 Oh. St. 509; 90 Am. St. 602; 3 Elliott on Railroads, § § 1251-1303; 4 *Id.*, § 1579.

2. A railway company is under no duty to repair its tracks or keep its yards in any particular condition for trespassers and licensees; they assume the risk. 2 Thompson on Negl., § 1760; *Ib.*, § 1848; 106 Ark. 390; 141 Mich. 75; 33 Cyc. 761.

3. The coal was not the proximate cause of the injury. 84 Ark. 270.

S. Brundidge, J. W. & J. W. House, Jr., for appellee.

1. There was an implied, if not a positive, invitation for appellee to board this particular train at this particular place. He had a pass, was an employee, and is entitled to recover. 96 Ark. 638; 89 *Id.* 103; 85 *Id.* 326; 81 *Id.* 187. This pathway was universally used and the presumption is that the railroad company acquiesced. 79 Ark. 157; 103 Ark. 226; 90 Fed. 783; 45 Oh. St. 11; 12 N. E. 451; 38 Atl. 236; 41 A. & E. R. Cases (O. S.) 501; 69 Vt. 555; 97 S. W. 1122; 193 F. 603; 126 Ill. App. 601; 133 N. W. 672; 132 S. W. 992; 4 Hun. 760; 3 Am. Rep. 628; 57 *Id.* 446; 88 S. W. 192; 27 *Id.* 27; 64 N. E. 582; 85 Ky. 224; 16 Utah 42; 43 S. E. 39; 36 C. C. A. 361.

2. Where a person, by reason of some peculiar circumstance, has his attention directed to some other object and momentarily forgets the danger incident to travel, that does not amount to negligence *per se*, and is a question for the jury. 99 Ark. 254; Am. Ann. Cases, 1913, D. 37; 183 N. Y. 506.

3. The mere posting of a sign is not sufficient. 135 Mass. 352; 163 *Id.* 330; 65 Ill. App. 649.

McCULLOCH, C. J. The plaintiff was struck, knocked down and seriously injured by one of the defendant's freight trains in the railroad yards at Gurdon, and he instituted this action to recover damages on account of such injuries.

He was going down a pathway between the main track and a sidetrack for the purpose of boarding a train, when he stumbled over a pile of coal, about two feet high, in the pathway, and fell under the slowly moving freight train on the main track, and one of his legs was cut off just below the knee, and the other foot was cut through just about the instep. This occurred about midnight. The pile of coal which obstructed the pathway fell from the coal chute while the men were placing coal in the engines. It was about 2,500 feet south of the station at Gurdon, and the freight train had stopped at the coal chute for the purpose of taking on coal.

Plaintiff was employed by defendant railway company in the supply department, his duties being to travel with the supply cars and distribute oil. He had been to El Dorado with his oil cars, and returned to Gurdon enroute to Argenta. It was Saturday night, and he was to join the oil cars at Argenta on Monday morning, to go to McGehee, on another division of the road. The foreman of his department also accompanied the cars, and plaintiff obtained permission of the foreman to leave the oil cars at Gurdon and make his way back to Argenta that night on another train without waiting for the cars to be transported the next day. Plaintiff, after getting his lunch at an eating house near the station at Gurdon, saw the freight train stop at the coal chute, and decided to go down there and board the caboose to ride to Little Rock. He had a pass which permitted him to ride on all kinds of trains, including through freight trains. He started down the track hurriedly to reach the caboose before the train moved, and when he got nearly to the engine, the train started, and he quickened his gait and was going, as he describes it, "in a trot," when he stumbled over the pile of coal and fell. The train was going very slowly when plaintiff fell, and his feet were thrust under the train and the wheels struck him before he could extricate himself.

The evidence tends to show that the pile of coal fell from the chute and had accumulated there for a day or

two. There was a space of nine feet between the main track and the passing track, and there was a well beaten path along there which was used by employees, and also by the public to some extent. There was a sign there, erected by the company, warning trespassers from the tracks and right-of-way.

Plaintiff testified that he had been to Gurdon a time or two before, and had seen employees and others walking along that path. He stated also that he had seen employees get off trains down at the coal chute and walk up to the depot along that path.

The only charge of negligence against the company is in permitting the pile of coal to accumulate in the path and in allowing it to remain there as an obstruction to those who attempted to use the path.

(1-2) Plaintiff had the right to ride on freight trains, and it can not be said that he was not traveling on the business of the company in returning from Gurdon to Argenta. But he was not required to travel on that particular train. He was not acting under the immediate command of his superior when he undertook to board the train. While he had the right to board the freight train wherever it might be found for the purpose of riding on the company's business, the pass which enabled him to ride on through freight trains was not an invitation to board them wherever found. In other words, his right to board freight trains wherever found did not imply an obligation on the part of the company to furnish him a safe place and opportunity to board them. If he saw fit to board a freight train away from the station at a tank or coal chute, he did so at his own risk, unless the servants of the company were guilty of some negligence in the operation of the train which resulted in his injury. So, the fact that the plaintiff was going down the path for the purpose of boarding the train adds no strength to his cause of action, and his right to recover must exist, if at all, upon the obligation of the company to keep the path clear for the benefit of any one who saw fit to use it.

Now, the evidence establishes the fact that, notwithstanding the warning posted by the company, the path was a well beaten one, and was frequently used by employees and oftentimes by any one else who saw fit to use it. This, however, was, at most, only a license which was extended, notwithstanding the warning, if the path was used openly with the acquiescence of those in charge of the yards.

(3) It is well settled, however, that a bare licensee under circumstances of this kind is not entitled to any affirmative act of protection on the part of the owner who grants the license. In this respect the case stands the same as if some one else owned the premises instead of the railway company.

"The bare permission of the owner of private grounds to persons to enter upon his premises does not," said this court in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Dooley,* 77 Ark. 561, "render him liable for injuries received by them on account of the condition of the premises."

In that case the defendant, the railway company, had erected a stile over a fence along the right-of-way and permitted the same to get out of repair, and the plaintiff was injured on account of the breaking down of the steps. The question arose whether the company had invited the public to use the steps, and there was enough evidence to show such an invitation, and the company was held liable, but in doing so, this court unqualifiedly laid down the rule that the granting of a mere license to use a way through an owner's premises does not imply an obligation to keep the same in repair.

The same principle was announced by this court in the recent case of *Chicago, R. I. & P. Ry. Co.* v. *Payne,* 103 Ark. 226. There the public had been permitted to use, with the acquiescence of the company, a road or path along the right-of-way, and negligence was ascribed in allowing a ditch across the right-of-way to get out of repair, on account of which the plaintiff was injured while attempting to pass along. The court said:

"The undisputed evidence shows that appellee was a mere or bare licensee. She was using the footpath upon appellant's right-of-way for her own convenience, and not for any purpose connected with the business of appellant, or for the common interest or mutual benefit of appellant and appellee. Appellant did no affirmative act to compel or induce appellee to use the footpath upon its right-of-way. It merely acquiesced in such use by appellee and the public. Under such circumstances, it can not be said that there was any implied invitation upon the part of appellant for the use of its right-of-way by appellee. Appellant therefore did not have to exercise ordinary care to make the pathway safe for appellee. As appellant had done nothing that could be construed as an invitation to appellee and the public to use its right-of-way for a footpath, appellant was not negligent, because, in draining its right-of-way, it failed to exercise ordinary care to make and leave the footpath safe for appellee."

(4) Now, in the present case, there is not the slightest evidence to indicate that the pathway was used in a way that an invitation can be implied on the part of the railway company to the public or its employees to use it. The use was, at the most, merely permissive, and those who used it were licensees, who took the privilege with its concomitant peril.

Neither was there any command or invitation to the plaintiff to use the path for the purpose of reaching the freight train, and he was a mere licensee in going down there to board that train. As we have already seen, the company owed him no duty to furnish him a safe place to board the train at the coal chute or at any place other than at the station, and when he chose to board the train at that place, he did so at his own risk.

We are unable to discover any theory in the law upon which plaintiff is entitled to recover damages, and as the evidence is undisputed, no useful purpose would be served in remanding the case for a new trial. The judgment is therefore reversed and the cause dismissed.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY AND ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY v. KENDALL.

Opinion delivered July 13, 1914.

1. NEGLIGENCE—JOINT LIABILITY OF TWO DEFENDANTS—RAILWAY COLLISION.—Both defendant railroad companies will be liable in damages for an injury to a conductor on the train of one of them, when two trains collided at a crossing, and when both were negligent, and either could have avoided the injury by the exercise of ordinary care.
2. DAMAGES—PERSONAL INJURIES—ELEMENTS—BASIS OF AWARD.—Plaintiff, a railroad conductor, was injured in a collision by the negligence of two defendant railroads. *Held*, in assessing his damages, the jury should not estimate the entire life expectancy of plaintiff, at the full salary he was receiving when injured, but should take into consideration the probability of loss of time from sickness, loss of position and decreased physical force with advancing years.
3. DAMAGES—PERSONAL INJURIES—AMOUNT—BASIS OF AWARD.—Compensation for damages due to negligence must be awarded on a reasonable basis, and the jury can not give any amount they please, although the amount is largely within the reasonable discretion of the jury.
4. DAMAGES—EXCESSIVE AWARD—PRACTICE.—Where the jury, in an action for damages for personal injuries, makes an excessive award of damages, the judgment will be reduced to a reasonable amount on appeal.

Appeal from Monroe Circuit Court; *Eugene Lankford,* Judge; modified and affirmed.

STATEMENT BY THE COURT.

This is an action for damages for personal injury to appellee suffered in a collision between the passenger train of the St. Louis, Iron Mountain & Southern Railway Company, on which appellee was conductor, and a local freight train of the St. Louis Southwestern Railway Company at the crossing of the tracks near Clarendon. The tracks of this railway company, hereafter called the Cotton Belt, and the Iron Mountain cross each other nearly at right angles, and on the morning of the accident the train on which appellee was conductor left Clarendon about 7:30, and whistles were blown for the street

and railway crossings. The train slowed down, the porter got off and walked ahead to the crossing, and flagged the engineer to come on. He started up with an increased speed, and after his engine had passed the crossing, he heard a noise that attracted his attention, and discovered the train on the Cotton Belt track approaching. It was at the stop-board, and the wheels were sliding. He immediately increased the speed of his train to clear the crossing and get out of the way of the other train. The Cotton Belt engine struck the back end of the negro coach and the front end of the white coach, and went through the train, wrecking it and crushing and bruising appellee's body, breaking three ribs, dislocating his shoulder and cutting a bad gash in his head. The Cotton Belt train had been switching and was standing on the track about 530 feet from the crossing when it started up. The porter who signaled the Iron Mountain train to cross said he did not see the Cotton Belt train on its track at the time. That his view was obstructed by some cars near the seed house, although many others testified that there were no cars on any track that could have prevented his seeing the train. When the engineer of the Cotton Belt train started up, he took his orders he had received at Brinkley, and was reading them over again, and did not discover the Iron Mountain train until he was within 175 feet of the crossing, too close to stop and avert the collision. He was surprised and stunned at the sight, but immediately put his brakes in emergency, and tried to stop his train.

The evidence shows that the enginemen on either train could have discovered the presence of the other train by looking, five or six hundred feet before reaching the crossing, and that none of them looked. The Iron Mountain engineer said that he relied upon his flagman, and thought he had the right-of-way, and did not look on that account, and the other engineer was reading his orders.

A witness who was some distance below the crossing saw the porter on the crossing signaling the Iron Moun-

tain train to come on, and he also saw the Cotton Belt train upon the track beyond, coming. Did not know why the porter did not see it.

Another witness was near the crossing south of both tracks, and said the Iron Mountain train was between her and the north side. She saw the negro signal the Iron Mountain train to cross, and could see the Cotton Belt train coming at the time; saw both trains. The Iron Mountain train was at the crossing a little ahead, and after it started over the crossing, she could not see the Cotton Belt train coming down the track.

The appellee was sixty-two years old at the time of the injury with a life expectancy of 12 and 86/100 years. He was in bed about three months, the result of the injury, and peritonitis developed and aggravated his suffering. He claims to be suffering now from neuritis, which grows worse during spells of bad weather. He is permanently injured and totally incapacitated for doing manual labor. He was earning $1,600 a year at the time of the injury as conductor, and making about that much out of his store at Holly Grove. He estimated his income at $3,000 a year. The jury returned a verdict against both the railroad companies for $18,000 for pecuniary loss, and $20,000 for bodily injury, pain and suffering, and from the judgment, both the companies appeal.

E. B. Kinsworthy, P. R. Andrews and *T. D. Crawford,* for appellant, St. Louis, I. M. & S. Ry. Co.

1. The verdict is excessive. No such allowance as $24,000 has ever been sustained.

2. When two trains approach a crossing at the same time, the rule is that the one which first reaches and stops at the post upon its line is entitled to precedence in crossing. 54 F. 649; 52 Am. & E. R. Cas. 462; 38 Minn. 455; 116 Ind. 60-2; 97 Ala. 515; 13 So. 408. Trainmen on one road who comply with the statute on approaching a crossing have a right to assume that trainmen on the other road will also comply with it. 97 Ala. 515; 13 So. 408; 65 Tex. 32. Agreements as to crossings are binding.

42 A. & E. R. Cas. 233. There is no presumption of negligence in favor of an employee engaged in operating a train, as against the employer. 113 Mo. 70; 20 S. W. 896; 100 Ark. 422; 60 Fed. 993. To warrant a finding that negligence was the proximate cause, it must appear that the injury was the natural and probable consequence of the negligent or wrongful act, and ought to have been foreseen. 93 Va. 49; 57 Am. St. 786. Ordinarily, the question of proximate cause is for the court where the facts are not in dispute; if in dispute, for the jury. 139 Pa. St. 363; 10 Allen. 535.

3. In view of these authorities, there was error in the charge. The court should have directed a verdict for the Iron Mountain Railway Company.

Sam H. West and *J. C. Hawthorne,* for St. Louis Southwestern Railway Company.

1. The third and fourth instructions asked for defendant railway company should have been given. Plaintiff was in charge of the train and responsible for the collision. The question of plaintiff's, and the employees under him, negligence should have been submitted to the jury. 53 Mo. App. 276; 78 Ill. 619; 50 N. E. 729. The negligence of a son is imputable to a father in cases like this. So is the negligence of those whom the injured fellow-servant controls or directs. 25 N. E. 355; *Ib.* 863; 71 N. E. 799; 41 N. E. 629.

2. The verdict is excessive.

Thomas & Lee, for appellee.

1. Both defendants are liable as joint tort-feasors, and the case was submitted to the jury under proper instructions. Both were negligent. 63 Ark. 177; 29 Cyc. 565; 61 Ark. 381; 23 *Id.* 112; 203 Ill. 518; 33 Cyc. 726.

2. Verdict not excessive. 13 Cyc. 38, 39-245; 92 Ala. 209; 87 Ga. 69; 114 Ga. 183; 84 *Id.* 297; 74 *Id.* 851; 13 Cyc. 47; 11 L. R. A. 43; 82 Kan. 318.

3. As to separate liability. 51 Fed. 649; 73 Ark. 112-116; 27 L. R. A. (N. S.) 209.

KIRBY, J., (after stating the facts). (1) Neither of the appellants complain of the instructions given the jury on the part of the appellee, both insist that the verdict is excessive, and each contends that but for the negligence of the other, the accident would not have occurred, and that any negligence on its part was not the proximate cause of the injury. There is no doubt but that those in charge of the Cotton Belt train, by keeping a lookout, could and would have seen the Iron Mountain train approaching the crossing in time to have avoided the injury by stopping the train if they had been in the exercise of ordinary care. Neither is there any doubt but that the enginemen of the Iron Mountain train could also have discovered the Cotton Belt train by the exercise of ordinary care in time to have prevented the collision. Both of the railroad companies were negligent, and but for the negligence of each, the collision would not have occurred, and the concurring negligence of both produced the injury for which both are liable. Cyc. lays down the following general rule: " * * * Where an injury is sustained by reason of the joint or concurrent negligence of two railroad companies, * * * plaintiff may sue both jointly, and it is not necessary that there should be a breach of a joint duty or any concerted action on the part of the defendants, but it is sufficient if their several acts of negligence concur and unite in producing the injury complained of; nor is it material that one of the defendants owed the plaintiff a higher degree of care than the other." 33 Cyc. 726.

In *City Electric Street Railway* v. *Conery,* 61 Ark. 381, where an injury was received by coming in contact with a telephone wire charged with electricity communicated from a trolley wire, the court said: "If the injury was the result of concurring negligence of the two parties, and would not have occurred in the absence of either, * * * the negligence of the two was the proximate cause of the same, and both parties are liable." See, also, *St. Louis, I. M. & S. Ry. Co.* v. *Shaw,* 94 Ark. 15; *St. Louis*

S. W. Ry. Co. v. *Mackey,* 95 Ark. 297; *Strange* v. *Bodcaw Lumber Company,* 79 Ark. 490.

(2) It is contended that the damages are excessive, and this contention must be sustained. The appellee was sixty-two years old with a life expectancy of virtually thirteen years, and earning $1,600 a year salary at the time of the injury. He is permanently and totally disabled from performing manual labor, and can not resume his duties as conductor, in which he had been engaged for twenty years or more. He suffered great pain from the dislocated shoulder, the broken ribs, the cut on the back of his head and other bruises, and had an attack of peritonitis before his recovery, and was confined to his bed for about three months. His wounds are all healed, but he still suffers from neuritis, and will probably continue to do so throughout his life. The pain is worse during bad weather. Appellee had passed beyond life's meridian well down on the further slope. There was no hope of promotion in prospect for him, and but thirteen years of life in expectancy. It is possible, but not probable, that he would have continued physically able to discharge the duties of his position, and retained it until the age of seventy-five, the end of his expectancy. Virtually, $14,100 will purchase an annuity that would yield $1,600 a year, the amount of salary appellee was receiving, but this estimates the entire life expectancy at the full salary for the period without taking into consideration, as ought to be done, the probability of loss of time from sickness, loss of position and decreased physical force with advancing years, and the jury allowed even more than this, and their verdict is excessive. Appellee's business at Holly Grove, it is true, was shown to be yielding him an income also, but the injury can not be said to have caused him loss on that account, for he was not personally conducting the business, and so far as the proof shows, he can devote more directing attention to it now than he was doing before the injury.

(3-4) The jury awarded $20,000 damages for pain and suffering. Appellee is well of his injuries now after

three months of suffering and confinement to his bed, save for the neuritis that will probably afflict him to the end. He suffered much, but, as said in *St. Louis, I. M. & S. Ry. Co.* v. *Brown,* 100 Ark. 124, "There is no market where pain and suffering are bought and sold or any standard by which compensation for it can be definitely ascertained and the amount actually endured determined," and compensation therefor must be considered on a reasonable basis, and the jury can not give any amount they please, although the amount of damages must be left largely to the reasonable discretion of the jury. The court is of the opinion that the amount awarded for pain and suffering is excessive also. *St. Louis, I. M. & S. Ry. Co.* v. *Brown,* 100 Ark. 123; *Aluminum Company* v. *Ramsey,* 89 Ark. 541. Upon the whole case, our conclusion is that the award of damages for each cause of action is excessive, and that the judgment for both causes should be, and is reduced, to $20,000, and as modified, it will be affirmed.

It is so ordered.

MARTIN v. STATE.

Opinion delivered September 28, 1914.

1. CRIMINAL LAW—IMPERSONATING AN OFFICER—To constitute the offense of impersonating an officer under Kirby's Digest, § 1964, it is not sufficient that one falsely asserts that he is an officer, and has the authority to act as such, nor is it sufficient that he declares his intention to act as such; but to constitute this offense, it is essential that he assumes or exercises, or attempts to exercise some of the functions, powers, duties or privileges incident or belonging to the office which he asserts he holds at the time.
2. CRIMINAL LAW—IMPERSONATING AN OFFICER.—The false statement by defendant that he had a warrant and intended arresting one M., made for the purpose of wrongfully extorting payment of a sum of money from M., when defendant did not arrest, nor undertake to arrest, M., does not constitute the assumption of the functions of an officer, or an attempt to exercise the privileges, powers, or duties incident or belonging to an officer.

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

STATEMENT BY THE COURT.

Appellant was indicted for the crime of impersonating an officer, and upon his trial was convicted and given a sentence of two years in the penitentiary.

The proof on the part of the State was made by the prosecuting witness, Os Martin, Ben Fears, with whom the prosecuting witness was boarding, and Lela Mann, a sister of the prosecuting witness. Fears testified that he went with appellant to the field where Martin was plowing, and that appellant told Martin he had a warrant for him, and was going to arrest him. Upon being asked about his warrant, appellant stated that he had a warrant issued against Martin because Martin had told appellant a lie in a trade for a horse, by reason of which appellant had been induced to trade for a horse upon which there was a mortgage, and which he had subsequently lost on account of this mortgage. Appellant told Martin that he had consulted an attorney, and had been advised that he could arrest Martin or let him go without arresting him, and he stated to Martin that if he would confess that he had lied to him, and would pay him $5, that he would not make the arrest. That appellant stated that he had gotten $5 from one Jim Warvell, a boy who was with appellant at the time the horse trade was made, and the $5 which he claimed to have so received was exhibited at the time. That Martin, who was spoken of by the witnesses as being a boy, had no interest in either of the horses which were traded, but appellant insisted that Martin had stated that the owner of the mortgaged horse had a right to trade it, and although Martin at first denied having made this statement, he subsequently admitted that he had done so. This admission, however, was only made after appellant had manifested great anger, and had threatened to assault Martin. Fears further testified that when appellant first began to talk, he acted like an officer, and wound up acting like a man who wanted to fight.

Martin testified that appellant claimed that he (Martin) had told him a lie and caused him to get cheated out

of his horse, and that he had a warrant for him, but would let him go if he would pay $5, and he admitted having told a lie, but said he did so in order to avoid a personal difficulty with appellant.

Lela Mann testified that she met appellant as he was going down to see her brother, and that he told her he was going to get her brother, and would bring him back within a short time, but that he would let Martin out of his trouble, if he would pay him $5, as the Warvell boy had done.

No witness testified that appellant claimed to be an officer, nor was there any evidence that he actually undertook to arrest Martin. On the contrary, he merely stated that he had a warrant for Martin's arrest, and was going to arrest him. During all of this conversation in the field, Martin stood between his plow handles, leaning against his plow.

Martin further testified that when appellant first came up to him, he thought he was joking, but when he saw that he was very angry, he decided appellant wanted to fight, and he admitted having lied to avoid being whipped, as appellant was much larger than he was, but that appellant did not arrest him, and did not try to arrest him, and that he did not think appellant was going to arrest him, but thought he was going to fight him.

We do not set out the evidence offered on behalf of appellant, but it was to the effect that he had only attempted to collect $5 as damages upon account of the fraud perpetrated upon him.

Among other instructions, the court gave the following:

"In this case, defendant, Bev Martin, is charged with the crime of impersonating an officer. (Reads indictment.) The statute under which this charge is preferred reads that, 'No person shall assume to exercise, or attempt to exercise, any of the functions, powers, duties or privileges incident or belonging to the position or office of special deputy sheriff, special constable, special deputy marshal, and policeman, or other peace officer, without

having been legally and duly appointed as such, or has been summoned by some peace officer as provided by law.' "

T. W. Campbell, for appellant.

The evidence does not sustain a verdict of conviction under the statute upon which this prosecution is based. Taking all of the testimony on the part of the State as true, no case of impersonating an officer is made out within the meaning of the statute. Kirby's Dig., § 1965.

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

We think the proof brings this case within the law declared in section 1964, Kirby's Digest.

SMITH, J., (after stating the facts). The instruction set out above is substantially the language of section 1964, of Kirby's Digest, under which section this prosecution was had.

Other instructions applying the section above quoted to the facts of this case were given, to which exceptions were duly saved, but we find it unnecessary to set them out.

It appears from the evidence, which we have set out, that the jury might have found the facts to be that appellant claimed to have a warrant authorizing him to arrest Martin, and that appellant announced his intention of doing so. But there was attached to the announcement of his purpose to make the arrest the condition that he would not do so if Martin would pay $5 as damages, and it appears that appellant's purpose was either to collect this $5, or to whip Martin in the event he failed to pay. He may have been deterred from the accomplishment of either of these reprehensible purposes by the presence of Fears and his interposition in the discussion. But there is no evidence that appellant ever actually undertook to arrest Martin.

"An arrest is made by placing the person of the defendant in restraint or by his submitting to the custody of the person making the arrest." Section 2122, Kirby's Digest.

The person of Martin was not placed in restraint, nor did he submit himself to the custody of appellant, but, upon the contrary, Martin testifies that he did not think appellant meant to arrest him.

(1-2) To constitute the offense of impersonating an officer under the section above quoted, it is not sufficient that one falsely asserts that he is an officer, and has the authority to act as such, nor is it sufficient that he declares his intention to act as such; but to constitute this offense, it is essential that he assumes or exercises, or attempts to exercise, some of the functions, powers, duties, or privileges incident or belonging to the office which he asserts he holds at the time. Appellant did not arrest Martin, nor did he undertake to do so. He merely stated that he had a warrant and falsely declared his purpose of making an arrest. But such false statements, even though made for the purpose of wrongfully extorting payment of a sum of money, did not constitute the assumption of the functions of an officer or the attempt to exercise the privileges, powers, or duties incident or belonging to an officer.

We are not called upon to decide what, if any, violation of the law appellant committed by his conduct, as it is sufficient, for the purposes of this case, to say that the proof is insufficient to sustain a conviction under the section above quoted, and the judgment of the court below is, therefore, reversed and the cause remanded for a new trial. *France* v. *State,* 68 Ark. 529; *Reed* v. *State,* 97 Ark. 156; *Jones* v. *State,* 85 Ark. 360.

COX v. STATE.

Opinion delivered September 28, 1914.

1. CRIMINAL LAW—RIGHT TO WITHDRAW PLEA OF GUILTY.—Where defendant voluntarily and without improper influence entered a plea of guilty, it is within the discretion of the trial court, at a later term, to allow defendant to withdraw that plea or to refuse to do so, and that discretion is not abused, where the court under these facts, refuses to permit the withdrawal of the plea of guilty.

2. CRIMINAL PROCEDURE—JUDGMENT AT SUBSEQUENT TERM.—Sentence may be pronounced on a plea of guilty at a term subsequent to that at which the plea was entered.

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

STATEMENT BY THE COURT.

The appellant was indicted at the December, 1912, term of the Greene Circuit Court for assault with intent to kill. He entered his plea of guilty, and the cause was continued until the December, 1913, term of the court. At that term the prosecuting attorney asked that the appellant be sentenced. The appellant thereupon filed the following petition:

"Comes the defendant and moves the court to set aside the plea of guilty heretofore entered by defendant in this cause, and says that he had no attorney at the time of the agreement to enter said plea, and that he was not able to employ an attorney; that he was called and forced to go to trial, and that on account of his inability to procure the aid of an attorney, and on account of his own inability to attend said trial, he entered his said plea.

"That he was not in fact guilty of an assault to kill, as charged in the indictment then pending against him, and that he was not advised, and did not know the full consequences of his said plea.

"That the witnesses to the fight for which he was indicted are within the jurisdiction of this court, and that they may be had upon usual process. Defendant says that he was justified in striking Ben Bowlin in his necessary self-defense, and that a trial of said cause will disclose.

"Wherefore, he prays that he may be permitted to withdraw his plea of guilty, and enter his plea of not guilty, and have a trial before a jury, and for all other proper and legal relief."

The court heard testimony on behalf of the appellant to sustain his motion, to the effect that he had endeavored to employ an attorney, but did not succeed because he was unable to pay the fee. He entered his plea

because he was mad, and did not have any one to assist him. He testified that the attorney whom he endeavored to employ advised him that he was not guilty, and that he could be cleared before a jury, and that he was advised to enter a plea, and the matter would be dropped.

The attorney to whom he had spoken testified that the appellant was unable to pay him the fee that he charged, and that he was not employed because the father of appellant was not willing to indorse the note for appellant to obtain the money, and that the appellant "became mad because his father had thus deserted him and walked up in a spirit of anger and pleaded guilty."

This attorney testified further that the court advised appellant at the time he entered his plea that at any time thereafter the court saw fit, the court could have appellant arraigned and sentence him to the penitentiary on his plea of guilty, from one to twenty-one years.

Appellant also, concerning this, testified as follows: "I did not know the result of entering the plea. It is true Judge Driver, who was on the bench, did tell me something in substance about what would be the result," and, on cross-examination, "I understood what Judge Driver said, but I was not thinking about that; I was mad and worried."

There was much other incompetent and irrelevant testimony heard by the trial court, to the effect that since appellant entered his plea of guilty, he had committed various misdemeanors, and also other testimony to the effect that appellant, since he entered his plea, had worked on a farm and made a good farm hand.

The court denied appellant's petition to set aside his former plea of guilty, and granted the prosecuting attorney's motion to have appellant sentenced, and the court thereupon sentenced the appellant to twenty-one years in the State penitentiary, and this appeal has been duly prosecuted.

No brief for appellant.

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

WOOD, J., (after stating the facts). The court did not err in overruling the appellant's motion to set aside his plea of guilty entered at a former term of the court, and in sentencing appellant upon such plea. The appellant was twenty-four years of age. He was advised by the court of the legal consequences of such plea.

(1) The statute provides for the appointment of counsel upon the request of one who has been indicted for a felony where he is unable to employ any. Kirby's Digest, § 2273. Appellant made no request for the court to appoint counsel to defend him. On his motion to set aside the plea of guilty, he did not offer to introduce any testimony that tended to prove that he was not guilty of the crime charged, and his testimony was not sufficient to show that he was induced to enter a plea of guilty under a misapprehension of the facts. His plea of guilty was entered voluntarily, and there is nothing in the record to show that the plea was improperly entered. It was within the discretion of the court, under the evidence adduced, to allow appellant to withdraw his plea of guilty entered at a former term, or to refuse to allow him to do so. There was no abuse of the court's discretion. *Joiner* v. *State,* 94 Ark. 198.

(2) This court has held that sentence may be pronounced on a plea of guilty at a term subsequent to that at which the plea was entered. *Thurman* v. *State,* 54 Ark. 120; *Greene* v. *State,* 88 Ark. 290; *Joiner* v. *State,* 94 Ark. 198; *State* v. *Wright,* 96 Ark. 203; *Barwick* v. *State,* 107 Ark. 115.

The judgment is affirmed.

CHAMBERS v. OGLE.

Opinion delivered September 28, 1914.

APPEALS—BOND FOR COSTS—PRACTICE IN SUPREME COURT—NONRESIDENT APPELLANT.—Under Kirby's Digest, § 1198, which provides that "the appellant may be required to give security for costs under the same circumstances that plaintiffs in civil actions may be so required," a nonresident appellant, who has appealed to the Supreme Court,

will be required to execute bond, with surety to be approved by the clerk, conditioned that he will pay the costs of the appeal in the event that the judgment be affirmed or the appeal dismissed.

Appeal from Madison Chancery Court; *T. H. Humphreys,* Chancellor; motion sustained.

John W. Grabiel, for appellant.

Wade H. James, for appellee.

PER CURIAM: Appellees filed a motion, alleging that appellant is a nonresident of the State, and asking the court to make an order requiring him to give bond for costs, pursuant to section 1198, of Kirby's Digest, which provides that "the appellant may be required to give security for costs under the same circumstances that plaintiffs in civil actions may be so required."

The statute relied on clearly gives this court the power to require a nonresident appellant to give bond for costs, but the question is, what should be the terms and conditions of the bond, whether to pay the whole costs of the action, or merely the costs of the appeal.

The statutes provide that nonresident plaintiffs and corporations, with certain exceptions, shall give bond for costs upon the commencement of an action, and upon failure to give such bond, the action may be dismissed. Kirby's Digest, § 959, *et seq.*

The word "circumstances" used in section 1198 refers to the fact of nonresidence, and not to the terms of the bond. This section deals with parties as appellants, and not with respect to their status in the lower court; whereas, the general sections on the subject apply only to plaintiffs. It necessarily follows that in dealing with the party as an appellant, it was the design of the lawmakers in this section to require security for the costs incurred on appeal, and not the costs of the whole action; otherwise, the requirement would amount to a denial of the right to appeal without supersedeas of the judgment for costs. There is nothing in our statutes which appears to militate against the right of any party to appeal from the judgment against him without being

required to give bond to supersede such judgment; but the provision of the section now under consideration is one dealing with the costs of the appeal and requiring a nonresident appellant to give bond for costs of the appeal.

An order will therefore be entered, in accordance with that section requiring the appellant in this case to execute bond, with surety to be approved by the clerk, conditioned that he will pay the costs of the appeal in the event that the judgment be affirmed or the appeal dismissed.

HUNT v. STATE.

Opinion delivered September 28, 1914.

1. ASSAULT WITH INTENT TO RAPE—DEFENSE—IMPOTENCY.—Mere impotency on account of failing powers from old age is no defense to the crime of assault with intent to rape.
2. ASSAULT WITH INTENT TO RAPE—CRIME OF.—The essence of the crime of assault with intent to rape is the violence done to the person and feelings of the injured female.
3. WITNESSES—CROSS-EXAMINATION—CREDIBILITY. — Kirby's Digest, § 3138, as amended by Act No. 52, 1905, providing for the manner of impeaching witnesses has no application to the cross-examination. of a witness for the purpose of testing his credibility.
4. CRIMINAL LAW—DEFENDANT AS WITNESS—CROSS-EXAMINATION—CREDIBILITY.—The defendant in a criminal prosecution, when he takes the witness stand, places himself in the attitude of any other witness, and he may be interrogated concerning specific acts of his own for the purpose of testing his credibility.
5. CRIMINAL LAW—DEFENDANT AS WITNESS—CREDIBILITY—FORMER CONVICTION.—Where the defendant in a criminal prosecution offers himself as a witness, on cross-examination it is improper to ask him concerning an indictment or accusation against himself, but for the purpose of testing his credibility he may be asked about a judgment of conviction.

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

Lamb & Caraway, for appellant.

1. The court erred in its charge to the jury defining the crime of assault with intent to commit rape, in omitting from such definition the necessary element of pres-

ent ability to commit the offense. Under the rule prevailing in this State, there can be no assault without, first, an attempt, and, second, present ability to carry the attempt into effect. Kirby's Dig., § 1583; *Id.*, § 2009.

The crime of rape can not be committed by one not legally or physically able to commit the offense. Where one is impotent, either as a presumption of law because of his youth, or because of some permanent or temporary disability, can not, during the existence of such disability, be guilty of rape. 1 Wharton's Crim. Law (9 ed.), § 552; 2 Bishop's New Crim. Law, § 1116.

In jurisdictions where an assault is defined to be an attempt, coupled with "present ability" to commit the offense, an impotent man can not be convicted of the crime of assault with intent to commit rape. 49 Ark. 179; 77 Ark. 37; 38 N. W. (Dak.) 440-442, 443; 18 Ala. 521; 1 Wharton, Crim. Law (9 ed.), § 552; 51 Pac. (Utah) 818.

2. The court erred in requiring appellant to testify with reference to his arrest and conviction in Randolph County. Kirby's Dig., § 3138; 70 Ark. 272; *Id.* 107; 79 Ark. 347; 100 Ark. 199; 103 Ark. 28; 78 Ark. 284.

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

1. Impotency is a defense against a charge of committed rape, but it is not a defense where the charge is assault with intent to commit rape. 2 Pick. (Mass.) 380; 127 Ia. 689; 32 Ind. 220; 38 N. W. 440; 2 Bishop, New Crim. Law, § § 737, 738.

2. There was no error in requiring appellant to testify in reference to his arrest and conviction in Randolph County. He had testified in his own behalf, and, on cross-examination, the State had the right to inquire into his arrest and conviction. 100 Ark. 199-202.

McCULLOCH, C. J. This is an appeal from the judgment of conviction of the crime of assault with intent to commit rape. Appellant was seventy-four years of age at the time the crime was alleged to have been com-

mitted, and the accusation is that the assault was made upon a young woman in the city of Paragould.

The testimony is conflicting, but is sufficient to warrant the finding that he made the assault with intent to have carnal knowledge of said female forcibly and against her will.

The evidence of the injured female is that she resisted successfully, and that the appellant finally desisted before the consummation of the enforced act of intercourse.

Appellant's testimony tended to show that on account of his extreme age and failing powers, he had lost all desire for sexual intercourse, and was physically unable to consummate such an act. In the trial of the case, his attorney asked the court to give an instruction to the jury to the effect that the offense was not complete unless the accused was capable of consummating the act of intercourse—in other words, that impotency was a defense to the charge of assault with intent to commit rape.

Our statute defines an assault as "an unlawful attempt, coupled with present ability to commit a violent injury on the person of another." Kirby's Digest, § 1583. That definition has been applied by this court in determining the essential elements of the crime of assault to commit murder, the court holding that "both the intention and the ability to commit a battery are necessary to constitute an assault." *Pratt* v. *State,* 49 Ark. 179.

Professor Wharton, in his work on Criminal Law (eleventh edition, Vol. 1, § 690), lays down the rule broadly that impotency is a sufficient defense to an indictment for the consummated crime of rape, though not for an assault with intent to rape.

In another part of the same volume (section 223), he says: "If there be juridical incapacity for the consummated offense (*e. g.* infancy), there can be no conviction of the attempt; and, therefore, a boy under fourteen can not, according to the prevalent opinion, be convicted of an attempt to commit a rape, as principal in the first degree. It is otherwise when the incapacity is merely ner-

vous or physical. A man may fail in consummating a rape from some nervous or physical incapacity intervening between attempt and execution. But this failure would be no defense to the indictment for the attempt. At the same time there must be apparent capacity."

Mr. Bishop also lays down the rule that impotency is no defense to the charge of assault with intent to commit rape.

(1-2) The decisions on this subject are neither abundant nor clear, but we are convinced that the rule stated above by the learned text writers is the sound one, and that mere impotency on account of failing powers from old age is no defense to the crime of assault with intent to rape. The essence of the crime is the violence done to the person and feelings of the injured female. Complete consummation of the act of sexual intercourse is not essential even to the crime of rape; a partial penetration, without emission, being sufficient to make that crime. It follows, therefore, that the crime of assault with intent to commit a rape may be complete even though the perpetrator lacks physical vigor to consummate the act.

Appellant testified in his own behalf, and on cross-examination, counsel for the State drew out the fact that several years ago appellant had been convicted of a similar offense, alleged to have been committed on the person of another woman, and sought to draw out from him an admission that he had committed the offense. Appellant admitted that he had been so convicted, but denied that he was guilty of the charge. Objection was made to this line of examination, and an exception was duly saved, and is now pressed as grounds for reversal.

Counsel for appellant rely upon the statute of this State (Kirby's Digest, § 3138, as amended by the Act No. 52, of 1905, p. 143), which declares that "A witness may be impeached by the party against whom he is produced, by contradictory evidence by showing that he has made statements different from his present testimony, or by evidence that his general reputation for truth or morality

render him unworthy of belief, but not by evidence of particular wrongful acts, except that it may be shown, by the examination of a witness, or record of a judgment, that he had been convicted of a felony."

(3-4-5) That statute has no application to the cross-examination of a witness for the purpose of testing his credibility. On the contrary, it has been held that the defendant in a criminal prosecution, when he takes the witness stand, places himself in the attitude of any other witness, and that he may be interrogated concerning specific acts of his own for the purpose of testing his credibility. *Hollingsworth* v. *State,* 53 Ark. 387. He can not be asked about a mere accusation or indictment (*Benton* v. *State,* 78 Ark. 284), but for the purpose of testing his credibility, he may be asked about a judgment of conviction. *Vance* v. *State,* 70 Ark. 272. Such matters are collateral to the issue and affect only the credibility of the accused as a witness, but are nevertheless competent for that purpose.

We are therefore of the opinion that there is no error in the record; and as the evidence was legally sufficient to sustain the conviction, the judgment must be affirmed.

It is so ordered.

WHITLEY v. STATE.

Opinion delivered September 28, 1914.

1. TRIAL—RIGHT OF COURT TO ADMONISH JURY TO RETURN VERDICT.—It is not error for the court to admonish the jury of the importance of a case, and to express the hope that they may be able to arrive at a verdict.
2. TRIAL—ADMONITION TO JURY TO RETURN VERDICT—OPINION OF COURT.—After the jury in a criminal case had deliberated six and a half hours, it is not error for the court to say to them, "There ought to be no difficulty in arriving at a verdict where the evidence is as plain and short as it is in this case," and such language is not an expression of an opinion upon the merits of the case as a whole, or upon any particular fact in evidence.
3. CRIMINAL LAW—EVIDENCE OF GOOD CHARACTER.—Good reputation prior to the commission of the crime of murder held no defense thereto, and evidence of defendant's good reputation is admissible

only as throwing light upon the question of who was the aggressor.

4. CRIMINAL LAW—GOOD CHARACTER OF DEFENDANT—ARGUMENTATIVE INSTRUCTION.—Where defendant is charged with the crime of murder, instructions that proof of defendant's good reputation and character, if strong enough, would warrant an acquittal, or prove that deceased was the aggressor, are argumentative and are properly refused.

5. CRIMINAL LAW—SCENE OF CRIME—VIEW BY JURY.—Under Kirby's Digest, § § 2379, 2380, it is proper for the court to send the jury to view the scene where it was charged a crime had been committed, solely in the custody of the sheriff, and it was unnecessary to send with the jury some one specially designated to point out the scene of the crime to them, where the scene of the crime and its surroundings had been described by witnesses to the court and jury.

6. CRIMINAL LAW—VIEW BY JURY—OATH BY SHERIFF.—In a homicide trial, where the sheriff had previously taken oath with reference to taking charge of the jury, it is not necessary to administer another oath to the sheriff before he took the jury for a view of the scene of the alleged homicide.

7. TRIAL—CRIMINAL LAW—VIEW BY JURY—DISCRETION OF COURT.—Whenever, in the course of a criminal trial, a view is necessary, the time during the trial for ordering and conducting it are within the discretion of the trial judge.

8. CRIMINAL LAW—VIEW—PRESENCE OF DEFENDANT.—Where the jury is sent to view the scene of an alleged crime at the request of defendant, and defendant fails to accompany them, he will be held to have waived his right to do so.

9. HOMICIDE—EVIDENCE—MOOD OF DECEASED BEFORE KILLING.—Proof that deceased was in a mirthful mood, before he was shot by defendant, when defendant has pleaded self-defense, while irrelevant is not prejudicial.

10. TRIAL—MULTIPLYING INSTRUCTIONS.—The court is not required to multiply instructions on the same issue.

Appeal from Prairie Circuit Court, Northern District; *Eugene Lankford,* Judge; affirmed.

STATEMENT BY THE COURT.

The appellant was indicted for murder in the first degree, and was convicted of murder in the second degree and sentenced to twenty-one years in the penitentiary for the killing of one Wesley Munn, and has duly prosecuted this appeal.

Jess Whitley and Wesley Munn were rival suitors for the hand of Miss Bessie Baty. The young men and

the young lady mentioned lived in the town of Des Arc. The young men had been assiduous in pressing their respective suits, and the young lady had decided in favor of Munn. This aroused the jealousy of Whitley to an extreme degree.

On Sunday evening prior to the killing, which occurred on Friday, January 2, 1914, Whitley begged Miss Baty to marry him, and she told him that she would not give up Mr. Munn for anybody, whereupon Whitley said "he wished Wesley Munn was in hell; that he could kill him like a chicken." The killing occurred about 9 o'clock in the morning. About two hours before the killing, Whitley purchased a new .38 Colt's double-action pistol. Immediately after the shooting, Whitley was seen going toward his store, and upon being asked what was the matter, said, "I got one long, tall son-of-a-bitch." This was said in his usual tone of voice and he appeared to be calm.

A witness who was in the store when Whitley entered some five or six minutes before the killing occurred, stated that he looked sick and his eyes were red; that she asked him if he was sick; he replied, "No," then drew a pistol and turned around. Witness said to him, "You must be desperate," and he replied, "I am," and turned and walked out of the store and went east.

Whitley and Munn, just before the shooting occurred, were seen standing in front of one Bethel's store, talking. The witness who observed them, stated that at that time neither was making any movements. The witness started down the street, and, on hearing shots fired, turned and looked around and saw defendant shoot at Munn. Munn had his hands drawn up at his elbows, and hallooed in a loud voice, "Oh, My God; he has shot me." During the shooting, Munn was turning from Whitley; Whitley was close to him—about five or six feet from him when the last shot was fired. Munn had one shot in his breast, one in his right side, and two in his left hip. Another witness testified that Munn had six shots; that one entered from the front, one from the side and four from the back.

The testimony of other witnesses tended to show that when they heard the shooting, they looked in that direction and saw one man following another and shooting at him. One witness testified that just before the shooting occurred, he observed Whitley walking along back and forth in front of Bethel's store. Immediately after the shooting, witnesses reached Munn, who was leaning against Bethel's store door, and he had commenced to fall. He fell to the floor and expired in a few moments. Witnesses examined his pockets and found no weapons.

The above are succinctly the facts as they were adduced in behalf of the State.

Witness Bethel testified, over the objection of appellant, that deceased came in witness's store just before the killing, and he and witness were joking just before he left the store and deceased seemed to be in a mirthful mood. Appellant excepted to the testimony as to deceased's frame of mind before the killing.

The defendant, in his own behalf, testified that Miss Baty had told him on the Sunday afternoon before the killing that Munn had said that before she and Whitley should marry, he, Munn, would kill them both; that in the same conversation she said that she cared more for the defendant than any one else she had ever been with. He denied that he had made any statements to the effect that he wished Munn was in hell, or that he could kill him like a chicken. He stated that he did not buy the pistol for the purpose of hunting up Munn and killing him, but for the purpose of protecting himself. Munn would not speak to defendant, and his manner was not friendly toward him. Defendant was a much smaller man than Munn, and had a crippled hand.

Defendant was out collecting bills, and in going to see a party to collect a month's rent, he had to pass by Bethel's store. There he saw Munn. He had, prior to that time, received a letter with Bessie Baty's name signed to it, which he was sure had been written by Munn. He was out in the middle of the sidewalk when Munn came out of Bethel's store. Munn hesitated, and they

faced each other, and defendant asked Munn "what his idea was for fixing up the letter the way he did." Munn replied, "You must be looking for trouble, and right now you will get it, and put his hand to his hip pocket and made a demonstration as though he were going to draw a pistol, and defendant drew his gun and shot him. When he had shot about twice, Munn commenced to move backward and sideways, backing off with his left side to defendant. Defendant advanced four or five steps toward him, and continued shooting. Munn, during the time, kept his right hand back under his coat and defendant looked for him to commence shooting at any time.

Several witnesses testified as to the good reputation of the defendant for peace and quietude.

The above are substantially the facts as they were developed, with much detail, in the testimony that was taken at the trial.

About thirty minutes before the jury returned its verdict, the jury came into court and stated that they had not agreed on a verdict. The court thereupon gave to the jury the following instruction;

"Gentlemen, this is an important case, and I do not want to hurry you, but hope you can arrive at a verdict in this case. There ought to be no difficulty in arriving at a verdict where the evidence is as plain and short as it is in this case; consider it carefully, but report as soon as possible." The defendant objected and excepted to the ruling of the court in giving the instruction. The jury had then been deliberating about six and a half hours.

The court also gave, over the objection of defendant, the following instruction:

"In this case the defendant sets up self-defense as his excuse for the killing. The law does not require him to establish his defense by a preponderance of the evidence, but it is sufficient if the testimony in the whole case raised a reasonable doubt as to whether he acted in necessary self-defense or not." The appellant duly excepted to the ruling of the court.

The court also gave the following instruction:

"There has been some evidence introduced bearing upon the good character of the defendant prior to the killing which you should consider in making up your verdict, but you are instructed that good reputation prior to the commission of the crime is no defense, and the evidence is introduced for the purpose of throwing light upon the question as to who was the probable aggressor; and if you are convinced by the evidence beyond a reasonable doubt that the defendant committed the crime as charged, the fact that his reputation was good prior to that time would be no defense." To the giving of this instruction, the defendant objected and saved his exceptions.

The appellant offered several instructions to the effect that the jury should consider the evidence of the good character of the defendant for peace and quietude, and that such good character, if proved to the satisfaction of the jury, might of itself create such a reasonable doubt in their minds as would justify them in returning a verdict of acquittal, and to the effect that defendant's good character for peace and quietude, when proved, was a strong circumstance to determine who was the probable aggressor, and also to determine whether or not the defendant shot in self-defense. These prayers for instructions were refused, to which appellant duly excepted.

Other instructions fully defining the various degrees of homicide and correctly declaring the law as to self-defense, were given, to which no objection is urged here.

Other facts stated in the opinion.

J. G. & C. B. Thweatt, F. E. Brown and *W. A. Leach,* for appellant.

1. When the jury returned into court and stated that they had not agreed upon a verdict, the court erred in stating that "there ought to be no difficulty, etc., where the evidence is as plain and short as it is in this case." It in effect nullified the instructions with reference to a reasonable doubt, by giving the impression that there was

in fact no ground for a reasonable doubt; and, since, if the evidence of defendant's innocence had been plain, it would have been the duty of the court to direct a verdict of acquittal, the jury, in the absence of such direction, were left to the assumption that the court looked upon the evidence of guilt as plain. Const., art. 7, § 23; 60 Ark. 49; 51 Ark. 147; 73 Ark. 573.

2. The court erred in its instruction as to the character of the defendant, in limiting the evidence as to character to the purpose of throwing light on the question as to who was the probable aggressor. It has a broader purpose than that. Character is a substantive fact, to throw light on the defendant's guilt or innocence, to be considered in connection with all the other evidence in the case. 104 Ark. 162-183. See, also, 28 Ark. 164; 34 Ark. 742; Hughes, Instructions to Juries, 785, § 757; 2 Brickwood Sackett, Instructions, § 2480; 5 Enc. of Law, 867; 3 Enc. of Ev. 8; 163 N. Y. 11.

3. It was error to send the jury to view the place of the killing, without accompanying them himself, or sending some one to point it out to them, without permitting the defendant to accompany them, and without administering to the jury the oath required by statute. Kirby's Dig., § § 2379, 2380; 15 Nev. 407; 47 Wash. 243; 30 Ark. 329; Underhill on Crim. Evidence, § 230; 78 Ky. 639; 70 Miss. 755; 22 Nev. 358.

4. Testimony that the deceased was joking and in a mirthful mood one or two minutes before the killing was improperly admitted. The character of the deceased in a homicide case is not relevant unless put in issue by the defendant, and in any event could not be proved by specific acts. Moreover, his frame of mind could not be classed as a part of the *res gestae.* 3 Enc. of Ev., 14; 11 *Id.* 367.

5. The court erred in refusing to instruct the jury as requested in defendant's proposed instruction No. 18, that the law does not require the defendant to establish his claim of self-defense by a preponderance of the evidence, but that it is sufficient if the testimony in the whole

case raises a reasonable doubt as to whether he acted in necessary self-defense or not. 98 Ark. 436; 85 Ark. 359.

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

1. The court's remarks to the jury, when they returned without a verdict, was in no sense an expression of opinion upon the weight of the evidence, but a commendable effort to impress upon them their duty to agree upon a verdict, and was clearly within the discretion and duty of the court. 98 Ark. 83-87.

2. The instruction as to the character of the defendant was correct. 34 Ark. 743; 44 Ark. 115-122.

3. There was no error committed in the sending of the jury to view the place of the killing. Both sides requested it. They were sent in charge of the sheriff under the same oath given them the night before not to permit any discussion of the case, etc., and the sheriff was also under oath, and instructed by the court to point out the place of the killing. 36 Ark. 284-289.

Appellant did not request leave to accompany the jury, and, therefore, waived that right. 108 Ark. 191.

4. The testimony as to the deceased being in a mirthful mood shortly before he was killed was not prejudicial.

5. Appellant's requested instruction 18 was properly refused. The same ground was covered by instructions given by the court. 100 Ark. 199.

WOOD, J., (after stating the facts). (1-2.) It was not error for the court to admonish the jury of the importance of the case and to express the hope that they might be able to arrive at a verdict. After the jury had deliberated for six and a half hours, it was not error for the court to say to them, "There ought to be no difficulty in arriving at a verdict where the evidence is as plain and short as it is in this case." The court, by this language, did not express an opinion upon the merits of the case as a whole, or upon any particular fact in evidence. It was a comment upon the character of the evidence as a

whole, but without any intimation of the opinion of the court as to whether the evidence tended to show guilt or innocence.

In *Bishop* v. *State,* 73 Ark. 568, we said: "It is entirely proper for a trial judge, and it is his duty at all stages of the deliberations of the jury, to make plain the obligation resting upon them, if possible, to agree upon a verdict consistent with the facts and the concurring individual convictions of each juror." See, also, *St. Louis, I. M. & S. Ry. Co.* v. *Devaney,* 98 Ark. 83-87, where we said: "The trial judge may properly admonish the jury as to the importance or desirability of their agreeing on a verdict."

The language used by the court in the case at bar was only an expression upon the part of the court of a desire to have the jury return a verdict in the case, but there was no intimation by the court that he was of the opinion that the evidence, as a whole, or any part of it, indicated appellant's guilt.

(3) The court's instruction on the good character of appellant for peace and quietude was in conformity with the law on that subject as announced by this court. See, *Kee* v. *State,* 28 Ark. 164; *Edmonds* v. *State,* 34 Ark. 743; *Rhea* v. *State,* 104 Ark. 162.

The only doubtful issue in the case was as to who was the probable aggressor. According to the testimony for the State, the appellant brought on the fatal rencounter without any provocation whatever. The testimony introduced on the State's behalf tended to show that the appellant armed himself and deliberately sought out Munn and shot him to death because he was a successful suitor for the hand of Miss Baty in marriage. Jealousy, according to the testimony for the State, was the only cause for the unfortunate killing.

On the other hand, according to the testimony of the defendant himself, he approached Munn for an explanation in regard to a letter which he, the appellant, conceived that Munn had dictated or caused to be written, and that thereupon Munn made a demonstration as if to

draw a weapon, when the appellant began shooting him in self-defense.

The only issue, therefore, that was determinative of the guilt or innocence of the accused was as to whether the defendant or the deceased was the aggressor. It was not error, in this state of the case, for the court to tell the jury that the evidence of good reputation prior to the commission of the crime was introduced for the purpose of throwing light upon the question as to who was the probable aggressor.

(4) Some of the prayers for instructions on behalf of appellant concerning good character told the jury that if good character was shown, it might of itself create such a reasonable doubt as would justify a verdict of acquittal; that "when proved strong enough, it will warrant the jury in believing the defendant innocent;" and, again, that "it is a strong circumstance to determine who was the probable aggressor," and, also, "to determine whether or not defendant shot in self-defense," etc. Instructions in this form were clearly argumentative and expressly told the jury that the effect of the proof of good character would justify them in believing the defendant innocent. These prayers for instructions were an expression of the court on the weight to be given to the evidence on this particular phase of the case, and were erroneous.

So much of the prayers concerning good character as correctly stated the law were covered by the instruction which the court gave.

The testimony of witnesses Horn and Staton tended to corroborate the testimony of the defendant himself to the effect that the deceased, during the shooting, had his hand at his hip pocket. The testimony of witness Austin Flynn tended to show that it was impossible for Horn and Staton to have seen what they claimed, on account of an iron column and other obstructions in their line of vision.

Thereupon, the attorneys for the State and for the defendant requested that the jury be sent to the scene of the killing in charge of the sheriff, and the defendant re-

quested that the court send witnesses Horn and Staton with the jury to the scene of the killing to show or point out to the jury their respective positions at the time the shooting occurred, or else to send some proper person who knew where Horn and Staton claimed to have been at the time of the shooting to so point out their respective positions at the time of the shooting to the jury. The court refused to send either Horn or Staton, or any other person, with the jury to point out the positions of Horn and Staton at the time of the shooting; to which ruling of the court the defendant at the time excepted.

The record shows that the court did not accompany the jury to the scene of the killing, and that he did not appoint any person to accompany the jury other than the sheriff and his deputy, nor did he appoint any person to point out to the jury the scene of the killing. The defendant was not with the jury while they were gone to inspect the scene of the killing, but remained in the custody of the officer. Neither he nor his counsel requested that he be permitted to accompany the jury to the scene of the killing.

Appellant made a request that the court postpone sending the jury to the scene of the killing until after witnesses Horn and Staton were called to the stand to point out on the drawing that had been introduced, and to testify as to their respective positions at the time the shooting was taking place. The court instructed the sheriff to proceed with the jury to the scene of the killing, saying that the above witnesses could be introduced later, and that the jury would be better able to understand the positions as pointed out to them. The appellant duly objected and excepted to the rulings of the court.

We find no error prejudicial to appellant in any of these rulings. The statute provides:

"When, in the opinion of the court, it is necessary that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, it may order the jury to be conducted in a body, in the custody of proper officers, to the

place, which must be shown to them by the judge or a person appointed by the court for that purpose.

"Such officer must be sworn to suffer no person to speak or communicate with the jury on any subject connected with the trial, nor do so themselves, except the mere showing of the place to be viewed, and return them to the court without unnecessary delay, or at some specified time." Kirby's Digest, § § 2379, 2380.

(5) The direction by the court to the sheriff to proceed with the jury to the scene of the killing was sufficient to meet the requirements of the statute. The scene of the killing had been accurately described by the witnesses who had testified before the view was requested, and from the description that had been given of the place where the fatal encounter took place the jury must have been fully apprised of the scene of the killing. It was therefore unnecessary, under these circumstances, to send some one specially designated to point it out to them. Besides, the direction of the sheriff to proceed with the jury to the scene of the killing was virtually an instruction to him to point out the scene to the jury. See, *Benton* v. *State,* 30 Ark. 328-350.

The testimony as to the location of the scene of the killing was not controverted. Under the evidence, there was no possibility of any mistake being made by the jury when they were directed to view the scene of the killing.

The sheriff and his deputy had been specially sworn in relation to their duties of keeping the jury together during the progress of the trial, and had been instructed not to allow the jurors to communicate among themselves, and they had been specially instructed not to communicate with the jury themselves, nor to allow any one else to do so.

The objections here made to the rulings of the court are well settled adversely to the contention of appellant in *Curtis* v. *State,* 36 Ark. 284-289, where we held as follows: "The place of the homicide, and its surroundings had been described to the court and jury, by the witnesses who had been examined, and it appears that the sheriff,

under the order of the court, conducted the jury to, and showed them the place to be viewed, by them. The sheriff was not only acting under his oath of office, but it appears had been previously specially sworn as to his duties in relation to keeping the jury together, etc., to their duties during the view, before proceeding to make it. * * *"

(6) True, no special oath was administered to the sheriff or his deputy on the particular occasion of sending the jury to make a view, but the record shows that the sheriff had the jury in charge the night before "under proper oath and instructions as to the guarding of the jury," and that the court "instructed the officers that they were under the same oath and instructions about guarding the jury as they were the night before, and not to permit any discussion of the case while they were viewing the scene of the killing, or while they were absent from the court room."

The requirements of the statute as to the oath to be taken by the officers and instructions to be given them were sufficiently met by the oath which the officers took and the instructions they received, as shown by the record in this case.

(7) The court did not err in refusing to postpone the sending of the jury to the scene of the killing until witnesses Horn and Staton had testified as to their respective positions at the time the shooting was taking place. As we said in *Curtis* v. *State, supra,* "Whether the view is necessary, and the time during the trial of ordering and conducting it are within the discretion of the presiding judge."

(8) The record shows that appellant was in court, and that neither the appellant nor his counsel requested that appellant be permitted to accompany the jury while they were gone to view the scene of the killing. This was a right which appellant had. *Benton* v. *State,* 30 Ark. 328; *Owen* v. *State,* 86 Ark. 317. But when his attorneys, for him, requested the view, and he and they for him failed to request that he be allowed to be present during

the view, this was tantamount to voluntary absence on his part, and he thereby waived his right. *Davidson* v. *State,* 108 Ark. 191-203; *McVay* v. *State,* 104 Ark. 629. It does not appear from the record that the court, either expressly, or by implication, deprived appellant of his substantive right to be present at the view. The court did not refuse to permit him to be present. In *Benton* v. *State, supra,* the record was sufficient to show a refusal by the court to permit the accused to accompany the jury to the scene of the killing, as held in *Owen* v. *State, supra.*

(9) The court did not err in admitting testimony to the effect that the deceased was joking and in a mirthful mood one or two minutes before the killing. It was not shown that Munn had declared any evil or serious design concerning the appellant on the morning of the killing, much less that he was bent on a mission of murder. On the contrary, the testimony of appellant himself shows that he approached the deceased for the purpose of an explanation of the letter, and that it was then that the deceased resented the inquiry. The proof showing that the deceased was in a mirthful mood two or three minutes before the fatal meeting, which he was not anticipating, although wholly irrelevant, could not have prejudiced the rights of appellant.

(10) The court did not err in refusing to give prayer for instruction No. 18, requested by appellant. The instruction was fully covered by other instructions which the court gave on that subject. The court correctly instructed the jury as to the principles of law embodied in the refused prayer by giving the statute concerning the burden of proving circumstances of mitigation that justified or excused the homicide, etc.

There is no error in the record, and the judgment is affirmed.

O'BRIEN v. ALFORD.

Opinion delivered September 28, 1914.

1. REPLEVIN—DELIVERY BOND.—In an action in replevin, where the defendant executed a bond "to abide the order and judgment of the court" with other stipulations, the bond, although not in the wording of the statute, *held* sufficient in terms to constitute a delivery bond wihin the meaning of Kirby's Digest, § § 6863 and 6870.
2. REPLEVIN—DELIVERY BOND—WORDING.—The statute does not prescribe any set form of words for a delivery bond, and conditions named therein, not required by the statute, may, where severable, be treated as surplusage.
3. DELIVERY BOND—SUMMARY JUDGMENT.—A summary judgment may be rendered in the trial court against the sureties on a delivery bond.

Appeal from Mississippi Circuit Court, Chickasawba District; *W. J. Driver,* Judge; affirmed.

STATEMENT BY THE COURT.

Appellees sued W. F. DeLong to replevy a promissory note. The order of replevin contained a capias clause, under which DeLong was taken into custody. DeLong executed the following bond:

"We undertake and are bound to J. E. Roberts, sheriff of Mississippi County, Arkansas, and to J. T. & M. M. Alford, plaintiffs herein, in the sum of eighteen hundred dollars, that the defendant, W. F. DeLong shall abide the order and judgment of the court in this action, and that he will deliver to the plaintiffs the property sought to be replevied in their complaint or in lieu thereof will pay to them the value of said property as the court may direct, if the plaintiff prevails in this action, and that said defendant, W. F. DeLong, shall render himself amenable to the order of the court, and that he will not depart from said court without exoneration from this bond and the order of the court.

(Signed) "W. F. DeLong,
"C. H. Hawkins,
"Zeph O'Brien."

This bond was signed by the appellants as sureties for DeLong. Appellees obtained judgment against DeLong for the amount of the note sued for, "or for the value of said note should defendant fail to deliver same to plaintiff, which value the court finds to be $900, with 8 per cent interest thereon from December 14, 1912, until paid."

At a subsequent term of the court, appellees moved the court to render judgment against the appellants as sureties on the bond of DeLong, and the court, after finding that appellees had been unable to collect their judgment against DeLong, proceeded to render judgment against the appellants for $900, with interest at 8 per cent per annum from December 14, 1912, until paid, and for costs.

Appellants caused a writ of *certiorari* to be issued from this court to quash the judgment against them.

Appellants, pro se.

The judgment is void, (1) because the bond was taken pursuant to section 6859, Kirby's Digest, and is, therefore, a bail bond. The sureties would not be bound unless an execution had been issued against the body of the defendant and returned "not found." Kirby's Digest, § § 315-326; 1 Ark. 152; 47 Ark. 388. (2) Because it is not a statutory bond for the retention of property. The conditions are not similar to the *one* required by section 6863, Kirby's Digest. 78 Ark. 237.

Appellees, pro se.

The bond in question is a substantial compliance with the statute, and that is all that is required. 40 Ark. 433; 10 Ark. 89; 14 Ark. 229; 97 Ark. 553; 5 Cyc. 747.

Where the statute prescribes what the substance of a bond shall be, without prescribing the form, the fact that the bond contains conditions in excess of those prescribed, will not render it void, but such conditions, where severable, may be rejected as surplusage, and the instrument will be valid, as to those which comply with the statute. 5 Cyc. 748; *Id.* 756; 76 Ark. 415.

WOOD, J., (after stating the facts). The only question on this appeal is whether or not the court erred in finding that the bond set out above is a statutory bond as prescribed by section 6863, of Kirby's Digest, which provides that the defendant "may cause a bond to be executed to the plaintiff in the presence of the sheriff by one or more sufficient sureties in double the value of the property to be affected that the defendant shall perform the judgment of the court in the action."

(1) The bond under consideration is sufficient in terms to constitute a delivery bond within the meaning of sections 6863 and 6870, of Kirby's Digest.

The appellants contend that the bond under consideration is a bail bond, executed under the authority of sections 6858 and 6859, of Kirby's Digest. These sections provide that when the defendant in replevin has been taken into custody, he may be discharged "upon executing to the officer," having him in custody "a bond in a penalty of at least double the value of the property, * * * conditioned that such defendant shall abide the order and judgment of the court in such action, and that he will cause special bail to be put in if the same be required."

The bond under consideration was not executed to the officer, and was not made to protect him in case the defendant made his escape, and was not present to abide the order and judgment of the court, and was in no sense a penal bond as provided under sections 6858 and 6859. It did not contain all the conditions required by the latter of the above sections. But the bond was executed to the plaintiffs (appellees here), and does contain the conditions essential for a delivery bond as prescribed by section 6863, *supra*. That section prescribed that the bond shall contain a provision "to the effect that the defendant shall perform the judgment of the court in the action."

(2) True, the bond under consideration contains more provisions than are necessary in order to fulfill the requirements of a statutory delivery bond, but that does not render the bond invalid. The statute does not pre-

scribe any set form of words for the delivery bond and the conditions not required may be treated as surplusage where they are severable, as they are in the present case, from the conditions which the statute requires. 5 Cyc. p. 748. See, also, *State* v. *Smith,* 40 Ark. 431-433.

In the sense in which the terms "to abide the order and judgment of the court" are used in the bond under consideration, they mean the same as the terms "to perform the judgment of the court," as prescribed by section 6863, *supra.* This would not be the case, of course, but for the other language used in the bond. In *Duncan, Trustee,* v. *Owens,* 47 Ark. 388, we held that these terms, when employed in connection with the capias clause of our statute in replevin constitute a bail bond as specified by sections 6858 and 6859, *supra.* See, Black's Law Dictionary, p. 7; Words & Phrases, vol. 1, p. 16; Anderson's Law Dictionary, p. 6, and cases cited in notes 1 and 2. See, also, *John Erickson* v. *F. A. Elder, et al.,* 34 Minn. 370; *C. M. Jackson* v. *State of Kansas,* 30 Kan. 88; *Hodge & Wife* v. *Hodgdon,* 8 Cush. (62 Mass.) 294.

(3) But, in the bond under review, the other language "he will deliver to the plaintiffs the property sought to be replevied, or in lieu thereof will pay to them the value of said property as the court may direct," shows that the purpose of the obligor and sureties was to execute a delivery bond, and this, with the other language, is sufficient to meet the requirements of the statute as a delivery bond. This language being used by the obligor and by appellants, his sureties, it is our duty to hold that it constitutes a delivery bond in compliance with the statute. See, *Crawford* v. *Ozark Ins. Co.,* 97 Ark. 549.

The court, therefore, did not err in rendering judgment summary against appellants under section 6870, of Kirby's Digest. The judgment of the circuit court is affirmed.

DENT v. PEOPLES BANK OF IMBODEN.

Opinion delivered September 28, 1914.

1. APPEAL—RULE ON STENOGRAPHER—PRACTICE.—The Supreme Court will not issue a rule on the stenographer in the circuit court to require him to furnish a transcript of the oral testimony taken in a cause; the remedy to require a transcript to be filed is in the circuit court.
2. APPEAL—BILL OF EXCEPTIONS—TIME FOR FILING IN THIRD CIRCUIT.—A bill of exceptions was prepared and submitted to the trial judge for approval, and was lost. *Held*, appellant within the time allowed by the court may have prepared a bill of exceptions containing his own recital of the oral evidence taken, and have the same approved by the judge, or, the action being in the Third Circuit, he may file a skeleton bill of exceptions under the terms of the special statute and later get the transcript of the stenographer's notes.
3. APPEAL—BILL OF EXCEPTIONS—THIRD CIRCUIT.—After the expiration of the time allowed for filing a bill of exceptions, in the Third Circuit, it is too late to incorporate a recital of the oral proceedings, except by a transcript made by the stenographer and approved by the judge.

Appeal from Lawrence Circuit Court; *H. L. Ponder*, Special Judge; motion overruled.

G. G. Dent, pro se.

PER CURIAM: Appellant filed a motion in which he alleges that from causes over which he had no control he has been unable to perfect the bill of exceptions in this case. The judgment appealed from was rendered by the circuit court of Lawrence County on September 5, 1913, and time (120 days) was given within which to prepare and file bill of exceptions. Appellant alleges that he was unable to procure a transcript from the stenographer within the time specified, and filed a skeleton bill of exceptions; and that thereafter he procured the transcript and delivered the same to the special judge, who presided at the trial of the cause; that the trial judge failed to return the transcript to him, but lost it; and that when he applied to the stenographer for another transcript, he found that the stenographer's notes had been lost, and that the stenographer, for that reason, was unable to fur-

nish another transcript. This occurred after the expiration of the time allowed for filing the bill of exceptions, and appellant is therefore left with only a skeleton bill without any record of the oral proceedings.

(1) He is not very definite as to the relief which he asks, but he does ask that the special judge, the stenographer, and the clerk of the court be cited to appear and make disclosures as to the lost papers. The allegations of the motion are to the effect that the stenographer's transcript and his notes have both been lost, and it would avail nothing to cite the officers named to appear here for disclosure. At any rate, this court has no authority over the stenographer, and the remedy to require a transcript to be filed, if the notes could be found, would devolve upon the circuit court.

The special statute in force in the judicial circuit whence this appeal comes provides that the appellant in the case "may file a skeleton bill of exceptions with the clerk without incorporating therein the stenographer's transcript, when said transcript has not been prepared and approved by the court or judge thereof, within the time allowed by law for filing the bill of exceptions, and the clerk shall insert said stenographer's transcript as, and after, same has been approved by the court or judge thereof, in the record of the Supreme Court, when the same is filed by the stenographer." Act No. 325, Session of 1911.

In the case of *Gibson* v. *Inman Packet Co.*, 111 Ark. 521, 164 S. W. 280, we held that under that statute, the stenographer's transcript, when approved by the judge, could be filed within the year allowed for an appeal.

(2-3) Appellant, within the time allowed by the trial court for filing the bill of exceptions, could have prepared a bill of exceptions containing his own recital of the testimony, and had that approved by the judge, or he had the right to file a skeleton bill of exceptions under the terms of the special statute, and later get the transcript of the stenographer's notes. After the expiration of the time allowed for filing the bill of exceptions, it was

too late to incorporate a recital of the oral proceedings, except in the manner prescribed by the special statute; that is, by the transcript made by the stenographer and approved by the judge.

Since it has become impossible for the stenographer to furnish another transcript, and the one prepared and delivered to the trial judge was never approved and has been lost, there appears to be no relief for appellant unless it be by an action in the chancery court to compel the appellee to submit to a new trial, as pointed out in several decisions of this court. *Kansas & Arkansas Valley Railroad Co.* v. *Fitzhugh,* 61 Ark. 341; *Little Rock & Hot Springs Western Rd. Co.* v. *Newman,* 73 Ark. 555; *Missouri & North Arkansas Ry. Co.* v. *Killebrew,* 96 Ark. 520. Whether the facts will justify relief in that direction, we are not called on now to decide. It is sufficient to say that under the facts stated in the motion, no relief can be granted here in the way of requiring the record to be perfected.

The motion is therefore overruled.

CANNON v. STATE.

Opinion delivered September 28, 1914.

1. VAGRANCY—EVIDENCE OF GAMBLING IN OTHER COUNTIES.—In a prosecution for vagrancy, testimony of witnesses to the effect that the defendant told them that he had been gambling in other counties, within twelve months of the finding of the indictment, is competent.
2. VAGRANCY—EVIDENCE—PREVIOUS ACTS.—Evidence of acts of gaming, before one year prior to the finding of the indictment against defendant, is admissible, being part of a series of acts indicating continuousness on the part of defendant, in going from place to place for the purpose of gaming.

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

Elmer J. Lundy, for appellant.

The court erred in admitting the testimony introduced by the State as to appellant's acts of gaming in order to prove vagrancy. All the essential acts of vagrancy

alleged must be clearly shown. 119 Ga. 427; 46 S. E. 628; 110 Ga. 915; 36 S. E. 293; 108 Mass. 17; 60 S. W. 880; 145 Ala. 682; 40 So. 88; 52 Ga. 574.

The court erred in allowing the admission of evidence as to whether or not the defendant had been at work, as it was no part of the offense charged in the indictment.

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

There was substantial evidence from which the jury found that appellant did go about from place to place for the purpose of gaming, and was thus a vagrant. 109 Ark. 130-134; 109 Ark. 138-150.

HART, J. The defendant, Wiley Cannon, was tried and convicted in the Polk Circuit Court of the crime of vagrancy, charged to have been committed by going about from place to place for the purpose of gaming. From the judgment of conviction, he has duly prosecuted an appeal to this court. The testimony is substantially as follows:

Witnesses for the State all testify that the defendant has resided in Mena, Polk County, for ten years or more, and had not, to their knowledge, done any work for the past five or six years. Some of them stated that he was a constant associate of a professional gambler named Davis.

One of the witnesses stated that he resided at De Queen, in Sevier County, and that about six months prior to the trial he had a conversation there with the defendant, in which the defendant told him that he was at De Queen looking for a "live one." The witness stated that he was familiar with gambling terms, and that the phrase "live one" is a term among gamblers to indicate some one with money who wants to engage in gambling at cards.

Another witness stated that the defendant told him that he had gone to Waldron, in Scott County, to engage in a game of cards, and that he went there for the purpose of "making a cleaning." Another testified that the

defendant told him that he had gone to Waldron, and had "got the worst of it" over there.

It was also shown that the defendant admitted that he had gone to Texas and had engaged while there in a game of craps, that he was frequently absent from Mena, and had been convicted in the circuit court of Polk County within the last twelve months of gaming.

Other testimony showed that he had been convicted of gaming prior to twelve months before the return of the indictment in this case. Other witnesses testified that they had seen the defendant gambling. Some of these games were within twelve months before the finding of the indictment in this case; others were prior thereto. No testimony was introduced in behalf of the defendant.

It is earnestly insisted by counsel for the defendant that the testimony is not sufficient to warrant his conviction.

In the case of *Davis* v. *State,* 109 Ark. 341, Davis was indicted and convicted in the Polk Circuit Court under the same statute under which the defendant in the instant case was indicted. The court held that section 2068, of Kirby's Digest, applies 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.

The court further held that where a defendant is charged with vagrancy under this section of the statute, evidence of games participated in by him in other counties is competent to show the purpose of his wandering about, whether to pursue a lawful vocation, or to habitually engage in the pursuit of gambling.

(1) Therefore, the testimony of witnesses to the effect that the defendant told them that he had been gambling in other counties within twelve months before the finding of the indictment was competent.

It was also shown by the State that the defendant had been engaged in gaming prior to twelve months before the finding of the indictment, and counsel for the defendant insists that this testimony was incompetent. The testi-

mony introduced by the State shows that the defendant had been engaged in gambling within twelve months prior to the return of the indictment against him, and also that he had been engaged in gambling prior to and up to twelve months before the finding of the indictment.

In the case of *Adams* v. *State,* 78 Ark. 16, the defendant was charged with the crime of incest. Evidence was adduced by the State to prove the illicit relations between the defendant and his niece, mentioned in the indictment, which occurred more than three years before the finding of the indictment. The court said:

"The evidence tended to prove that these illicit relations, constituting incest, commenced six or seven years before the finding of the indictment, and continued to the time when the act for which he was indicted was committed. This evidence, although it discloses other acts of incest with the same niece, the indictment for which is barred by the statute of limitations, is admissible for the purpose of showing the probability of the commission of the offense charged, and sustains the evidence of such offense. *Commonwealth* v. *Bell,* 166 Pa. St. 405."

(2) So, here, the testimony shows that the defendant had commenced gambling probably two years before the finding of the indictment and had so continued up to the time he was indicted, and although the acts of gaming prior to twelve months before the finding of the indictment were so remote in point of time that the statute of limitations would protect the defendant, if he were indicted for those acts, still proof of such act of gaming is admissible because it is one of a series of acts indicating continuousness on the part of the defendant in going from place to place for the purpose of gaming.

Therefore, we hold that the testimony was competent and are of the opinion that the evidence was sufficient to warrant the verdict.

The judgment will be affirmed.

SPIVEY AND LYNCH *v.* STATE.

Opinion delivered September 28, 1914.

1. EVIDENCE—NARRATIVE OF PAST EVENTS.—Narrations of past events are not admissible under the *res gestae* doctrine.
2. EVIDENCE—LETTERS OF DECEASED—ADMISSIBILITY.—In a prosecution for homicide, letters written by deceased to his daughter, stating that he was going to defendant's house pursuant to an agreement, and might be killed, *held*, not admissible in evidence as part of the *res gestae*.
3. EVIDENCE—NARRATION OF PAST EVENTS—RES GESTAE—ADMISSIBILITY.—In a prosecution for homicide, statements written by deceased in a diary, as to events which occurred upon the occasion of a previous visit to defendant, are inadmissible in evidence, as part of the *res gestae*.
4. EVIDENCE—RES GESTAE—NARRATIVE OF PAST EVENTS.—In a prosecution for homicide, evidence of statements made by deceased as to the object and purpose of his going to defendant's house held inadmissible, not being part of the *res gestae*.
5. EVIDENCE—TELEPHONE CONVERSATION.—In a prosecution for homicide, the daughter of deceased may testify as to what deceased said in a telephone conversation with defendant, when it is shown by other evidence that deceased and defendant did hold a telephone conversation at the time testified to.
6. EVIDENCE—COLLATERAL PROCEEDING AGAINST DEFENDANT.—In a prosecution for homicide, the pleadings in another action, wherein defendant was seeking a divorce from deceased, are inadmissible in evidence.
7. EVIDENCE—PLEADINGS AS EVIDENCE.—The statements made in the answer and cross-complaint in an action for divorce are *ex parte* statements, and are not evidence of the truth of the matters alleged therein.
8. EVIDENCE—HOMICIDE—RELATIONSHIP OF DECEASED AND DEFENDANT—MOTIVE.—In a prosecution for homicide, it is competent to show the pendency of a suit for divorce between deceased and defendant, as a fact to show the feeling and relationship between the parties, together with evidence of the grounds of the complaint or cross-complaint, as indicating the motive for the killing.
9. EVIDENCE—HOMICIDE—CONSPIRACY—MOTIVE.—One S. was charged with the crime of killing his stepfather, and his mother was charged with assisting in the crime. *Held*, evidence of the pendency of a suit for divorce between deceased and S.'s mother is admissible in a prosecution of S., under the theory that the killing was done in pursuance of a conspiracy.

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

Roy D. Campbell and *Thomas & Lee,* for appellants.

1. The testimony of the witness, Mabel Lynch to the effect that she heard the deceased talking over the telephone on Wednesday night before the killing to some person unknown to her, was incompetent and should have been excluded. 12 Cyc. 423; 3 N. Y. Cr. Rep. 483; 31 Tex. Cr. Rep. 349, 20 S. W. 753. See, also, 1 R. C. L., 477, § 13; 74 Pac. 275; 94 Ark. 404.

2. The court erred in admitting as evidence the notes of deceased to his daughter, dated May 7 and May 9, 1913, and the two entries dated May 7 and May 9, 1913, found in the diary of the deceased after his death. The writing of a deceased person is no more admissible evidence than his unsworn declarations while living. 23 Ark. 131. The notes to the daughter are incompetent to prove the matter contained therein, because they are mere hearsay and *ex parte* statements. 89 Ark. 471. And neither the notes nor the entries in the diary are admissible as part of the *res gestae.* 43 Ark. 100; Wharton, Cr. Ev. (9 ed.), § § 262, 263; 2 Bishop, Cr. Proc., § 625; 1 *Id.,* § 1086; 88 Ark. 454; 85 Ark. 479; 43 Ark. 292; 48 Ark. 333; 58 Ark. 272; 9 Am. & Eng. Enc. of L. 677; 24 Cal. 640.

3. It was error to admit as evidence conversations detailed by the witness Trice as having been had with the deceased on Wednesday and Friday before the killing. The conversations were not had in the presence of the defendants, nor communicated to them, and they were clearly not a part of the *res gestae.* 21 Cyc. 931; 94 Ala. 9; 145 Cal. 717; 141 Ill. 75; 84 Miss. 414; 163 U. S. 612; 26 Cent. Dig., tit. "Homicide;" 89 Ill. 90.

4. The court erred in permitting the clerk to read, as a part of his evidence, the pleadings in the divorce case pending between the deceased and Mrs. Lynch. The pendency of a divorce suit by the wife against the husband may be shown by parol as indicating a motive for the killing of the husband by the wife, but the record of the suit is not admissible. 57 Ind. 46; 66 Ind. 430; 13 Tex.

App. 478; 1 McLain's Cr. Law, § 416; 93 Mo. 193, 6 S. W. 118; 102 Mass. 1.

The pleadings in the suit of Mrs. Lynch against deceased would not be admissible for any purpose as against the defendant Spivey. 21 Ark. 329; 14 Ark. 640; 15 Ark. 280; 17 Ark. 60.

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

1. There is evidence in the record connecting Mrs. Lynch with the telephone conversation overheard by the witness Mabel Lynch, sufficient to make her testimony admissible on that point.

2. The facts set out in the notes and in the entries in deceased's diary were proved by other evidence in the case; hence their introduction as evidence, if erroneous, was not prejudicial. 108 Ark. 191. But it was not error to admit them in evidence. Declarations of the deceased person in a homicide showing that he was about to set out for the place where he was slain, have long been held to be admissible as explanatory of his purposes in going to the particular place. 96 Ala. 24; 90 Ala. 523; 27 Ala. 1; 13 Tenn. 259.

3. The testimony of witness Trice relative to what deceased told him was admissible for the same reason that the notes and diary entries were admissible.

4. The pleadings in the divorce case were admissible to show the motive impelling the appellant Mrs. Lynch to commit the crime.

HART, J. The defendants, Robert Spivey and Lillie D. Lynch, were indicted for the crime of murder in the first degree, charged to have been committed by Robert Spivey shooting R. C. Lynch while Lillie D. Lynch was present aiding and abetting him. The defendants were tried before a jury and convicted of murder in the second degree, their punishment being fixed at five years in the State penitentiary. From the judgment of conviction, they have duly prosecuted an appeal to this court.

The facts, so far as are necessary for a determination of the assignments of error presented, briefly stated, are as follows:

Robert C. Lynch was shot by Robert Spivey, between 10:30 and 11 o'clock p. m., on the 9th day of May, 1913, just after he entered the home of Lillie D. Lynch, in Monroe County, and was instantly killed. At the time he was the husband of Lillie D. Lynch and Robert Spivey was his stepson. Robert C. Lynch had been formerly married, and by his first wife had reared a family of girl children, all of whom were grown at the time he was killed. He separated from his first wife, and she brought suit for divorce against him. During the pendency of the suit, he boarded with the defendant Lillie D. Lynch, who was then Lillie D. Spivey. His first wife was granted a decree of divorce, and about twenty days thereafter he married Lillie D. Spivey and they moved to her farm in Monroe County, Arkansas, where they resided for about two years until their separation in the month of September, 1912. During their residence on the farm of the defendant Mrs. Lynch, Robert C. Lynch managed it. In October, 1912, the defendant Lillie D. Lynch instituted a suit for divorce against him, and also sought the recovery of certain property which she alleged Robert C. Lynch had taken from her farm and disposed of for his own use and benefit. This suit was pending at the time Robert C. Lynch was killed. During the pendency of the suit, Robert C. Lynch visited the defendant Lillie D. Lynch at her home. According to witnesses for the State, he visited her at least once a week, and their relations were friendly. According to the testimony of the defendants, he did not visit her more than once or twice a month, and during these visits they had quarrels about the division of the property, and their relations were confined to a discussion of their property affairs. Mrs. Lynch occupied as a bedroom one of the front rooms of the house, and her son, Robert E. Spivey, who was about thirty-five years of age, slept in the room immediately back of her bed-room. On the night Robert C. Lynch was killed, he entered the house

through a window in the room across the hall from the bedroom of Mrs. Lynch, between 10:30 and 11 o'clock p. m. Just after he entered the room, he was shot and killed by Robert E. Spivey. Mrs. Lillie D. Lynch was present.

At the time Robert C. Lynch was killed he had on an overcoat, which was buttoned up. In a pocket of the overcoat was a linen mask to which strings were attached. In another pocket was found an electric searchlight. Near the feet of deceased's body was found a .38 calibre pistol, cocked and on safety, the magazine filled with cartridges, and one of the cartridges in the barrel of the pistol. A large dirk was stuck down in the waist band of his trousers and supported by his suspenders. He had on a suit of winter underclothes, no top shirt or coat, and a pair of low-quarter shoes, over which were worn a pair of high top arctic overshoes.

The southwest window and screen of the room in which he was killed had been raised. The deceased's body was found lying crumpled up, face downward, near the raised window. His hand was partly under his body. A load of buckshot had entered his right breast just below the nipple, in a space three and one-half or four inches in circumference.

The theory of the State was that the defendant Lillie D. Lynch had an understanding with her son, Robert E. Spivey, that she would invite the deceased to her home on the night of the killing, that the deceased should enter the southwest window of the west room, and that upon his entering the room, defendant Spivey should shoot the deceased with his shotgun, that it might appear that the deceased had been killed by Spivey in the defense of their home. Evidence was adduced by the State to support this theory.

The theory of the defense was that the deceased came to the home of defendant without the knowledge of either of them, and for the purpose of obtaining certain papers which the defendant Lillie D. Lynch had in her possession, and which pertained to the litigation between them, and that the defendant Robert E. Spivey shot him in the

defense of their home, not knowing who he was nor for what purpose he had entered the house. Robert E. Spivey testified, in brief, that he was living with his mother at the time the deceased was killed; that the deceased had not been in the habit of visiting his mother at night since her separation from him; that on the night of the killing, his mother came into his room where he was sleeping, and told him to get up, that some one was breaking into the house; that he asked her where, and she told him in the west front room; that he got up, got his gun, and went out into the hall to the front room door; that he saw the bulk of something that looked like a man over near the window; that he fired two shots at him with his shotgun, and then ran out into the yard and rang a bell to alarm the neighbors; and that he did not know who it was who had entered the room, and had no suspicion whatever that it was the deceased, and no knowledge whatever that the deceased contemplated coming to the house that night.

The deceased was killed on Friday night, May 9, 1913. At the time of his death, he resided in Cotton Plant and lived in an office just in the rear of the home occupied by his former wife and daughters. On Wednesday prior to the killing, the deceased wrote a note to his daughter Mabel, which is as follows:

"May 7, 1913.

"Wednesday evening, 8 o'clock p. m.

"Am going to Saulsberg. Lillie has promised me this evening while there, if I would come back at 10 o'clock tonight she would raise the west parlor window and let me in. I could stay until daylight with her in the parlor, and no one would know I had been there. It may be a job up to assassinate me. If so, I have told Ben Trice all about the arrangements, and am going, so if I never come home alive, bury me by my loved ones.

"Your loving father,

"Robert C. Lynch."

Written on the back is the following note:

"I left this on my desk for Mabel, but as I did not go, went with Mabel to the picture show.

"R. C. Lynch."

The deceased did not go to see the defendant Lillie D. Lynch that evening, but instead went with his daughter to a picture show. The evidence for the State shows that Mrs. Lynch telephoned him on that evening not to come, but to defer his visit until a later time to be fixed by her. The note which the deceased wrote to his daughter was not delivered to her, but was left in his desk where she found it on the morning after he was killed. On the night he was killed, he wrote his daughter another note which he left in his desk, and which she found there on the morning after he was killed. That note reads as follows:

"Friday night, May 9, 1913.

"Mabel: If I do not get back tonight, look for me at Saulsberg; have an engagement with Lillie, in the parlor at 10:30 tonight. Will ride 'Nip.'

"Father."

It appears, also, that the deceased kept a diary which was found in his desk by his daughter after his death. An entry in his diary of the date of May 7, 1913, reads as follows:

"Wednesday, May 7, 1913.

"Phone rang and Lillie says, 'You know the business we were talking about?' 'Yes.' 'Will have to postpone until later, and not to come.' I told her I was ready to go. 'Wait until I can see you,' she answers. 'Your pleasure is my happiness,' so I did not go to Saulsberg tonight. Mabel came in office when I was pulling off my heavy clothing and overshoes. Told Ben Trice of the trip, and he advised against it, saying, 'You don't know what you will run up against.'"

It also appears than an entry was made in his diary of the date of May 9, 1913, on which day the deceased visited the defendant Lillie D. Lynch at her home, and the entry in the diary purports to be a statement of what

they did and said during that visit. He sets out in detail their lascivious conduct on the occasion of the visit, and states that the room was to be arranged so they might have sexual intercourse on his next visit. He also expresses a suspicion that he might be killed on the next visit, but said he was going to make it.

The letters and the contents of the diary were introduced in evidence over the objection of the defendants, and they assign the action of the court as an error for which the judgment should be reversed.

The Attorney General contends that the testimony was admissible as part of the *res gestae.* It is not possible to define accurately the declarations which should be treated as parts of the *res gestae.* The decisions of the courts of the different States are sometimes perplexing, and are often irreconcilable. But certain general principles are regarded as well settled.

In discussing the subject of *res gestae,* Mr. Wharton says: "The distinguishing feature of declarations of this class is that they should be the necessary incidents of the litigated act; necessary in this sense, that they are a part of the intermediate concomitants or conditions of such act, and are not produced by the calculated policy of the actors. They must stand in immediate causal relation to the act, and become part, either of the action immediately producing it, or of the action which it immediately produces. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act." Wharton's Criminal Evidence (10 ed.), vol. 1, page 504. See, also, Greenleaf on Evidence (15 ed.), vol. 1, § 108.

Again, Mr. Wharton, in discussing declarations and occurrences, as *res gestae,* says: "It is essential, however, to the admission of declarations under this exception, that they should have emanated instinctively from the act put in evidence. If they were before or after it, so as to be open to the suspicion of being self-serving, they are to be excluded. They are admissible, because

they are so wrought up in the body of the act that they can not be separated from it. In such cases, the act is part of the declaration and the declaration part of the act. The words and deeds form part of a common mass of signs which can not, in this sense, be distinguished." Wharton's Criminal Evidence (10 ed.), vol. 1, page 508.

In the case of *Carr* v. *State,* 43 Ark. 99, the court said: "*Res gestae* are the surrounding facts of a transaction, explanatory of an act, or showing a motive for acting. They are proper to be submitted to a jury, provided they can be established by a competent means, sanctioned by the law, and afford any fair presumption or inference as to the question in dispute."

It is urged by the Attorney General that the letters of the deceased to his daughter and the entries of his diary admitted in evidence were admissible under the principles laid down in the cases of *Hunter* v. *State,* 40 N. J. L. 495, and *State* v. *Pearce,* 87 Kan. 457, 30 Am. & Eng. Ann. Cases, 358, and case note. In these cases, and other cases of like character, it was held that statements of one starting on a journey as to where he came from, and where he was going are ordinarily admissible in evidence as a part of the *res gestae.*

The case of *Hunter* v. *State, supra,* contains an exhaustive and well reasoned discussion of the subject. The reason given for the admission of such testimony is that in the ordinary course of things, it was the usual information that a man about to leave home would communicate for the convenience of his family, information of his friends or regulation of his business. That is to say, the statements of the declarant as to where he was going explained his act of going, and, being a part of that act, excluded the evidence of design on his part, and are, therefore, admissible in evidence.

(1-2-3) It has been universally held, however, that narrations of past events are not admissible under the *res gestae* doctrine. So, also, expressions by the deceased of suspicions that he might be killed were simply expressions of his own state of feeling toward the defendant,

and did not, in any sense, characterize and explain his act in going to the home of the defendant. Surmise or suspicion as to what might happen to him, should he go to the home of the defendant, did not in any manner characterize or explain his act of going, and are not a part of that act. Therefore, under the well-settled rules of evidence laid down by the text writers and the adjudicated cases, they were not admissible in evidence. Neither was the declaration of the deceased as to what occurred when he visited the home of the defendant in the day time before he was killed that night, admissible as part of the *res gestae.* They were simply narrations of past events, and might have been made by design.

Under the cases relied upon by the Attorney General, it was permissible to prove the declarations of the deceased to the effect that he was going to the home of the defendant Lillie D. Lynch, to visit her. But his statements of what occurred on a previous visit and his suspicions of what might occur on a future visit were not admissible in evidence, and for the error in admitting them, the judgment must be reversed.

(4) The trial court also permitted a witness on behalf of the State to testify that he had had a conversation with the deceased prior to his going to the home of the defendant Lillie D. Lynch, and that the deceased had told him the object and purpose of going there, and the manner of his entrance which had been agreed upon between him and the defendant, Lillie D. Lynch. For the reason given above, the witness should have only been permitted to state that deceased told him that he was going to the home of Lille D. Lynch, to visit her.

(5) It is also objected by counsel for defendant that the court erred in permitting evidence of a telephone communication between the deceased and the defendant Lillie D. Lynch. The daughter of the deceased testified that on Wednesday evening preceding the killing, she was in her father's office and heard him say over the phone: "Hello, you say not come—you say not come tonight? All right, you let me know; good-by." It is urged by

counsel for defendant that this testimony should not have been admitted, because there was nothing to show that the defendant Mrs. Lynch was the person to whom her father was talking at the time. The State, however, proved by the telephone operator that Mr. Lynch had a conversation with his wife on that evening, and that the records of their office show a telephone call between Mr. and Mrs. Lynch on that evening at about the same hour as that testified to by the daughter of the deceased, and also that Mr. and Mrs. Lynch were accustomed to talking to each other over the telephone. This testimony sufficiently identified the conversation over the telephone. In Ruling Case Law, vol. 1, paragraph 13, page 477, the rule is stated as follows: "Communications through the medium of the telephone may be shown in the same manner, and with like effect, as conversations had between individuals face to face. But the identity of the party against whom the conversation is sought to be admitted must be established by some testimony, either direct or circumstantial; to hold parties responsible for answers made by unidentified persons opens the door for fraud and imposition." See, also, 12 Cyc. 423.

(6-7) Over the objection of the defendant, the State was permitted to introduce in evidence the proceedings in the divorce case, including the complaint of Lillie D. Lynch, and the answer and cross complaint of Robert Lynch. The suit for the divorce was a collateral proceeding, and the court should not have allowed these pleadings to be introduced in evidence against the defendants. This is especially true in regard to the answer and cross complaint of the deceased, Robert C. Lynch. The statements made in his answer and cross-complaint for divorce were merely his *ex parte* statements, and were not evidence against the defendants of the truth of the matters alleged therein.

(8) As a fact to show the feeling and relation of the parties to each other, it was competent to show the pendency of the divorce suit between them. The pendency of the suit, the parties to it, and the grounds of the com-

plaint or cross-complaint, whether for desertion, adultery, cruel treatment, etc., might properly have been admitted in evidence as showing the state of feeling between the parties and as indicating the motive for the killing. *Binns* v. *State,* 57 Ind. 46; *Pinckord* v. *State,* 13 Texas Court of Appeals 468; McClain on Criminal Law, vol. 1, § 416.

(9) This evidence would also have been competent against the defendant Robert E. Spivey, because, under the theory of the State, a conspiracy to kill the deceased had been formed between the defendants to this action.

Other assignments of error have been pressed upon us for a reversal of the judgment, but we do not deem it necessary to determine them, for they are not likely to occur on a retrial of the case.

For the error in the admission of the testimony as indicated in the opinion, the judgment will be reversed, and the case remanded for a new trial.

STATE USE AGRICULTURAL SCHOOL DISTRICT NO. 1 *v.* CRAIGHEAD COUNTY.

Opinion delivered July 6, 1914.

1. COUNTY FUNDS—COUNTY COURTS—COUNTY EXPENDITURES.—Under the Constitution, art. 7, § § 28 and 30, Const., 1874, the county and quorum courts have exclusive jurisdiction in all matters relating to the levying of county taxes and the making of appropriations for the expenses of the county, and the disbursement of money for county purposes.
2. COUNTIES—LEGISLATIVE AUTHORITY.—The Legislature has no authority under the Constitution to consider the merits of the various local affairs of the counties of the State.
3. COUNTIES—COUNTY FUNDS—LEGISLATIVE CONTROL.—The Legislature may enumerate, or limit, the purposes for which a county may expend its revenues, but it can not itself make appropriations of county funds.
4. COUNTIES—APPROPRIATION BY QUORUM COURT—VALIDATING ACT—VALIDITY.—The act of 1911, p. 1005, No. 352, Special Acts, validating an appropriation made by the quorum court, and directing the county judge to issue warrants in pursuance thereof, *held,* beyond the legislative authority, and does not validate the said appropriation.

5. AGRICULTURAL SCHOOLS—COUNTY PURPOSE—STATE INSTITUTIONS.—The Agricultural school of the First District, located in the city of Jonesboro, is a State, and not a county institution, and its support can not be a county purpose.

Appeal from Craighead Circuit Court; *J. F. Gautney,* Judge; affirmed.

STATEMENT BY THE COURT.

The appellant filed in the Craighead County Court a petition setting up that at the October term, 1910, the quorum court of that county had appropriated the sum of $10,000 to secure the location of one of the Agricultural schools provided for by Act No. 100 of the Acts of the General Assembly of 1909; that the trustees of said school had accepted the offer made to secure the location of the school in that county, and had located the school at Jonesboro in said county, and had purchased a large farm, and had erected buildings thereon, and that the school was being maintained and operated for the purpose of educating the citizens of Craighead County, and other counties, in the science of agriculture and the domestic arts and sciences, and by reason of the location of said school in said county, the inhabitants thereof had gained a special benefit. The claim was duly verified and a copy of the order of the quorum court making the appropriation was attached as an exhibit. The claim was rejected by the county court, and an appeal was taken to the circuit court, where, upon the trial of the cause, the appellant introduced the claim, and the appropriation of the quorum court, and offered to make the following proof in support of the claim. That the board of trustees of the school pursuant to the authority vested in them by Act No. 100 of the General Assembly of 1909, advertised they would locate the institution in the county paying the largest bonus therefor, taking into consideration conditions as to health, soil, etc., and after receiving donations from the citizens of Craighead County, the county supplemented the donations through its quorum court by appropriating the sum of $10,000 out of its revenues, which said board of trustees, after due consideration, accepted, and

voted to locate said agricultural school at or near the city of Jonesboro, and thereafter purchased a farm, erected buildings, and is now maintaining an institution as provided for by the said act of the Legislature, and these statements at the time were admitted to be true. Appellant further offered to prove that the location of said institution in the county was an internal improvement of local concern to the county in that the institution would be of greater benefit to the people of Craighead County than to the people of other counties, since it established an educational institution at the doors of the citizens of that county, and at less cost and less effort than the student body of other counties. Appellant further offered to show that the people of Craighead County derived more benefit than the people from other counties for the reason that the school is more accessible to the people of that county, and could be attended at less cost, and that the appropriation by the State for the maintenance of the said institution is largely spent in that county. This offer was denied and exceptions were saved.

The General Assembly at its 1911 session passed an act numbered 352, which is found at page 1005 of the Special and Private Acts of the session of that year. This act was entitled "An Act to Validate the Action of the Quorum Courts of Craighead, Mississippi, Jackson, Cross and Poinsett Counties in Making Appropriations to secure the Location and for the Establishment of the State Agricultural School for the First District." This act contained a preamble reciting that the quorum courts of the counties named had at their regular terms, on the first Monday in October, 1910, appropriated certain moneys out of the general revenue funds of their respective counties to secure the establishment of this school at Jonesboro, and recited that the board of trustees, relying upon the appropriations, had so located the school. This act declared the action of the quorum courts in making said appropriations, to be valid and binding, and the county judges of those counties were commanded, upon the demand of the board of trustees of said school, to make an

order directing the issuance of warrants for the amounts appropriated, on the treasurer of the respective counties for the purpose of paying said appropriations.

The court below made a general finding in favor of the county and disallowed the claim, and this appeal has been duly prosecuted from that judgment.

Rose, Hemingway, Cantrell & Loughborough, for appellant.

1. The claim of appellant should have been allowed. The location of the school was an internal improvement and of local concern and benefit to the county. The quorum court had authority to make the donation and appropriation. Acts 1911, p. 1005. Many courts of other States have passed on the question. The leading case is 12 Allen 500-507-8; 47 N. Y. 608; 101 U. S. 407; 76 Ill. 455; 84 *Id.* 544; 37 Ind. 155-162; 50 Mich. 7; 19 Pa. St. 258; 92 U. S. 312; 94 *Id.* 310; 113 *Id.* 7; 111 *Id.* 363.

2. This court has always maintained the sovereignty of the Legislature over counties which are merely political subdivisions of the State. 4 Ark. 473-486; 27 *Id.* 614; 28 *Id.* 317-328; 32 *Id.* 51; 33 *Id.* 497; 37 *Id.* 339; 56 *Id.* 148. Art. 7, § 28, Const., is certainly very broad.

Lamb & Caraway, for appellee.

1. The money of the county can not lawfully be appropriated or paid to appellant.

(a) The agricultural schools are State institutions, the entire burden of establishing and maintaining which devolves upon the State. The revenue to be expended for this purpose is to be derived from a tax imposed upon "all property subject to taxation," and shall be "equal and uniform throughout the State." Const. 1874, art. 16, § 5.

(b) The attempt to appropriate money of the county to the payment of this claim is also in violation of Constitution, art. 7, § § 28 and 30. 33 Ark. Law Rep. 225; 21 Ark. 40; 1 Cooley on Taxation, 187; 36 N. E. (Ohio) 472; 49 N. E. (Ohio) 477; 60 L. R. A. (Fla.) 539; 58 N. E. (Ind.) 1037; 61 Miss. 283.

(c) The appropriation is forbidden also by art. 12, § 5, Const. 32 Ark. 580; 50 Pa. St. 173. These agricultural schools are "institutions" within the meaning of the above constitutional provision. 4 Words & Phrases, tit. "Institutions;" Webster's Unabridged Dict.; 22 Cyc. 1373.

(d) It is conceded that Craighead County can not tax itself or be taxed for the location of an institution in some other county, yet the act under which appellant seeks to impose the burden upon that county, also undertakes to validate a similar attempt in other counties. Notwithstanding counsel's effort to the contrary, there is nothing in the resolution to the effect that the appropriation is made only upon condition that the school be located in Craighead County. So far as its language is concerned, the school could as well have been located in some other county, and the appropriation have been as valid. 57 Ark. 554; 52 Ark. 547; 42 N. W. 31; 9 Minn. 258-260-2; 9 Heisk. (Tenn.) 349-356-7; 17 Atl. 388; 52 N. W. (Mich.) 468; 39 N. J. L. 576; 20 S. W. (Tex.) 81.

2. The act of May 30, 1911, is invalid. The Legislature can confer authority upon local taxing bodies to such extent only as the Constitution permits, and no more, or, perhaps, it would be more correct to say, to such extent as is not prohibited by the Constitution.

SMITH, J., (after stating the facts). Provision was made in our present Constitution for the management of the internal affairs of the counties by the creation of county and quorum courts for that purpose. Section 28 of article 7, of the Constitution of 1874, provides: "The county courts shall have exclusive original jurisdiction in all matters relating to county taxes, roads, bridges, ferries, paupers, bastardy, vagrants, the apprenticeship of minors, the disbursement of money for county purposes, and in every other case that may be necessary to the internal improvement and local concerns of the respective counties. The county court shall be held by one judge, except in cases otherwise herein provided."

Section 30 of article 7 of the Constitution provides for the levy of taxes and the making of appropriations for the expenses of the county by the quorum court.

(1-2-3) The Constitution contemplates that these two courts shall have exclusive jurisdiction in all matters relating to the levying of county taxes, and the making of appropriations for the expenses of the county, and the disbursement of money for county purposes. The Legislature would be unduly burdened, if it was required to consider the merits of the various local affairs of the respective counties, and no such authority was given it. It is within the province of the Legislature to determine the various purposes for which, and the order in which, the quorum court may make appropriations for the various county purposes, and the Legislature has done this in section 1499 of Kirby's Digest. This section is subject to the Legislature's right to amend as it may deem proper to do; but while it may enumerate, or limit, those purposes for which the county may expend its revenues, it can not itself make these appropriations, otherwise a conflict of authority and of action might arise between the quorum courts and the Legislature, and the Constitution has undertaken to avoid this condition by vesting the exclusive authority to make these appropriations in the courts of the counties.

(4-5) We think the act of the Legislature above mentioned validating the appropriation and directing the county judge of Craighead County to make an order, directing the issuance of warrants of that county, is ineffective, and does not validate the action of the quorum court in making this appropriation. If the Legislature had the authority to direct the county judge to issue this warrant, pursuant to the action of the quorum court in making this appropriation, then it would have had the right to make this appropriation in the first instance, independent of the action of the quorum court, and as we have said, no such authority is vested in the Legislature. It may be true the Legislature could authorize the county court of any particular county to establish a school, or

other institution, to respond to the particular needs of that county, and might authorize a quorum court to make the necessary appropriations for its support and maintenance. But we are not called upon here to decide whether this could be done or not, for this is not what the Legislature here undertook to do. The agricultural school of the First District, located in the city of Jonesboro, is in no sense an institution of that county, and its support can not be a county purpose. A study of the act authorizing the establishment of this school makes it entirely clear that this school is a State institution. No officer of Craighead or any other county as such, has any voice in its control or management. The trustees vested with the control and management of the institution are appointed by the Governor of the State, subject to the concurrence and approval of the Senate, and any vacancy which may occur on the board of trustees is similarly filled, and these trustees have the entire control and management of the institution, and they employ the teachers and prescribe the course of study. The State has reserved to itself the right to complete control over this institution, and has assumed the burden of its maintenance, and appropriations were made therefor, not only in the act creating the district school, but in subsequent acts of the General Assembly. It is true the institution is located in Craighead County; but it was required that the school be located in some one of the counties constituting the First Agricultural School District, and Craighead was one of those counties, and all of those counties are parts of the State. A discretion was vested in the trustees, in the location of this institution, and they were directed to consider inducements which should be offered for its location; but the inducement contemplated was, of course, only such as might be lawfully made. It may be true, as appellant offered to prove, that Craighead County will derive certain benefits which will not be enjoyed by other counties of the State in that district, because of the location of the school in that county. Such institution located there is more accessible to the people

of that county; but such benefit does not deprive the institution of its character as a State institution. The act creating this institution necessarily contemplated that it was desirable that the institute should have as large attendance as possible, and it may be true of this institution, as it is of most other institutes of learning, that it will be more generally patronized by residents of territory immediately adjacent to it, than by citizens of territory more remote. But no right so to patronize and enjoy the benefits of the institution are conferred exclusively upon the people of Craighead County. Upon the contrary, section 9 of the original act provides that the tuition of the school shall be free, and that the trustees may limit the number of students from time to time, according to the capacity and means of the institution, and shall make rules of admission so as to equalize as near as practicable the privileges of the school among the counties, according to population. It is thus seen that if Craighead County was permitted to make this donation, its citizens would acquire no greater rights to the use of the facilities of the school, than those enjoyed by the citizens of other counties.

In 1899, the Legislature of the State of Florida enacted a law in regard to the militia of that State. It contained the following provision: "It shall be the duty of the board of county commissioners in each county in which there is a company, or battery of State troops, to provide each company or battery with an armory suitable for its meetings and drills and the safe storage of arms and equipments." In a proceeding to compel the commissioners of a county in that State to erect an armory, it was contended this act was void because it violated the provisions of section 5 of article 9 of the Constitution of that State, which reads as follows: "The Legislature shall authorize the several counties and incorporated cities or towns in the State to assess and impose taxes for county and municipal purposes, and for no other purposes, and all property shall be taxed upon the principles established for State taxation. But the cities and incor-

porated towns shall make their own assessments for municipal purposes upon the property within their limits." * * * The Supreme Court of that State, in the case of *State* ex rel. *Milton* v. *Dickenson and others,* 60 L. R. A. 539, 44 Fla. 623, held this act to be unconstitutional, and in so doing, said: "No body of the State militia, in other words, has any prescribed function or duty to perform exclusively in or for any particular county in the State, that it is not under equal obligation to perform in or for any other county of the State wherever the exigency may arise for its exercise. And whenever and wherever it is so called upon to act, it is there as the representative of the State's supreme sovereignty, and not as that of the county in which it acts. The place of residence of its individual members has nothing whatever to do with fixing its status, either as a State or county institution. The conclusion reached is that the militia of the State, and every part thereof, is essentially and necessarily a State institution, or, rather, an arm of the State Government, resort to which can only be had upon the failure of all other governmental authority; and that it can be, and should be, in the very nature of things, wielded only by the supreme sovereign power of the State; that it is in no sense such a county institution or establishment as that any particular county can exclusively be either authorized, or required, to impose taxes for its, or any part of its, maintenance. It is essentially a State institution, taxation for the support and maintenance of which can be imposed only by the State, and, when so imposed, such taxation is required by paragraph 1, of article 9, of our Constitution, to be at a uniform and equal rate upon all the taxable property throughout the State, and can not for such purpose be confined to or burdened upon the property in any one county, to the exclusion of any or all the other counties of the State."

Among other cases cited in that opinion in support of the language which we have quoted is the case of *Hutchinson* v. *Ozark Land Co.,* 57 Ark. 554. This Hutchinson case, *supra,* involved the validity of a tax sale where

the county court of Clay County, which county is divided into two judicial districts, had levied a higher tax for county general purposes in one district than in the other. Because of this inequality, that sale was held void, and Justice MANSFIELD there said: "If the taxes levied in the two judicial districts of Clay County were not county taxes within the meaning of the Constitution, then the county court has no power to levy them, and they were for that reason illegal. But if they were levied for county purposes, that made them county taxes, and the nature of such taxes required them to be imposed by a levy applicable to the entire county."

The validity of the appropriation of the quorum court of Craighead County depends upon the decision of the question whether or not the location and maintenance of this school was a county purpose, and a majority of the court are of the opinion that it was not; but that the school is one of the institutions of the State, and as such, the burden not only of its maintenance, but of its erection, must be borne by the State at large. *Cotham* v. *Coffman,* 111 Ark. 108; 163 S. W. 1183.

The judgment of the court below is therefore affirmed.

MCCULLOCH, C. J., and WOOD, J., (dissenting). It should be borne in mind that the Constitution of the State is not a grant nor an enumeration of the powers, but is merely a limitation, in so far as it is expressed, upon the legislative power. The Legislature is sovereign except as to the limitations expressed in the Constitution or necessarily implied therefrom.

In the instance now under consideration, the Legislature has not attempted to make a direct appropriation of county funds, but it has merely ratified or legalized what the county court had previously done, the appropriations made by the county court in regular session. And, conceding that there was no statute to authorize the appropriations at the time, the Legislature had power to ratify.

The majority hold that the agricultural school is a State institution, and that the Legislature had no power to localize it or to determine that any part of the benefits were local, so as to place the expenses or a portion of it on the county. With this conclusion, we are unable to agree. There is nothing in the Constitution which prevents the Legislature from classifying matters which may be the subject of local or county expenses. The numerous authorities cited in the brief of appellant abundantly sustain that proposition. The Legislature could, we think, extend authority to the county to use funds for the establishment of an agricultural school; and that being true, it could determine that a State institution was of sufficient local benefit to be treated as the subject-matter of appropriation of county funds for county purposes. The provision of the Constitution conferring jurisdiction upon the county court in matters "relating to county taxes, * * * the disbursement of money for county purposes, and in every other case that may be necessary to the internal improvement and local concerns of the respective counties," does not limit the power of the Legislature with respect to determining what shall constitute internal improvements. It does not take away the power of the Legislature to determine what shall constitute, in whole or in part, a matter of local concern. The county court is as much subject to the legislative will as any other functionary, except to the extent that the control may be limited by the express terms of the Constitution.

It seems clear to us that the Legislature has determined that the agricultural school is a matter of local concern in the county, to the extent of the appropriations made by the county court, and that it was within the power of the Legislature to do this.

SEITZ v. MERIWETHER.

Opinion delivered October 5, 1914.

1. APPEAL AND ERROR—CHANCERY—FINAL ORDER.—A decree which disposes of all the matters in issue between the parties and gives all consequential directions necessary to carry it into execution, is a final decree; but if such consequential directions be not given, though the decree may adjudicate as to the interest or right in controversy, it is not final.
2. APPEALS—REFERENCE TO A MASTER—PREMATURE APPEAL.—An appeal from a decree of the chancery court, referring to a special master, the accounts between the litigants, with instructions to report in accordance with the directions of the court, is taken prematurely, if taken before the master makes his report.
3. APPEALS—DECREE IN CHANCERY—FINALITY.—In an action by a levee district against the contractor, attorney and engineer, a decree against the attorney for a definite sum of money, being enforceable, is final, and a decree against the engineer enjoining him from serving any further as engineer, and enjoining the levee board from employing him, is also final, and the parties may appeal from the same.
4. APPEALS—CHANCERY—REFERENCE TO A MASTER—FINAL ORDER.—A decree against a defendant, referring his accounts to a master for an accounting is not final, and can not be reviewed on appeal.
5. ATTORNEY'S FEES—ST. FRANCIS LEVEE DISTRICT.—Under section 21, Act 172, p. 444, session of 1905, the Board of Directors of the St. Francis Levee District was authorized to employ an attorney and provided that "* * * fees to be paid such attorney * * * shall not exceed in any one year the sum of two hundred and fifty dollars;" *held*, the manifest intention of the Legislature was to limit the sum to be paid the district's attorney to two hundred and fifty dollars per annum, and when the board paid an attorney more than that amount, the district may recover back the same.
6. VOLUNTARY PAYMENTS—PUBLIC AGENCY—RIGHT TO RECOVER BACK.—Where a public agency, like a municipal corporation or improvement district, pays an officer or servant more than is authorized by the statute, the public corporation or district may recover back the said excess from the said officer or servant.
7. PUBLIC AGENCIES—PAYMENT OF EXCESSIVE FEES—RECOVERY—DEFENSE.—The officers and employees of public agencies are compelled to take notice of the limitations upon the authority of the governing body; and when they receive fees in excess of the amount authorized by statute, they can not defend a suit for recovery thereof on the ground that the payment was voluntary.
8. EQUITY JURISDICTION—IMPROVEMENT DISTRICTS—TAXPAYERS.—Equity will take jurisdiction of an action by taxpayers or dissenting di-

rectors of an improvement district, against the district to recover excessive fees paid employees of the district, where the directors refuse to bring suit to recover the excessive sums paid.

9. IMPROVEMENT DISTRICTS—SUIT BY TAXPAYER—CONSTITUTIONAL LIMITATION.—Section 13, art. 16, Const. of 1874, giving a citizen the right to prevent the enforcement of any illegal exaction, *held* not to include improvement districts, but it is the duty of equity to provide a remedy for a taxpayer whose interests are involved in the operation of improvement districts.

10. IMPROVEMENT DISTRICTS—OFFICERS AND EMPLOYEES—REMOVAL—JURISDICTION OF COURTS.—The statute creating an improvement district authorized the election of an engineer, and definitely fixed his term, *held* the power of appointment and removal being reposed in the board of said district, the courts will not attempt to exercise the power of appointment or removal.

11. IMPROVEMENT DISTRICTS—ILLEGAL ACTS—JURISDICTION OF COURTS.—The courts have power to prevent illegal acts of the board or engineer, but not the power to oust either from office. Act 172, p. 444, Acts 1905.

Appeal from Greene Chancery Court; *Charles D. Frierson,* Chancellor; reversed as to Mitchell; affirmed as to Spence; appeal of the contractors dismissed.

R. H. Dudley and *R. E. L. Johnson,* for appellants.

1. On behalf of appellant Spence, we contend:

(1) The act contemplates two separate attorneys, or one attorney to act in two separate and distinct capacities. Acts 1909, p. 429, § 21.

(2) The payment of $500 to him was voluntary, with full knowledge of the law and facts connected therewith, and, there being neither allegation nor proof of fraud, can not now be recovered back. 46 Ark. 167; 49 Ark. 70; 70 Ark. 5; 72 Ark. 552; 92 Ark. 309; 102 Ark. 159.

(3) The board, in making the allowance and payment to the attorney, acted clearly within their discretion, and the courts have no jurisdiction of the subject-matter.

2. On behalf of the appellant contractors, it is urged:

(1) Under the averments of the complaint, the chancery court had no jurisdiction to wrest the management, control and construction of the ditch and levee

from the board of directors and lodge the same in the chancery court. 5 Pomeroy, Equity Jur., § § 342-346.

Fraud will not be inferred against the majority of the board, because they refused to discharge the engineer on the demand of one member. Moreover, there is no allegation that his report was not true, nor that the members of the board had any knowledge of any irregularity or impropriety charged against either the engineer or the contractors. 153 S. W. (Ark.) 259.

(2) The decree deprives the contractors of their right to perform their contract under the direction of the board, and orders an accounting before a special master, when the proof fails to establish, and the court does not find, that either the board or the contractors were acting illegally, wrongfully or fraudulently. 168 Fed. 756; 115 S. W. 1090; 83 Ark. 554; 160 U. S. 1, 40 L. Ed. 319-337; 228 U. S. 610, 57 L. Ed., 989; 114 N. Y. S. 689; 118 N. W. 712; 49 So. 317; 201 Mass. 596; 88 N. E. 348; 76 N. E. 529; 208 Ill. 623.

(3) The decree as to the contractors is final in that it adjudicates adversely to them, that the complaint states a cause of action against them; that the court had jurisdiction to render the decree; that they are not entitled to pay for the refill of the muck ditch, and that they be required to render an account to a special master. 80 Ark. 513; 104 Ark. 379; *Id.* 641.

3. For appellant Mitchell:

(1) The chancery court was without jurisdiction to render the decree ousting him as engineer and restraining the board from continuing him in that position. Chancery has no jurisdiction to interfere by injunction with the acts of the board done in the exercise of the grant of power conferred by the legislative enactments, where there is no allegation nor proof of fraud on the part of the board in the selection of the engineer. 96 Ark. 424, and authorities cited; 160 S. W. (Ark.) 240.

The board proceeded in accordance with the power conferred by the acts of the Legislature. The board's

acts were therefore legal, and injunction did not lie. 22 Cyc. 880, and authorities cited.

M. P. Huddleston and *Block & Kirsch,* for appellees.

1. The St. Francis Drainage District is a public *quasi*-corporation, having no powers other than those expressly conferred by statute. 94 Ark. 380; 79 Ark. 229; 67 Ark. 413; 93 Ark. 491; 71 Ark. 4.

Where there is any doubt as to the existence of any of its powers, the doubt must be resolved against the district. 1 Dillon, Mun. Corp. (4 ed.), § 89. Its governing officers or board of directors are mere trustees of the funds and property of the taxpayers of the district, and accountable as such in equity for any abuse of their trust. 52 Ark. 541; 33 Ark. 704; 2 Dillon, Mun. Corp., § § 915-919. And taxpayers of the district may maintain a suit against such officers or board of directors to correct abuses and prevent misapplication of the funds. 54 Ark. 645; 101 U. S. 601; 121 Ill. 290; 103 Ind. 449; 23 C. C. A. 631. Equity has the power in such cases not only to grant relief by injunction, but also to compel restitution of funds unlawfully paid out. 61 Neb. 882; 85 Ark. 89; 75 N. W. (Wis.) 245; 101 N. W. (Ia.) 1055; 80 N. W. (Minn.) 694; 102 Wis. 181.

2. The statute, section 21, of Act 172, Acts 1905, under which appellant Spence was employed, contemplates the employment of but one attorney, and limits his compensation to the sum of $250 per annum. Even if the act contemplated the employment of two attorneys, the language of the act is sufficiently clear to limit their aggregate compensation to the sum of $250. Chancery was the proper forum in which to bring the suit, and had jurisdiction to order Spence to refund the five hundred paid to him without authority of law. Const. 1874, art. 17, § 13; 90 Ark. 219; 85 Ark. 89; 88 Ark. 353; 173 Ill. 331; 51 Ind. 325.

The rule as to voluntary payments, has no application to the facts presented here. 83 Ark. 275.

3. Under the provisions of section 15 of the act (Acts 1905, p. 442), it was the duty of the board of di-

rectors to withhold 15 per cent of the estimates furnished by the engineer to guarantee a faithful performance of the contract. Their failure to do this was contrary to the law, and gave any taxpayer of the district the right to come into equity to prevent such further payments and to secure redress for payments already made.

Any acceptance by the engineer of work that resulted from any change in the contract not in his power to make, could not be binding on the district, nor upon the taxpayers thereof. 100 Ark. 166. The board of directors themselves had no authority to change the contract after it had been let. Section 14 of the act; 93 N. W. (Minn.) 911; 97 *Id.* 420; 75 N. Y. 65; 43 N. E. (Ind.) 216; 135 Ala. 187.

McCULLOCH, C. J. The St. Francis Drainage District, covering certain territory in Clay and Greene counties, Arkansas, was created by a special statute enacted by the General Assembly of 1905, for the purpose of constructing drainage ditches and building levees in the territory described. The act named five directors and provided for the appointment of their successors by the Governor, and constituted the board a body corporate with authority to cause the improvement named above to be made and to do the other things necessary to carry forward the work.

A section of the statute with reference to the employment of an attorney reads as follows:

"The board of directors or the president thereof, may engage the services of an attorney for the purpose of enforcing the payment of delinquent taxes, and an attorney may also be employed by the board for the purpose of bringing or defending any suit which may be instituted by or against the drainage district, but in all cases of fees to be paid such attorney, shall be agreed upon in writing at the time of employment, and shall not exceed in any one year the sum of two hundred and fifty dollars." Section 21, Act 172, Session of 1905, p. 444.

The statute further provided that the board should effect an organization "by electing a president, a secre-

tary and a treasurer, who shall also be collector, and an engineer, and prescribe the duties and fix the salaries of said officers, not to exceed the amounts fixed by law," and further provided that said officers should be elected for two years at the first annual meeting of the board and biennially thereafter at regular meetings. The board was duly organized and W. E. Spence, an attorney-at-law, in Clay County, was employed as the attorney for the district, and J. D. Mitchell was elected as engineer. The board entered into two written contracts with A. W. Wills & Sons, one for the cutting of a ditch, and the other for the building of the levee as authorized in the statute, and the work was proceeded with pursuant to these contracts. Dissatisfaction subsequently arose on the part of two members of the board, and also on the part of many property owners and taxpayers in the district, concerning the operations of the district, the performance of the contract by the contractors, the method of paying the contractors, and the amounts so paid, and various other things which became the subject-matter of acute controversy. These differences resulted in the present action, instituted by two dissenting directors and several taxpayers against the other members of the board, the contractors, the engineer and the attorney.

In the complaint it is alleged that the contractors were making overcharges under the contract, and were being paid in excess of the contract price; that the stipulated percentage of estimates were not being reserved in accordance with the terms of the contract, and also that there are various other irregularities and inaccuracies in the account with the contractors. It is also alleged that the engineer had fraudulently approved the estimates of the contractors, and had also been guilty of fraud in padding his accounts for salaries of the assistant engineers in his employment. The complaint alleges further, that the attorney, Mr. Spence, had been allowed five hundred dollars as fees in excess of the amount authorized by statute. The prayer of the complaint is that the board of directors be restrained from paying the con-

tractors any further sums of money on account of the levee; that an accounting be had as to the amount of work done by the contractors, and the amount paid by them in accordance with the contract; and an accounting be had of the moneys paid to Mitchell, the engineer; that Spence be compelled to refund the excessive sum of five hundred dollars paid to him; and that the board be restrained from further employing Mitchell as the engineer; and that judgment be rendered in favor of the district for whatever sums are found to be due from the contractors, from Mitchell and from Spence.

All the defendants answered, in substance denying the allegations of the complaint with respect to the irregularities and errors in the account of the contractors or the allowances to them, and as to the misconduct of the engineer, and the unlawful payment of excessive fees to the attorney. The case was heard by the chancellor upon the pleadings, the documentary evidence, and the depositions of witnesses, and there was a finding by the chancellor in favor of the contractors on some items, and against them on others; against the attorney, Mr. Spence, for the five hundred dollars paid to him; and against the engineer, Mr. Mitchell, for sums paid to him in excess of the amounts paid to his assistants. The court thereupon rendered a decree against Spence, directing him to pay the treasurer of the district said sum of five hundred dollars, and making perpetual the temporary restraining order preventing the board from employing Mitchell as engineer. There was a reference to a special master of the accounts between the district and the contractors, with instructions to report in accordance with the directions of the court. Both sides saved exceptions and prayed an appeal to this court, but neither of the appeals was prosecuted within the time prescribed by law, and subsequently the defendants obtained an appeal from the clerk of this court. We have not before us the report of the master and the final decree of the court thereon, if such decree has been rendered.

The first question which arises is whether the decree rendered by the court, or any part of it, is final and appealable. It will be noticed from the above recital that the court did not award any amount for or against the contractors. The court merely made certain findings and referred the accounts to a special master for report.

(1) In the early case of *Crittenden* ex parte, 10 Ark. 334, the court laid down the rule that "a decree, which disposes of the matters in issue between the parties and gives all the consequential directions necessary to carry it into execution, is a final decree; but if such consequential directions be not given, though the decree may adjudicate as to the interest or right in controversy, it is not final."

The test announced in that case has never been departed from by this court, so far as we know, but has been reiterated in numerous later cases. *Haynie* v. *McLemore,* 12 Ark. 397; *Shegogg* v. *Perkins,* 34 Ark. 117; *Davie* v. *Davie,* 52 Ark. 224; *Cohn* v. *Huffman,* 52 Ark. 436; *Heffner* v. *Day,* 54 Ark. 79; *Batesville* v. *Ball,* 100 Ark. 496.

In *Davie* v. *Davie, supra,* Chief Justice COCKRILL, speaking for the court, said that "a judgment in equity is understood ordinarily to be interlocutory when inquiry as to matter of law or fact is directed preparatory to a final adjudication of the rights of the parties," but that, quoting from the Supreme Court of the United States in *Beebe* v. *Russell,* 19 How. 283, "where the decree decides the rights to the property in contest and directs it to be delivered up, or directs it to be sold, and the complainant is entitled to have it carried into immediate execution, the decree must be regarded as final to that extent, although it may be necessary for a further decree to adjust the account between the parties." In the same case it was also said that an appeal will be allowed "where a distinct and severable branch of the cause is finally determined, although the suit is not ended."

(2-3-4) Applying those tests, it is clear that the appeal of the contractors is premature and must be dis-

missed, but that the decree against defendant Spence, and also the decree against defendant Mitchell were final and appealable; the decree against the former being for a definite sum of money and enforceable; and against the latter enjoining him from serving any further as engineer of the board and enjoining the board from employing him. The further decree against Mitchell concerning his accounts with the board, and referring the same to a master for an accounting, was not final, and can not be reviewed under the record now before us.

(5-6-7) The appeal of Spence calls for a construction of the statute and the determination of the question whether or not he was entitled to collect the additional sum of five hundred dollars for his services as attorney of the board. He was first employed at a salary of two hundred fifty dollars *per annum* as the attorney for the board to represent the board generally and institute and defend all necessary suits. Subsequently, he was formally employed to institute suits for the collection of taxes and was allowed the additional sum of five hundred dollars. The contention is that the section of the statute quoted above contemplates the employemnt of two attorneys, or rather two distinct employments of an attorney to act in separate capacities, and that the limitation prescribed by the statute does not apply to both. We are of the opinion, however, from a careful perusal of the statute, that this construction is unsound, and that the contention can not be sustained. It is manifest that the Legislature intended to give authority to the board to engage the services of one or more attorneys for the purpose of bringing or defending suits and for the purpose of enforcing the payment of delinquent taxes; but the whole amount to be paid for attorneys' fees was limited to the sum of two hundred fifty dollars per annum. The board has no authority to expend more than that sum during any one year, whether one or more attorneys are employed for all the purposes named in the statute. The payment to Mr. Spence was therefore unauthorized, and the court was correct in ordering him to pay the amount

back to the treasurer of the board. The chancellor found that the fee charged was very reasonable, when measured by the standard of fees generally charged by attorneys for similar services, and we are thoroughly satisfied that that finding is correct. There is no evidence of fraud or bad faith in making the charge, for it appears that the question of construction of the statute was submitted to a disinterested attorney of high standing, who advised the board that they were authorized under the statute to pay this additional sum to Mr. Spence. But we are quite clear in our view that the statute does not authorize this payment, and it was unjustifiable, and the fact that it was made in good faith does not afford any reason why the attorney should not be ordered to pay it back to the district. The question of recovery of money voluntarily paid does not apply to officers and servants of a public agency like a municipal corporation or improvement district. The officers and the employees of such public agencies are compelled to take notice of the limitations upon the authority of the governing bodies; and when they receive fees in excess of the amount authorized by statute, they can not defend a suit for the recovery thereof on the ground that the payment was voluntary. *Arkansas Brick & Mnfg. Co.* v. *McConnell,* 70 Ark. 568.

(8) It is urged with much earnestness that the court could not assume jurisdiction in a suit of this kind at the instance of the taxpayers or dissenting directors, but we are of the opinion from the authority of the cases cited in appellees' brief that the jurisdiction of a court of equity is complete to grant relief under the circumstances set forth in the pleadings and established by the proof in this case. While there are no specific charges of fraud against the directors themselves, it is alleged that they made the excessive payment to Mr. Spence and have refused to bring suit to recover the sum, and this we think is sufficient to give the court jurisdiction to entertain the complaint of the property owners in the district.

The controlling principle is stated by Chief Justice ENGLISH, in the case of *Town of Jacksonport* v. *Watson,* 33 Ark. 704, as follows: "A court of equity may, at the suit of property holders or taxable inhabitants of a municipal corporation, restrain the corporation and its officers from making an unauthorized appropriation of the corporate funds. This is so because the corporation holds its money for the corporators, the inhabitants of the town or city, to be expended for legitimate corporate purposes, and a misappropriation of these funds is an injury to the taxpayer, for which no other remedy is so effectual or appropriate as an injunction."

We held in *Griffin* v. *Rhoton,* 85 Ark. 89, that a chancery court would entertain jurisdiction upon a complaint of taxpayers to require a public officer to pay back fees illegally collected.

(9) It is true, there is a provision in the Constitution to the effect that "any citizen of any county, city or town may institute suit in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever." (Constitution of 1874, § 13, art. 16), and it has been held by this court that the provision gives authority to a taxpayer to prevent the illegal disbursement of moneys by counties and municipalities. That provision of the Constitution does not include improvement districts, but the principle is the same, and it is the duty of the court of equity to mold a remedy for taxpayers whose interests are involved in the operation of improvement districts. Our conclusion is that the suit was properly brought to require Mr. Spence to refund the money illegally paid to him and to reach all other matters set forth in the complaint which involved the collection and distribution of funds of the district. In all cases where the district itself had the right to maintain an action to prevent the misappropriation of funds or to recover misappropriated funds, the taxpayers had a complete remedy in the event of the refusal of the board to institute such an action.

(10-11) The only remaining question in the case presented for our determination is whether or not the decree enjoining defendant Mitchell from further performing duties as engineer, and restraining the board from continuing him in that work, is correct. Without undertaking to decide at this time whether the charges against Mitchell were sustained by the proof, we are of the opinion that the court exceeded its power in undertaking to restrain the board from continuing Mitchell in his place as engineer. That amounted to ousting Mitchell from his place, whether it be called an office or an employment. The statute, as already shown, authorized the board to elect an engineer, and the term of his incumbency was definitely fixed by the statute. This authority was reposed in the board, and it would be an usurpation of authority for the court to attempt to exercise the power of appointment or removal. The court has the power to prevent illegal acts of the board or engineer, but not the power to oust either of them from office.

The decree against defendant Spence is therefore affirmed; the decree against Mitchell and the board, restraining the board from retaining Mitchell as engineer, is reversed and remanded with directions to dismiss the complaint as to that feature of the case. The appeal of Mitchell and the appeal of the contractors, A. W. Wills & Sons, concerning the state of the accounts between them respectively and the board, are dismissed as premature.

COTTON v. INGRAM.

Opinion delivered October 5, 1914.

1. APPEAL AND ERROR—EXCEPTIONS—REVIEW—SUFFICIENCY OF EVIDENCE.—Where no exceptions were saved to the introduction of testimony, nor to the instructions of the court, the only question presented for review on appeal, is the sufficiency of the evidence to sustain the verdict.
2. ANIMALS—SERVICE OF MALE—NEGLIGENCE.—One who furnishes the service of a male animal for breeding purposes is held to ordinary care to prevent injury to the female.

3. PRINCIPAL AND AGENT—AUTHORITY OF AGENT—PROOF.—The authority of an agent can not be proved by his own declarations.
4. PRINCIPAL AND AGENT—ACTS OF AGENT—APPARENT SCOPE OF AUTHORITY.—The principal is liable for the acts of his agent done within the apparent scope of his authority.
5. ANIMALS—SERVICE OF MALE—INJURY TO FEMALE—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.—Plaintiff's mare was injured while being served by defendant's stallion, due to negligence of defendant's son, who was in charge of the stallion. *Held*, under the evidence, defendant's son was acting for defendant within the apparent scope of his authority rendering defendant liable for his negligence.

Appeal from Van Buren Circuit Court; *George W. Reed,* Judge; affirmed.

G. C. Bratton, for appellant.

1. Agency can not be proved by the declarations of the alleged agent. 86 Neb. 519, 125 N. W. 1072; 31 Ark. 212; 33 Ark. 251; *Id.* 316; 44 Ark. 213; 46 Ark. 222.

2. If appellee knew that Martin Cotton had had no experience in handling stallions, he assumed the risk of injury to the mare.

3. Under the testimony, it was purely a question of law whether or not the injury was accidental; and if there was any negligence, appellee's own testimony shows that he was the negligent party, in allowing the mare, which he was holding, to make the move which caused the accident. 1 Am. & Eng. Enc. of L. 82.

Appellee, pro se.

1. Where acts are done within the apparent scope of the agent's authority, the principal will be held liable, even though the agent had no authority. Tiffany on Agency, 183, and authorities cited; 38 Ark. Law Rep. 348; 96 Ark. 456.

2. The relation of master and servant does not enter into this case, and the doctrine of assumption of risk does not apply. There is no assumption of risk where the damage is caused by negligence. 26 Cyc. 1180.

3. The evidence that the injury and death of the mare resulting from an entrance per rectum raises a presumption of negligence. 19 N. W. 961.

McCULLOCH, C. J. (1). A mare owned by the plaintiff died from injuries received while being served by a stallion, and this is an action against the defendant to recover the value of the mare on the ground that defendant's servant was negligent in handling the stallion when serving the mare. The plaintiff recovered judgment below and the defendant has appealed. No exceptions were saved to the introduction of testimony nor to the instructions of the court; therefore, the only question presented for review is whether the evidence was sufficient to sustain the verdict.

Defendant was not the owner of the stallion, but arranged with the owner, who lived in another locality, to let him have the stallion to stand at his farm during that season. The undisputed testimony of the defendant is that the owner of the stallion agreed to send the animal over on the last of March, but failed to send him until the fourth day of April, when defendant was away from home. Defendant had a son nineteen years of age, who, according to the testimony, looked after his father's stock during the latter's absence. The plaintiff took his mare over to defendant's farm on April 8 and she was served by the stallion in the absence of the defendant, and the latter's son attended to it.

There is a sharp conflict between the testimony of the plaintiff and that of the defendant's son concerning the incidents attending the service. The plaintiff testified that the young man held himself out as having authority to handle the stallion and as having sufficient experience to do so; but, on the other hand, the young man testified that he had had no experience and did not claim to be able to handle the stallion, but that he attempted to do so at the urgent request of the plaintiff himself. At any rate, the mare was injured while being served by the stallion, and the evidence is sufficient to establish negligence on the part of defendant's son in handling the stallion.

In a Michigan case, almost identical with this one upon the facts, Judge Cooley, speaking for the court, held

that the injury under the circumstances described was sufficient to make out a *prima facie* case of negligence. *Peer* v. *Ryan,* 54 Mich. 224.

A text book on the law of animals lays down a different rule, to the effect that under such circumstances it devolves upon the owner of the injured mare to prove negligence. Ingham on Animals, § 106.

Without attempting to reconcile those conflicting views of the law, it is sufficient to say that in this case the evidence was sufficient to warrant the jury in drawing an inference of negligent conduct from all the circumstances proved in the case, including the manner in which the mare was injured.

(2) The text book above referred to lays down the law to be that one who furnishes the service of a male animal for breeding purposes is held to ordinary care to prevent injury. There can be no question about that being the law.

(3-4) The most serious question in the case is whether the evidence is sufficient to show authority on the part of defendant's son to put the horse to the mare. The evidence on the part of the defendant is that when he left home he did not know that the horse was to be sent over to his place, as the time had expired by one day for the owner to send him. He testified further that he had given no instructions to his son concerning the horse, and that the act of his son was either induced by the request of the plaintiff himself or that it was gratuitous and without authority. The plaintiff testified that the young man told him that he had authority to handle the horse and that his father expected him to attend to the horse during that breeding season; but it is too well settled for controversy that the authority of an agent can not be proved by his own declarations. It is equally well settled in the law, however, that the principal is liable for the acts of his agent done within the apparent scope of his authority (*Brown* v. *Brown,* 96 Ark. 456), and on this theory of the case we think that the evidence sustains the verdict.

(5) The evidence is that the defendant's son was nineteen years of age and was left in charge of his father's stock during the latter's absence. The evidence does not show that the appearance of the young man indicated lack of discretion and physical strength of the average of those of his age, or that he lacked sufficient strength to handle the stallion under such circumstances. He was before the jury as a witness and they had the opportunity of determining whether or not he had the appearance of being a man able to do that kind of work. He held himself out to the plaintiff, according to the latter's testimony, as having sufficient experience to do so, and we can not say that under the circumstances the plaintiff was at fault in assuming that the young man was able to do what he proposed. Under those circumstances, we think that the act of the defendant's son was within the apparent scope of his authority. That being true, the evidence is sufficient to sustain the verdict, and the judgment is accordingly affirmed.

STROUD v. CONINE.

Opinion delivered October 5, 1914.

1. JUSTICES OF THE PEACE—INSTALLMENT CONTRACTS—JURISDICTION AS TO AMOUNT.—D. assisted S. in the sale of land and S. agreed to pay to D. $1,250 in installments of $125 at certain stated times. After three installments became due, D. sued S. in justice court for $375. *Held*, the justice court was without jurisdiction, and a judgment against S. was void.
2. JUSTICES OF THE PEACE—SETTING ASIDE JUDGMENT—NEW TRIAL.—Where a justice of the peace sets aside a judgment and grants a new trial, the judgment ceases to exist, and an affidavit for appeal, filed thereafter, amounts to nothing.
3. CERTIORARI—PURPOSE OF REMEDY.—A writ of *certiorari* can not be used as a substitute for appeal for the mere correction of errors or irregularities in the proceedings of inferior courts.
4. CERTIORARI—OTHER MODE OF RELIEF.—*Certiorari* is not the appropriate remedy if efficient relief may be obtained by a resort to other available modes of review.
5. CERTIORARI—REMEDY—JURISDICTION OF INFERIOR COURT.—A writ of *certiorari* may be used by the circuit court in the exercise of its ap-

pellate power and superintending control over inferior courts when the tribunal to which it is issued has exceeded its jurisdiction.

6. JUSTICE COURTS—JURISDICTION—TEST.—As a general proposition, the amount claimed or in controversy, is the test by which the jurisdiction of a justice of the peace is to be determined.

7. JUSTICES OF THE PEACE—JUDGMENT—JURISDICTION—CERTIORARI.—Where the amount demanded by plaintiff in an action in justice court exceeds the jurisdiction of the justice, *certiorari* may be invoked to set aside the judgment, the same having been rendered without jurisdiction.

Appeal from Benton Circuit Court; *J. S. Maples*, Judge; reversed.

STATEMENT BY THE COURT.

This action was commenced before a justice of the peace by A. J. Decker against H. L. Stroud to recover the sum of $375. A written complaint was filed and the foundation of the action was a written contract between the plaintiff and the defendant, set out in the complaint, which, in effect, recites that Stroud had sold to one Gregory a certain manufacturing plant for the sum of $25,000, payable in annual installments of $5,000 each; that for the assistance given him by Decker in making the deal Stroud was to pay Decker $125 upon the payment of each $5,000; and that when all the payments, amounting to $25,000, had been made he was to pay Decker an additional $125 on each $5,000 paid, making in all $1,250 for the assistance of Decker in effecting the deal.

The complaint alleged that Stroud and Gregory had entered into the written contract mentioned in the agreement above referred to, that the same is being carried out and is still in full force and effect, that three installments of $5,000 each had been paid by Gregory to Stroud, and that Stroud was indebted to him in the sum of $125 on each installment. The plaintiff prayed judgment against the defendant for the aggregate sum of $375.

On the 17th day of November, 1909, judgment by default was rendered in favor of the plaintiff against the defendant before the justice of the peace. On December 20, 1909, the defendant Stroud filed a motion be-

fore the justice of the peace to set aside the judgment against him and to grant him a new trial. On the same day the justice of the peace entered an order setting aside the judgment and granting the defendant a new trial. He then set the case for trial on the 1st day of January, 1910. On December 24, 1909, the defendant Stroud filed affidavit for appeal from the judgment rendered against him on December 17. On January 1, 1910, the plaintiff's attorney appeared, but the defendant made default, and judgment was again rendered in favor of the plaintiff against the defendant for the sum of $375. Stroud filed in the circuit court a petition for a writ of *certiorari*. At the March term, 1910, of the circuit court, Decker appeared by counsel, waived the issue and service of the writ of *certiorari* and consented that the transcript in the appealed case be taken as the record in the case, and also filed a motion to dismiss the appeal. The two cases were continued from term to term until the March term, 1913. At that time they were consolidated by consent and heard by the court. Before trial the plaintiff Decker had died and the case was revived in the name of W. H. Conine as his administrator. The circuit court dismissed the writ of *certiorari* and the appeal of Stroud, and from the judgment rendered the defendant has duly prosecuted an appeal to this court.

McGill & Lindsey, for appellant.

Appellee, pro se.

HART, J., (after stating the facts). It is contended by counsel for the defendant that the amount sued for was in excess of the jurisdiction of the justice of the peace and that his judgment was, therefore, void. In this contention we think counsel are right.

In Ruling Case Law, volume 1, page 352, it is said: "A contract to pay money in installments is divisible in its nature, that is, each default in the payment of an installment may be the subject of an independent action provided it is brought before the next installment becomes due; but each action should include every install-

ment due when it commenced unless a suit is, at the time, pending for the recovery thereof, or other special circumstances exist."

In the case of *Fort Smith Paper Co.* v. *Templeton,* 113 Ark. 490; 168 S. W. 1092, the court held: "A suit for monthly installments of rent due under a lease specifying a yearly rental payable in monthly installments is a 'single cause of action' within Constitution 1874, article 7, section 40, limiting the jurisdiction of justices of the peace in matters of contract to controversies where the amount does not exceed $300, and where the amount of the installments exceeds $300 the justice has no jurisdiction."

In the case of *State* v. *Scroggin,* 10 Ark. 327, the defendant had executed a written instrument agreeing to pay the State for the use of internal improvement the sum of $400 in five equal installments, payable in one, two, three, four and five years after date. The court held that several installments being due, a separate action could not be brought on each installment so due, but that one action for the breaches of the contract must be brought, and that for this reason the aggregate amount of installments due was the measure of damages and determined the jurisdiction of the court.

(1) So, here, there was a contract for an entire service, but the parties stipulated that payment for such service should be made periodically in fixed sums, and the failure to make three of these payments became the foundation of this suit. The plaintiff had a right to sue for the damages caused by the nonpayment of the installments as they came due, but, having waited until three installments became due before bringing his suit, the aggregate amount of the installments then due determined the jurisdiction of the court. The amount sued for by the plaintiff is the sum in controversy in this action and determines the jurisdiction. That amount being in excess of the amount for which suit may be brought before a justice of the peace under our Constitution, it follows that the judgment rendered by the justice of the peace in favor of the plaintiff against the de-

fendant on the 17th day of December, 1909, was without jurisdiction and void.

On the 20th day of December, 1909, the justice of the peace granted the defendant a new trial and entered an order setting aside the judgment renderd on the 17th day of December. On the 24th day of December, 1909, the defendant filed an affidavit for an appeal from the judgment rendered on December 17, 1909, and contends that this brought the case before the circuit court for trial anew. He relies on the case of *Cathey* v. *Bowen*, 70 Ark. 348. We do not think that case is an authority for his contention. There a motion for a new trial was filed by Cathey against whom Bowen had recovered judgment, and it was granted. Subsequently, Cathey asked to withdraw his application for a new trial, and prayed an appeal to the circuit court, which was granted. The court held that this left the judgment against him in full force. The reason given was that, taking the whole record together, it could be construed as nothing more than the filing of a motion for a new trial, which was afterward withdrawn by the party making it, leaving the judgment as entered by the justice of the peace to stand. There it was not shown that the justice of the peace ever set aside his judgment, and that was the controlling reason which moved the court to make its ruling.

(2) In the present case, the justice of the peace actually set aside the judgment and entered an order to that effect. Where a justice of the peace sets aside a judgment and grants a new trial, the judgment ceases to exist. 24 Cyc., 604-5.

The justice of the peace had set aside the judgment against the defendant before the defendant filed his affidavit for appeal. In other words, when the affidavit for appeal was filed there was no judgment against the defendant and his affidavit for appeal amounted to nothing. No appeal was granted him from the judgment subsequently entered by the justice of the peace. Therefore, the circuit court properly dismissed his appeal.

(3-4-5) The defendant, however, was entitled to have the judgment of the justice of the peace reviewed by *certiorari.* It is true, we have frequently held that a writ of *certiorari* can not be used as a substitute for appeal for the mere correction of errors or irregularities in the proceedings of inferior courts, and it is a general rule that *certiorari* is not an appropriate remedy if efficient relief can be or could have been obtained by a resort to other available modes of review. But one of the exceptions to the rule is that a writ of *certiorari* can be used by the circuit court in the exercise of its appellate power and superintendent control over inferior courts where the tribunal to which it is issued has exceeded its jurisdiction. *Merchants & Planters Bank* v. *Fitzgerald,* 61 Ark. 605; *Railway Company* v. *State,* 55 Ark. 200; *Gregg* v. *Hatcher,* 94 Ark. 54.

(6) As a general proposition, the amount claimed or in controversy is the test by which the jurisdiction of the justice of the peace is to be determined. *Thompson* v. *Willard,* 66 Ark. 346; *Little Rock, Miss. River & Tex. Ry.* v. *Manees,* 44 Ark. 100; *Lafferty* v. *Day,* 7 Ark. 258.

(7) A written complaint was filed before the justice of the peace in the instant case and the amount claimed for which judgment should be rendered against the defendant was $375. The amount claimed by the plaintiff is the sum in controversy and determined the jurisdiction of the justice of the peace. The amount demanded exceeded the jurisdiction of the justice of the peace, and, such being true, *certiorari* could be invoked to set aside the judgment rendered without jurisdiction.

The judgment is, therefore, reversed and the cause remanded, with directions to the circuit court to quash the judgment of the justice of the peace in favor of the plaintiff against the defendant.

LEE v. STATE.

Opinion delivered October 5, 1914.

CRIMINAL LAW—PANDERING—INDICTMENT—PROOF—VARIANCE.—In a prosecution for the crime of pandering, the indictment alleged that the female was brought to the home of L., "said home then and there being situated on Lake Street, in the city of * * *" *held*, the description of the house and street was descriptive of the offense, and must be proved as charged, and a judgment on a verdict of guilty, will be reversed, when the proof showed the house to have been situated on a street other than Lake Street.

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

W. W. Bandy, for appellant.

The cause should be reversed because of a fatal variance between the allegation in the indictment as to the location of appellant's house, and the proof thereof. The place or house of the appellant was descriptive of the offense, and should have been proved as alleged. 62 Ark. 459; 63 Ark. 312; 64 Ark. 188; *Id.* 235.

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

The act under which this prosecution is based does not make it material to show the particular place where the crime was committed, further than to prove that it occurred at some place in the State. Acts 1913, p. 407; 63 Ark. 312-314; Kirby's Dig., § 2229.

KIRBY, J. Appellant was indicted and convicted for a violation of what is known as the pandering act, for enticing Clarissa Grubbs, a female under the age of sixteen years, to become an inmate of an assignation place and engage in a life of prostitution, the indictment charging this place, towit:

"The home of her, the said Mrs. Lee, * * * said home then and there being situated on Lake Street, in the city of Paragould, Greene County, Arkansas, which said house was then and there a place where prostitution was practiced, encouraged and allowed," etc.

The testimony is otherwise sufficient to show the commission of the offense, but it is claimed that there is a variance in the proof, the only testimony introduced showing that the home of Mrs. Lee, or her house, was situated, not on Lake Street, in the city of Paragould, as charged, but upon a short street in that vicinity, and the majority of the court are of the opinion that the contention should be sustained.

The offense charged in this indictment is one of a local character or nature, consisting of enticing a female under age to visit or become an inmate of a place where prostitution is practiced, or an assignation house, and the place was properly descriptive of the offense, it being necessary to allege a place. *Bryant* v. *State,* 62 Ark. 459; *Jenks* v. *State,* 63 Ark. 312; *Adams* v. *State,* 64 Ark. 188; *Keoun* v. *State,* 64 Ark. 231.

In *Keoun* v. *State, supra,* the court said: "Where an indictment contains a necessary allegation, which can not be rejected, and the pleader makes it unnecessarily minute in the way of description, the proof must satisfy the description as well as the main part of the indictment."

A description of the house or place was descriptive of the offense, and, while the indictment would have been sufficient had it charged only "her home in Paragould," since the pleader charged specifically the location of the place upon a particular street, it also became descriptive of the offense, and material, and should have been proved as charged.

The testimony, having failed to show the commission of the offense, by enticing the girl into the home situated on Lake Street, as alleged, did not sustain the charge of the indictment, and the variance is fatal.

The judgment is reversed, and the cause remanded for a new trial.

GODFREY v. HUGHES & HALL.

Opinion delivered October 5, 1914.

1. ACCOUNT STATED—FRAUD OR MISTAKE—IMPEACHMENT.—An account stated may be impeached only for fraud or mistake.
2. ACCOUNT—BALANCE—EVIDENCE OF AGREEMENT AS TO BALANCE DUE.—In action on a note it is error to exclude evidence of an understanding between the parties that the note did not represent the true net balance of indebtedness between the parties.
3. ACCOUNT—FULL SETTLEMENT—EVIDENCE.—In an action on a note, when the issue is raised, the court should submit to the jury the issue of whether the note was given in full settlement of all transactions between the parties.

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

STATEMENT BY THE COURT.

Appellees are physicians and surgeons, and in that capacity attended the families of both appellants, and made settlement of their accounts as such with them on June 1, 1910. On that day appellant Holmes, in settlement of his doctor's bill, executed to appellees his note in the sum of $121.50, and on the same day Godfrey, the other appellant, in settlement of his doctor's bill, executed to appellees his note in the sum of $153, which note was signed by Godfrey as principal and Holmes as surety. The note executed by Holmes individually appears to have been paid, but suit was brought upon the other note, and this appeal is prosecuted from the judgment rendered in the suit upon that note. The suit on this note was begun in the court of a justice of the peace, and at the trial before the justice a set-off was filed by appellant Holmes amounting to $258.65, and judgment was rendered in his favor for the excess over the face of the note. An appeal was duly prosecuted to the circuit court, and, upon the trial there, appellees offered in evidence the note sued upon, the execution of which was admitted, and rested their case. Whereupon appellants, to maintain the issues on their part, introduced Holmes, who testified that he had had numerous transactions with appellees, but that no attempt was made

to make any settlement of any part of the amount due him. He testified that appellees presented him with a statement of his doctor's bill, the correctness of which he did not then, and does not now, question, but that no account was taken of the various items for which credit is now asked. He explains this by saying that appellees stated they desired to raise some money and wanted to use his note as collateral for that purpose; that a considerable part of his account against appellees was for horse hire, and at the time of the execution of the note appellees were then using one of his horses, and it was not known how much longer they would continue to use it, and no attempt was, therefore, made to ascertain and settle the indebtedness due him by appellees. In other words, the note represented only the amount of his doctor's bill, without taking into account the various credits to which he was entitled. He further testified that he signed this note relying upon appellees' promise to later settle their indebtedness with him.

Upon motion of appellees, this evidence was excluded, and the court then, over the objection of appellants, instructed the jury to return a verdict in favor of appellees, for the full amount sued for, less certain credits which were subsequent to the date of the note.

T. W. Campbell, for appellants.

The execution of the notes did not operate as an account stated. That doctrine has no application to the facts in this case. There was no account rendered to Holmes giving debits and credits, but was only a statement of debits, and the proof is that at the time Holmes executed the notes he expressly mentioned the horse hire and insisted that same be set-off against the doctor's bill, and that Hughes stated that they would pay him later for the horse hire.

It is the consent of the debtor that the balance claimed is the true amount of indebtedness between the parties, that imparts the character of an account stated.

52 Miss. 494; 10 Hump. 238; 1 Cyc. 379; *Id.* 366; *Id.* 381; 55 Ark. 376; 86 Ala. 238; 130 Mo. 668.

C. H. Henderson, for appellees.

An account stated is not subject to attack except for fraud or mistake. 64 Ark. 39; 80 Ark. 438; 41 Ark. 502; 68 Ark. 534; 80 Ark. 438. The settlement in this case resulting in the execution of the notes constituted an account stated.

SMITH, J., (after stating the facts). Appellees insist that the note represents an account stated and that it can not be impeached, as appellants do not allege, nor claim, that its execution was procured by fraud or is the result of any mistake, and this was evidently the view of the trial judge in directing a verdict in favor of appellees.

(1-2) It is true that an account stated may be impeached only for fraud or mistake, but we do not think this was an account stated. According to this excluded evidence, the parties were not undertaking to settle the balance due after taking into account the various debits and credits, but only the amount due appellees, the correctness of which amount is not now questioned. This note does not evidence an account stated, because it is the consent of the debtor that the balance claimed is and shall be treated as the true net balance of indebtedness between the parties that imparts the character of an account stated to an account, and that consent is lacking here. The rule is stated in 1 Cyc. 366, as follows:

"An account may be the foundation of an account stated, though it does not cover all the dealings between the parties. But the rule that an account may become a stated account without including all the dealings between the parties is confined to an account on one side, and while a stated account in such a case would be evidence of the correctness of the demand on the one side, it would not be conclusive against a demand on the other side, for, to support a plea of a stated account so as to conclude the parties in relation to all the dealings between them, the accounting must be shown to have been

final. Hence, the binding force of an account stated will not be given to the mere furnishing of an account or other transaction which was not with a view to asserting a claim, establishing a balance due, or finally adjusting the matters of account between the parties."

A substantially similar statement of the rule is found in volume 1, Ruling Case Law, 210, where it is said:

"In other words, the balance found need not be complete and final, for in the last analysis an account stated is nothing more than an agreement between the parties as to the items considered. If the agreement is that the balance found is final and complete, it constitutes an account stated as to every item; but, upon the other hand, a court can not limit the right parties have to make such lawful contracts as they choose, and, therefore, to agree as to certain items and leave open for adjustment or adjudication other items. The burden is on the person claiming that certain items were not included in an account stated to substantiate his claim. It is open for the parties to show in what regard the account stated was made, and that certain matters were excluded from consideration, and as to those matters they are not concluded by the account stated. And though the authorities are conflicting, the better rule seems to be that the giving of a note by a debtor to his creditor, nothing else appearing, is *prima facie* evidence of an accounting and settlement of all demands between the parties." Numerous cases are cited in support of the text which we have quoted. See also *Glasscock* v. *Rosengrant*, 55 Ark. 376-382.

(3) It follows, therefore, that the court erred in refusing to submit the issue as to whether or not the note was given in full settlement of all transactions between the parties, and for that error the judgment of the court below is reversed and the cause will be remanded for a new trial.

BAXTER COUNTY BANK *v.* COPELAND.

Opinion delivered October 12, 1914.

1. BANKRUPTCY—STATE AND FEDERAL LAWS.—The State insolvency act of June 26, 1897, was superseded by the bankruptcy act of Congress of July 1, 1908, insofar as the acts relate to the same subject-matter and affect the same persons.
2. FRAUDULENT CONVEYANCES—ALLEGATIONS OF FRAUD.—Mere general allegations that an assignment made by defendant of his assets was made to defraud his creditors is insufficient.
3. FRAUDULENT CONVEYANCES—CONVEYANCE OF EXEMPT PROPERTY.—Creditors can not complain where a debtor exchanged exempt personal property for real property, taking title to the latter in his wife's name.
4. APPEAL AND ERROR—CLERICAL MISPRISION—CHANCERY APPEAL—JUDGMENT.—Where the chancery court should have entered judgment in appellant's favor for a certain sum, on appeal the trial in the Supreme Court being *de novo*, the Supreme Court will enter such judgment as the chancery court should have entered upon the undisputed facts of the record.

Appeal from Baxter Chancery Court; *George T. Humphries,* Chancellor; modified and affirmed.

STATEMENT BY THE COURT.

J. C. Copeland, an insolvent merchant of Marion County, Arkansas, on the 4th day of January, 1913, executed a general deed of assignment for the benefit of creditors, naming T. L. Bond as assignee. The deed included all of his property except certain articles of personal property, described in the schedule attached, which he claimed as exempt. The deed specified that the assignee, after filing the inventory of the property described in the deed and making the bond required by law, should administer the assets under the directions of the chancery court in conformity with the statutes.

The deed was filed with the clerk of the Marion Chancery Court on the 8th day of January, 1913, and the assignee took possession of the property. Copeland thereafter moved to Baxter County and traded the personal property scheduled as exempt for town lots in Cotter, Baxter County, to one Browning, and had the deed to the lots made to his wife.

On the 20th of March, 1913, the Baxter County Bank instituted suit against Copeland and his wife and Browning and T. L. Bond and A. G. Thompson in Baxter Chancery Court. It set up in its complaint that Copeland and his wife were then residents of Baxter County; that Copeland had executed to one Gallup two promissory notes in the sum of $114.90 each, which Gallup had, for value and before maturity transferred to the bank. It alleged "that Copeland is wholly insolvent and has recently traded off a large amount of his personal property to one Henry Browning for certain lots in the town of Cotter; that he caused Henry Browning to convey said property to Lula B. Copeland, wife of J. C. Copeland, for the purpose of hindering and delaying his creditors and placing the same beyond the reach of his creditors, among whom was the plaintiff; that J. C. Copeland, for the purpose of hindering, delaying and defrauding his creditors, transferred to T. L. Bond and A. G. Thompson a large amount of personal property by voluntary transfer, wholly without consideration, and that said Copeland still remains the owner thereof, and of the land described; that Copeland is insolvent and that his debts exceed the sum of $1,000." The complaint prayed that a receiver be appointed to take possession of the goods in the hands of T. L. Bond and A. G. Thompson and safely keep the same pending suit, and that Copeland be declared the beneficial owner of the real property deeded to his wife, Lula B. Copeland, by Browning, and that the same be subjected to the plaintiff's debt, and it prayed for judgment on the notes.

Appellees J. C. Copeland and Lula B. Copeland answered the complaint, admitting that the personal property claimed by them as exempt was traded for the town lots as set forth in the complaint, and that the title was taken in the name of Lula B. Copeland, but denied that this was done to hinder or defraud creditors. They alleged that the property traded for the town lots was exempt and had been scheduled and set apart as exempt property in J. C. Copeland's deed of assignment; that

the deed was taken in his wife's name in good faith and for a valuable consideration; that Lula B. Copeland has furnished the said J. C. Copeland the sum of $500 in cash, and that this was the consideration for the deed to her.

In the Marion Chancery Court an *ex parte* petition was filed at the April term, 1913, by certain creditors of J. C. Copeland, in which they alleged the execution of the deed of assignment by Copeland and the proceedings thereunder, towit: That Bond, the assignee, had taken possession of the property mentioned, and that after taking possession of the same a receiver was appointed by the chancery court of Baxter County, who, under the orders of the chancery court, had taken the property from the possesion of T. L. Bond; that the Baxter Chancery Court had decreed that when the Marion Chancery Court took jurisdiction of the property for the purpose of administering the same under the assignment that said goods and property should be returned to the jurisdiction of that court. It set up that the assignee named in the deed had failed to qualify; that the Marion Chancery Court took jurisdiction and appointed a trustee in his stead.

The Baxter County Bank appeared specially to this petition and objected to the Marion Chancery Court taking jurisdiction. It set up that Copeland was indebted to it, and was indebted generally in a sum exceeding $1,500; that the assignment was void, and that the law pertaining to general assignments for the benefit of creditors, to be administered in the chancery court, was inoperative. It alleged that it had a suit pending in the Baxter Chancery Court against Copeland, and that said court had ample power and jurisdiction to adjudicate all the matters involved.

The Marion Chancery Court overruled the bank's objection to its jurisdiction, and assumed jurisdiction to administer the personal estate mentioned in the deed of assignment of Copeland, and appointed a trustee. From this order of the Marion Chancery Court the bank

appealed. Thereafter, at the October term, 1913, of the Baxter Chancery Court, the court dismissed the complaint of the bank as to the personal property and as to the receivership, for the reason that the Marion Chancery Court had assumed jurisdiction to administer the personal estate and had appointed a trustee to take charge of the same.

The Baxter Chancery Court, after a further hearing of the cause upon the pleadings, the deposition of Copeland and the agreed statement of facts, entered the following finding:

"That Lula B. Copeland has title to the town lots in controversy; that defendant J. C. Copeland is indebted to the plaintiff for the debt sued for;" and the court entered a decree in favor of the bank for $114.90, the principal of said note, and for the additional sum of $25.38 interest thereon, and entered a decree quieting the title to the lots in controversy in Lula B. Copeland.

Appellant duly prosecutes these appeals from the decrees of the Marion and the Baxter chancery courts. The causes are consolidated for convenience in the hearing. The agreed statement of facts used in both the Marion and the Baxter chancery courts is as follows:

"It is agreed that on and prior to the 4th day of January, 1914, J. C. Copeland, one of the defendants herein, was engaged in the mercantile business in Marion County, Arkansas, and was, at and prior to said date, a resident of said Marion County. That in pursuing the said business, the said J. C. Copeland became involved, contracting a large amount of indebtedness that he was unable to pay, among other indebtedness the two notes of one hundred and fourteen dollars each to H. H. Gallup, and by him assigned to Baxter County Bank.

"That on the 4th day of January, 1913, while the said J. C. Copeland was a resident of said Marion County, and while his entire stock of merchandise was situated in said Marion County, Arkansas, he executed,

acknowledged and delivered to the defendant, T. L. Bond, the following instrument of writing:

"(Reference is here made to the deed of assignment.)

"That the said T. L. Bond, on the 8th day of January, 1913, caused said instrument of writing to be filed with the clerk of the Marion Chancery Court and at once took possession of the entire stock of merchandise belonging to the said Copeland, except that portion of said stock listed in schedule "A," and which the said Copeland claimed as exempted to him under the laws of the State of Arkansas. That the property alleged to have been sold by the defendant Copeland to the defendant Browning were the goods described in schedule "A" to the above deed. That all of the stock of goods mentioned in said deed, except those sold to the defendant Browning, were at, and all times prior to the institution of this suit, in Marion County, Arkansas, and were at the time of the appointment of the receiver therein in the possession of the said T. L. Bond through his agent, A. G. Thompson.

"That the receiver heretofore appointed by this court has taken possession of the said property and is now in possession thereof. T. L. Bond has made an inventory of the said property, but has not filed said inventory nor executed bond as provided by law as such trustee. That the chancery court of Marion County has never taken any steps therein, nor made any orders in relation to said assignment, and has never assumed any jurisdiction thereof unless the mere making of the said deed by Copeland and the filing of the same by Bond is to be construed as giving jurisdiction, nor has the said chancery court of Marion County been in session since execution and filing of the said deed. That all of the parties to said deed were at the time of the execution thereof residents of Marion County. That the inventory attached to the receiver's report herein is the inventory made by the said T. L. Bond, trustee. That at the time of the commencement of this action, the defendant, J. C. Copeland, was a resident of Baxter County, Arkansas,

and both J. C. Copeland and Lula B. Copeland were served with summons in this action by the sheriff of Baxter County, in Baxter County."

Allyn Smith, for appellant.

1. As to the Marion County case, the deed of assignment was void, since the debts exceeded $1,000, and the attack was made within four months. 88 Ark. 519; 97 Ark. 520.

2. The Baxter Chancery Court erred in failing to give judgment for both notes.

Z. M. Horton, Gus Seawell and *Sam Williams,* for appellees.

1. The statute, Kirby's Digest, § § 336-343, presupposes a deed of assignment and the creation of a trust. It undertakes only to regulate the execution of the trust and to safeguard the interests of the creditors, and is not an insolvency law nor suspended by the National Bankruptcy Act of 1898.

While the making of a deed of assignment for the benefit of creditors is an act of bankruptcy under the National Bankruptcy Act, yet, as against every one, except proceedings in bankruptcy taken within four months from the date of the execution and delivery thereof, the deed is good. 5 Cyc. 241; 176 Fed. 505; 57 S. W. 566; 76 S. W. 135; 91 U. S. 51, 23 L. Ed. 377; 187 U. S. 177; 174 U. S. 590; 97 Ark. 520.

Upon the execution and delivery of the deed of assignment the title to the property vested in the trustee, and the execution of the bond and filing the inventory were conditions subsequent. 64 Ark. 207; 54 Ark. 124; 37 Ark. 64; 36 Ark. 406.

The Marion Chancery Court, therefore, had jurisdiction, since the title vested in the trustee who resided in that county; and that trustee having failed to make the bond and file the inventory required by statute, it was proper, after the expiration of the time in which to avoid the deed of assignment in bankruptcy, for the Marion Chancery Court to appoint a trustee. Felter on

Equity, 171; 39 Cyc. 277; 20 S. W. 1039; 123 S. W. 574; 87 S. W. 590.

2. The judgment of the Baxter Chancery Court dismissing the complaint as to the town lots, was correct, because as to exempt property there can be no creditors. 54 Ark. 193; 57 Ark. 331; 60 Ark. 1; 52 Ark. 547; 59 Ark. Ark. 503.

3. Appellant obtained the judgment against Copeland on the notes sued on, to which it was entitled. If the failure to enter judgment on both notes was a clerical misprision, no appeal would lie therefrom until the chancery court has had an opportunity to correct it. Kirby's Dig., § 4429.

WOOD, J., (after stating the facts). (1) The chancery court of Marion County had no jurisdiction to administer the estate of J. C. Copeland under the general deed of assignment. The State insolvency act of June 26, 1897,* was superseded by the bankruptcy act of Congress of July 1, 1898, insofar as they relate to the same subject-matter and affect the same persons, as was held in *Hickman* v. *Parlin-Orendorff Co.*, 88 Ark. 519. See, also, *Roberts Cotton Oil Co.* v. *Morse & Co.*, 97 Ark. 513.

An attack was made by appellant on this deed of assignment by its objection to the Marion Chancery Court assuming jurisdiction to administer the assets under this insolvency act within four months after the deed of assignment. The Marion Chancery Court therefore erred in assuming jurisdiction to administer the personal assets of the estate under this deed of assignment, and the chancery court of Baxter County erred in holding that the Marion Chancery Court had such jurisdiction.

(2-3) It appears from the pleadings and agreed statement of facts that these errors were not prejudicial to appellant. The appellant does not allege nor show facts sufficient to prove that the deed of assignment was made for the purpose of hindering, delaying or defrauding Copeland's creditors. Mere general allegations to that effect are not sufficient. Appellant does not set up

* See Session Laws 1897, Page 115, Act 48.

any facts tending to show fraud. The allegations of its complaint as to the transfer of personal property for the lots therein mentioned and the taking of the title to those lots in Lula B. Copeland are not sufficient to show fraud in this transaction, and the agreed statement of facts shows that the creditors had no right to complain of this, for the personal property transferred was exempt. Copeland and his wife had a right to make such disposition of that property as they pleased. The creditors of Copeland could not subject such property to the payment of their debts. See *Sims* v. *Phillips,* 54 Ark. 193; *Clark* v. *Edwards,* 57 Ark. 331; *King* v. *Hargadine-McKittrich Dry Goods Co.,* 60 Ark. 1.

(4) The chancery court did not err, therefore, in holding that the title to the lots in controversy was in Lula B. Copeland, and in quieting her title. The proof fails to show any fraud on the part of appellee J. C. Copeland in making the deed of assignment. Under the pleadings and the agreed statement of facts the chancery court should have entered a judgment in favor of the appellant bank for the additional sum of $114.90, with interest. The undisputed facts show that this amount was also due the appellant, and the court should have entered a decree for that sum, and doubtless would have done so had a specific request been made for such judgment. The failure to enter such judgment was in the nature of a clerical misprision, and, as the trial is *de novo,* this court will enter such judgment as the chancery court should have entered upon the undisputed facts of the record. See *Greenlee* v. *Rowland,* 85 Ark. 101.

The decree of the Baxter Chancery Court is modified and affirmed, and judgment will be entered here in favor of the appellant for the additional sum of $114.90, with interest at 10 per cent. per annum from August 6, 1912. As it is manifest that the chancery court would have rendered judgment for this sum had its attention been called to the oversight at the time its decree was entered of record appellant is not entitled to the costs of this appeal, and judgment for costs will be in favor of the appellees.

MULLINS v. COMMISSIONERS OF BRIDGE IMPROVEMENT DISTRICT NO. 2.

Opinion delivered October 12, 1914.

1. LOCAL IMPROVEMENT—BRIDGE—CITY ORDINANCE—VALIDITY.—An ordinance of a city establishing an improvement district to construct a portion of a bridge across the Arkansas river, the portion to be constructed by the district to be to the center of the river which was the geographical boundary of the city, *held* invalid.
2. LOCAL IMPROVEMENT—BRIDGE—BOUNDARY OF DISTRICT.—A bridge must be situated wholly within the district created to build it.

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

STATEMENT BY THE COURT.

The owners of real property in the vicinity of Broadway Street, in the city of Little Rock, desired to secure the building of a bridge across the Arkansas River at the foot of that street. To this end they organized an improvement district for the purpose of assisting the county of Pulaski in its construction. The validity of that district was passed upon by this court in the case of *Mullins* v. *Mayor and Aldermen of the City of Little Rock,* 168 S. W. 1074. The proposed bridge connected the cities of Little Rock and Argenta, which are separated by the Arkansas River, the center of that stream being the boundary between those cities. It was held in that case that the ordinance establishing that district was void.

Following this decision, another district has been created for the purpose of constructing this bridge, and the appellant here has sought to enjoin all proceedings under ordinances of the city of Little Rock which established said improvement district. Attached to the complaint was a copy of the ordinance, from which it appeared that the nature of the improvement to be undertaken was designated as the building of so much of a bridge across the Arkansas River, for the accommodation of vehicles, foot passengers, street cars and inter-

urban cars, as may be situated within the limits of the district in the city of Little Rock.

An answer was filed by the commissioners of the district, who were made defendants, in which it was alleged that no bridge would be built by them under the ordinance creating their district unless arrangements were made for the building of the entire bridge, that part lying within the city of Little Rock to be built by them, while the portion within the city of Argenta was to be built by an improvement district organized in that city, or by the county of Pulaski.

Other questions were raised by the pleadings which we find it unnecessary to discuss.

Appellant filed a demurrer to the answer on the ground that it failed to state facts sufficient to constitute a defense. This demurrer was overruled, and appellant has duly prosecuted his appeal.

R. E. Wiley and *Marvin Harris,* for appellant.

1. An improvement district can not be formed to aid another person or body to make an improvement. *Mullins* v. *Mayor and Aldermen,* ms. op.

The plan adopted in the formation of the present district can not evade or overcome the difficulties created by the decision in the former appeal.

The bridge is a unit. It must be a completed structure before it will justify the expenditure of money on it. Either the county court commissioners or the district commissioners must have control of the construction of the bridge. Two bodies can not exercise separate control over the construction of the two halves of the bridge. The arrangement, therefore, for the county to build that portion of the bridge outside of the district would, under the former decision, be fatal to the validity of the improvement district. And the result is not different in law, if under the ordinance arrangement is made for the Argenta half of the bridge to be built by an improvement district organized in that city.

2. An improvement district can not be lawfully formed to aid in making an improvement a part of which is without the city limits. Page & Jones, Taxation by Assessment, § 365; Kirby's Dig., § 5664; 50 Ark. 116; 81 Ark. 286; 67 Ark. 37.

Rose, Hemingway, Cantrell, Loughborough & Miles, for appellees.

The question presented is whether an improvement must be complete in itself and effective, without co-operation. If such a limitation upon the power of organizing improvement districts should be established, it would, as in the case of sewer districts, end in public disaster. In such case, a sewer district could not be organized unless it had an independent means of discharging the sewage. Yet, in point of fact, the great majority of the sewer systems here have been dependent upon other systems of sewers, and would be entirely useless without such co-operation. As illustrating the principle contended for here, see 175 Ill. 24; 51 N. E. 821; 172 Mo. 523; 72 S. W. 944; 1 Page & Jones, Taxation by Assessment, § 401.

If a sewer system could be built dependent upon a water supply yet to be procured, without which it would be entirely useless, as has recently been held by this court could be done, it is certainly possible to provide for the building of half of a bridge when that half is not to be undertaken until the building of the other half is assured. 109 Ark. 99.

SMITH, J., (after stating the facts). The facts in the present case are similar to those in the former case of *Mullins* v. *Mayor and Board of Aldermen,* above cited, except that in that case it was the purpose of the improvement district to assist Pulaski County in constructing a bridge across the Arkansas River connecting the cities of Argenta and Little Rock, whereas, in the present case it is the purpose of the improvement district to construct that portion of the bridge which lies within the city of Little Rock, that is, to a point in the center of the Arkansas River. We think that, to a large extent, the

reasoning of the former case is applicable to the facts of the present case. In the former case, it was held that an improvement district could not be lawfully formed to aid Pulaski County to build this bridge across the Arkansas River, because, among other reasons, the control of the construction of the bridge would be in others than the commissioners of the improvement district, whereas, the law required the control of improvements made by municipal improvement districts to be in the commissioners of the district, and it was there said:

"The law does not contemplate, and there can not be two boards of improvement or commissioners in control of the construction of the one improvement, and the county court is given the power to construct bridges of this kind, and, in exercising such power, when it undertakes it, would necessarily do so to the exclusion of any other agency than that provided for under the law. It may be desirable to have a free bridge constructed under the terms proposed in the ordinance, and that it could be secured for less cost to the district by this contribution by it of the designated sum to the improvement and in aid of the county, but the law makes no provision whatever for a local improvement district aiding the county in the construction of such an improvement."

And, having mentioned the fact that an improvement district might receive contributions from the county and city to a proposed improvement for the purpose of reducing the cost of the improvement to the limited 20 per cent of the value of the real property in the district, it was there further said:

"Although an improvement district may accept such contributions, there is no power given by law to such a district to levy assessments and make contributions to aid other agencies in the making of the improvement, notwithstanding it could thus secure a desired local improvement at a much less expense to the property owners than would be required if it was constructed by the district itself."

If we were correct in so holding, that decision is apparently conclusive of the present case.

To avoid the effect of that decision, the ordinance creating the improvement district under consideration provides that these commissioners shall not undertake the construction of their half of the bridge until suitable and satisfactory arrangements have been made for the completion of the other half by either the county of Pulaski or the city of Argenta, and it is said that the effect of this provision is to provide for the construction of an improvement lying wholly within the district. To sustain this view, we are cited to cases upholding the establishment of sewerage districts where no adequate outlet facilities had been afforded in the plans of the sewerage districts themselves and counsel for appellees cite and rely upon the decision of this court in the case of *Sembler* v. *Water & Light Improvement District,* 109 Ark. 90. In that case a sewerage district was established without the necessary arrangements having been made to furnish water for flushing it, and the district was attacked upon that as well as upon other grounds. Discussing that question, it was there said:

"* * * 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."

But we do not think that case announces the principle which should control here. The sewer district was a complete entity, the construction of which was wholly within the control of the commissioners of that district. They had the authority and were under the duty of exe-

cuting the plans for the construction of this improvement, and there was no division of their authority, no necessity to conform to the requirements, of the commissioners of any other sewerage district in the perfection of their plans and in their execution. Here it must be conceded that the construction of a bridge to the middle of the river would be a useless and futile thing to do and not such an improvement as is contemplated by the law. *Ferguson* v. *McLain,* 113 Ark. 193; 168 S. W. 127.

(1-2) But appellees say that concession is without effect here for the reason that the very ordinance under which they seek to proceed expressly limits their right to construct their portion of the improvement upon the condition that the remainder thereof shall be provided for, either by Pulaski County or the city of Argenta. In its practical effect, we think this is an evasion of our former decision, and the Sembler case does not control. If this is the county's bridge, the commissioners appointed by the county judge, together with that officer, would necessarily have the control of the improvement. Section 549, Kirby's Digest, and *Mullins* v. *Mayor, etc., supra.* And if the construction of the remaining half should be undertaken by an improvement district within the city of Argenta, rather than by Pulaski County, the construction of that half would necessarily be exclusively under the control and supervision of the commissioners of that district. It might be possible for these different agencies to co-operate harmoniously in the construction of this improvement, so that, when their joint labors were completed, a bridge would be constructed, but while this is possible, it is not certain. Even if satisfactory plans should be prepared and accepted, many questions of detail would arise, which would require conferences and concessions, and if these conferences were not held and concessions made, a condition would arise which the law has not contemplated nor provided for. Such an improvement as a bridge must be situated wholly within the improvement district, and, in our opinion, this ordinance seeks to do indirectly

what it is not permitted to do directly, and that is to aid in the construction of this bridge.

For the reasons stated, the decree of the court below will be reversed and the cause will be remanded, with directions to sustain the demurrer to the answer.

DUTTON v. MILLION.

Opinion delivered October 12, 1914.

1. BILLS AND NOTES—FAILURE OF CONSIDERATION—RECOUPMENT AND ABATEMENT.—In an action on a promissory note, the defendant is entitled, by way of recoupment, to an abatement for so much of the consideration as has failed.
2. BILLS AND NOTES—FAILURE OF CONSIDERATION—ABATEMENT.—A performed work for B., by digging a well, for which B. gave A. his promissory note. *Held*, where the work proved to have been defectively done, in an action by A. against B. on the note, B. is entitled to an abatement for so much of the consideration as has failed.
3. CONTRACTS—FAILURE OF CONSIDERATION—LIABILITY OF PROMISSOR.—A. agreed to dig a well for B., for which B. agreed to pay him. B. relied entirely upon A.'s knowledge and skill in doing the work, and when completed, accepted the same. *Held*, B. was not bound by his acceptance, when it appeared that the well was defectively dug and curbed.
4. APPEAL AND ERROR—JUDGMENT FOR ONE OF TWO DEFENDANTS—RIGHT OF PLAINTIFF TO COMPLAIN.—Where an action is brought against two defendants on a promissory note, and the verdict was in the name of one defendant, omitting the name of the other, and the judgment followed the form of the verdict, *held*, where both defendants had a common defense, the verdict and judgment should have been in favor of both, and the plaintiff can not complain because the judgment was not so rendered.
5. MARRIED WOMAN—NOTE OF HUSBAND—LIABILITY.—A married woman is not liable on a note executed jointly with her husband, and not made with reference to her separate estate nor for the benefit thereof.

Appeal from Randolph Circuit Court; *C. H. Henderson*, Special Judge; affirmed.

Appellant, pro se.

T. W. Campbell, for appellees.

The verdict was clearly a finding by the jury in favor of the counter-claim for damages interposed by the appellees, and such finding settles the rights of the parties, regardless of the form of the verdict. The counter-claim was a general plea that inured to both, and a verdict in favor of either defendant inured to the benefit of the other also. 71 Ark. 1; 36 Ark. 491; 11 Ark. 512; 17 Ark. 371.

McCULLOCH, C. J. This is an action instituted before a justice of the peace of Randolph County by the plaintiff, George Dutton, against the defendants, George W. Million and his wife, Florence Million, to recover the balance of a promissory note executed by the defendants to plaintiff for a part of the price for digging a well. The case was appealed to the circuit court, and the trial there resulted in a verdict and judgment in favor of the defendants.

The plaintiff was engaged in the business of digging wells, and entered into a contract with defendant, George W. Million, to dig and curb a well on the latter's farm. According to the terms of the contract, the plaintiff was to receive a certain price per foot for digging and curbing the well, and that he "guaranteed that he would get water." When the well was completed, the aggregate price was found to be $120, and the defendant, George W. Million, paid the plaintiff the sum of $25 in cash and executed the note in controversy, in the execution of which his wife joined. The sum of $50 was paid on the note, and this action was, as before stated, instituted to recover the balance. The defendants defended on the ground that the well was worthless by reason of poor workmanship of the plaintiff in curbing it, and that the consideration of the note, therefore, failed to the extent of the unpaid balance.

The testimony adduced by the defendants establishes the fact that after using the well a while the water became wholly unfit for use, many of the witnesses testifying that it had a dry or "irony" taste and looked muddy

and dingy. Defendants themselves testified that the water was unfit for use, as stated by the other witnesses, and that it had sand and dirt in it, which spoiled the well. There is also testimony to the effect that the defendant in putting in the galvanized iron casing or curb cut holes in it so as to let the water run into the well, and that this caused the well to fill with seep water and to let sand and dirt into it. Another witness, of experience in the well business, testified to the effect that cutting holes in the casing had the effect of ruining the well. Defendant, George W. Million, admitted that he was present when the well was dug and curbed, and knew the manner in which the work was done, but testified that he had had no experience in the well business and relied entirely upon the skill and judgment of the plaintiff and did not know at the time he made the cash payment and executed the note that the workmanship was unskillful or that the well would prove unsatisfactory.

It is earnestly contended, on behalf of the plaintiff, that the evidence is insufficient to establish the defense, but we are of the opinion that, while the evidence is not entirely satisfactory, there is enough to warrant a submission of the issue to a jury and to sustain the verdict.

In the case of *Webster* v. *Carter,* 99 Ark. 458, we held that in an action on a promissory note the defendant is entitled, by way of recoupment, to abatement for so much of the consideration as had failed; and in disposing of the case, we quoted with approval from the Supreme Court of Alabama in the case of *Peden* v. *Moore,* 1 Stewart & Porter, 71, as follows:

"Whenever a defendant can maintain a cross action for damages on account of defect in personal property purchased by him, or for a noncompliance by the plaintiff with his part of the contract, he may, in a defense to an action upon his note made in consequence of such purchase or contract, claim a deduction corresponding with the injury he has sustained."

The court submitted this case to the jury upon instructions which permitted them to return a verdict for

the defendants if they found that by reason of negligence or unskilfulness of plaintiff in putting in the casing the value of the well had been depreciated to the extent of the amount of the balance due on the note.

The court further instructed the jury that the plaintiff was not bound by his acceptance of the well, even though he was present and knew the character of the material and workmanship, if he was ignorant on the subject and relied entirely upon the representations of the plaintiff as to his skill.

We think those instructions were correct; for if, as contended by defendant, George W. Million, he had no knowledge of the proper method of constructing the curbing, and merely accepted the work because of his reliance upon the representations and superior knowledge of the plaintiff, he would not be bound by his acts, and was entitled to claim a failure of the consideration to the extent of the depreciation of the well caused by unskilful workmanship. Our conclusion is that the case was submitted under proper instructions, and that there was enough evidence to sustain the verdict.

The suit was, as before stated, against the defendant, George W. Million, and his wife, but the verdict of the jury was in favor of the defendant, George W. Million, and omitted any mention of his wife. The judgment followed the form of the verdict, and was only in favor of George W. Million. Subsequently, the plaintiff filed a motion to redocket the case as against Mrs. Million and proceed with another trial against her. The court overruled that motion, and we think that was correct. The defendants presented a common defense, and the verdict should have been in favor of both if in favor of either. The court should have rendered judgment in favor of both defendants upon the verdict, and the plaintiff can not complain because that was not done. Moreover, the undisputed evidence in the case showed that the defendant, Mrs. Million, was not liable on the note, as it was executed jointly with her husband and not with reference to her separate estate nor for the benefit thereof.

Judgment affirmed.

CITY OF PARAGOULD *v.* MILNER.

Opinion delivered October 12, 1914.

1. EMINENT DOMAIN—COMPENSATION—BENEFITS—INCREASE IN VALUE.—Where the public use for which a portion of a land owner's land, is taken so enhances the value of the remainder, as to make it of greater value than the whole was before the taking, the owner will be held in such case to have received just compensation in benefits.
2. EMINENT DOMAIN—COMPENSATION—EVIDENCE OF BENEFITS—LIMITATIONS.——In determining whether the public purpose for which a portion of a land owner's land is taken enhances the value of the remainder, the benefits which will be considered must be those which are local, peculiar and special to the owner's land.
3. EMINENT DOMAIN—COMPENSATION—MUNICIPAL CORPORATIONS.—Art. 12, § 9, of the Constitution of 1874, providing for compensation to the owner when land is taken by a corporation does not apply where it is appropriated for a public use by a municipal corporation.

Appeal from Greene Circuit Court; *J. F. Gautney,* Judge; reversed.

STATEMENT BY THE COURT.

The appellant instituted this action in the circuit court of Greene County, alleging substantially as follows: That it is a public municipal corporation, with full power and authority to establish, open and widen streets and alleys for public purposes within its corporate limits; that the defendant is the owner in fee of a certain tract or parcel of land in the city of Paragould, which it describes, said real estate being located at the northwest corner of Highland Avenue and Sixth Street, running three hundred feet on the west side of Sixth Street; that in order to widen Sixth Street to the proper width and in accordance with what the public interest demands, it will require a strip of land four feet wide off, from and across the east side of the tract described; that it has sought to obtain the consent of the defendant to the widening of the street through his property as aforesaid, but has failed to do so by reason of the refusal of the defendant to relinquish his title thereto for the purpose of widening the street; that on the 15th of Sep-

tember, 1913, the city council of Paragould passed a resolution for the purpose of authorizing condemnation proceedings for the strip mentioned for the purpose of widening the street. The prayer was for the condemnation of the strip for public purposes and for all proper relief. With the complaint was an exhibit showing the resolution of the city council, duly passed, authorizing and directing the condemnation of the strip of land, specifically described in the complaint.

The answer contained a specific denial of all the material allegations of the complaint.

Witnesses were introduced as to the value of the strip of land sought to be condemned. There was a stipulation of counsel to the effect that witnesses would testify, if permitted to do so, that the benefits to the property left after the strip was condemned would exceed the value of the property appropriated by $300. Appellant offered testimony to this effect, but the court refused to allow it to introduce it; to which exceptions were duly saved.

The court also instructed the jury, over the objection of appellant, that they "should not take into consideration any betterment that may accrue to the defendant by reason of this proposed improvement;" that "you can not pay a man for his property in betterment, and the sole question to be determined by you will be the difference in the value of the property after this strip is taken off of it, and what it now is. The measure of his damage is the difference between the value of the property as it now stands and what it will be after this strip is taken off from it."

There was a verdict in favor of the appellee for $100. From a judgment in this sum this appeal has been duly prosecuted.

William F. Kirsch, for appellant.

The court erred in excluding evidence that the value of the remaining property would be enhanced by reason of the improvement, and in directing the jury not to

"take into consideration any betterments that may accrue to the defendant by reason of this proposed improvement," etc. 64 Ark. 556; 167 U. S. 548; 91 N. E. (Ind.) 234; 134 Ind. 262; 17 Kan. 58; 143 Mass. 521; 83 S. W. (Mo.) 439; 112 N. C. 759; 6 Ore. 328; 225 Pa. St. 184; 6 R. I. 514; 23 Vt. 362; 50 Wash. 29; 8 Kan. 419; 27 Kan. 382; 47 Kan. 191.

W. S. Luna, for appellee.

There was no issue raised as to special benefits either by allegations in the complaint or by the proof; hence, the only question presented is as to general benefits. The court's instructions 1 and 2 are right and correctly state the law. Art. 12, § 9, Const.; Kirby's Dig., § § 2901, 2898, 2899; 39 Ark. 171. See, also, 68 Ark. 600, 604, 605.

WOOD, J., (after stating the facts). Article 12, section 9, of our Constitution, under the title, "Municipal and Private Corporations," provides as follows: "No property, nor right-of-way, shall be appropriated to the use of any corporation until full compensation therefor shall be first made to the owner, in money, or first secured to him by a deposit of money, which compensation, irrespective of any benefit from any improvement proposed by such corporation, shall be ascertained by a jury of twelve men, in a court of competent jurisdiction, as shall be prescribed by law."

In *Cribbs* v. *Benedict,* 64 Ark. 556, the court had under consideration the question as to whether or not a land owner could receive compensation for land taken for the use of the public in benefits that the remainder of his land would receive by reason of the improvement. In determining this question, the court had in mind article 2, section 22, of the Constitution, which provides that private property shall not be taken, etc., for public use without just compensation, and the other sections of our Constitution which guarantee to the owner of property taken for public use just compensation, as embodied in the eminent domain provisions. Chapter 58, sections 2898 to 2901, inclusive, of Kirby's Digest. Appellee re-

lies upon these provisions of the Constitution to sustain the ruling of the court on the excluded testimony and the instruction which the court gave.

In the case of *Cribbs* v. *Benedict, supra,* we said: "Where the Constitution is silent upon the subject, the decisions of the courts present diverse views upon the right to consider, by way of compensation for a portion of his land taken for public use, the benefits thereby accruing to the remainder. The view which seems to us to accord with reason, and which is supported by high authority, is that where the public use for which a portion of a man's land is taken so enhances the value of the remainder as to make it of greater value than the whole was before the taking, the owner in such case has received just compensation in benefits. And the benefits which will be thus considered must be those which are local, peculiar and special to the owner's land, who has been required to yield a portion *pro bono publico.*" Numerous authorities are cited in the opinion in support of the doctrine. See also the additional authorities cited in appellant's brief.

The doctrine announced in the above case is controlling here and shows that the ruling of the court in excluding the offered testimony and in giving the instruction was error.

The appellee contends that there was no allegation or proof to the effect that the improvement contemplated here was peculiar and special to the owner's land as contradistinguished from the benefits to the general public, but the rulings of the court were placed upon the broad ground, as expressed in the instruction, "that you can not pay a man for his property in betterments." This would exclude the idea of peculiar and special benefits being considered by way of compensation for land taken and appropriated to the public use. Besides the allegations of the complaint and the testimony were sufficient to warrant a submission to the jury of the issues as to whether or not appellee would receive peculiar and special benefits. It appears that it was necessary in order

to straighten the street, to take four feet which jutted out in front of appellee's lot.

Appellee also insists that the appellant is a corporation within the meaning of article 12, section 9, of the Constitution, *supra,* and that under the provisions of that section it would have to make compensation in money, and that no benefits, special or otherwise, could be considered by way of compensation.

While section 8 is included under the head of "Municipal and Private Corporations," it is manifest from the language of that section, as well as the context of other sections in article 12, that the word "corporation" as used in section 9 refers to private corporations, for when land is appropriated for the use of the public it is not appropriated "to the use of" any corporation. Here the land is condemned by the municipal corporation to be appropriated to the use of the public.

The rulings of the court above referred to were erroneous. The judgment is therefore reversed, and the cause remanded for a new trial.

ALEXANDER v. PHILPOT.

Opinion delivered October 12, 1914.

APPEAL AND ERROR—WITHDRAWAL OF PETITION—RIGHT OF REMONSTRANT TO APPEAL.—Certain persons filed a petition asking that a license to sell intoxicating liquors be granted them under the act of February 17, 1913. A remonstrance was filed, but before the court made an order in the cause, petitioners withdraw the petition. *Held,* by the withdrawal of the petition, the remonstrants obtained what they desired, and they had no right of appeal from the order of the court allowing the withdrawal of the petition.

Appeal from Jefferson Circuit Court; *Antonio B. Grace;* Judge; affirmed.

STATEMENT BY THE COURT.

This is an appeal from a judgment of the Jefferson Circuit Court, denying appellants' petition for a mandamus. The facts as disclosed by the pleadings and the

agreed statement of facts in the record are substantially as follows:

In January, 1914, H. B. Fienberg and divers other persons filed in the county court of Jefferson County their several applications for license to sell intoxicating liquors in the city of Pine Bluff. Some days thereafter they filed with the county court a petition purporting to contain the names of a majority of the white adult inhabitants of Pine Bluff, praying that license be granted for the sale of intoxicating liquors within that city. The petition was presented under the act approved February 17, 1913, and generally known as the "Going Act."

The appellants appeared, under authority of the act, as remonstrants to the petition, and set up in their remonstrance that the petition did not contain a majority of the adult white inhabitants of the city of Pine Bluff as required by the act.

The court proceeded to hear the testimony and many days were consumed in the trial, and on February 12, 1914, the county court announced that he was ready to give his opinion. Thereupon, the petitioners for license asked leave of the court to take a nonsuit. It was the opinion of all the attorneys in the cause that the petition asking that license be granted and the remonstrance thereto was in the nature of a suit between the parties, and it was agreed that the nonsuit be taken.

On February 17 the remonstrants to the petition filed an affidavit for appeal, in which they set up "that the appeal in this cause is taken because the remonstrants verily believe that they are aggrieved by the judgment of the court in allowing a nonsuit in this cause, and is not taken for vexation or delay, but that justice may be done."

On the 18th of February, 1914, the county court made an order permitting the attorney for the petitioners to take the petition from the files, and on the 28th of February, 1914, the same petition containing additional names was filed in the county court, and the county

court permitted the old petition to become the basis of the new petition for license.

On the 20th of February the appellants, petitioners herein for the writ of mandamus, who were remonstrants in the county court, filed in the circuit court their petition in the present cause, praying a writ of mandamus to compel the county court to make an order granting an appeal to the circuit court, and directing the county clerk to transmit all of the original papers, including the original petition and the record entries, to the clerk of the circuit court. On the 16th of March, 1914, appellants filed an amended petition, setting up substantially the same facts as already stated, and with the alternative prayer, "that if the circuit court should hold that the county court had no authority to grant a nonsuit that a mandamus be granted compelling the county court to hear and determine the matter of the majority or no majority on the original petition, and that said order be entered *nunc pro tunc* as of February 13, 1914, and that said order when so made shall not be allowed to prevent an appeal, or such action as appellants may then see proper to take; that an order be made in the nature of an injunction preventing the county court from considering the original petition as a basis for granting or refusing saloon license until the circuit court shall have heard and determined the relative rights of all parties as presented by the complaint."

J. M. Shaw and *W. B. Sorrells,* for appellants.

1. This was not a contest in the nature of a suit between parties wherein individual or personal rights are involved; but it was a public question in the nature of an election to be decided in the manner provided by law. In allowing a nonsuit to be entered, the county court treated the proceeding as a suit between parties, and the signers of the petition as having such individual or personal rights in the petition as would allow them to withdraw it or take a nonsuit. In doing so, the court exercised a discretion in excess of its jurisdiction. 70

Ark. 175; 73 Ark. 18; 40 Ark. 294; 51 Ark. 164; 56 Ark. 115.

2. From the order of the county court, the remonstrants had the right of appeal, which was absolute, and the county court had no discretion to determine whether the appeal was proper or not. Kirby's Dig., § § 1487-1489; 43 Ark. 40. This right being absolute, mandamus will lie to compel its allowance. 35 Ark. 298; 43 Ark. 33; 28 Ark. 294.

3. The petition, under the Going Act, is jurisdictional. Once filed, it can not lawfully be withdrawn and be made the basis of a new petition with additional signatures. The county court was, therefore, without jurisdiction to pass upon the so-called petition on March 28, 1914. Going Act, § § 1, 2.

W. D. Jones, for appellees.

1. It is settled beyond controversy in this State that a court trying a case is vested with discretion to permit a plaintiff to discontinue his action and enter a nonsuit after the final submission at any time before judgment is formally entered. Am. & Eng. Enc. of L., 721-728; Kirby's Dig., § 6157; 23 Kan. 262; 69 Ark. 432; 76 Ark. 403.

The county court had the discretionary power not only to allow the nonsuit, but also the withdrawal of the petition. 25 Conn. 133; 21 Okla. 807; 61 Conn. 63; 20 Fla. 425.

2. It is elementary that where an inferior court is vested with discretion as to a particular subject, the writ of mandamus will not lie to control that discretion. 1 Ark. 11; 25 Ark. 615; 3 Ark. 427; 9 Ark. 240; 4 Ark. 302; 11 Ark. 599; 14 Ark. 368; 77 Ark. 101; 82 Ark. 483.

To authorize the issuance of the writ, it must be shown that there was a refusal by the person against whom the writ is sought, to do the act or perform the duty imposed by law which it is the object of the mandamus to enforce. 28 Ark. 294. Here the record does not show that the attention of the county judge was ever

called to the affidavit for appeal, or that he knew it had been filed.

WOOD, J., (after stating the facts). The record does not show that any one of the remonstrants prayed for an appeal to the circuit court, but, even if it had so shown, the remonstrants were not aggrieved by the ruling of the court in allowing the petition to be withdrawn. The remonstrants to the petition were, in effect, asking that the court make no order allowing licenses to sell intoxicating liquors to be issued. When the petitioners were permitted to withdraw their petition, they were no longer asking for licenses, or that such petition be granted, and therefore no order on such petition was made granting licenses.

The withdrawing of the petition placed *in statu quo* the matter of granting or not granting licenses to sell intoxicating liquors in the city of Pine Bluff. After the petition was withdrawn, no licenses could be issued until the "Going law" was complied with. The order of the court allowing the petition to be withdrawn was, in legal effect, tantamount to making no order permitting licenses to be issued. The remonstrants were contending for this, and by the order of the court they obtained virtually that for which they were contending. They were, therefore, not aggrieved by the court's order and had no right to appeal from such order.

In *Phillips* v. *Goe,* 85 Ark. 304, we said: "The parties who appealed from the orders of the county court were parties to the proceedings, but they were not protestants, and therefore were not persons aggrieved by the judgment appealed from, within the meaning of the statute allowing appeals to be taken from judgments of the county court."

The cases of *Bordwell* v. *Dills,* 70 Ark. 175; *Wilmans* v. *Bordwell,* 73 Ark. 418, and *Clark* v. *Daniel,* 77 Ark. 122, and other cases on which appellants rely, are not analogous and not in point. There the petitioners had signed a petition to put in force the three-mile law prohibiting the sale of liquor, and the court held that after

the petition had been filed with the county court and had been taken up for consideration it was not within the province of the petitioners to withdraw their names from the petition without leave of the court, and that such leave could not be granted except for good reasons, because the petitioners had inaugurated a proceeding for a salutary police regulation for the preservation of morals and protection of the peace of the citizens. Here the petitioners were seeking to do precisely the opposite of what the petitioners were asking in those cases. Here the petitioners were asking that licenses be granted to sell intoxicating liquors and the remonstrants were objecting to that, and when the petition was withdrawn it was equivalent, as before stated, to giving the remonstrants what they were asking for. In the language of the learned circuit judge: "The withdrawal of the petition defeated all application for saloon licenses, which was precisely what the remonstrants desired." The petition became *functus officio,* so far, at least, as that case was concerned.

As to whether or not a petition, after having been once filed and thereafter by the permission of the court withdrawn, could have other names added thereto and then be refiled as an original application for the granting of licenses under the provisions of the "Going law," and as to whether or not such petition has completely performed all of its functions as a petition for the granting of licenses when it has been once filed and taken up for consideration under the provisions of the "Going law," are questions not now before us. These are questions upon which we expressly reserve decision.

The judgment of the circuit court denying the writ of mandamus is in all things correct, and it is affirmed.

BANK OF MIDLAND *v.* HARRIS.

Opinion delivered June 29, 1914.

1. ABATEMENT—MONEY DEPOSITED AND DUE COUNTY—EFFECT OF PAYMENT TO COUNTY BY OFFICER.—Where liability has accrued to a county by reason of a deposit of county funds in a bank, and the failure or refusal of the bank to pay over on demand, and suit is brought by the proper officer to recover on behalf of the county, such action is not abated by the payment of the funds to the county by the officer who is secondarily liable.
2. BANKS—DEPOSIT OF PUBLIC FUNDS—LIABILITY—ABATEMENT.—Under Kirby's Digest, § 1990, making the stockholders in a bank primarily liable for county funds deposited therein, where action has been commenced for the recovery of the money of the county, the action does not abate because of the payment of the amount to the county by those secondarily liable, and may be presecuted to final judgment for the benefit of those who are secondarily liable.
3. COUNTY FUNDS—DEPOSIT—FAILURE TO PAY—LIABILITY OF BANK—SUBROGATION.—The county officer who pays to the county money due the county in the regular course of his settlement with the county, is subrogated to the right of the county against the stockholders of a bank refusing to turn over to him, county funds deposited therein.
4. SUBROGATION—TRIAL AT LAW—REVERSAL.—Where a cause involving the right of subrogation was tried at law without objection, and the law court rendered a correct judgment, the judgment will not be reversed because the case was tried in the wrong forum.
5. BANKS—DEPOSIT OF PUBLIC FUNDS—LIABILITY OF STOCKHOLDERS.—The liability of the stockholders of a bank under Kirby's Digest, § 1990, for public funds deposited in the bank, dates from the time the public officer puts the money in the bank for deposit; so when a county collector with funds in a bank paid the county treasurer with a check on said bank which the treasurer deposited in the same bank, only the stockholders who owned stock in the bank when the treasurer deposited the collector's check, will be liable for the same to the county.
6. BANKS—DEPOSIT OF PUBLIC FUNDS—LIABILITY OF STOCKHOLDERS.—The liability of a stockholder for public funds attaches at the time of the failure or refusal of the bank to pay over on demand.
7. BANKS—DEPOSIT OF PUBLIC FUNDS—LIABILITY OF STOCKHOLDER—TRANSFER OF STOCK.—Although the legal liability of a stockholder of a bank in which are deposited public funds under Kirby's Digest, § 1990, attaches only to stockholders at the time the liability arises, yet, if, after the deposit is made in the bank, and the inchoate statutory obligation is thus incurred, if a stockholder transfers his stock, not in good faith, but for the purpose of escaping

liability and with knowledge of insolvency on the part of the bank, he will be treated as a stockholder at the time of the default, and accordingly held liable.

8. BANKS—STOCKHOLDERS—TRANSFER OF STOCK—RECORD—LIABILITY OF STOCKHOLDER.—A transfer of stock, without the same being recorded on the books of the corporation, is efficacious to sever the relation between a stockholder and the corporation, if the sale has been made honestly and in good faith, and the vendor has done all that can be required of a careful and prudent business man in order to make such transfer.

9. CORPORATIONS—STOCKHOLDERS—CERTIFICATE OF PRESIDENT AND SECRETARY.—The list of stockholders of a corporation certified by the president and secretary, on file in the county clerk's office is competent evidence for the purpose of showing who are stockholders of the corporation, and is *prima facie* evidence of that fact.

10. CORPORATIONS—COMPLIANCE WITH STATUTE— DE JURE AND DE FACTO EXISTENCE.—A strict compliance with the requirements of the statute is essential to create a corporation *de jure*, but a strict compliance is not essential to the *de facto* existence of a corporation.

11. CORPORATION DE FACTO—LIABILITY OF STOCKHOLDERS.—Where there is a *de facto* corporation, the stockholders thereof are estopped to dispute its legal corporate existence for the purpose of escaping liability.

12. CORPORATIONS—DE FACTO EXISTENCE—LIABILITY OF STOCKHOLDERS.—Where an attempt was made to organize a banking corporation according to law, and the articles of incorporation were drawn up and filed with the county clerk, but were not filed with the Secretary of State, and the corporation undertook thereafter to do business as a corporation, it will be held to be a corporation *de facto*, and the stockholders thereof will be held for public funds deposited therein, and will be estopped to deny the legal existence of the corporation.

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

Read & McDonough, for appellants, Dyke Bros.

1. The alleged articles of incorporation in the clerk's office were inadmissible. Acts 1905, p. 319; Kirby's Dig., § 845. The stockholders did not become a corporation until after the articles were filed as prescribed by law. 35 Ark. 144; *Ib.* 365. The proper way to prove the corporate existence is by the certificate of the Secretary of State. 35 Ark. 144; *Ib.* 365; 132 Fed.

41; 62 Pac. 386; 70 N. W. 302; 55 Mo. 310; 55 Barb. 45; 46 Ind. 142, etc.

2. The court erred in admitting the minutes of the meetings. Kirby's Dig., § 837; 91 Ark. 445; 71 Kan. 558; 140 Fed. 385; 79 *Id.* 906; 123 *Id.* 659; 88 *Id.* 207; 126 N. Y. 113; 26 N. E. 1046; 12 L. R. A. 473; 22 Am. St. 816; Thomp. on Corp., § 1924.

3. The hearsay evidence of Denman was incompetent and prejudicial.

C. E. & H. P. Warner, for W. T. Quinley.

1. Plaintiff having settled with the county in full, and having ceased to be county treasurer, can not recover. Kirby's Dig., § § 1990-3; Cook on Corp. (7 ed.), § § 214-218; 192 U. S. 386; 63 Mass. 192; 185 Fed. 192; 97 *Id.* 297; 94 N. Y. 515; 139 S. W. 801. The doctrine of subrogation can not be invoked. 25 Miss. 73; 29 W. Va. 673; 76 Fed. 673. But if it could, the right is purely equitable. Sheldon on Subrogation, § 4; 6 Pom. Eq. Jur., § 922; 33 Ala. 706; 4 Cal. 256; 54 Miss. 683; 60 S. E. 509; 33 Atl. 705.

2. Quinley was not a stockholder at the time the deposit was made, nor when the bank made default. 97 Ark. 374; Kirby's Dig., § 841; 132 N. Y. 250; 30 N. E. 644; 28 Atl. 719; 75 Pac. 798; 10 Cyc. 738.

3. It was error to give instruction 6. An assignment of stock in blank is good. 4 Thomp. on Corp. (2 ed.), § 4317.

4. The practice of giving conflicting instructions has been repeatedly condemned. 104 Ark. 67; 93 *Id.* 140.

Winchester & Martin, for McEachin and Weir.

1. The best evidence is always required, and secondary evidence is never admissible unless it is the best to be had.

2. The county had been paid, and Harris was no longer treasurer, and there was no liability.

3. These appellants were not stockholders when the deposit was made. Kirby's Dig., § 1990. See cases cited, *supra,* in appellants' briefs.

G. C. Hardin, for appellee, Johnson.

97 Ark. 387, settles appellee's nonliability. Kirby's Dig., § 849. He was *not* a stockholder.

A. A. McDonald, for appellee, Harris.

1. *Warren* v. *Nix,* 97 Ark. 374, settles the question as to the right of plaintiff to recover. 51 Ark. 260; 75 *Id.* 288.

2. The incorporation was duly proven. 58 Ark. 98; 71 *Id.* 379; 25 Miss. 73; Kirby's Dig., § § 841-4; 73 Fed. 136.

McCULLOCH, C. J. The plaintiff, as treasurer of Sebastian County, instituted this action against the Bank of Midland, a domestic corporation engaged in the banking business, and its stockholders, to recover the sum of $1,367.51, alleged to have been deposited by plaintiff as treasurer in said bank and which the bank failed or refused to pay over on demand.

The case was tried before a jury, and a verdict was returned against all of the defendants save one, and they appealed to this court. The plaintiff appealed from the judgment in favor of defendant, Johnson.

Plaintiff was elected as treasurer of Sebastian County, and served for the term of two years, ending October 31, 1912. During the time for collection of taxes the tax collector deposited part of his collections in the Bank of Midland, and when he made his settlement with the county court and paid over the county funds to the treasurer he gave that officer a check on the Bank of Midland for the sum of $1,437.51, which the treasurer turned over for credit and deposit in that bank. This occurred on or about the 1st day of July, 1912, and the bank failed on August 7, 1912. A few days thereafter plaintiff, as treasurer, made demand for the funds, and upon failure to pay, he instituted this action before the expiration of his term. He made his settlement with the county, and paid over all the funds due the county, including the amount involved in this controversy, after the expiration of his term, but before the trial of this

case, and when the case came on for trial the defendants sought an abatement of the action on the ground that the stockholders of the bank were liable only to the county, and not to the treasurer personally, and that since the funds had been paid over to the county all liability on the part of the stockholders ceased.

That is the first question presented for our consideration.

(1-2) Precisely the same condition existed in the case of *Warren* v. *Nix,* 97 Ark. 374, but it does not appear to have been argued as ground for reversal, and the point was not discussed in the opinion. The stockholders were held liable, however, in that case, and it can be treated as a decision of that proposition of law. We therefore hold, in conformity with that decision, that, where liability has accrued to the county by a deposit of funds and a failure or refusal to pay over on demand, and suit is brought by the proper officer to recover on behalf of the county, such action is not abated by the payment of the funds to the county by the officer who is secondarily liable. We held in *Warren* v. *Nix, supra,* that the statute makes the stockholders primarily liable, and that where action has been commenced for recovery of the money for the county it does not abate from the payment of the amount, but may be prosecuted to final judgment for the benefit of those who are secondarily liable.

The statute (Kirby's Digest, § 1990) provides that "the said officers and the sureties on their official bonds, the bank and the stockholders of the bank, shall be liable for all funds that such bank on demand shall fail to pay to the person entitled to receive the same."

This refers to the public funds mentioned in the preceding clause of the statute, and, of course, only establishes a liability to the county.

(3) There can not be direct liability both to the county and to the officer and sureties on his bond, but after the liability to the county has once attached and suit instituted to recover it, such liability is not extin-

guished by a payment made by the officer in the regular course of his settlement with the county. Those who pay under those circumstances are subrogated to the rights of the county against the stockholders of the bank. *Wilson* v. *White,* 82 Ark. 407.

Learned counsel for defendants cite authorities which appear to militate against the right of subrogation under a statute enacted purely for the protection of public revenues.

We think, however, that these authorities have no controlling force in this case, for the reason that they relate merely to the remedy, and hold that there is no subrogation to the remedies given to the public by the statute. It has been held by this court in numerous cases that a tax purchaser under void tax sale is subrogated to the rights of the State for the tax lien which has been discharged, but, of course, the purchaser is not subrogated to the remedies of the State as to a summary sale of the property.

It is also urged that subrogation is an equitable remedy, which can not be invoked at law.

(4) It is, however, sufficient answer to that to say that no objection was made to a trial of this case at law, and if the correct result has been worked out the judgment will not be reversed because the case was tried in the wrong forum. *Wilson* v. *White, supra.*

The defendants who have appealed defended on the ground that they were not stockholders, some of them that they never owned stock in the corporation, and others that they parted with their stock before the liability attached. The defense of each of them presents somewhat different questions and must be discussed separately.

One of the defendants, McEachin, was the principal stockholder and cashier of the bank, and had active management of it up to the time he sold his stock on May 14, 1912. He sold his stock to one I. H. Cunningham by written assignment and executed a power of attorney authorizing the transfer of the stock on the books of the

bank. Cunningham paid for the stock and McEachin immediately ceased all connection with the bank as stockholder. He testified that the bank was solvent at that time, and that it became insolvent solely on account of money of the bank which was taken out by Cunningham after the latter took charge. The transfer was never recorded on the books of the corporation, nor was certificate thereof filed in the office of the county clerk as provided by the statute. I. H. Cunningham and W. R. Cunningham (presumed to be kinsmen, but this is not definitely shown in the evidence), took charge of the bank and managed it up to the time of the failure. I. H. Cunningham was president and W. R. Cunningham cashier. The Cunninghams assumed active management of the bank at the time of the purchase of McEachin's stock, and continued until the bank failed and was placed in the hands of a receiver in August, 1912.

The court, over the objection of the defendants, gave the following instruction:

"3. If you find from the evidence that R. A. McEachin, W. T. Quinley, Amos Johnson, or either or all of them, were stockholders in said Bank of Midland on the dates when said T. A. Harris, as such sheriff and collector, deposited said public funds in said bank, and that they, or either of them, thereafter and before said 7th day of August, 1912, sold or transferred their stock in said bank, notwithstanding said sale, you should find for the plaintiff, if you find that they, or either of them, from their relation with or to said bank, or from knowledge or information with reference to its financial condition knew, or could have known, of its solvency from knowledge or information sufficient to put them on notice that same was solvent at time of the sale of their said stock, if you find a sale was made, and that the bank was insolvent."

(5-6) The law applicable to this case is stated in *Warren* v. *Nix, supra,* and this instruction is clearly in conflict with it. The instruction proceeds upon the theory that if, before the deposit was made, the stockhold-

ers knew that the bank was insolvent, or had such connection with the bank as to put them upon notice of that fact, they could not dispose of the stock so as to escape liability for future deposits. Now, the deposit was made by the treasurer on or about July 1, 1912, which was nearly two months after McEachin had sold his stock to Cunningham. The liability of the county does not relate back to the time that the money was placed in the bank by the collector, for he gave a check to the treasurer on the bank, and there is nothing in this case to show that the check would not have been paid if demanded. In fact, the treasurer himself testified that he placed the check in the bank as a deposit to his credit as treasurer. Therefore, the deposit dates from the time that the treasurer put the check in the bank for credit. If McEachin as a stockholder assigned his stock before that time, and did all that the law required him to do in making the assignment, he was not liable for future deposits made, even though the bank was insolvent at the time he assigned his stock and he knew it. The liability of a stockholder for public funds attaches at the time of the failure or refusal to pay over on demand. In *Warren* v. *Nix, supra,* we said:

"Section 1990 of Kirby's Digest provides that the stockholders of the bank shall be liable for the public funds therein deposited when the bank shall fail to make payment upon demand, and this in effect fixes the time when such liability arises, and that is when default in payment is made; this also determines that such liability is against only those who are stockholders at the time of such default."

(7) Notwithstanding the fact that the legal liability only attaches to those who are stockholders at the time of the default, yet if, after the deposit is made in the bank and the inchoate statutory obligation is thus incurred, if a stockholder transfers his stock, not in good faith but for the purpose of escaping liability and with knowledge of insolvency on the part of the bank, he will be treated as a stockholder at the time of the default,

and accordingly held liable. In other words, the law treats a sale of the stock under those circumstances as fraudulent, and it does not relieve from liability. That, however, is far from holding that a stockholder in a bank can not escape future liability by transferring his stock, regardless of the condition of the bank and his intentions with respect thereto. A stockholder can not, by fraudulent transfer, escape liability for funds already deposited; but he can escape liability for future deposits by transfer of his stock, regardless of the good faith of the transaction, provided there is an actual assignment consummated according to the terms of the statute.

The court was, therefore, in error in giving the third instruction, which made the liability of the stockholders turn upon their knowledge or information of the financial condition of the bank at the time they transferred the stock, even though that occurred before the money was deposited. The fact is uncontradicted that McEachin transferred his stock to Cunningham before the money was deposited; but the transfer was not recorded upon the books of the corporation.

(8) We held in *Warren* v. *Nix, supra,* that a transfer, without the same being recorded on the books of the corporation, was efficacious for the purpose of severing the relations between a stockholder and the bank if a sale of stock has been made honestly and in good faith, and the vendor "has done all that can be required of a careful and prudent business man in order to make such transfer."

There is a very wide conflict in the authorities on this question, but we must treat it as settled by the decisions referred to, and the only question in this case is whether or not the evidence concerning McEachin's transfer of his stock to Cunningham brings it within that rule.

The evidence shows that McEachin had control of the bank when he assigned his stock, he being cashier at the time, and that when he severed his relations by transferring his stock there was no one legally in charge

to record the transfer. However, he delivered the transfer to I. H. Cunningham, who, together with the other, W. R. Cunningham, immediately took charge of the bank, and the transferree became president. While it is true that he did not deliver the transfer into the "hands of the proper official to enter same upon the books," for the reason that there was no such official, but he did deliver it to one who was to become such official and who did become such official, and served as such for a period of nearly two months before the deposit was made. This was done openly, and the business of the bank was openly conducted by the Cunninghams with the implied, if not the express, approval of the other stockholders.

We are of the opinion, therefore, that this evidence shows beyond dispute that McEachin did all that a careful and prudent business man would ordinarily do to consummate the transfer and that he escaped liability for future deposits.

W. T. Quinley, another one of the defendants, sold and transferred his stock to I. H. Cunningham on May 14, 1912, and delivered him a power of attorney containing authority to make the transfer on the books. Quinley was originally one of the directors, but several years before he sold his stock he had severed his official relations with the bank and had no connection with it except as stockholder and depositor. He had nothing to do with the management of the bank. His case is, therefore, a stronger one than that of McEachin, and for the reasons already stated he was, according to the undisputed evidence, not a stockholder within the meaning of the statute at the time the liability of the stockholders attached.

Dyke Bros., a partnership, composed of two brothers of that name, were recorded as being the owners of eleven shares of stock. Their contention is that certificates had never been issued to them, and that they were not, in fact, stockholders.

We are of the opinion, however, that there is enough evidence to establish the fact that they were stockhold-

ers, and that being true, there is no effort to show that that relation was severed prior to the default of the bank in regard to the public funds.

(9) The list of stockholders, certified by the president and secretary of the corporation, on file in the clerk's office, is competent evidence for the purpose of showing who were the stockholders, and is *prima facie* evidence of that fact.

This list recorded the names of Dyke Bros. as holders of eleven shares of the stock.

A witness, who was formerly connected with the bank at the time of its organization, testified that the stock book of the bank was lost, but that the corporation had purchased a lot of furniture from Dyke Bros. and paid them in shares of stock of the bank.

One of those defendants testified that they were not stockholders and had never been notified of the issuance of any stock to them; but all of that testimony made a question for the jury, and we think it is sufficient to sustain the finding that those defendants were, in fact, stockholders.

H. B. Weir is another one of the defendants who has appealed, and it is contended for him that the evidence does not show that he was a stockholder.

Mr. Weir was certified, on the list heretofore referred to, as the holder of three shares of stock. He testified that he subscribed for shares of stock and gave a check in payment of the amount but that the shares were never actually delivered to him. The evidence was, we think, sufficient to establish the fact that he was, in fact, a stockholder of the bank.

The jury found in favor of defendant, A. S. Johnson. He owned thirteen shares of stock of the bank, which he assigned to McEachin, and the transfer was duly recorded, those shares being part of the stock which was assigned by McEachin to Cunningham.

The registered list shows that defendant Johnson owned another share. He testified that he knew nothing about that, except that Mr. Denman, one of the organ-

izers of the bank, told him that he had given him a share of the stock, but that he never received it or paid for it.

We think there is enough testimony to warrant the jury in finding that defendant Johnson was not a stockholder.

The judgment in Johnson's favor is affirmed, and the judgments in favor of plaintiff against defendants Dyke Bros. and Weir are also affirmed. The judgments against defendants McEachin and Quinley are reversed and the cause as to them is dismissed.

KIRBY, J., dissents as to McEachin and Quinley.

ON REHEARING.

McCULLOCH, C. J. Counsel for appellants, Dyke Bros., call our attention to the fact that we failed to decide the question raised by them that the proof was incomplete to establish the corporate existence of the Bank of Midland, and it is insisted, for that reason, that the judgment is not supported by sufficient evidence. The opinion of the court is silent on that question and a decision on the petition for rehearing calls for a discussion of that subject.

Dyke Bros. denied the corporate existence of the Bank of Midland, and they were the only ones of the defendants who raised that question. The plaintiff introduced in evidence the original articles of incorporation filed in the office of the county clerk, and also the record made in the office of the clerk, but there was no attempt to prove that the articles had ever been filed in the office of the Secretary of State. The case, therefore, stands, according to the record, as if the articles of incorporation were never filed with the Secretary of State and no certificate of incorporation ever issued by that officer. The proof is undisputed, however, that there was an organization of the bank pursuant to the articles filed in the office of the county clerk, that directors and other officers were duly elected, and that the business was operated thenceforth as a banking corporation.

Our statute provides that before any such corporation shall commence business, the president and directors shall file the articles of association, together with a certificate, setting forth the purposes for which the corporation is formed, the amount of capital stock, the amount actually paid in, the names of its stockholders and the number of shares owned by each, with the county clerk of the county in which the corporation is to have its principal place of business; and also shall file said articles of incorporation and certificate, with the endorsement of the county clerk, in the office of the Secretary of State, and that the latter officer shall, upon the filing of such endorsed articles and certificates and the payment of the fees required by law, issue to the incorporators a certificate of incorporation which "shall be admissible in all the courts of the State as *prima facie* evidence of due incorporation." Kirby's Digest, § 845.

(10) It must be conceded that strict compliance with the requirements of the statute is essential to create a corporation *de jure*. The authorities are unanimous on that proposition. But it is established by the overwhelming weight of authority that strict compliance with all the provisions of the statute is not essential to the *de facto* existence of a corporation.

"The statutory requirements for the organization of corporations," says Professor Thompson, "are generally regarded as conditions precedent to the formation of a corporation, and a substantial compliance is necessary in order to constitute a corporation *de jure*. But in the nature of the case, and under the definition given, if some step in the progress of the organization is unintentionally omitted, and the other requirements are present, there will be a corporation *de facto*. The accidental failure to comply with some legal requirement is one of the elements to the corporate existence *de facto;* otherwise, it would be a corporation *de jure*. A very common omission of strict or substantial compliance is found in the failure either to properly execute, acknowledge or record the certificate of incorporation or articles of as-

sociation. The general rule is that the mere failure to properly execute and acknowledge the certificate or the failure to record the certificate or articles of association will not be fatal to the existence of a corporation *de facto,* where the other elements are present." 1 Thomp. Corp. (2 ed.), § 234.

Further on in the same volume (section 255) the learned author says: "Not only is the corporation itself bound, but its officers and stockholders, or other persons interested, as well as those who have dealt with the pretended corporation with knowledge of a claim of corporate capacity, are not permitted to set up either for themselves, or on behalf of the corporation, any irregularity in the organization, for the purpose of either shielding the corporation, or of freeing themselves from personal liability. The certificate of incorporation is made for the benefit of the public, and neither for the corporation nor its stockholders."

Another text writer on the subject states the rule broadly that "the corporation is a *de facto* corporation where there is a law authorizing such a corporation and where the company has made an effort to organize under the law and is transacting business in a corporate name." 1 Cook on Corporations (7 ed.), § 234.

Still another text writer states the same rule in the following language: "Cases not seldom arise in which some condition precedent to the legal organization of a corporation has been omitted, and in which no conclusive certificate of due incorporation exists, and in which no estoppel to deny the company's existence can be invoked. In such cases, the American courts generally will, under certain conditions, hold that the association although not legally incorporated, is nevertheless a corporation *de facto,* that is to say, an association whose right to corporate functions and attributes is complete as against all the world except the sovereign." 1 Machen on the Modern Law of Corporations, § 284.

To the same effect see Helliwell on Stock and Stockholders, § 438.

The text writers fortify their conclusions with numerous citations of authorities, showing beyond peradventure that this is the generally established rule.

Judge BATTLE, in delivering the opinion of the court in *Forbes* v. *Whittemore,* 62 Ark. 229, recognized that principle by using the following language: "They (the parties who were attempting to escape liability as they were stockholders) never undertook to organize themselves into a corporation, and were not a corporation *de facto.*"

This court decided in the case of *Garnett* v. *Richardson,* 35 Ark. 144, that where the act of incorporation was incomplete by reason of the same defect in this case (*i. e.,* not filing the articles with the Secretary of State), the incorporators were personally liable as partners. That decision seems to be against the weight of modern authority, and the doctrine of it should not be extended any further. It does not follow that the corporation itself would not also be liable as a *de facto* corporation, nor that statutory liability of incorporators would be unenforceable.

(11) We have here a case of statutory liability of the stockholders for public funds borrowed from the bank, and the rule stated by the text writers undoubtedly is conclusive that where there is a *de facto* corporation the stockholders are estopped to dispute its legal corporate existence for the purpose of escaping liability.

(12) We hold, therefore, that the proof in this case was sufficient to establish a *de facto* existence of the corporation and that the stockholders are liable for the public funds deposited in the bank while doing business as such corporation, they being estopped to deny the legality of the corporate existence.

It is also insisted that we erred in holding that the evidence was sufficient to show that Dyke Bros. were stockholders. They were not mentioned as stockholders in the original certificate to the articles of incorporation, but were listed as stockholders in an annual certificate filed by the president and secretary pursuant to the

terms of section 848 of Kirby's Digest, which provides that the president and secretary of every such corporation shall annually make a certificate showing, among other things, the amount of capital actually paid in, and the name and number of shares of each stockholder. We said in the former opinion in this case that such certificate was *prima facie* evidence of the facts therein recited, and also that the testimony of one of the witnesses introduced by the plaintiff tended to show that Dyke Bros. were stockholders. We adhere to that conclusion.

It is insisted that the testimony of the witness referred to was purely hearsay, and therefore inadmissible, but, after a careful re-examination of it, we think that the testimony as it appears in the record is not altogether hearsay. The statements of the witness are to some extent contradictory, and in some places appear to be statements of fact within his own knowledge and at other places mere hearsay. We can not, however, from a perusal of the statements of the witness, say definitely that all of it is hearsay, for we think that was a question for the determination of the court and jury who heard the witness testify in person and could better judge of his statements as to personal knowledge of facts which he attempted to relate.

Rehearing denied.

HART and KIRBY, JJ., dissenting.

CASEY v. TROUT.

Opinion delivered October 12, 1914.

1. IMPROVEMENT DISTRICTS—MATERIALS OF PROPERTY OWNER—COMPENSATION—LIMITATIONS.—Kirby's Digest, § 5685, limiting the time for the correction of assessments made against property in an improvement district, has no reference to the provisions of Kirby's Digest, § 5689, which provides the manner in which a property owner may be allowed compensation for an improvement made by himself and used by the board of commissioners in constructing the general improvement.

2. IMPROVEMENT DISTRICTS—MATERIALS OF PROPERTY OWNER—COMPENSATION.—A property owner is entitled under Kirby's Digest, § 5689, to compensation from the district for curbing belonging to him and used by the district in the construction of the work of the district.

3. IMPROVEMENT DISTRICTS—MATERIALS OF PROPERTY OWNER—SET-OFF.—A property owner must ask for an allowance as against an improvement district which uses his property in the construction in order to be entitled to the benefit of Kirby's Digest, § 5689, but if he does ask such an allowance, and the same is refused, he may present his claim as a set-off to a suit to collect his assessment, if done in apt time.

4. IMPROVEMENT DISTRICTS—ALLOWANCE TO PROPERTY OWNER.—Where, upon proper application, an allowance is made under Kirby's Digest, § 5689, to a property owner for materials belonging to him and used in the improvement, the certificate issued to the land owner may be used in the payment of the tax for the improvement against said property.

5. IMPROVEMENT DISTRICTS—USE OF MATERIALS OF LAND OWNER—COMPENSATION—HOW OBTAINED.—Where the board of improvement refuses to allow a property owner's claim for compensation for the use of materials of the latter in the construction of the improvement, the property owner's remedy is to present his claim as a defense to an action brought against him by the board to enforce collection of the assessment made on his property.

6. LACHES—DOCTRINE OF.—Laches, in its legal significance is not mere delay, but delay that works disadvantage to another.

7. IMPROVEMENT DISTRICTS—COMPENSATION TO LAND OWNER—LACHES.—The lapse of a period of four years before the exercise of the claim of a land owner against an improvement district, for materials belonging to him and used by the district, will not be held to bar the land owner's claim by reason of laches.

8. IMPROVEMENT DISTRICTS—COMPENSATION TO PROPERTY OWNER—REMEDY.—A property owner with a valid claim against an improvement district for the use of materials belonging to the land owner, may set off his claim against any payment of the assessment against his property for the improvement for any year.

Appeal from Pulaski Chancery Court; *Jno. E. Martineau,* Chancellor; affirmed.

STATEMENT BY THE COURT.

This action was brought by appellants as Board of Improvement for Street Improvement No. 136, of the City of Little Rock, against Jacob Trout, *et al.*, to collect

an improvement district assessment on certain real estate.

Appellees defended on the ground that in making the improvement the board of improvement had taken and used certain curbing belonging to appellee Trout, and that he was entitled to pay therefor. The amount claimed is presented as a set-off against the assessment sued on.

The case was heard and determined on an agreed statement of facts substantially as follows: The appellee Trout, prior to the organization of the improvement district, had set a curbing in front of his lot. When the improvement was made the curbing was taken up and reset in front of his lot. Appellee met some of the members of the board on the street and demanded an allowance for his curbing. He did not make out and file with the board a claim therefor. The board of improvement declined to make any allowance for the value of the curbing, and so notified appellee.

Appellee paid the annual assessments on his property in the district for the years 1908, 1909, 1910, 1911 and 1913, but failed to pay the assessment for the year 1912. The assessment for that year is the subject-matter of this suit.

The chancellor allowed the claim of appellee for the curbing as a set-off to the amount of the assessment. To reverse the decree, this appeal has been prosecuted.

Carmichael, Brooks, Powers & Rector, for appellant.

The appellees having failed to begin legal proceedings within thirty days after publication of the assessment for the purpose of correcting or invalidating the assessment was forever barred and precluded. Kirby's Digest, § 5685; 86 Ark. 1; 90 Ark. 39; 84 Ark. 257; 67 Ark. 30; 69 Ark. 68; 81 Ark. 86; 95 Ark. 575.

By making the numerous payments, the appellees assented to the legality of the assessment, and is now estopped. 55 Ark. 148; Hamilton on Special Assessments, § 728; 81 Ark. 284; 112 La. 806; 61 Minn. 542; 40 Minn. 5; 91 N. Y. S. 533 (101 App. Div. 550).

The appellees have not pursued the method pointed out by the statute for obtaining the benefit of set-off. 84 Ark. 269; 54 Ark. 224; 50 Ark. 385.

The remedy for appellees was by mandamus. Kirby's Digest, § 5739.

Ben D. Brickhouse, for appellee.

The act does not contemplate a suit to obtain the benefit of set-off. Kirby's Dig., § 5689.

Appellee is not barred from claiming his set-off. The statute gave him a set-off against the assessment, and this would be so until all the assessments had been paid. 118 Pac. 391; 120 Pac. 840.

It was not necessary to invoke the remedy of mandamus. This was a just demand against the district, and this is a particular instance where claims may be set off against taxes. The court properly allowed the set-off under the maxim, equity regards that as done which ought to have been done. 97 Ark. 217.

HART, J., (after stating the facts). It is contended by counsel for appellant that the claim of appellees for the value of the curbing is barred by the statute of limitations. To sustain their contention they rely on section 5685 of Kirby's Digest, which reads as follows: "Within thirty days after the passage of the ordinance mentioned above, the recorder or city clerk shall publish a copy of it in some newspaper published in such town or city for one time; and all persons who shall fail, to begin legal proceedings within thirty days after such publication for the purpose of correcting or invalidating such assessment shall be forever barred and precluded."

The claim of appellees for the set-off is based on section 5689 of Kirby's Digest, which reads as follows: "If, in the construction of sidewalks or making other improvement, any owner of taxable 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 being also as good as that required by the system determined upon by said board, the board of improvement shall

appraise the value of the improvement made by the owner, and shall allow its value as a set-off against the assessment against his property. And in case the owner who has made such improvements shall be found to have failed to come up to the required standard, the board may allow him the value of the materials thereof, so far as the same may be profitably used in perfecting the system aforesaid, as a set-off against the assessment against his property thus improved. In such cases the board shall issue to the owner a certificate showing the amount of set-off allowed, which certificate shall be received by the collector in lieu of money for the amount named therein charged against said property."

(1-2) It is manifest that section 5685 has no reference to the provisions of section 5689. Section 5685 provides a limitation for the purpose of correcting or invalidating assessments made against the property. Section 5689 has no reference to the action of the assessors. It provides the manner in which a property owner may be allowed compensation for an improvement made by himself which has been used by the board of commissioners in constructing the general improvement. At the time the assessment is made on his property, the property owner could not know whether or not the board of improvement would use in the construction of the general improvement an improvement which had already been made by him. That is, in the present case, appellee could not know at the time the assessment on his property was made whether or not the board of commissioners would use his curbing in constructing the general improvement in the district. He could not know this fact until after the board had determined whether or not it would use it. After he ascertained that the board did use the curbing which he had placed in front of his lot, he demanded of the board of improvement that it should allow him the value of his curbing. It is true that he did not make this demand of the board while it was in session, but he did make it to one or more members of the board, and the agreed statement of facts shows that the board

declined to make any allowance to him for the value of his curbing, and so notified him. Thus it will be seen that appellee Trout did all that he could do to secure the allowance. It would have been useless for him to file a written application for such an allowance after the members of the board had refused to make it, and it is a maxim, of almost universal application, that the law does not require a vain and useless thing to be done.

(3) In this respect the instant case differs from *Board of Improvement District No.* 5 v. *Offenhauser,* 84 Ark. 257. Here the claimant asked the board to make an allowance for his curbing. In that case, the claimant did not ask the board to make him an allowance, and the court said he was not entitled to a set-off because he did not pursue the method pointed out by the statute. In other words, if the claimant does not ask for an allowance as required by the statute, he is not entitled to it, but if he does ask the board for an allowance, and it is refused, he may present his claim as a set-off to a suit to collect his assessment if done in apt time.

(4) It is true that the latter part of section 5689 provides that the board shall issue to the owner a certificate showing the amount of the set-off allowed, which certificate shall be received by the collector in lieu of money for the amount named therein charged against said property. This is done for the convenience of the property owner and under the statute he can present it to the collector in payment of the taxes assessed against him just as county and State warrants may be used in the payment of taxes assessed by the county and State, respectively.

It does not follow, however, that because the board of commissioners refused to make the allowance that the property owner is deprived of the use of his claim as a set-off against the assessment sought to be enforced against his property. Such holding would leave him entirely without a remedy in case the board of commissioners refused to make him an allowance.

It is insisted by counsel for appellant that appellee's remedy to compel the board of improvement to make the

allowance would have been by mandamus. We do not agree with them in that contention. Mandamus would have been the proper remedy, perhaps, to compel the commissioners to act on his claim, but not to control their action on it.

(5) In the instant case, the board of commissioners did act on his claim and refused to allow it. Appellee then could present his claim in an action brought against him by the board to enforce collection of the assessment made on his property.

(6) Again, it is contended by counsel for appellant that appellee is barred by laches. "Laches, in legal significance, is not mere delay, but delay that works disadvantage to another. So long as parties are in the same condition, it matters little whether he presses a right promptly or slowly within limits allowed by law; but when, knowing his rights, he takes no step to enforce them until the condition of the other party has in good faith become so changed that he can not be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as estoppel against the assertion of the right. The disadvantage may come from the loss of evidence, change of title, intervention of equities, and other causes; but when a court sees negligence on one side, and injury therefrom on the other, it is a ground for denial of relief." 5 Pomeroy, Eq. Jur. (3 ed.), section 21.

This quotation from Mr. Pomeroy was approved by this court in the case of *Tatum* v. *Arkansas Lumber Co.,* 103 Ark. 251. The doctrine had also already been defined in substantially the same language in the case of *Earle Improvement Co.* v. *Chatfield,* 81 Ark. 296.

(7) Appellee Trout paid the assessments for the years 1908, 1909, 1910 and 1911, but refused to pay the assessment for the year 1912, and this suit was instituted for the purpose of collecting that assessment. A period of only four years had elapsed, and there is nothing in the record to show that the condition of the parties had been changed in the slightest degree during these four

years. No disadvantage had come to appellants from the loss of evidence, change of title, intervention of equity, or from any other cause.

(8) There is nothing in section 5689 from which it may be inferred that the set-off should have been used against the first assessment sought to be enforced against the property owner. In fact, but one assessment of benefits is made against the property, but the payment thereof may be divided into a series of years. The assessment is still one assessment. Therefore, had the certificate been allowed by the members of the board, it could have been used in the payment of the assessment for any year.

As we have already seen, the board refused to allow the claim of appellee and we do not think he has been guilty of any conduct that would be the ground of a denial of the relief asked by him. As said by Mr. Pomeroy, laches, in legal significance, is not mere delay, but is that delay which works disadvantage to another.

It follows that the decree will be affirmed.

LEWIS v. RIEFF.

Opinion delivered October 12, 1914.

1. IMPROVEMENT DISTRICTS—POWERS AND LIMITATIONS.—Improvement districts are governmental agencies or *quasi*-corporations with certain powers and duties of a public nature and can only exercise the functions which the statutes have expressly conferred upon them.
2. IMPROVEMENT DISTRICTS—ESTABLISHING AN ALLEY—POWER OF MUNICIPAL CORPORATION.—A municipal corporation is without power to organize an improvement district in a city for the purpose of opening, establishing and creating an alley through property when no alley has ever been opened, dedicated or provided for.

Appeal from Pulaski Chancery Court; *Jno. E. Martineau,* Chancellor; reversed.

Mehaffy, Reid & Mehaffy, for appellant.

The power to lay off and open streets and alleys has been given by the Legislature to municipal corporations alone. Kirby's Dig., § § 5664, 5665. An improvement

district is not a municipal corporation, nor the agent of the municipal corporation within which it is organized. 55 Ark. 148.

Statutes conferring the power to open streets and alleys must be strictly construed. If improvement districts can open alleys under our law, they can open streets. This is clearly not intended by the Legislature. 103 Ark. 529.

The power of the board of improvement in this case is expressly limited by the statute which provides that "all such improvements shall be made with reference to the grades of streets and alleys as fixed, or may be fixed, by the ordinances of said city." Kirby's Dig., § 5672.

The district has "no powers, duties or liabilities except as conferred expressly by statute." 94 Ark. 381, 382.

Carmichael, Brooks, Powers & Rector, for appellee.

We think the right of property owners to organize an improvement district for the purpose of opening an alley through city property in which their lots are situated, is clearly conferred by the statute. Kirby's Dig., § 5664. This act not only specifically authorizes the "grading or otherwise improving streets and alleys," but also confers authority for "making any local improvement of a public nature," and this broad authority has been fully sustained by the courts. 67 Ark. 36; 70 Ark. 541.

The only limitation on the creation of an improvement district for any purpose is that the improvement shall be of a *public nature,* for *public use.* Dillon, Mun. Corp. (4 ed.), § 959; 3 *Id.* (5 ed.), § 1031; 1 Paige & Jones on Assessments, § 321.

KIRBY, J. The only question presented by this appeal, for determination, is whether an improvement district can be organized in a city for opening, establishing and creating an alley through property where no alley has ever been opened, dedicated or provided for.

Section 5664, Kirby's Digest, provides, "The council of any city of the first or second class of any incorporated town may assess all real property within such city or

within any district thereof, for the purpose of grading or otherwise improving streets and alleys, constructing sewers or making any local improvement of a public nature in the manner hereinafter set forth." Section 5672 authorizes the board of improvement to form plans for the improvement within the district and prescribe estimates for the cost thereof, "but all such improvements shall be made with reference to the grade of streets and alleys that may be fixed by the ordinances of said city."

Said section 5664 authorizes the formation of improvement districts, "for the purpose of grading or otherwise improving streets and alleys, constructing sewers or making any local improvement of a public nature, etc., and the appellee insists that an alley is a local improvement of a public nature within the meaning of the statute. The statute, however, provides a restriction and limits the purposes for which districts may be formed to "grading or otherwise improving streets and alleys," evidently referring to streets and alleys already opened, dedicated or provided for. This view is confirmed by the statutes providing a different agency and giving the municipalities themselves the power for opening and establishing streets and alleys. Section 5456 and subdiv. 2, sections 5593, 5648, Kirby's Digest.

(1) It was not the purpose of the law to give two separate agencies power to open and establish streets and alleys, or to have control and supervision of them, as held in *Sanderson* v. *Texarkana,* 103 Ark. 529, and the power has been expressly given to the municipality and can not be delegated by it to a different agency. Improvement districts are governmental agencies or *quasi*-corporations with certain powers and duties of a public nature, and can only exercise the functions which the statutes have expressly conferred upon them. In *Board Imp. Sewer District* v. *Moreland,* 94 Ark. 381, the court said: "The effect of our former decision on the subject of improvement districts organized within the limits of cities and towns, and of fencing, drainage and levee districts, is to make them governmental

agencies, or public *quasi*-corporations, which are 'purely auxiliaries to the State, and have no powers, duties or liabilities except as conferred expressly by statute.' " They are neither municipal corporations nor agents of the municipal corporations within which they are organized, but they derive their powers directly from the Legislature, and in exercising them, act as the agent of the property owners. *Fitzgerald* v. *Walker,* 55 Ark. 157. They have no control over the streets and alleys of the municipality except for the purpose of making the improvement for which the district was organized, and this being accomplished, the street or alley becomes subject to the exclusive control of the municipality. *Pulaski Gas Light Co.* v. *Remmel,* 97 Ark. 318. Improvement districts are given the power to exercise eminent domain in furtherance of the purpose of their organization. Sections 2921-2925, Kirby's Digest.

(2) It is true, as contended by appellee, that this court has held that an improvement district can be created in a city for the purpose of acquiring and improving a public park, the court saying of the statute: "The language is certainly broad enough to include any kind and class of improvement which will enhance the value of real estate of the particular district that is benefited," but the only limitation upon the making of improvements is not, as contended by appellees, that it shall be a local improvement of a public nature, for the statute expressly limits the power to organize such districts so far as streets and alleys are concerned, to the "purpose of grading or otherwise improving them," manifestly intending that they shall have already been opened, laid out, dedicated or established by competent authority. The city council was without authority to create the improvement district, and it had no authority to levy the assessment which is void against the property of the appellant.

The judgment is reversed and the cause remanded with directions to dismiss the complaint for want of equity.

GERMAN NATIONAL BANK *et al.* *v.* YOUNG, RECEIVER.

Opinion delivered July 13, 1914.

1. RECEIVERS—CONDUCT OF BUSINESS—OBJECTIONS.—Where a receiver conducted a business at a loss, after the lapse of three years it is too late for an interested party to object to the final settlement and to seek to charge the receiver with the loss.
2. RECEIVERS—OPERATION OF BUSINESS—BORROWED MONEY.—A receiver who borrows money from several parties to operate the business must pay back all the claims for borrowed money used in the operation of the business, *pro rata.*
3. RECEIVERS—FEES—EARNINGS PRIOR TO THE RECEIVERSHIP.—Where one Y. was appointed receiver of an insolvent corporation, he will be entitled to a preference under Kirby's Digest, § 4057, for the amount due him for services rendered as an employee of the corporation before it was placed in the hands of a receiver.
4. RECEIVERS—FEES.—Where a fixed sum was agreed upon as a reasonable fee for the receiver of an insolvent corporation, the receiver will not be allowed to collect an additional commission upon the sale of the property of the corporation.

Appeal from Sebastian Chancery Court; *J. V. Bourland,* Chancellor; reversed.

STATEMENT BY THE COURT.

In April, 1909, the Hiawatha Smokeless Coal Company, operating a coal mine in Scott County, was by the chancery court on the application of some of its stockholders, the company being insolvent, placed in the hands of a receiver to be wound up and its assets distributed. The complaint prayed that the same be managed under the orders and direction of the court, and that the receiver be ordered to borrow as much money as was necessary to protect the property; and one June 21, R. A. Young was appointed receiver, and "was authorized to borrow money to meet the payroll then due at the mine and pay the necessary expenses of preserving the property, and, if, in his judgment, it was to the best interest of all parties, to operate the mine, employing union miners for that purpose."

The company was indebted at the time of his appointment in the sum of $26,208.54. He operated the mine about eight months during the three years of the receiv-

ership before the property was sold, and borrowed money to pay the expenses of the operation, $7,000 being borrowed from the German National Bank, which was the principal creditor at the time of his appointment. He mined and sold coal during the operation of the mine to the amount of $23,594.16. The mine property was sold for $25,839.22. The receiver's report on June 1, 1912, covering the period of the receivership, showing the moneys received and paid out, is as follows:

RECAPITULATION OF RECEIPTS.

Loan from banks	$21,700.00
Sales of coal	23,594.16
Sale of mine mules	500.00
Incidentals	64.72
	$45,658.88
Sebastian County Bank	77.86
	$45,736.74

RECAPITULATION OF DISBURSEMENTS.

R. A. Young (personal)	$ 2,034.65
Seb. Co. Bank, Int. on O. D.	134.89
Taxes 1909, 1910, 1911	1,235.53
Pay roll	24,864.53
Operating expenses, notes and interest	17,460.05
	$45,729.65

He later filed a supplementary report showing receipts, including the sale of the mine property, $25,839.22, and disbursements of $19,366.63, in which was an allowance of compensation to him as receiver of $4,000.00, and in which he claimed a commission of 15 per cent on the sale of the mine, amounting to $3,852.

Appellant excepted to the different reports on several grounds, some of which were sustained and the report was confirmed, and it appealed from the judgment of the court overruling certain exceptions, assigning as errors the following:

4. The court erred in not sustaining its objection to the item of $2,034.65, for which the receiver claimed credit as expenses when the money was used for his personal benefit.

5. In not charging the receiver with the amount lost in the operation of the mine.

6. In paying certain creditors in full, in effect giving their claims preference and discriminating against the bank.

8. In the allowance of the claim for extra compensation for salary of bookkeeper in the sum of $1,776.65.

9. In the allowance of claim of Young for services before his appointment as receiver.

12. For the allowance of commission for the sale of the property to the receiver in addition to the compensation already allowed and paid him.

Hill, Brizzolara & Fitzhugh, for appellant; *Moore, Smith & Moore,* of counsel.

R. W. McFarlane and *Read & McDonough* for appellee.

KIRBY, J., (after stating the facts). This appeal is from a decree overruling exceptions to a report of a receiver and ordering distribution of assets in his hands.

The first contention noted is the allowance of $2,034.65 to the receiver as expenses, which was in fact moneys used directly by the receiver as follows:

"December 21, 1909, a check for $1,700 used to pay off his personal note. Another check is on April 25, 1910, for the same purpose for $636.37. Another for $413.21. He purchased for himself one mule at the mine, agreeing to pay therefor $100, and from this amount, $2,849.58, it was considered that the Greenwood Coal Company's account for $814.93 should be deducted, leaving a balance of $2,034.65."

The receiver replied to the exception and stated that the items above were for advances made to him personally and contends that the money was drawn from the

funds on hand for his personal use, and that his account showed that was part of his fees, and was not claimed as expenses of the receivership. It is also claimed that the amount having been allowed by the court in its approval of the receiver's report of June 10, 1912, and not appealed from is *res judicata,* and can not be re-examined. These items show on such reports as were filed charged "R. A. Young, personal." It is true, most of the parties interested understood, when agreeing that the receiver's compensation should be fixed at $4,000, that the said $2,034.65 had been used as expenses in the administration of the estate by the receiver, when, in fact, it was used as stated above, for the receiver's personal benefit, and he claimed that in the agreement for the allowance of his compensation, it was understood that he should have the $4,000 in addition to said sum. The court, however, is of the opinion that the preponderance of the testimony shows it was the intention and agreement to allow only $4,000 to the receiver for his entire services, and that that sum is a reasonable compensation therefor. He was receiver for several other concerns during the time of this receivership, was superintendent for another coal mining company during the whole period at a salary of $150 per month, and during no part of the period did he devote his whole time to the business of this receivership. The decision approving the allowance of the item $2,034.65, not having been appealed from after the allowance and confirmation of the report, can not now be re-examined, it is true, but we are of the opinion that equity, good conscience and justice require that the $4,000 allowed as compensation for the receiver must be reduced by said amount of $2,034.65, already paid him, and that the court erred in not so reducing it and making a final allowance of an amount sufficient with it to make the $4,000 compensation in all.

(1) The receiver was given authority, if, in his judgment, he thought it to the best interest of the estate, to operate the coal mine, and proceeded to do so. It was shown that he was a capable and skilled superintendent

or mine operator, and that he had operated the mine under adverse conditions, and in a reasonably careful and economical way, and that the loss was due more to bad labor conditions and dull times, in not being able to dispose of the product to advantage, than to any fault of the receiver, and we do not think the court erred in refusing to charge him with the amount lost in the operation of the mine. It was the duty of those interested, and they should have kept closely in touch with the receiver's proceedings, and have objected to the further operation of the mine, and had it discontinued if they did not think it would result to their benefit. They will not be heard now on the final settlement of the receivership of three years to complain that the mine was operated at a loss, and that the receiver, who seemed to have been given, and to have exercised a free hand in its operation, shall be charged with the amount of the loss. *Buster* v. *Mann,* 69 Ark. 23.

(2) There is no need to sustain the sixth assignment. It appears that certain small amounts were paid to certain of the creditors of the company, but an examination shows that these amounts were for preferred claims, to the payment of which appellant only had the right to object that they should not have been paid until after it had received all the money it loaned the receiver with which to operate the mine. He should not have paid off all the other indebtedness in full incurred by him for money borrowed for operating the mine, and only about 70 per cent of the amount borrowed from the German National Bank during the receivership, but should have paid the claims for borrowed money used in the operation of the plant *pro rata,* if there was not enough to pay it all, and will be directed to pay said bank first, and at once out of the money in his hands the balance due upon its claim for money loaned him as receiver before any other disbursement or distribution is made.

The eighth assignment is sustained. The claim for extra compensation for the bookkeeper should not have been allowed. The reports show the amount of $15 al-

lowed monthly for a bookkeeper's services, and the receiver's supplementary report shows an amount claimed as extra compensation for a bookkeeper of $2,575.41. The testimony shows that no complete set of books was kept by the bookkeeper, who was shown to have been a competent one, that he was a cashier of a bank, and kept books also for the Greenwood Coal Company, and did this work as he himself said, "as a side line." The whole course of dealing shows that it was not contemplated that he should be paid more than $15 a month for the service, and the testimony shows that the service rendered was not worth more than that amount. The mine was only operated for about eight months during the whole three years for which he was paid $15 per month for keeping books. The whole claim for extra compensation should have been disallowed and the exception sustained, and the court erred in making the allowance of $1,776.65 on this claim.

(3) With regard to assignment No. 9, we will not disturb the court's ruling. Young was a capable mining man and superintendent, was engaged at the mine for two months before it went into the hands of the receiver, and as an employee, his claim was entitled to preference under section 4057, of Kirby's Digest, and the amount of $150 per month was agreed upon, and not unreasonable for the service rendered.

(4) Assignment No. 12 is also sustained. The court erred in allowing the receiver the commission of $1,540.80 upon the sale of the property. Four thousand dollars had been agreed upon as a reasonable sum and allowed as compensation for his services as receiver, and the evidence shows that that was a reasonable amount for all services rendered by him, and the court erred in making any further allowance, and he must be charged again with the $1,540.80 so erroneously allowed.

He will be charged and must account for the item of $2,034.65, as decided under the fourth assignment, with $1,776.65, amount erroneously allowed for extra compensation to the bookkeeper, as decided under the eighth as-

signment, and with the $1,540.80 erroneously allowed for commissions upon the sale of the property, as decided under assignment 12—in all with the sum of $5,352.10 additional.

For the errors indicated, the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

GEE v. HATLEY.

Opinion delivered October 12, 1914.

1. TRIAL—INSTRUCTED VERDICT—QUESTIONS OF FACT.—To authorize the court to withdraw from the jury the questions of fact involved in the litigation, it is essential that, at the conclusion of all the evidence in the case, the plaintiff and defendant should each request the court to direct the verdict, and this request must not be accompanied by any request for instructions to the jury which would require the jury to determine any controverted question of fact.
2. ADVERSE POSSESSION—POSSESSION OF DEFENDANT—QUESTION FOR JURY.—In an action to recover the possession of certain land, where defendant denied that its possession was permissive, but alleged, and offered proof, that it was hostile and adverse, the issue should be submitted to the jury.
3. EVIDENCE—TITLE TO LAND—CHURCH—TAXES.—In an action by a church to recover possession of land, evidence of the payment of taxes by the defendant and his vendees is admissible, although a church is not charged with the payment of taxes.
4. ADVERSE POSSESSION—EVIDENCE—NOTICE TO OWNER.—Where B. entered upon certain premises belonging to appellee by permission, the presumption is that his subsequent possession and that of those claiming under him was also permissive, but this may be overthrown by evidence that the possession was adverse.

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

STATEMENT BY THE COURT.

This suit was brought by the Presbyterian Church, through its trustees and elders in Prescott, Arkansas, to recover possession of a portion of lot 6, block 36, of the Railroad Survey of the town of Prescott, Arkansas.

The original title of the church to the lot was not disputed, in fact, the defendants claimed title through mesne conveyances from the trustees of the church as well as by adverse possession.

On April 13, 1889, the church, through its officers, sold to one James T. Brooks, forty-four feet off the back end of this lot. Brooks entered into the possession of the land which he had bought and enclosed it, together with sixteen additional feet, and remained in possession of the entire sixty feet of the lot until June 7, 1899, at which time he executed a deed to the entire sixty feet, and the defendants acquired the title of his vendee by mesne conveyances.

At the trial in the court below, the plaintiffs introduced certain deeds through which they claimed title, together with an agreed statement of facts relating thereto, which, together, were sufficient to establish a *prima facie* right to recover the possession of the land in controversy, and rested their case. Whereupon the defendants requested the court to direct a verdict in their favor. It does not appear upon what ground this request was made, and the court properly declined to grant it.

The defendants then offered their evidence in support of the allegations of their answer. This answer had been amended to allege that the deed to Brooks through which they claimed had inadvertently failed to describe all of the land conveyed to him, and that this deed should, in fact, have described the entire sixty feet, which description would have included all of the land in controversy; but this allegation was abandoned, and no evidence was offered to substantiate it, and the defendants offered evidence only in support of their plea that they and their predecessors in title, back to and including the said J. T. Brooks, had been in the open, adverse, exclusive and continuous possession of said land for a period of more than twenty years, and that they had kept it under fence and paid the taxes thereon without interruption during all of this time without any question of ownership or possession having been raised until the filing of the complaint herein.

The defendants, and all of their predecessors in title, were present and testified at the trial, except Brooks, who died before the institution of this suit; and these witnesses offered to testify, when called in rebuttal to the evidence offered on behalf of plaintiffs showing the permissive character of their possession, that they had no knowledge of any permissive possession given to Brooks by the church, through which Brooks acquired possession of the sixteen-foot strip of land in controversy, and they each offered to testify that their possession of the land had been as an owner thereof; but, upon the objection of the plaintiffs, this evidence was excluded by the court.

A former pastor of the church testified on behalf of the plaintiffs to the effect that some time after the deed was made to Mr. Brooks, permission was asked by him to enclose more of the church lot than he had bought, and this he was allowed to do in order to prevent people from hitching horses on the lot back of the church. The witness did not remember the exact date of this agreement, but stated that it was more than twenty years ago, somewhere between 1887 and 1897, and that there was no consideration paid for this privilege, but that the right to enclose this strip was granted as a matter of courtesy and to prevent people from driving and hitching their horses and teams near the church.

Another member of the church testified about having had a conversation with Brooks, in which Brooks spoke of the permissive character of his possession.

At the conclusion of all the evidence in the case, the plaintiffs requested the court to direct the jury to return a verdict in their favor, which was done. It does not appear that the defendants made any request for instructions, but the record recites the fact to be that the plaintiffs alone made the motion for a directed verdict. A motion for a new trial, in which various exceptions were saved, having been overruled, this appeal has been duly prosecuted from the judgment of the court awarding the possession of the land to the plaintiffs.

H. B. McKenzie, for appellants.

1. If it be conceded that the possession of the original holder was permissive, as alleged by appellee's witnesses, yet the continuous possession under successive holders by warranty deed for a period much longer than the statute requires, with the original holder having only permissive possession of the disputed portion of the land, and his successors holding by deed without notice, with the understanding and belief that they owned what they held, and improved it as such, their possession has ripened into title by adverse possession. 86 N. W. 515; 122 S. W. 403; 136 Ind. 20; 4 Mason 326; Freeman on Co-Tenancy & Partition, § 224; 13 Serg. & R. 358; 13 Me. 337; 20 N. W. 320-329; 144 Mo. 192; 50 S. E. 450, 138 N. C. 35. See, also, 2 Enc. of L. & Pr., 461; 24 Am. St. Rep. 934.

The actual possession of the land, coupled with acts of ownership was notice to the world of the title under which they held. 90 Ark. 149.

A *bona fide* purchaser holds adversely to the world. He may disclaim the title under which he entered, and stay by any other title and any other defense against his grantors and all others. 5 Wall. 268; 16 Pet. 25; 5 Pet. 402; 136 Ind. 20; 92 Ind. 70.

2. Appellants and their predecessors having held possession under deed for more than twenty years, the law will presume that the possession was adverse. 17 Wend. 642; 10 Serg. & R. 182; 9 Watts 363; 29 Pa. 495, 72 Am. Dec. 654; 46 Pa. 376; 1 Coldw. 313.

3. The question of adverse possession is one for the jury to determine, and the court erred in not submitting that question to the jury. 99 Ark. 446; 3 Allen (Mass.) 354; 164 S. W. 728.

As to the character of the acts of ownership, in such cases, it is said that all the law requires is that the acts of dominion shall be of such a character as may be reasonably expected to inform the true owner of the fact of possession and claim of adverse title. 5 Am. St. Rep. 398, and cases cited. See, also, Mees. & W. 355; 77 Tex. 578;

27 Neb. 57; 116 N. Y. 34; 38 Conn. 562; 6 Allen 20; 56 Ala. 444; 37 Minn. 113-115.

G. R. Haynie and *McRae & Tompkins,* for appellees.

1. Where one enters into possession of land with the permission of the true owner, the possession can never be adverse until the party in possession disclaims and brings home to the true owner notice of the disclaimer. 1 Cyc. 1032; 43 Ark. 469-485; 33 Ark. 633; 42 Ark. 118; 69 Ark. 562; 20 Ark. 547; 4 Howard 289; 5 Cow. 123, 15 Am. Dec. 451; 58 Am. Dec. 217, 218; 110 N. Y. 543; 41 Md. 81-96; 2 Enc. of Law & Proc. 391, and authorities cited; 34 Ark. 312; 77 Ark. 177; 80 Ark. 444; 84 Ark. 140; 66 L. R. A. 431-434; 32 L. R. A. (N. S.) 939, note; 12 *Id.* 1142, note.

2. As to notice, either actual or constructive, of adverse holding, the burden rests upon the appellants to show it. There is no evidence of any notice in the record. And, as to presumption of notice, that may be rebutted by evidence or circumstances. 1 Jones on Evidence, § § 76-81.

The record of a deed which is not in line of a party's title is not constructive notice to him. 99 Ark. 446; 69 Ark. 95; 76 Ark. 5.

3. The question should not have been submitted to the jury because there is not a disputed fact in the case. Moreover, both sides asked peremptory instructions, and no other. 105 Ark. 25.

4. The entry of Brooks being permissive, the presumption is that it remained so, and the burden was on the appellants to show hostile possession and when it began. 10 Yerg. 476; 1 Jones on Evidence, § 58b; 22 Ark. 466; 4 Ark. 457; 1 Crawford's Dig. 755; 1 Greenleaf on Ev. (16 ed.), § § 41, 42.

SMITH, J., (after stating the facts). It is urged that the action of the court in directing the jury to return a verdict in favor of the plaintiffs is conclusive of the facts in issue in this case, and the case of *St. Louis Southwestern Ry. Co.* v. *Mulkey,* 100 Ark. 71, is cited in support of that contention. But we do not agree with them in this

contention. In the *Mulkey* case, at the conclusion of all the evidence, both the plaintiffs and the defendants united in a request to the court that a verdict be directed by the court, each of the parties asked that that direction be given in its favor, and no other instructions were asked, and it was there said:

"It is also true that the parties had the right to waive a jury and submit the matter to the court for trial in the first instance, and, each having requested the court to direct a verdict in his favor, and not having requested any other instruction, they, in effect, agreed that the question at issue should be decided by the court, and waived the right to the decision of a jury, and the court's decision and direction has the same effect as would have been given to the verdict of the jury upon the question at issue, without such direction."

(1) To authorize the court to withdraw from the consideration and determination of the jury the questions of fact involved in the litigation, it is essential that, at the conclusion of all the evidence in the case, the plaintiff and defendant should each request the court to direct the verdict, and this request must not be accompanied by any request for instructions to the jury which would require the jury to determine any controverted question of fact.

(2) These conditions were not met in the instant case, and the question of fact here involved should have been submitted to the jury for its determination. It is true that the record recites a request upon the part of the defendants for a directed verdict, but this request was made when the plaintiffs had introduced the agreed statement of facts and the deeds which constituted their paper title and made a *prima facie* showing of the right to recover the possession of the land. That request was made by the defendants alone, and was properly refused by the court, and at the time it was made amounted to no more than an exception to plaintiff's paper title and its sufficiency to make a *prima facie* case. Had a verdict then been directed by the court, it must necessarily have been directed against the defendants, instead of in their favor.

Having refused this request, the court then permitted the defendants to offer their evidence in support of their allegation of adverse possession, and this lawsuit involves that question, and its decision will turn upon the final determination of that question. And all of the evidence bearing upon this issue was offered after the court's refusal to direct a verdict at defendant's request, and the only issue of fact in the case was raised after this refusal, and thereupon the plaintiffs alone requested the court to direct a verdict in their favor, and we think the court's action in doing so was erroneous. The defendants denied that their possession was permissive, and alleged, on the contrary, that it was adverse and hostile, and we think that issue should have been submitted to the jury. The evidence is undisputed that Brooks's possession was permissive, but it, by no means, follows that that of his vendees was, necessarily, likewise permissive. Brooks conveyed the land away in June, 1899, and those claiming through him have since been in the continuous possession of the disputed strip of land, and we think they not only should have been permitted to testify as they did that their possession was as owners, but, further, that they should have been permitted to testify that they had no knowledge of any permission granted to Brooks, and that their possession was not in subordination to this permission.

(3) It is urged by appellees that the evidence in regard to the payment of taxes on the part of defendants and their predecessors in title was incompetent because no taxes were chargeable against the property of the church, and that the officers of the church could not, therefore, know, and were not charged with the duty of knowing, that these payments were being made. We think this evidence was competent, notwithstanding the fact that no taxes were chargeable against the property of the church. These tax payments were an evidence of an adverse holding, and the proof of the payments was admissible in support of that plea.

As the cause must be remanded for a new trial upon the question of fact as to whether or not the holding of the vendees of Brooks was adverse to the church and had ripened into title, we think it not improper to declare the law applicable to that issue, a clear statement of which is found in 1 Ruling Case Law, § 68, in the article on Adverse Possession and under the sub-title, "Whether Tenant May Hold Adversely," and the rule was there announced as follows:

"As a general rule, the possession of a tenant is that of his landlord, and will be so deemed until the contrary appears. This rule affects all who may succeed to the possession, immediately or remotely, through or under the tenant. Therefore, so long as the relation of landlord and tenant exists, the tenant can not acquire an adverse title as against his landlord. This is merely one application of the rule that the tenant can not deny his landlord's title. It is equally well settled that one who enters as tenant is not, merely because of that fact, precluded from subsequently holding adversely to his landlord. To do so, however, it is necessary to renounce the idea of holding as tenant, and to set up and assert an exclusive right in himself. It is also essential that the landlord should have actual notice of the tenant's claim, or that the tenant's acts of ownership should be of such an open, notorious, and hostile character that the landlord must have known of it. Such conduct on the part of the tenant necessarily furnishes the landlord with the legal title to enter and repossess himself of the premises. So, a third person may set up, as against the landlord, an outstanding adverse title purchased from the tenant without notice of the tenancy."

(4) The case of *Singer* v. *Naron,* 99 Ark. 446, discusses and reviews a number of cases involving the principle which will control in the decision of this case. The case just cited is authority for the statement that the church is not constructively affected with notice of the conveyances from Brooks to appellants and their predecessors in title from the mere fact that these deeds were

recorded, because they are not in the chain of the church's title; but these deeds are admissible in evidence for the purpose of showing the character of the possession. And it is true that it having been shown that Brooks entered into the permissive possession of the land, the presumption is that his subsequent possession and that of those claiming under him was in subordination to the church's title and pursuant to this permission. But this presumption may be overthrown by the evidence, and the jury should find that it was overthrown, and that the possession was adverse, if they should find the fact to be that the trustees of the church had actual notice of this adverse possession, or that defendants' occupancy had been so inconsistent with the presumption of a permissive possession as to impute knowledge to the trustees of that hostility. If the jury should find the fact to be that appellant's occupancy of the land was of such a character as to be entirely inconsistent with the idea of a permissive possession, and that it was so continued for the full statutory period, then they should find for the appellants.

For the error indicated, the judgment will be reversed and the cause remanded for a new trial.

SMITH v. SPINNENWEBER.

Opinion delivered October 19, 1914.

1. GARNISHMENT—JUDGMENT AGAINST DEFENDANT—NECESSARY PARTIES.—A valid judgment can not be rendered against the garnishee where no judgment has been rendered against one of two defendants, who is an indispensible party to the suit.
2. GARNISHMENTS—DEBTOR NOT A PARTY—REVERSAL—RELEASE OF GARNISHEE.—Where judgment was improperly rendered against a garnishee the principal debtor not having been made a party, upon reversal of the cause the debtor may be made a party, and the garnishee is not entitled to an absolute discharge pending the making of the debtor a party.
3. GARNISHMENT—OVERDUE NOTE.—An overdue, negotiable, promissory note, still in the hands of the payee, is subject to garnishment.
4. GARNISHMENT—NOTE—FRAUDULENT TRANSFER.—Where a note is tranferred for the purpose of defrauding creditors, the same may be reached by garnishment.

5. PARTNERSHIP—DEBT OF PARTNER—TRANSFER OF PROPERTY.—Partnership property may by consent of the partners, be appropriated to individual indebtedness, and where property has been so transferred, the equity of the partnership creditor is lost.

Appeal from Randolph Circuit Court; *J. W. Meeks,* Judge; reversed.

S. A. D. Eaton, for appellant Ellis.

1. A judgment against the partnership in favor of the appellees is a prerequisite to a valid judgment against the garnishee. 62 Ark. 616; 70 Ark. 127. A writ of garnishment must have a judgment to support it. 31 Ark. 652.

2. The court erred in refusing to charge the jury that before they would be authorized to find for the plaintiffs, they must find from the evidence that Ellis on or subsequent to, the 9th day of December, 1912, was indebted to W. A. Smith & Bro. in some amount, or had in his possession a promissory note belonging to W. A. Smith & Bro. 76 Ark. 98.

3. Instructions 1 and 2, given by the court, are both erroneous. As to instruction 1, the note was transferred before maturity, and it is conceded that it was in appellant's possession, which was presumptive evidence of his ownership, at the commencement of the garnishment proceedings. The burden of proving his want of ownership was on the appellees. 2 Enc. of Evidence, 517 *et seq.* An endorsement purporting to transfer a negotiable note is presumed to be genuine, and to import value. Litt. Sel. Cas. (Ky.) 208; 37 Minn. 404; 4 Ark. 535; 9 Ala. 638; 22 La. Ann. 457; 51 Miss. 55; 29 Ore. 483.

As to instruction 2, there was an entire want of evidence on which to base it. 63 Ark. 177; *Id.* 563; 70 Ark. 99; *Id.* 441; 71 Ark. 351.

C. H. Henderson, for appellees.

1. Judgment was obtained against the partner who remained, six months before the garnishment proceeding was brought to trial. Plaintiff could not be expected

to do more than obtain judgment against who remained within the jurisdiction of the court, and the fact that one of the partners fled from the State apparently to avoid his creditors, should not deprive the court of its jurisdiction. Garnishment is a suit and not a process or execution. 24 Fed. Cas. No. 14239, Hempst. 662; 20 Cyc. 978.

2. The burden was upon the garnishee to show that he was an innocent purchaser of the note for value, and that issue was submitted to the jury and found against him. 39 Ark. 97; 90 Ark. 93; 107 Ark. 581.

3. The evidence warrants no other conclusion than that Smith and Ellis, realizing the precarious condition of the assets of the partnership, made a transfer of this note to Ellis as a gift and to avoid the seizure of the same by the creditors. Such assignment was fraudulent and void as to the creditors. 20 Wis. 311; 20 Cyc. 1017; 35 Vt. 39; 87 Ala. 58.

4. The assignment, if made, was to satisfy an individual indebtedness of W. A. Smith, and was, therefore, void, unless consented to by the other partner. Parsons on Partnerships, 202-13; 52 Ark. 558; 104 Ark. 109; 40 Ark. 551; 93 Ark. 57; 84 Ark. 172; 20 Cyc. 1029; *Id.* 993.

McCULLOCH, C. J. This is an action instituted in the circuit court of Randolph County by the plaintiffs, Spinnenweber & Peters, against the defendants, W. A. Smith and J. B. Smith, as copartners under the firm name of W. A. Smith & Bro., to recover the sum of $150 alleged to be due on account for rent of a farm and the price of timber sold. A garnishment was sued out at the commencement of the action against E. N. Ellis and A. H. Fredricks as garnishees and interrogatories were filed against them, to which they made response. One of the defendants, J. B. Smith, was served with process, and the action proceeded to final judgment against him, but there was no service, either actual or constructive, against W. A. Smith, the other defendant. Defendant J. B. Smith filed an answer denying that he was a mem-

ber of the firm of W. A. Smith & Bro. or that he was indebted to the plaintiffs in any sum. There was a separate trial of the issue between the plaintiffs and J. B. Smith which resulted in a verdict and judgment in favor of the plaintiffs for the amount of their claim.

E. N. Ellis, one of the garnishees, filed a separate response and intervention, in which it appears that the other garnishee, Fredricks, executed a negotiable promissory note to W. A. Smith & Bro. for the sum of $150, that the same had been transferred by a proper indorsement on the note to garnishee Ellis, and that he is now the holder of the same for a valuable consideration. The said garnishee contends that the note was transferred to him before maturity for a valuable consideration, but the note was overdue and unpaid in his hands at the time of the trial below. There was a trial of the issue between the plaintiff and the garnishees before a jury and the verdict was in favor of the plaintiffs against both the garnishees in the sum of $100. The court thereupon rendered judgment against both garnishees for the sum named in the verdict. Garnishee Ellis alone has appealed.

(1) It is insisted in the first place that final judgment should not have been rendered against the garnishees until judgment was rendered against the defendants, and we are of the opinion that this contention is well founded. There was a judgment against J. B. Smith, one of the defendants, but in his answer he disclaimed any interest in the partnership assets; and even though the jury decided against him as to liability for plaintiffs' debt, it does not follow that this obviated the necessity of bringing in, by proper process, the other defendant, who confessedly is a member of the firm and interested in the note, if the assignment to garnishee Ellis is not valid. At any rate, it was improper to proceed with the trial of the rights of the garnishee without bringing in W. A. Smith, one of the original debtors, as he was a party in interest and is not bound by the judgment of the court rendered

against the garnishees. He was an indispensable party, in other words, and no final judgment could be rendered without his presence in the action. The proof tended to show that he was a fugitive from justice and is now in the State of Mississippi, but he could have been brought in by publication of a warning order, the court having acquired jurisdiction of the property by service on the garnishee.

This court decided in *Norman* v. *Poole,* 70 Ark. 127, that under the garnishment statute now in force it is indispensable that final judgment be rendered against the principal debtor before there can be any final judgment against the garnishee. Judge RIDDICK, speaking for the court in that case, said: "The proceeding against the garnishee is ancillary to that against the defendant. As the object of the garnishment is to reach money or property in the possession of the garnishee, and subject it to the payment of the judgment which the plaintiff may recover against the defendant, it follows that there can be no lawful judgment against the garnishee until after the judgment has been recovered against the defendant."

(2) It is not too late for said defendant W. A. Smith to be brought in and it can be done after the cause is remanded to the circuit court, as the case is still pending and the garnishee is not entitled to an absolute discharge pending the process to bring in the other defendant.

Inasmuch as there may be another trial of the case, we deem it proper to notice some of the other assignments so that the court may have some guide for the trial of the case when the record is complete.

(3) In the first place, the question is not free from doubt as to whether a negotiable promissory note can be reached by a garnishment and the maker required to respond. There is some conflict in the authorities on this question, but it seems to be settled by the weight of authority that an overdue, negotiable, promissory note

still in the hands of the payee, is subject to garnishment. Rood on Garnishments, § § 133-134 Our statute recognizes this by providing for a garnishment to reach "goods, chattels, moneys, credits and effects" in the hands or possession of the garnishee belonging to the defendant. The right seems also to be recognized by a decision of this court in *Cross* v. *Haldeman,* 15 Ark. 200, where it is said that "a garnishee, answering and admitting his indebtedness, as the maker of negotiable paper, without reserve or qualification, does so at his peril," and may be held liable under the garnishment.

(4) The note bears the written assignment of W. A. Smith & Bro. and it remains now unpaid in the hands of garnishee Ellis. There is an issue presented in the case whether Ellis is a *bona fide* holder of the note or whether it was transferred to him in fraud of the creditors. The plaintiffs are entitled to a trial of that issue; and, as the maker of the note as well as the holder is a party garnishee, if it be found that the assignment is colorable and made for the purpose of defrauding creditors, the plaintiffs are entitled to reach the funds by the process of garnishment. It was error, however, to render judgmen against Ellis for the recovery of the money. The judgment could have been only against Fredricks, the maker of the note.

The court gave the following instructions, over the objections of the garnishee:

"1. You are instructed that, if you find from the evidence that the note garnisheed was the property of W. A. Smith & Bro., and that same was assigned by W. A. Smith to E. N. Ellis for the payment of the individual debt of the said W. A. Smith, and that J. B. Smith, the other partner, did not consent thereto, you will find for the plaintiffs."

"2. If you find from a preponderance of the testimony, that a part of the note was assigned for professional services for the benefit of the firm of W. A. Smith & Bro., and a part of it for for the individual benefit of W. A. Smith, then you should find for the plaintiffs

against the defendant for such part of the note as was for the individual service for W. A. Smith, and your verdict for the balance of said note, should be for the defendant."

(5) These two instructions were both erroneous; the second one because it ignored entirely the question of the consent of the other partner to the transfer; and the first one for submitting that question at all, inasmuch as the undisputed evidence was that W. A. Smith was authorized to assign the note. This court has steadily adhered to the rule that, partnership property may, by consent of the partners, be appropriated to individual indebtedness; and where property has been so transferred, the equity of the partnership creditors is lost. *Boyd* v. *Arnold,* 103 Ark. 105. Now, the record in this case shows beyond dispute that the assignment of this note to the garnishees was made by W. A. Smith in the name of the partnership; and even if it was for an individual indebtedness, it was not without the consent of any one else interested. In fact, the other defendant in the case expressly denied that he was a member of the partnership and there was therefore no reason for submitting the issue to the jury whether consent had been given by the copartner of W. A. Smith. It was erroneous to give any instructions to the jury on that subject, and the issues should have been narrowed to the single one concerning the *bona fides* of the transfer, as that was the only disputed question in the case. There was, we think, enough dispute on that issue to warrant a submission to the jury. Garnishee Ellis testified that the note was assigned to him by W. A. Smith upon a certain consideration, but the plaintiffs proved a prior conflicting statement which would warrant the jury in rejecting his present statement if they believed it to be untrue.

The judgment is reversed and the cause remanded for further procedings not inconsistent with this opinion.

WOODS v. STATE.

Opinion delivered October 12, 1914.

1. LIQUOR—SALE WITHOUT LICENSE.—Where defendant purchased whiskey at the request of one M., with money belonging to M., going to a person to whom M. directed him, defendant having no interest in the liquor nor the sale thereof can not be convicted of the crime of selling intoxicating liquor without a license.
2. LIQUOR—PROCURING FOR ANOTHER.—Under an indictment charging the unlawful sale of intoxicating liquors, a defendant can not be convicted of the crime of purchasing liquor for another as denounced in Kirby's Digest, § 5135.

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

Steel, Lake & Head, for appellant.

We think the trial court erroneously construed the purport of the decisions of this court in liquor selling cases to be that where one, with money furnished by another, purchases intoxicating liquor of an unlicensed dealer then, no matter whether he is acting solely as agent of the party who furnished the money and is not interested in the liquor or its sale, or not, the party making the purchase is guilty, notwithstanding the party for whom it is bought directs the purchaser to go to a particular person and get a certain quantity of liquor with a certain sum of money then handed him for that purpose.

The Foster case, 45 Ark. 361, and the Hunter case, 60 Ark. 312, upon which the State relies for conviction, do not sustain this construction, because in both of those cases the means resorted to were for the purpose of evading the law, and that the purchaser concocted a scheme whereby he induced an innocent owner trying to conform his conduct to the law, to violate it unwittingly.

That the court was wrong in construing this court's decisions to mean that all are violators of the law who purchase liquor of unlicensed dealers, see 68 Ark. 468; 72 Ark. 14; 82 Ark. 405; 90 Ark. 582; *Id.* 589; 101 Ark. 569; 105 Ark. 462.

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

KIRBY, J. Appellant was convicted of the offense of selling intoxicating liquor without license upon a directed verdict, and appealed from the judgment.

The State's testimony tended to show that one McNutt, who was in the employ of the Anti-Saloon League as a detective, went to the appellant in Little River County and furnished him money with which to buy the whiskey, after first asking him if he knew where any could be procured, and that defendant replied that he did and took the money and purchased the whiskey and delivered it to McNutt. McNutt admits that at the time he gave appellant the money he told him where to go and from whom to purchase the whiskey, saying that he had already before talked with appellant and ascertained from him that the party to whom he directed him to go was selling whiskey. Appellant testified that McNutt came to him, asked him if he knew where he could buy any whiskey or who was selling whiskey, to which he replied that he did not; that McNutt then gave him the money and told him to go over to Graham's, who was selling liquor, and purchase some for him, which he did.

If the State's testimony was undisputed, the appellant would have been guilty of violating the law by a sale of the liquor, and the verdict properly directed within the authority of *Bobo* v. *State,* 105 Ark. 462. The testimony is not uncontradicted, however, the appellant having sworn positively that he told McNutt that he did not know of any one who was selling liquor, nor where any could be bought; that thereupon the detective gave him the money and told him the names of the parties who were selling liquor, and asked him to go and buy it, which he did, and that he had no interest whatever in the liquors nor the sale thereof.

Under his own testimony he was guilty, at most, of procuring or purchasing the liquor for another, under

section 5135, Kirby's Digest, for which he could not be convicted under an indictment charging the violation of the law by a sale thereof.

For the error in directing the verdict, the judgment is reversed and the cause remanded for a new trial.

PAXTON v. STATE.

Opinion delivered October 12, 1914.

1. CRIMINAL PROCEDURE—DIRECTION OF VERDICT OF GUILTY.—The trial court may in a criminal cause direct the jury to return a verdict of guilty, when the evidence is consistent and reasonable, the witnesses unimpeached, and the evidence is of such a nature that it would be unreasonable for the jury not to return such a verdict, and that from the evidence reasonable minds could draw only the conclusion that defendant was guilty.
2. DIRECTED VERDICT—DUTY OF JUDGE.—A trial judge may direct a verdict only where the evidence raises no material question of fact for the jury's determination.
3. WITNESSES—CROSS-EXAMINATION—IMPEACHMENT.—A witness may always be impeached by cross-examination.
4. CRIMINAL LAW—CREDIBILITY OF WITNESSES—QUESTION FOR JURY.—Where defendant was being tried for selling liquor unlawfully, and the State's witnesses were men who had been employed to procure the proof, the question of their credibility is one for the jury, and it is error to direct the jury to return a verdict of guilty.

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

STATEMENT BY THE COURT.

Appellant was tried upon the charge of unlawfully selling liquor, and the State offered evidence tending to show that he had made two separate sales, but the proof concerning one of these alleged sales shows only that he procured whiskey for another, and this proof is insufficient to sustain a conviction for making a sale. See *Woods* v. *State*, 114 Ark. 391.

The proof concerning the second alleged sale was made by witnesses named McNutt and Nisler, and their evidence was entirely sufficient to sustain the conviction

had it been passed upon by a jury. Upon the cross-examination of these witnesses, however, they testified that they were employed by an anti-saloon league to secure evidence against violators of the liquor laws and to appear and testify in these criminal prosecutions. These witnesses were white men and testified that they received $5 per day and expenses, and that these expenses included their railroad fare, any whiskey which they might purchase, and their board. They further testified that they were seeking to secure evidence against certain negroes and that in their efforts to secure this evidence they associated with these negroes, ate and slept at their houses, and McNutt shot craps with them, and Nisler loaned money to others who played in the game, and both participated in drinking whiskey with the negroes after having purchased it.

The defendant did not testify in his own behalf, nor did he offer any evidence in support of his plea of not guilty, and at the conclusion of the State's evidence the court directed the jury to return a verdict of guilty, which was done, and this appeal has been prosecuted from that judgment.

Steel, Lake & Head, for appellant.

1. The testimony of the prosecuting witnesses is such that it can not be said as a matter of law that the jury must have believed it. As to the McNutt sale, the evidence shows that he himself was a bootlegger; that he associated with negroes, ate and slept at their houses, engaged in crap games with them, and that he was working for five dollars a day and expenses in hunting up evidence of liquor violators. The jury were not bound to accept as true the evidence of a man of such character and having such interest in the prosecution. 79 Ark. 247; 89 Ark. 273-6.

2. As to the McElhannon sale, there was no violation of law by Paxton. The evidence shows that the prosecuting witness pointed out to appellant the place where the liquor was sold and that McElhannon gave him

the money and sent him there to procure the whiskey for him. 45 Ark. 361; 60 Ark. 312; 68 Ark. 468; 72 Ark. 14; 82 Ark. 405; 90 Ark. 582; *Id.* 589; 101 Ark. 569; 105 Ark. 462.

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

The court's instruction to find appellant guilty was proper. 105 Ark. 462; 162 S. W. (Ark.) 1086; *Wilson* v. *State,* ms. op.

SMITH, J. (after stating the facts). (1) It is settled that the court may, even in a criminal case where imprisonment is not a part of the punishment, direct a jury to return a verdict of guilty, and the action of trial courts in so doing has been several times approved by this court. But this should be done only when the evidence is reasonable and consistent, and the witnesses stand unimpeached on account of either bias or prejudice and nothing is shown in the evidence which would raise any question as to their veracity, and the evidence offered is of such a nature that it would be arbitrary and capricious for a jury to refuse to believe the witnesses, and the proof is such that reasonable minds could draw only one conclusion from the evidence, that conclusion being the guilt of the party.

In the case of *St. Louis Southwestern Ry. Co.* v. *Trotter,* 89 Ark. 273, an instruction was approved in which a jury was told "that you are not bound to accept as conclusive the statement of the witnesses that the engine was in good order and carefully operated, although there may be no direct evidence to contradict them, but you will consider all the circumstances and evidence bearing upon the condition of the engine and mode of operating it, and the circumstances under which the fire took place, in arriving at your verdict."

(2) It is the province of the judge to pass upon any question involving the competency of the witness and the admissibility of the evidence offered; but it is the province of the jury to pass upon the weight of the evi-

dence and upon the credibility of the witness; and the trial judge may direct a verdict only where the evidence raises no material question of fact for the jury's determination. In other words, where the evidence raises questions which at last are questions of law.

(3) The right to impeach a witness by cross-examination is universally recognized. The leading case in our reports on that subject is the case of *Hollingworth* v. *State,* reported in 53 Ark. 387, where, in an able discussion of this question, Judge HEMINGWAY, speaking for the court, among other things, said:

"* * * It is always competent to interrogate a witness on cross-examination touching his present or recent residence, occupation and associations; and if, in answer to such questions, the witness discloses that he has no residence or lawful occupation, but drifts about in idleness from place to place, associating with the low and vicious, these circumstances are proper for the jury to consider in determining his credibility. That such a life tends to discredit the testimony of the witness, no one can deny; when disclosed on cross-examination, it is exclusively for the jury to determine, whether any truth can come from such source, and if so, how much."

In the case of *Kansas City So. Ry. Co.* v. *Belknap,* 80 Ark. 587, it was held not error to permit a witness for a railway company to be asked if transportation had been furnished him, and it was there said:

"The probative force of such evidence may be and is very weak, but the weight of it is for the jury. * * * It is proper always to show the bias or prejudice of a witness toward a party litigant as affecting the credibility of the witness. This is not collateral matter. *Crumpton* v. *State,* 52 Ark. 273."

In the case of *Skillern* v. *Baker,* 82 Ark. 86, where the action of the trial judge in directing a verdict was reversed, the court said: "But we are of the opinion that under the evidence this direction was improper. It may be said to be the general rule that where an unimpeached

witness testifies distinctly and positively to a fact and is not contradicted, and there is no circumstance shown from which an inference against the fact testified to by the witness can be drawn, the fact may be taken as established, and a verdict directed based as on such evidence. But this rule is subject to many exceptions, and where the witness is interested in the result of the suit, or facts are shown that might bias his testimony or from which an inference may be drawn unfavorable to his testimony or against the fact testified to by him, then the case should go to the jury."

The case of *Merchants' Fire Ins. Co.* v. *McAdams,* 88 Ark. 550, is to the same effect.

In the article on the subject of Trials in 38 Cyc. 1567, the duty of the court in passing upon a request to direct a verdict was defined as follows:

"Doubts should in all cases be resolved in favor of the submission of the case to the jury. It is only when the court can find no evidence which in its deliberate and ultimate judgment is entitled to be weighed that the jury should be instructed in terms that there is no evidence to support the burden of proof which rests upon the party. A verdict should not be directed except in cases where the evidence is so conclusive that reasonable minds could not differ as to the result to be reached. A verdict should not be directed unless the proof is free from substantial conflict, although the evidence preponderates in favor of one of the parties, or although the conflict arises only by indirection. A verdict should not be directed when it must be based on some fact which must be inferred from the evidence, and which is not a legal presumption therefrom; where the evidence would warrant a finding either way; where, although there is no conflict in the testimony of the witnesses, or although the facts be conceded, the evidence reasonably tends to contradictory conclusions. Nor should a verdict be directed where a party is the sole witness in his own behalf, and his evidence, although uncontroverted, is confusing, or on the

uncontroverted testimony of an interested witness, or of a witness shown to be hostile to the opposite party * * *."

Numerous cases are there cited in support of the text quoted.

It may be said that this evidence was undenied by the defendant, who was present and failed to testify. But under the statutes of this State a defendant may testify or not, as he pleases, and the statute expressly provides that his failure to testify shall not create any presumption against him. Section 3088, Kirby's Digest.

(4) Whatever may be said of the necessity of resorting to the means here employed of securing evidence in cases of this character it is nevertheless true that the State's witnesses were employed as spies and had that interest in securing convictions. At any rate, we think the proof was sufficient to require the submission of their credibility to the jury, and especially do we think this is so when taken in connection with the proof in regard to their associations and conduct. However convinced the trial judge may have been of the truthfulness of the evidence of these witnesses, the fact remains that an attempt was made, in the methods provided by the law, to establish the fact that these witnesses were not credible and the jury should have been permitted to pass upon that question.

For the error committed in directing a verdict the judgment will be reversed and the cause remanded for a new trial.

KIRBY, J., dissents.

PRICE v. STATE.

Opinion delivered October 19, 1914.

1. HOMICIDE—SUFFICIENCY OF EVIDENCE.—In a trial for homicide, the evidence held sufficient to warrant a verdict of murder in the second degree.

2. HOMICIDE—PROVOCATION.—Mere words, however offensive, do not justify an assault, and do not even serve to reduce the degree of the homicide from murder to manslaughter.

3. HOMICIDE—SELF-DEFENSE—ARGUMENTATIVE INSTRUCTION—HARMLESS ERROR.—In a trial for homicide the giving of an instruction beginning "the law of self-defense does not justify the right of attack," the instruction being otherwise argumentative in form, *held* not prejudicial, when considered in connection with all the instructions in the case.

4. HOMICIDE—SELF-DEFENSE—DEFENDANT AS AGGRESSOR.—The defendant in a prosecution for homicide is not entitled to invoke the law of self-defense if he is the aggressor in the difficulty, as when, with a deadly weapon in his hand, he sought out deceased and brought on the difficulty with intent to kill.

5. HOMICIDE—SELF-DEFENSE—RETREAT—HARMLESS ERROR.—The failure of an instruction on the issue of self-defense in a prosecution for homicide to state the law with reference to an abandonment of the difficulty by the defendant is not prejudicial, when defendant does not contend that he made any effort to abandon the conflict.

6. HOMICIDE—DEGREE—INTENT—PROVOCATION.—In a prosecution for murder it is proper to give at defendant's request an instruction that the offense would be manslaughter, if defendant struck the fatal blow under anger or fear suddenly aroused by an assault made upon him by deceased which constituted a provocation apparently sufficient to make the passion irresistible, even though defendant was at fault in provoking the difficulty and the assault of deceased was not of such apparent force as would justify defendant in killing in self-defense.

7. HOMICIDE—DEGREE—INTENT—SELF-DEFENSE.—In a prosecution for homicide an instruction is properly refused which entirely ignores the idea of malice and permits the jury to reduce the crime to manslaughter, even though they find that the defendant brought on the difficulty with malice and with intent to kill.

8. HOMICIDE—SELF-DEFENSE—SUDDEN PASSION—CONDUCT OF DEFENDANT—INTENT.—When defendant sought a difficulty with deceased with malice against him, and assaulted him, or used opprobious epithets toward him for the purpose of bringing on the difficulty, he can not claim the benefit of a sudden passion aroused by an assault made by deceased in consequence of defendant's own conduct.

9. APPEAL AND ERROR—FAILURE TO ASK PROPER INSTRUCTION.—Although a defendant in a prosecution for homicide is entitled to an instruction on a certain issue, he can not complain of the court's failure to give an instruction on that issue where he failed to ask a correct instruction on the same.

10. CRIMINAL LAW—DEGREE—REASONABLE DOUBT—DUTY OF JURY.—An instruction that "if any reasonable view of the evidence is or can

be adopted which admits of a reasonable doubt of the guilt of the defendant, then it is your duty to adopt such view and acquit," properly places the issue of the degree of the crime committed as provided by Kirby's Digest, § 2386, which provides that "where there is a reasonable doubt of the degree of the offense which the defendant has committed, he shall only be convicted of the lower degree."

11. TRIAL—INSTRUCTIONS ON SPECIFIC FEATURES.—In the trial of a case a court should not single out specific features of the case and emphasize them in separate instructions, but should submit all the facts and circumstances together for the consideration of the jury.

12. CRIMINAL LAW—MOTIVE—INSTRUCTIONS—SINGLING OUT ISSUE—PRACTICE.—While it is proper for the jury in a criminal prosecution, to consider the absence of a motive on the part of the deceased, it is nevertheless bad practice for the court in its instructions to single out that question, and a judgment will not be reversed because of the court's refusal to do so.

13. CRIMINAL LAW—INSTRUCTIONS—CHARACTER OF ACCUSED.—In a prosecution for homicide, evidence of defendant's good character is admissible, but it is not prejudicial error for the court to refuse to expressly tell the jury, that they must consider such evidence.

14. CRIMINAL LAW—EVIDENCE—COLLATERAL MATTER—RES GESTAE.—In a prosecution for homicide the State offered evidence that one D., during the difficulty which resulted in the killing, took up an ax which was taken from him by the by-standers. The defendant introduced D. as a witness and on cross-examination he denied that he had an ax in his hands. *Held*, it was proper for the State thereafter to introduce witnesses to testify that D. did have an ax and advanced on the combatants, this not being a collateral matter, and being a part of the *res gestae*.

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

John N. Cook, William H. Arnold and *Pratt P. Bacon*, for appellant.

1. The evidence does not support the verdict. The only crime shown is at most manslaughter. Kirby's Dig., § § 1777-8. No malice is shown. 93 Ark. 409.

2. The court erred in its charge to the jury. 104 Ark. 397; 93 *Id.* 409.

3. The remarks of the judge were prejudicial. 108 Ark. 129.

4. Improper evidence was admitted.

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

1. The evidence is amply sufficient to sustain the finding of the jury. 109 Ark. 130, 134; *Ib.* 138, 150.

2. Reviews the court's instructions and contends there is no error. Kirby's Dig., § 1765; 109 Ark. 510, 513, 461, 463; 4 Crawford's Digest, Trial, § 1687 (d).

3. Where the killing is proven to be without justification or excuse, it is the duty of the jury to convict regardless of previous good character. 34 Ark. 743; 44 *Id.* 115, 122.

4. The remarks of the trial judge were not prejudicial and there is no error in the admission and exclusion of evidence. Mere conclusions of a witness are not competent. The bias of a witness may be shown. It was proper to show the conduct of Kelly Dickson at the scene of the killing, as part of the *res gestae.*

5. On the whole case the judgment is right and should be affirmed.

McCULLOCH, C. J. The defendant Dan Price was indicted by the grand jury of Miller County for the crime of murder in the first degree in killing one Jesse Patton by cutting him with a pocket knife. The jury convicted him of murder in the second degree and fixed his punishment at twenty-one years in the penitentiary.

Defendant and deceased were both young men living in a country neighborhood in Miller County, and the killing occurred out in the woods where deceased was at work with several companions cutting stave bolts. Defendant is unmarried and had been visiting a young lady in the neighborhood. A report was circulated that deceased, Jesse Patton, and one Jim Pauling had made a statement in the hearing of others to the effect that they had seen the defendant hug and kiss the girl. This report reached the ears of the girl's father and he appealed to defendant to have the statement corrected. On the day of the killing, defendant, accompanied by his own brother and the father of the girl, went to the woods where deceased and

his companions were working. Before they reached there, deceased or some of those with him were apprised of the fact that the party was coming, and one of his companions, Adcock by name, went off and got a Winchester rifle and brought it to the scene and placed it under a log where they were at work. When defendant and his companions came up to the scene, deceased was sitting on the end of the log with an iron wedge in his hand tapping on the log. The party stood around there for twenty or thirty minutes engaged in conversation, the defendant standing out a few feet in front of the deceased with his pocket knife in his hand whittling. After they had conversed in a friendly way for some time, defendant said to the deceased "We come up here to see you about some tales." The deceased asked, "Where's Jim Pauling?" and defendant replied "We come by there but he wasn't at home. We will see him later." Deceased then asked "What have you heard?" And defendant replied "I heard you said you saw me hug and kiss Velma three times." Deceased said "I didn't say it." But after defendant replied "all right," deceased added "I said I saw you twice." Defendant then called deceased a damned liar and stabbed him in the breast with the knife which was then open in his hand. The testimony of some of the State's witnesses tends to show that at the time defendant struck the blow he had reversed the blade of the knife downward; and other testimony adduced by defendant himself tends to show that the knife was held in the same position as when he was whittling. The testimony on the part of the State also tends to show that deceased was making no demonstration towards the defendant, but merely rose up about the time the blow was struck, and that he made an attempt to strike defendant with the wedge but that the blow was without any force and the wedge went over defendant's shoulder. That testimony indicated that the blow was struck before the deceased tried to use the wedge. The testimony on the part of the defendant tends to show that when defendant

called deceased a liar the latter was standing up at the time and struck at defendant with the wedge before the stabbing was done. At any rate, the parties then engaged in a scuffle and others attempted to interfere or to separate them; and after several blows were passed, deceased started to run away and defendant followed him up and beat him over the head with his fist or with the knife. In a few moments it was discovered that deceased had been stabbed and he began to grow weak and died in a few minutes, before the surgeon could be brought to give him attention.

(1-2) It is insisted in the first place that the evidence is not sufficient to sustain the conviction of murder in the second degree and that putting the testimony in its strongest light it only established the defendant's guilt of manslaughter. We think there is enough evidence in the record to establish the crime of murder in the second degree. It is undisputed that defendant killed deceased, and that death resulted from the first blow struck by him immediately after he had called the deceased a liar. The jury could have found, under the evidence, that the defendant struck the blow immediately after the epithet was applied and before deceased showed any resentment or attempted to strike defendant with the wedge. The jury were therefore warranted in finding that the defendant was the aggressor in the difficulty; that he went to the scene with the intention of compelling deceased to retract the statements he had made, and to do the latter bodily harm unless he made the retraction. In other words, the evidence warranted a finding of the presence of malice on the part of the defendant and the absence of sufficient provocation to justify the killing. That being true, it can not be said that the evidence was entirely insufficient to justify a conviction of murder in the second degree. Doubtless the defendant acted upon what he conceived to be great provocation in seeking out deceased for the purpose of obtaining a retraction of the remarks he had made about defendant's conduct with the

girl; and the deceased's offensive reply in saying that he had seen him hug and kiss the girl twice was calculated to provoke him to anger; but it is too well settled for controversy that mere words, however offensive, do not justify an assault and do not even serve to reduce the degree of the homicide from murder to manslaughter. *Vance* v. *State,* 70 Ark. 272; *Wheatley* v. *State,* 93 Ark. 409.

There are numerous exceptions to the ruling of the court in giving and refusing instructions, and several of the exceptions, though not all of them, call for discussion.

The tenth instruction, which was given over defendant's objection, reads as follows:

"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 a 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."

(3) There was a special objection made to the first sentence in this instruction which declares that the law of self-defense "does not imply the right of attack." It can not be doubted that the sentence states a correct principle, but the use of the epigram rather gives the instruction an argumentative turn which should have been avoided. It is on this ground that that part of the instruction is objected to, and we think the objection is not without force; but it does not constitute prejudicial error when the instruction is considered along with others given in the case properly submitting all the issues to the jury. In the case of *Motley* v. *State,* 105 Ark. 608, we held that the statement in an instruction that "the law of self-defense begins in necessity and ends in necessity" was not prejudicial where the instructions on self-defense as a whole correctly submitted the issues to the jury. The sentence in the instruction under consider-

ation does not amount, as contended, to an assumption of fact that the defendant made the first assault and for that reason he is to be denied the right of self-defense.

(4) Again, it is said the instruction is erroneous and prejudicial in using language which assumed, that the defendant assaulted the deceased and that he was armed with a deadly weapon. The instruction does not assume the existence of those facts, but leaves it to the jury to determine from the testimony whether or not the defendant assaulted the deceased with intent to kill him or to bring on a difficulty, and whether he was at the time armed with a deadly weapon. It is undisputed that the defendant went to the scene for the purpose of seeking deceased and obtaining a retraction, or at least an explanation, of the statement which rumor attributed to him. It is also undisputed that at the time he broached this subject with deceased he was standing with his knife open and in his hand. The jury might have found from the testimony that defendant was perfectly innocent of any evil intentions in having his knife in his hand; or, on the contrary, they might have found that he had it in that position by design so as to be ready to attack the deceased if he refused to make the retraction. The meat of this instruction is that the defendant was not entitled to invoke the law of self-defense if he was the aggressor in the difficulty, and if, with a deadly weapon in his hand, he sought out deceased and brought on the difficulty with intent to kill. It does not assume the existence of any of these facts, but submits them to the jury.

(5) The instruction is indeed inaccurate in omitting from the statement of the law of self-defense the idea of abandonment of the difficulty which would give the accused the right to invoke the law of self-defense even though originally he was the aggressor; but that omission was harmless in this case for the reason that there is no contention that defendant attempted to retire from the difficulty. He contends that he was not the aggressor,

but he does not contend that he made any effort at all, or took any steps towards abandoning the difficulty.

The court gave at the request of the defendant three instructions on the law of self-defense which were certainly as favorable as defendant could have asked, and completely put before the jury his theory of self-defense. Whether or not they are accurate statements of the law we need not determine. Those instructions are as follows:

"3. You are instructed that if you believe from the evidence that the defendant was assaulted by the deceased with such violence as to make it appear to the defendant, acting without fault or carelessness on his part, that the deceased manifestly intended and endeavored to take his life or do him some great bodily harm, and that the danger was urgent and pressing, then in that case the defendant was not bound to retreat, but had the right to stand his ground, repel force with force, and if need be, kill deceased to save his own life or prevent his receiving great bodily injury, and it is not necessary that it shall appear to the jury to have been necessary to kill deceased."

"8. You are instructed that if you find from the evidence that the deceased was armed with an iron wedge at the time he was cut, and was making an effort to strike the defendant or acting in such manner as to induce the defendant as a reasonably prudent person to believe that he was in the act of striking him with said iron wedge and kill him, or do him great bodily injury, then the law presumes that the deceased intended to kill or to inflict serious bodily injury upon the defendant."

"9. You are instructed that if you believe from the evidence that defendant had heard that deceased had circulated or started the report about himself and Velma Dickson, then you are instructed that defendant had the lawful right to approach deceased in a peaceful manner for the purpose of correcting said report. So in this case, if you believe that defendant did in fact approach

deceased in a peaceable manner and inquire of him as to such report and that deceased thereupon assaulted or attempted to assault the defendant, as it appeared to the defendant acting as a reasonably prudent person without fault or carelessness on his part in coming to such conclusion, then defendant had the right to stand his ground, repel force with force, and to kill deceased if it was necessary as viewed from defendant's standpoint, to prevent deceased from killing him or inflicting great bodily injury upon him."

We, find, therefore, that there was no error involved in the giving of instruction No. 10, and it does not call for a reversal.

The court refused to give an instruction requested by the defendant as follows:

"4. You are instructed that although you may believe from the evidence that immediately preceding the assault upon defendant by Patton, if you believe there was such an assault, the defendant used insulting or abusive language toward or about Patton, yet this language would not justify Patton in making an assault upon defendant; and if you believe that such an assault, if one was made, was calculated to and did arouse the defendant to great passion, either of anger, fear or terror, and while laboring under such passion, he inflicted the injury from which Patton died, he can not be convicted of any crime greater than manslaughter."

(6) The court gave general instructions on manslaughter, but the defendant was entitled to an instruction, if he had asked for it, submitting the theory that the degree of the offense would be manslaughter if he struck the fatal blow under anger or fear suddenly aroused by an assault made upon him by deceased which constituted a provocation apparently sufficient to make the passion irresistible, even though he was at fault in provoking the difficulty and the assault of deceased was not of such apparent force as would justify defendant in killing in self-defense. *Allison* v. *State,* 74 Ark. 444.

(7-8) Instruction No. 4, requested by appellant, was not correct and was properly refused, for it entirely ignored the idea of malice and permitted the jury to reduce the crime to manslaughter even though they found that defendant brought on the difficulty with malice and with intent to kill. The omission is an important one, for if defendant sought the difficulty with malice against the deceased and assaulted the latter, or used opprobious epithets toward him for the purpose of bringing on the difficulty, he can not claim the benefit of a sudden passion aroused by an assault made by the deceased in consequence of the appellant's own conduct. *Blair* v. *State,* 69 Ark. 558; *Noble* v. *State,* 75 Ark. 246.

In the case of *Noble* v. *State, supra,* we stated the law on this subject as follows: "A person can not take advantage of a provocation invited and brought about by his own unlawful aggression, in order to reduce the grade of his crime from murder to manslaughter, when he has not in good faith attempted to retire from the encounter. If appellant was the aggressor in the first difficulty, and was assaulted and cut by deceased while so engaged, and killed deceased upon a sudden heat of passion aroused by the assault made by deceased, the grade of his offense was not thereby reduced to manslaughter. This is because malice, which is an essential element of murder, is implied from the fact that he sought the difficulty in which provocation for passion was given, and became the aggressor therein."

In the same case we quoted the following exception to this rule stated by Mr. Bishop: "Where an assault, which is neither intended nor calculated to kill, is returned by violence beyond what is proportionate to the aggression, the character of the combat is changed; and if, without time for his passion to cool, the assailant kills the other, he commits only manslaughter." 2 Bishop, Crim. Law, section 702.

(9) It will be noticed that the instruction on this subject requested by defendant does not contain the ele-

ments stated by Mr. Bishop as one of the exceptions to the general rule. Defendant did not, as we have already shown, attempt to retire from the difficulty; nor does the instruction submit the question whether the defendant brought on the difficulty with malice and with intent to provoke a difficulty and kill deceased. Defendant was entitled to an instruction on the subject embodied in instruction No. 4, but he can not complain of the court's refusal to give one unless the instruction he asked was correct. *Allison* v. *State, supra; Scott* v. *State,* 75 Ark. 142.

Another assignment of error relates to the court's refusal to give an instruction containing the following statement on the subject of reasonable doubt: "In considering your verdict in this case if you believe that defendant is guilty, but have a reasonable doubt as to whether he is guilty of murder or manslaughter, then it is your duty to give him the benefit of the doubt and find him guilty of manslaughter."

Our statute declares that "Where there is a reasonable doubt of the degree of the offense which the defendant has committed, he shall only be convicted of the lower degree." Kirby's Digest, § 2386. But the statute does not in express terms require the court to so instruct the jury, nor is it necessary that such an instruction should be given in the precise language of the statute. It is sufficient if the instructions as a whole convey that idea to the jury, so that if they have a reasonable doubt of the guilt upon any degree, the jury should acquit of that degree and find the accused guilty of the lower degree about which there is no reasonable doubt.

The court, however, gave a general instruction on the subject of reasonable doubt and gave the following one on this subject at defendant's request:

"5. You are instructed that the burden is on the State to prove that the defendant is guilty as charged in the indictment, and if the evidence fails to satisfy your minds beyond a reasonable doubt of his guilt, then it is

your duty to give him the benefit of such doubt, and acquit. If any reasonable view of the evidence is or can be adopted which admits of a reasonable doubt of the guilt of the defendant, then it is your duty to adopt such view and acquit."

(10) Now, we think the instruction just quoted was abundantly sufficient to convey to the jury the idea expressed by the statute in imposing the duty upon the jury of giving the accused the benefit of every reasonable doubt upon each degree of the offense charged in the indictment. The instruction says that "if any reasonable view of the evidence is or can be adopted which admits of a reasonable doubt of the guilt of the defendant, then it is your duty to adopt such view and acquit." That necessarily means that before the defendant could be guilty of any charge embraced in the indictment the evidence must be sufficient to satisfy the jury beyond a reasonable doubt. It is probably good practice to give the instruction in the language of the statute, and certainly it would be unobjectionable for the court to do so in cases of this kind; but we must assume that the members of the jury were of sufficient intelligence to comprehend the full meaning of such an instruction as the court did give, and we think it necessarily conveyed to their minds the idea expressed in the statute and that they understood the law to be declared that if they had a reasonable doubt as to the guilt or innocence of the defendant upon any degree of homicide involved in the indictment, it was their duty to acquit him of that particular degree of the offense. No error resulted, therefore, in the court's refusal to give the instruction requested.

Defendant introduced numerous witnesses to prove his good character for peace and quietude, and requested the court to give the following instructions on that subject, which the court refused:

"13. The court instructs the jury that a defendant on trial for a crime is entitled to offer in defense evidence

as to his good character, limited, however, to proof of such character as would make it unlikely that he would be guilty of the crime charged; but if it should appear that the defendant is guilty as charged you should so find, notwithstanding his good character, if any has been shown."

"16. In criminal prosecutions where there is a material conflict in the testimony as to whether the defendant or the deceased was the aggressor, the defendant may put in evidence proof of his good character, which the jury may take into consideration in determining his guilt or innocence."

"19. The defendant has offered evidence of good character. You will consider this with all the other evidence in arriving at your verdict as to his guilt or innocence."

(11-12) Each of those instructions correctly stated the law, but it is another question whether it was proper to give them to the jury, or rather whether it was error for the court to refuse them. That is a question which this court has never passed upon, but we are not without authority upon analogous questions. This court is thoroughly committed to the rule that in the trial of cases a court should not single out specific features of the case and emphasize them in separate instructions, but should submit all the facts and circumstances together for the consideration of the jury. We have said that while it was proper for the jury to consider the absence of a motive on the part of an accused, yet it was bad practice to single out that question and a judgment would not be reversed on account of the court's refusal to do so. *Hogue* v. *State,* 93 Ark. 316.

In *Gilchrist* v. *State,* 100 Ark. 330, we said that it was proper for the jury to consider the age of a youthful defendant in determining the degree of homicide involved in the charge against him, but that it was improper for the court to isolate that fact by submitting it in a separate instruction.

(13) So, in the present case, we say that while it is proper in a case of this kind to admit testimony of the good character of accused, and it may be proper in some cases to indicate to the jury by an appropriate instruction the limitations upon the consideration of such testimony, yet it is not generally erroneous for the court to decline to separate this feature of the evidence from the other facts and circumstances in the case and submit it in a separate instruction. The admission of the testimony by the court was equivalent to an instruction that the jury should consider it along with other facts and circumstances in the case for the purpose of determining the question of defendant's guilt or innocence, and there was no prejudicial error in refusing to expressly tell the jury that they might consider it. We are aware of the fact that there are some cases holding to the contrary on this proposition, but they are not in harmony with our decisions upon analogous questions and for that reason we do not give them any persuasive force.

There was an exception to the ruling of the court in permitting the State to introduce testimony of two witnesses to the effect that the father of the girl named, who was present at the time of the killing, and was a witness in the case, seized an ax during the encounter and that it was taken away from him by some of the by-standers. The defendant introduced Mr. Dickson, the father of the young lady, and he gave an account of the difficulty somewhat at variance with that of other witnesses. He testified that when the difficulty between the two men occurred he, with others, ran up to them, and that in his excitement he picked up a piece of the heart of a stave bolt and that one of the by-standers took it away from him and pushed him back. He was asked on cross-examination if he didn't have an ax in his hand when he started toward the combatants and that Moore, one of the by-standers, took it away from him, and he replied to this question by stating that he did not have an ax but had the piece of stave bolt in his hand. The State, in rebuttal,

introduced Moore and other witnesses to prove that Mr. Dickson took up an ax and started toward the combatants, and that the by-standers took it away from him.

(14) It is insisted that this was error for the reason that this was a collateral matter upon which the State was bound by the answer of the witness, and that it was improper to impeach him by the testimony of the other witnesses. Counsel invoke the rule announced by this court in *McAlister* v. *State,* 99 Ark. 604, to the effect that "it is proper to permit a witness to be asked as to specific acts affecting his credibility, yet if such matters are collateral to the issue, he can not, as to his answer, be subsequently contradicted by the party putting the question." The difference, however, in the cases is that this is not a collateral matter but is related to the acts of one who was present and apparently attempting to participate in the difficulty. It constituted part of the *res gestae* and the State was entitled to prove it as an independent fact and not merely as a collateral matter bearing solely upon the credibility of the witnesses. *Childs* v. *State,* 98 Ark. 430.

There are several other assignments of error which none of the judges think are well founded or of sufficient importance to call for discussion.

The views here expressed concerning the several propositions involved in this appeal are those of a majority of the judges; and if these statements of the law upon each of the assignments of error were shared by the same judges, constituting a majority on the separate questions involved, an affirmance of the judgment would necessarily result; but such is not the case, for some of the judges agree upon some of the conclusions here stated and disagree as to others, which brings about a result that while a majority of the judges agree upon the propositions of law which would affirm the case, a majority of them for different reasons vote to reverse it. Two of the judges (WOOD and HART, JJ.) are of the opinion that the court erred in giving instruction No. 10, and that the judgment

should be reversed and the cause remanded for a new trial. Mr. Justice HART is also of the opinion that the court erred in refusing, to give instruction No. 16 requested by defendant. Two of the judges (WOOD and SMITH, JJ.) think that the court erred in refusing to give the defendant's requested instruction on the subject of reasonable doubt, and that this constituted error which calls for a reversal of the judgment for murder in the second degree and a reduction of the degree of the offense to manslaughter, as this instruction relates only to the degrees of homicide and not to the question of guilt or innocence. Mr. Justice KIRBY and the writer are of the opinion that there is no error in the record and that the judgment should be affirmed. While the law of the case is settled by the concurring views of the judges as expressed in this opinion, the only net result which can be extracted from the divergent votes of the judges upon the question of affirmance or reversal is that the judgment for murder in the second degree must be reversed, but that the cause should not be remanded for a new trial if the attorney general elects to let the judgment stand as to the degree of manslaughter. This condition results from the fact that while three of the judges vote to reverse the judgment for murder in the second degree, only two of them vote to remand the cause for a new trial; and the vote of the other one, together with the two judges who think the whole judgment should be affirmed, prevents a remanding for a new trial if the State is willing to let the conviction for the crime of manslaughter stand. *Pollock* v. *Hennicke Co.*, 64 Ark. 180; *St. Louis, I. M. & S. Ry. Co.* v. *Adams,* 74 Ark. 326; *Carson* v. *Fort Smith Light & Traction Co.*, 108 Ark. 452.

The judgment of the circuit court is therefore reversed and set aside in so far as it adjudges the defendant guilty of murder in the second degree, and the cause will be remanded for a new trial unless the attorney general elects, within fifteen days, to stand upon a conviction of voluntary manslaughter, in which event the cause

will be remanded with directions to the circuit court to fix the punishment and sentence the defendant for the crime of manslaughter.

HASTINGS INDUSTRIAL COMPANY v. COPELAND.

Opinion delivered October 12, 1914.

1. APPEAL AND ERROR—REFUSAL TO GIVE REQUESTED INSTRUCTIONS—EXCEPTIONS.—A general exception to the refusal of the court to give several instructions requested collectively, will not be considered on appeal if any of them was properly refused.
2. CONTRACTS—RULE OF CONSTRUCTION—INTENTION.—In construing a contract the object is to arrive at the intention of the parties as shown by the circumstances surrounding the making of the contract, the situation and relation of the parties, and the sense in which, taking these things into consideration, the words used would naturally be understood.
3. CONTRACT—CONSTRUCTION—INTENTION OF PARTIES.—The parties to a contract will be held bound to the construction which they themselves have placed upon it.
4. CONTRACTS—CONSTRUCTION—ENFORCEABILITY.—As between two constructions of a contract, each of which is reasonable, one of which will make the contract enforceable, and the other will make it unenforceable, that construction which makes the contract enforceable will be preferred.

Appeal from Howard Circuit Court; *Jefferson T. Cowling,* judge; affirmed.

A. F. Auer, for appellant.

The instructions given by the court ignored the fact that it was appellee's duty to ascertain whether the soliciting agent had any authority other than to solicit subscriptions.

"One who deals with a special agent is bound to ascertain the nature and extent of his authority." 74 Ark. 561; 23 Ark. 411; 101 Ark. 75. The agreement of the soliciting agent to give appellee a "job of hauling" was inconsistent with the plain language of the contract, and not enforceable. 92 Ark. 508.

J. W. Bishop and *J. G. Sain,* for appellee.

The authority of the ordinary agent receiving subscriptions for shares on behalf of a corporation or other shareholders, is limited by the prescribed condition and any irregular contract would be contrary to the implied prohibition of the law. 1 Morowitz on Corp., § 73. But there is no proof in the record that this subscription was not authorized.

Appellee was a conditional subscriber, the condition being that he would be permitted to pay for the share in hauling. 1 Morowitz on Corp., § § 78, 86, 95, 100, 101.

HART, J. The Hastings Industrial Company, a corporation organized and doing business in the city of Chicago, State of Illinois, instituted this action before a justice of the peace against J. M. Copeland to recover an amount alleged to be due it upon a subscription contract. There was a verdict and judgment for the defendant in the justice of the peace court, and the plaintiff appealed. In the circuit court there was again a verdict and judgment for the defendant, and the plaintiff has appealed to this court.

The foundation of the action was a written contract between the Hastings Industrial Company and the other subscribers to the contract, whereby the former agreed to construct and equip for the subscribers a centrifugal power creamery and ice cream plant, and each subscriber agreed to pay therefor the amount set opposite his name. The contract provided that the subscribers thereto, after the ice cream plant was constructed, should organize a corporation, and each one should become a shareholder in the amount paid by him for the construction of the plant.

The defendant Copeland became a subscriber to this contract, and agreed to pay for the construction of the plant the sum of $100. The agent of the corporation, at the same time the contract sued on was executed, executed a written agreement with the defendant agreeing to pay him $3.50 per day for hauling, to be applied on his share of stock. The agreement further provided that the de-

fendant was to have ninety days for the payment of any part of his subscription that had not been paid in hauling.

The defendant testified that he kept his team ready to perform the hauling during the time provided in the contract, and that the plaintiff refused to permit him to do any hauling to be applied on his subscription, and that he did not thereafter participate in the organization of the corporation for the purpose of operating the ice cream plant, and did not consider himself in any way bound on his subscription for the construction of the same.

Other evidence was also introduced by him to that effect, and also to the effect that the agent of the plaintiff, with whom he made the contract for the hauling, was its general agent in regard to taking the subscription and making the contract.

The plaintiff asked the court to give seven instructions in its behalf, and excepted to the action of the court in refusing to give them. The refusal of the court to give these instructions is now assigned as error for which the judgment should be reversed. Some of the instructions asked by the plaintiff were peremptory in their nature in that they asked the court to tell the jury, as a matter of law, that the agent of the plaintiff who procured the defendant's signature to the contract was a special agent, and that his authority was limited to getting subscriptions for the establishment of the creamery.

(1) There was evidence in the record from which the jury might have inferred that the authority of the agent of the principal was not limited to getting subscriptions for the establishment of the creamery. The exceptions of the plaintiff to the refused instructions were in gross, and it is 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 was properly refused. *Tiner* v. *State,* 109 Ark. 138, and cases there cited.

(2) In construing a contract, the object is to arrive at the intention of the parties as shown by the circumstances surrounding the making of the contract, the sit-

uation and relation of the parties, and the sense in which, taking these things into consideration, the words used would naturally be understood. *Alf Bennett Lumber Co.* v. *Walnut Lake Cypress Co.*, 105 Ark. 421.

The parties to the present contract have adopted a construction of it which we think is binding on them. In others words, the parties to the contract have treated it as a conditional subscription on the part of the defendant. According to the interpretation placed on this contract by the parties themselves, the defendant was not to pay any part of his subscription unless allowed to do so by hauling material for the construction of the ice cream plant, at the price of $3.50 per day.

The contention made by counsel for the plaintiff in the court below was that the agent of the plaintiff who secured the subscription, did not have authority to make the contract with the defendant for the hauling. As we have already stated, there was testimony tending to show that he had authority to make that contract, and that he did not allow the defendant to do any hauling in payment of his subscription.

(3) The parties themselves having placed a particular construction on the contract, they will be held bound to that construction here.

(4) Again, it is objected by counsel for plaintiff that the contract for the hauling is void because too indefinite. As between two constructions, each reasonable, one of which will make the contract enforceable, and the other of which will make it unenforceable, that construction which makes the contract enforceable will be preferred. Thus, if a contract is open to two constructions, one of which will accomplish the intention of the parties, and the other of which will defeat such intention, or will make the contract meaningless, the former construction is to be preferred. Page on Contracts, Vol. 2, paragraph 1120.

Tested by this principle of law, we do not think the contract was too indefinite to be enforceable. By its own terms it was capable of definite enforcement and capable

of being performed according to the interpretation which the parties themselves placed upon it.

No other grounds were alleged by the plaintiff for the reversal of the judgment in its motion for a new trial, and, according to the well settled rules of this court, no other grounds than those mentioned in the motion can be considered by us on appeal.

It follows that the judgment must be affirmed.

MANSFIELD GAS COMPANY v. PARKHILL.

Opinion delivered October 5, 1914.

OIL AND GAS—LEASE—IMPLIED COVENANT—NOTICE BY LESSOR.—In every oil and gas lease a covenant is implied that the lessee will prosecute a diligent search and operation, and when the only consideration for the lease is a royalty, a failure on the part of the lessee to commence operations for a period of ten years will be held to be an abandonment, and the lessor may have the lease cancelled, even though he has failed to notify the lessor of his intention to have the lease cancelled.

Appeal from Sebastian Chancery Court, Greenwood District; *J. V. Bourland,* Chancellor; affirmed.

Geo. F. Youmans, for appellant.

No brief filed for appellee.

McCULLOCH, C. J. The plaintiff, W. T. Parkhill, owns a tract of land in Sebastian County, Arkansas, and instituted against the defendant an action in the chancery court of that county to cancel a gas and oil lease executed to defendant in the year 1901 by plaintiff's grantor. The case was heard by the chancellor upon the pleadings and depositions of witnesses, and the chancellor rendered a decree in plaintiff's favor, from which the defendant has prosecuted an appeal.

The lease in question, executed by the plaintiff's vendor, granted the defendant the exclusive right to mine and bore for gas and oil, and lead, zinc, iron, coal and other minerals, for a period of fifty years, the consideration being the nominal sum of one dollar cash in hand paid,

and the agreement to pay the lessor a royalty of 5 per cent of the value of all mineral mined from the land, and 3½ per cent of the value of gas and oil obtained. The lease contained a stipulation to the effect that the lessee should begin work toward prospecting on and developing the lands described in the lease, "or other lands within four miles of these above described within the period of one year from date;" but contained no other provision concerning the time when the operation should begin on the land thus leased. The testimony showed that within the time named above, defendant began operation on other lands within four miles of plaintiff's land in question. Nothing was done by defendant toward prospecting or operating the land in question of the plaintiff, and this action was begun in April, 1912, to cancel the lease.

The reason assigned by the president of defendant company for not prospecting this land and boring wells was that there was not sufficient market for gas flowing from wells bored on other lands owned by the company, and that the company was waiting for a market for its gas before developing wells on plaintiff's land. The president of the company testified that in September, 1911, he heard that plaintiff had purchased the land in question, and that he sought the latter for the purpose of making a change in the method of payment of royalty. The evidence showed that after some negotiations between the parties looking toward the new arrangement about the payment of royalties, the negotiations were broken off without anything being accomplished, and plaintiff then instituted this action.

The law of the case is fully laid down by this court in the case of *Mansfield Gas Co.* v. *Alexander,* 97 Ark. 167, which was similar to the present case in all the essentials. The court there quoted with approval from Mr. Thornton, in his work on The Law Relating to Oil and Gas, section 127, as follows: "It is an implied covenant in every oil and gas lease that a diligent search and operation will be prosecuted. And where the only consideration was the royalty, a failure on the part of the lessee to

commence operations for eight months was held to be an abandonment."

The lease in that case was precisely the same as the lease in the present case, and the only difference in the facts is that in the former case the lessor made an express demand upon the lessee to begin development of the land, and the latter failed to do so. In the present case, there was, according to the evidence, complete inactivity on the part of both parties to the lease for a period of more than ten years. We are of the opinion that this distinction does not take it out of the operation of the rule laid down in the former decision; for, according to the law, there stated, it is incumbent upon the lessee to begin operations within a reasonable time; and the fact that the lessor failed to make demand did not deprive him of the right to take advantage of the forfeiture brought about by inactivity during an unreasonable length of time. Nothing was required of the lessor by the terms of the contract, and nothing short of some affirmative act leading the lessee to rely upon the continued subsistence of the contract would deprive him of the right to take advantage of the forfeiture brought about by the inactivity of the lessee.

In the case cited above, we said: "According to the uniform holding of the authorities, the law will read into this lease a covenant on the part of the lessee that it will with due and proper diligence search the land described in the lease for minerals and will with due and proper diligence develop the same. This implied covenant is in effect a condition upon which the lease was made; a failure or refusal to perform that condition results in a forfeiture of the lease."

Since we find that the law of the case has already been decided by the former case, it follows that the decree of the chancellor must be affirmed, and it is so ordered.

WINKLER v. BAXTER.

Opinion delivered October 19, 1914.

1. JUDGMENTS—LIEN ON REAL ESTATE—FILING JUDGMENT IN ANOTHER COUNTY.—Where a judgment was obtained before a justice in one county, but a transcript of the proceedings before the justice were not filed in the circuit court of that county, the filing of the same in the circuit court of another county will not operate to give a lien on real estate of the defendant in the second county.
2. EXECUTION SALE—INVALID SALE—CLOUD.—Where the sheriff has sold land under an invalid execution and the original owner brought an action in ejectment against the purchaser at the sale, the said deed being a cloud on the plaintiff's title, it is proper upon motion, to transfer the cause to equity for the purpose of cancelling the deed and removing the cloud.

Appeal from Arkansas Chancery Court; *John M. Elliott,* Chancellor; affirmed.

STATEMENT BY THE COURT.

Appellant was the plaintiff in the action below, which was a suit in ejectment to recover an undivided half-interest in a certain tract of land situated in Arkansas County. The complaint alleged that plaintiff had obtained a judgment for $79.30 against one Sam Baxter in the court of J. W. Rowsey, a justice of the peace for Old River Township, Jefferson County, Arkansas, and that an execution was issued on this judgment, which was returned *nulla bona,* and that appellant, on July 11, 1907, obtained a certified transcript of this judgment, and the return of the execution in duplicate, both of which were signed by the justice of the peace, and that he filed one copy of this transcript in the office of the clerk of the circuit court of Arkansas County, and on August 27, 1907, mailed the other copy of the transcript to the circuit clerk of Jefferson County, together with the fee for filing the same. That on August 15, 1908, an execution was issued by the clerk of Arkansas County, based upon this transcript, under which the sheriff levied upon and sold the land in controversy, which was purchased at this execution sale by the appellant; and the year of redemption having expired, the sheriff of Arkansas County, on the

21st day of September, 1909, executed to appellant a sheriff's deed for said land.

This suit was brought against Charles T. Baxter, who was in possession of the land, and who had received a deed therefor from the said Sam Baxter, dated January 24, 1908, and appellant says that this conveyance was made after his lien had attached to the land, and was, therefore, subject to that lien.

Appellant excepted to this sheriff's deed, upon which the suit was brought, alleging the fact to be that the levy and sale by the sheriff and the deed executed by him pursuant thereto was illegal, for the reason that there was no legal judgment upon which the clerk of Arkansas County could issue an execution, and there was also an answer, which set up substantially the same facts.

In support of the allegations of the complaint appellant's attorney testified that he mailed a transcript of the justice's judgment to the clerk of the circuit court of Jefferson County, together with the necessary filing fees, but he does not undertake to testify that this transcript was ever received or filed by the circuit clerk of Jefferson County. Upon the contrary, the present clerk of Jefferson County and his predecessor, who, between them, had been in office for a period of time antedating this judgment, both testified that no such transcript had ever been received or filed in that office, and that no record in that office showed its receipt or filing.

The transcript of the alleged judgment, which was filed in Arkansas County, and on which the execution was later issued by the clerk of Arkansas County, is not certified to by the circuit clerk of Jefferson County. The lands involved are situated in Arkansas County, and the complaint alleged, and the appellee admitted, that he was in possession of the land.

W. N. Carpenter, for appellant.

There was a substantial compliance with the statute, Kirby's Dig., § § 4631, 4632, 4633, which is both directory and remedial. 34 Ark. 491. Remedial statutes are to be

liberally construed. 9 Ark. 328-35; 11 Ark. 496; *Id.* 620; 13 Ark. 58; 28 Ark. 200-206. See, also, 48 Ark. 309.

Appellee, pro se.

Before a judgment of a justice of the peace can become a lien against the lands of the defendant, a transcript thereof must be filed in the office of the circuit clerk of the county in which the judgment was obtained, and, though a certified copy thereof can be filed in a different county, yet execution on the judgment must be issued from the county in which the judgment was rendered, directed to and executed in the other county. Kirby's Dig., § § 4631-4634; *Id,* § 3206; 52 Am. St. Rep. 800; 52 Pac. 25; 97 Ind. 242; 35 Ia. 170; 57 N. W. 78; 74 Pac. 690; 69 Pac. 765.

The issuance of execution in Arkansas County, and the levy, sale and deed thereunder, were unauthorized and void.

SMITH, J., (after stating the facts). Sections 4631-4633, of Kirby's Digest, provide that every justice of the peace, on the demand of any person in whose favor he had rendered judgment for more than $10, exclusive of costs, shall give to such person, upon payment of costs, a certified copy of such judgment, and that the clerk of the circuit court of the county in which the judgment was rendered shall, upon the production of any such transcript, file the same in his office, and forthwith enter such judgment in the docket of the circuit court for judgments and decrees, and shall note thereon the time of filing such transcript. But that no such transcript shall be filed and no execution shall be sued out of the circuit court on such judgment until an execution shall have been issued by the justice of the peace and a return made showing that the defendant has no goods or chattels whereon to levy the same, and that when this has been done, every such judgment, from the time of filing the transcript thereof, shall be a lien on the real estate of the defendant in the county to the same extent as a judgment of the circuit court of the same county, and shall be carried into execution in

the same manner and with like effect as the judgments of such circuit courts.

Section 4438, of Kirby's Digest, provides that the judgments of the Supreme, chancery and circuit courts of this State shall be a lien on the real estate owned by the defendant in the county in which the judgment was rendered from the date of its rendition, but that such judgment shall not be a lien on the lands of the defendant in any other county than that in which it is rendered until a certified copy of the judgment is filed in the office of the clerk of the circuit court of the county in which the land lies.

(1) These statutes have not been complied with, and the judgment of the justice of the peace never became a lien upon the land in controversy, and there was never any authority for the action of the circuit clerk of Arkansas County to issue the execution under which the sale was made, and, consequently, there was no authority for the action of the sheriff in making the sale and in executing his deed to appellant. This is true, because the proof does not show that this transcript was filed in the office of the circuit clerk of Jefferson County, and this was, of course, the first step, and an indispensable one, to make a judgment of a justice of the peace a lien upon land in any county. It is not contended that the clerk of the circuit court of Jefferson County prepared a certified copy of the judgment for filing in the office of the clerk of the circuit court of Arkansas County, and there was no authority under the law for the filing of the transcript of the justice of the peace of Jefferson County with the clerk of the circuit court of Arkansas County. The whole proceeding appears to be invalid.

(2) It is insisted that the record does not show how this case was transferred to the chancery court. But no such question was raised in the court below, and no motion was made in the chancery court to remand the cause. Besides, the record recites that the parties appeared by their counsel and by agreement of both parties, the court proceeded to hear this cause. Moreover, the sheriff's

deed above mentioned is a cloud upon appellee's title and upon motion it would have been proper to transfer this case to the chancery court for the purpose of cancelling and removing this cloud, and the decree of that court cancelling it is affirmed.

DAVIS v. HALE.

Opinion delivered October 19, 1914.

1. BILL OF REVIEW—GROUND FOR—NEWLY DISCOVERED EVIDENCE.—To support a bill of review on the ground of newly discovered evidence, the matter discovered must be such as could not have been discovered by the use of reasonable diligence.
2. APPEAL AND ERROR—FINAL ORDER—APPEAL.—An appeal can not be taken from an order of a chancery court which is not a final order.
3. APPEAL AND ERROR—FINAL ORDER—NEW EVIDENCE.—In an action to foreclose a deed of trust, where the chancellor renders an interlocutory decree, that certain parties held a mortgage on certain land, but not decreeing the amount due, nor a sale of the land, the decree is not final, and it is within the discretion of the court to permit additional evidence to be taken in the case.
4. HOMESTEAD—CONVEYANCE OF—TRUST DEED—WIFE'S SIGNATURE AND ACKNOWLEDGMENT.—In order to complete a valid conveyance of homestead property, or to execute a valid deed of trust on the same, the wife must join in the execution of the deed and must also acknowledge that she has executed the same.
5. ACKNOWLEDGMENTS—SIGNATURE OF NOTARY.—An acknowledgment to the execution of a deed of trust is invalid when the notary does not sign his name thereto, although he does affix the imprint of his official seal.
6. ACKNOWLEDGMENTS—SIGNATURE OF NOTARY—CURATIVE ACT.—The curative act of 1911, Acts 1911, p. 12, does not render valid the certificate of acknowledgment to a deed of trust, when the notary failed to sign the same.
7. ACKNOWLEDGMENT—STOCKHOLDER AS NOTARY—VALIDITY.—Where a deed of trust is given to secure a valid debt and no fraud was alleged or proved as to its execution, and no coercion or undue advantage taken of the parties executing the trust deed, either by the officer taking the acknowledgment or the lender of the money, the acknowledgment will not be held invalid because the lender was a corporation and the notary taking the acknowledgment was a stockholder thereof.

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

STATEMENT BY THE COURT.

In March, 1913, H. J. Hale, as trustee for W. P. Hale, and F. B. Hale, as trustee for Osceola Cotton Oil Company, instituted an action in the chancery court against Hattie Davis, Frank Davis, Mattie Davis and Robert Davis, to foreclose a mortgage on real estate. The facts are as follows:

On the 5th day of November, 1909, Charles Davis and Hattie Davis, his wife, executed a deed of trust on their homestead to H. J. Hale, trustee, to secure a note due W. P. Hale for $300. The mortgage was signed by Charles Davis and Hattie Davis and the certificate of acknowledgment was filled out and the seal of the notary public attached to it. The seal contained the name of S. S. Semmes, notary public of Mississippi County, on it, but the signature of S. S. Semmes does not appear in the body of the certificate of acknowledgment, nor is it subscribed at the end thereof.

Charles Davis died November 7, 1911, and left surviving him a widow, Hattie Davis, and Frank, Mattie and Robert Davis, his minor children, and heirs at law.

On the first day of March, 1911, Charles Davis and Hattie Davis executed a deed of trust to F. B. Hale as trustee for Osceola Cotton Oil Company, a corporation doing business at Osceola, in Mississippi County, Arkansas, to secure a note of $800. The mortgage was acknowledged before a stockholder and officer of the corporation to which the deed of trust was given. The debts secured by the above deed of trust were the debts of Charles Davis and were evidenced by promissory notes which were not signed by Hattie Davis. At the fall term of the chancery court, 1913, an interlocutory decree was entered of record. In it the chancellor found that Charles Davis and Hattie Davis, his wife, intended that the deed of trust given to H. J. Hale, as trustee for W. P.

Hale, should embrace their homestead, but that by mistake of the draughtsmen other lands were described in it. It was decreed by the court that the description of the deed of trust should be reformed so as to embrace the homestead of Charles Davis. The chancellor also found that said deed of trust was given to secure a note of $300 executed by Charles Davis on November 5, 1909, and due one year after date, bearing interest at the rate of 10 per cent per annum from date until paid and that this note and no part of it had been paid except the interest up to November 5, 1911, and decreed that the deed of trust be declared a first lien on the homestead of Charles Davis.

The chancellor further found that Charles Davis and Hattie Davis, his wife, executed a second deed of trust to F. B. Hale as trustee for the Osceola Cotton Oil Company to secure a note executed to the said Osceola Cotton Oil Company for the amount of $800, due November 15, 1911, with interest at 10 per cent per annum from date until paid and that the note was signed by Charles Davis, and decreed that the deed of trust which was given to secure it be declared a second lien upon the homestead of Charles Davis, and that a master be appointed to determine the amount due on said note secured by said deed of trust. In the decree a master was appointed to ascertain the amount of money due on the note given to the Osceola Cotton Oil Company and was ordered to make his report at the next term of the court. At the February, 1914, term of the chancery court the defendants sought and obtained leave to file a bill of review on the ground of newly discovered evidence.

Thereafter Hattie Davis testified that she signed a deed of trust to H. J. Hale as trustee for W. P. Hale at her home in Mississippi County, seven miles from Osceola, but denied that she had ever acknowledged the same at any time or place. Subsequently a decree was entered in favor of the plaintiffs in which it was recited that the defendant, Hattie Davis and the minor defendants were all duly served with summons as required by

law and that a guardian *ad litem* had been appointed for the minor defendants. The court further found that the deed of trust of Charles Davis and wife executed to H. J. Hale, trustee for W. P. Hale, was intended to embrace the homestead of Charles Davis and that by mistake of the draughtsman other lands were described in said deed of trust. The chancellor further found that said deed of trust was given to secure a note executed to W. P. Hale for the sum of $300 with interest at 10 per cent per annum from date until paid and that no part of said note had been paid except the interest up to November 5, 1911. The court also found that the sum of $767.72 with 10 per cent interest from September 15, 1913, was due on the deed of trust given to F. B. Hale as trustee for the Osceola Cotton Oil Company and that the deed of trust given to H. J. Hale, as trustee for W. P. Hale, was a first lien upon the homestead and that the deed of trust given to F. B. Hale, as trustee for the Osceola Cotton Oil Company, was a second lien upon the homestead. A decree of foreclosure was entered.

From this decree the defendants have duly prosecuted an appeal to this court.

Appellants, pro se.

1. The land in question is a homestead, and to convey it the wife must not only join in the execution of the instrument, but also must acknowledge the same. Kirby's Dig., § 3901; 32 Ark. 453; 60 Ark. 270; 64 Ark. 493; 57 Ark. 242; 84 Ark. 335; 89 Am. St. Rep. 341, note; Devlin on Deeds, 1036, § 548, (b.); *Id.* 2403, § 1285.

To render a notary public's certificate of acknowledgment valid, he must *sign the certificate.* Devlin on Deeds, 98, § 496; 11 Am. St. Rep. 143; 100 Am. Dec. 152; 41 Am. Dec. 173; 20 Ohio, 119; 17 *Id.* 542; 26 Texas, 212; 127 Ill. 449; 44 Ark. 421.

2. The trust deed executed to F. B. Hale as trustee for the Osceola Cotton Oil Company is invalid, because the notary who took the acknowledgment of the same was, at the time, an officer and stockholder of that company.

43 Ark. 420; 33 L. R. A. 332, note; Devlin on Deeds, 856, § 477 (c.), 477 (d.); 138 Ga. 258; 44 L. R. A. (N. S.) 377; 75 S. E. 248; 1 Cyc. 555.

J. N. Thomason, for appellees.

1. The certificate of acknowledgment to the deed of trust to H. J. Hale, trustee, is sufficient.

It appears by the deed of trust and other evidence that Hattie Davis did acknowledge it, and if so, she is bound by her act, and the failure of the notary to sign his name would not be a defect of which she and the minor heirs could take advantage. If the acknowledgment was actually taken, as the certificate states, the signing was a ministerial act and could be supplied by the court. 21 Ark. 309; 14 Ark. 675; 36 Cyc. 446.

His failure to sign the certificate was cured by the curative act of 1911. Acts 1911, p. 12.

2. The certificate of acknowledgment to the trust deed executed to F. B. Hale as trustee, is not invalid because of the fact that the notary was an officer and stockholder in the Osceola Cotton Oil Company. 1 Cyc. 553, and cases cited; 20 Okla. 427; 16 Am. & Eng. Ann. cases, 133; 68 O. St. 280, 67 N. E. 729, 62 L. R. A. 790; 32 Wash. 572; 73 Pac. 680; 97 Tenn. 285; 125 Cal. 320, 57 Pac. 1070; 36 Fla. 575, 18 So. 850.

HART, J., (after stating the facts). (1) The court should not have given the defendants leave to file a bill of review. To support a bill of review for newly discovered matter, the matter must be such as could not have been discovered by the use of reasonable diligence. *Boynton* v. *Chicago Mill & Lumber Co.,* 84 Ark. 203; *Jackson* v. *Becktold Printing & Book Mfg. Co.,* 97 Ark. 415; *Smith* v. *Rucker,* 95 Ark. 517.

The defendants knew, or by the exercise of reasonable diligence could have known, that Hattie Davis had not acknowledged the deed of trust to H. J. Hale as trustee for W. P. Hale before the rendition of the decree by the chancellor in the fall of 1913.

(2) Moreover, that decree was not a final decree and no appeal could have been taken from it. Therefore the defendants could have presented their additional testimony without a bill of review. In the case of *Johnson's Ex'r.* v. *Clark,* 4 Ark. 235, the court held that under our statute regulating the practice in chancery courts a party is not entitled to an appeal unless upon a final decision or decree, and that where the decree affirms that the conveyance of certain slaves is a mortgage and that the complainant has a right to redeem under it, and directs the master in chancery to take an account and make a report to the next term of court, these facts clearly show that the decree is merely interlocutory and not final or conclusive between the parties.

In the case of *Sennett* v. *Walker,* 92 Ark. 607, this court quoted with approval from the case of *Davie* v. *Davie,* 52 Ark. 224, as follows: "In this case, while the decree takes the form of a final order in adjudicating the parties' proportionate interests in the land, it is apparent that the court has not fully adjudicated that branch of the cause. The relative interests of the parties in the land have been ascertained and determined, but the cause is retained with a reference to a master who is directed to report at a subsequent term, and the court is yet to determine, upon the coming in of the report, what amounts shall be charged as liens upon the several interests, and whether there shall be a sale of some of the interests to satisfy the same. The decree does not direct its execution, but looks to further judicial action before that event. The plaintiffs can suffer no injury by awaiting the termination of the litigation."

(3) Under the rule there announced, the decree of the chancellor entered in the fall of 1913 was clearly interlocutory and was not a final decree in the case. In that decree the court found that the deed of trust given to H. J. Hale as trustee for W. P. Hale was a first mortgage on the homestead and that the mortgage given to F. B. Hale as trustee for the Osceola Cotton Oil Com-

pany was a second lien upon the homestead of Charles Davis. No foreclosure of either mortgage was made. The decree did not direct its execution but looked to further judicial action before that event. It was necessary that there should be an ascertainment not only of the amount due under the mortgage, but that there should be a foreclosure of the same ordered before the decree could be considered final. It follows that it was a matter within the discretion of the court to permit additional evidence to be taken in the case.

(4) The property embraced in the deed of trust given in favor of W. P. Hale embraced the homestead of Charles Davis. The act of March 18, 1887, provides that no conveyance, mortgage or other instrument affecting the homestead of any married man shall be of any validity unless the wife joins in the execution of such instrument and acknowledges the same. Under this statute the wife must not only join in the execution of the deed of trust but must also acknowledge that she has executed it in order to render it a valid encumbrance against the homestead. *Bank of Harrison* v. *Gibson,* 60 Ark. 269; *Pipkin* v. *Williams,* 57 Ark. 242.

(5) In the instant case Hattie Davis testified that she did not acknowledge the deed of trust. The certificate of acknowledgment was filled out and the impress of the notary's seal, containing the name of S. S. Semmes was attached to the certificate, but the officer's name was not subscribed to the certificate of acknowledgment and it did not appear in the body thereof. Section 5395 of Kirby's Digest, provides that all mortgages shall be acknowledged in the same manner that deeds for conveyance of real estate are now required to be acknowledged. Section 746 of Kirby's Digest provides that every officer who shall take proof of the acknowledgment of any deed or conveyance of real estate shall grant a certificate thereof and cause such certificate to be endorsed on such deed, and further provides that the certificates shall be signed by the officer before whom the same is taken and sealed if he have a seal of office.

In reference to the precise question here involved, in 1 Ruling Case Law, § 57, p. 278, it is said: "The statutes relating to acknowledgments either in express language or by implication require the officer taking an acknowledgment to subscribe his name to the certificate, and it is imperative that this requirement be complied with. The insertion of the name of the officer in the body of the certificate—in accordance with the common practice to prepare the certificate in advance so that the officer has only to sign his name—will not be deemed to constitute his official signature so as to supply the omission to sign at the conclusion. The failure of the officer to affix his signature renders the certificate null and void as a general rule, and this although the certificate may have been attested by his official seal."

To the same effect see *Clark* v. *Wilson,* 127 Ill. 449, 11 Am. State Rep. 143; *Marston* v. *Brashaw,* 18 Mich. 81, 100 Am. Dec. 152.

It is also contended by the appellants that if the deed of trust be construed as invalid, that the acknowledgment is cured by the curative act passed February 10, 1911. See General Acts of 1911, p. 12. We can not agree with them in that contention. That act cures defective acknowledgments where words required by law to be in the certificate of acknowledgment have been omitted, or where the officer has failed or omitted to attach his seal of office to the certificate of acknowledgment. It does not purport to cure an acknowledgment where the name of the acknowledging officer was not subscribed to the certificate of acknowledgment.

(6) It follows that the deed of trust given in favor of H. J. Hale as trustee for W. P. Hale did not create a valid encumbrance against the homestead because the acknowledgment thereto was not subscribed by the acknowledging officer as required under the statute.

It is also contended by counsel for the defendants that the deed of trust given to secure the indebtedness of Charles Davis to the Osceola Cotton Oil Company did not create a valid encumbrance on the homestead because

the acknowledgment was taken by an officer and stockholder of the corporation. In a case note to *Ardmore National Bank* v. *Briggs Machinery & Supply Company,* 20 Okla. 427, 94 Pac. 533, 16 Am. & Eng. Ann. Cas. 133, 23 L. R. A. (N. S.) 1074, it is said that a majority of the decided cases is to the effect that a stockholder of a corporation has a beneficial interest in a mortgage given to the corporation in which he is a shareholder and that he is, therefore, disqualified from taking an acknowledgment of such mortgage. The reason given in most of the cases is that the taking of an acknowledgment is a *quasi*-judicial act, and that though a stockholder in a corporation has no independent ownership in the corporation, still he gets the benefit of an enhancement in the value of the corporate property by the increased value of his shares and that his holdings of stock may be so large that almost any transaction of the corporation may affect the value of his shares.

On the contrary, the rule in some of the States is that a shareholder of a corporation is not directly interested in the property of the corporation and the taking of an acknowledgment by him to a deed or mortgage to the corporation of which he is a shareholder being strictly a ministerial act, is not invalid.

In 1 Ruling Case Law, section 41, 270, the author says that neither of these views expresses the true rule. We quote therefrom as follows: "The truth seems to be that no arbitrary rule will prove a safe test for determining in every instance whether an officer is disqualified to act because of interest. The facts and circumstances of the case should be deemed of controlling importance, and the decision should proceed with reference thereto. Undoubtedly, it is unwise and contrary to public policy for an officer to take an acknowledgment to any instrument to which he is a party, or in which he is interested directly or indirectly. In any event, he should be disinterested and entirely impartial as between the parties. But arbitrarily to declare his act *ipso facto* void is repugnant to sound principles of the law of evidence, and

in many cases must be productive of great hardship and injury. A more salutary rule declares that where there is no imputation or charge of improper conduct or bad faith or undue advantage, the mere fact that the acknowledgment was taken before an interested officer will not vitiate the ceremony or render it void, if otherwise it is free from objection or criticism. The fact of interest, however, ought to be regarded with suspicion and should provoke vigilance to detect the presence of unfair dealing, the slightest appearance of which the party seeking to uphold the acknowledgment should be required to clear away."

The Supreme Court of Tennessee has held that an acknowledgment of a mortgage to a corporation taken by one of its stockholders is not void but is voidable, and will be set aside upon the slightest evidence of undue advantage, fraud or oppression arising out of such interest of the officer taking the acknowledgment. *Cooper* v. *Hamilton Perpetual Building & Loan Assn.,* 97 Tenn. 285, 37 S. W. 12, 33 L. R. A. 338. There a husband and wife executed a mortgage to a corporation to secure payment of a loan. The acknowledgment was taken by a stockholder and director of the corporation. There was no fraud practiced by the officer or the corporation. The court held the acknowledgment valid.

In the case of *Green* v. *Abraham,* 43 Ark. 420, we held that a party to a deed could not take an acknowledgment to it. The reason is that he is a party, and is directly interested in the transaction. We also held in the case of *Biscoe* v. *Byrd,* 15 Ark. 655, that the taking of an acknowledgment to a deed or mortgage belongs to that class of duties which are recognized by this and other courts as strictly ministerial. In the case before us, it does not appear from the face of the deed or of the certificate of acknowledgment that the officer before whom the acknowledgment was taken was a stockholder in the corporation.

(7) The undisputed evidence shows that the deed of trust under consideration was given to secure a valid

debt and the amount for which judgment was rendered was due and unpaid. There was no fraud alleged or proved in regard to the execution of the mortgage, and no coercion or undue advantage was taken of the parties executing the deed of trust either by the officer who took the acknowledgment or by the corporation itself. Under these circumstances, we think the acknowledgment was not void, and that the deed of trust created a valid lien on the homestead.

From the views we have expressed it follows that the decree, in so far as it ordered a foreclosure of the mortgage given to F. B. Hale as trustee for the Osceola Cotton Oil Company, will be affirmed; and that so much of the decree as ordered a foreclosure of the deed of trust given to H. J. Hale as trustee for W. P. Hale will be reversed and the cause remanded with directions to the chancellor to dismiss the complaint for want of equity.

HIRSCHMAN v. FOREHAND.

Opinion delivered October 19, 1914.

1. SPECIFIC PERFORMANCE—DEFECTIVE DESCRIPTION—STATUTE OF FRAUDS.—In a contract of sale, land was described as "Lots 8, 9 and 10, block 13, H's. addition to the incorporated town of L.," *held*, while the writing afforded an insufficient description of the property, equity will decree specific performance when the evidence introduced supplies an adequate and definite proof of the description, sufficient to take the contract out of the statute of frauds.
2. SPECIFIC PERFORMANCE—REFUSAL OF WIFE TO JOIN IN DEED—ABATEMENT OF PURCHASE PRICE.—In an action for specific performance, where the seller's wife refuses to join in the deed the buyer may refuse to accept the conveyance on account of the outstanding inchoate dower right and sue to recover damages for the breach of the contract, or he may accept the conveyance as far as it is within the power of the vendor to give, and have an abatement of the purchase price to the extent of the value of the contingent interest of the wife.

Appeal from Poinsett Chancery Court; *Charles D. Frierson*, Chancellor; affirmed.

Basil Baker and *C. T. Carpenter,* for appellant.

1. The contract is too uncertain and indefinite to support specific performance. 85 Ark. 3.

2. It can not be made certain by other proof. 85 Ark. 4.

3. The refusal of the wife to relinquish dower was a good defense. 6 Pom. Eq. 794. The complainant should be remitted to his legal remedy. *Ib.*

4. No effort was made to have the contract reformed. 85 Ark. 4.

Mardis & Mardis, for appellee.

1. The contract is vague and uncertain, but delivery of possession and making valuable improvements on the lots takes the case out of the statute. 46 Ark. 246, 247, 249; 68 *Id.* 150, 157; 91 *Id.* 282.

2. The refusal of the wife to sign the deed does not affect the rights of appellee. 85 Ark. 3. The decree is right.

McCULLOCH, C. J. Defendant is in possession of real estate in Poinsett County, Arkansas, described as lots Nos. 8, 9 and 10, in block 13, of Hirschman's First Addition to the incorporated town of Lepanto, and asserts ownership to said property under an alleged contract of sale executed to him by the plaintiff. The plaintiff instituted this action to recover possession of the property, and defendant filed an answer and cross bill, setting up title under his alleged purchase from plaintiff, and prayed for a specific performance of said contract.

The contract exhibited by defendant with his cross-complaint describes the property as "two lots in the town of Lepanto, being lots Nos. 8, 9 and 10," and recites that the plaintiff has sold the same to defendant "for a consideration of $300, and him to move his house out of street, according to bond made, and give up possession of that part of land; $1 paid in cash, balance to be paid on delivery of deed." This is signed by both the plaintiff and the defendant. The defendant contempora-

neously executed to plaintiff a bond conditioned that he would remove the house from the street; or in the event of his failure to move the house that he would pay the plaintiff $500 as damages. On final hearing of the cause, the court decreed specific performance of plaintiff's contract and plaintiff has appealed to this court.

It is insisted, in the first place, that the contract is not sufficiently definite as to the description of the property to justify a decree for specific performance. Counsel rely upon the case of *Fordyce Lumber Co.* v. *Wallace,* 85 Ark. 3, where it was held that a contract for the sale of land, describing it as "section 16-7-4," without any other description, and without specifying the county in which it is situated, was insufficient and unenforceable. The contract exhibited in this case standing alone is too indefinite, but the proof in the case is sufficient to supply the defect. The testimony adduced by defendant is to the effect that he and plaintiff went upon the land and the plaintiff stepped off the lines and pointed it out to him and then wrote the description into the contract. Pursuant to the contract, he took possession of this particular land and moved the house, at considerable expense pursuant to the terms of his bond, which formed a part of the consideration for the contract of sale. It appears further from the testimony that the house which was moved was partly on the land in controversy and had been erected by another party several years ago under contract with the plaintiffs grantor, whereby he was to have the right to remove the house or to purchase the lot on which it was situated. Subsequently, defendant acquired the rights of the person who built the house, and plaintiff purchased these lots, together with considerable other property in that locality, from one Greenwood, who owned the property at the time the house was built. Defendant asserted his right to compensation for the value of the improvements or his right to purchase the property; and it was this controversy which led up to the contract of sale for the lots in controversy.

(1) Defendant testified, as before stated, that when he and the plaintiff went upon the property to discuss the differences with respect to the defendant's right to have compensation for the house, the proposition was made to sell him these three lots, and the contract was thereupon made. While the writing affords an insufficient description of the property, we are of the opinion that the evidence is sufficient to establish a state of facts which takes the case out of the statute of frauds and supplies the proof of description so as to justify the court of equity in decreeing a specific performance of the contract.

(2) Plaintiff is a married man and insists that he is unable to perform the contract by reason of the fact that his wife refuses to join in the conveyance, and for that reason the court of equity should not compel performance. The contention of counsel for the plaintiff is that a husband will not be compelled to perform his contract for the sale of land where his wife refuses to join, and that the vendee is remitted to a court of law for his damages resulting from the breach of the contract. The authorities are not altogether in accord, but according to the great weight of authority, the refusal of the wife to join in the deed does not afford sufficient grounds to deny the vendee the right to compel a specific performance of the contract. He may elect to refuse to accept the conveyance on account of the outstanding inchoate dower right and sue to recover damages for the breach of the contract, or he may accept the conveyance of such interest as it is within the power of the vendor to give. 36 Cyc., 744. The authorities are not altogether in accord on this question, and Judge Story, in his work on Equity Jurisprudence, expresses some doubt as to the justice of that rule. 2 Story's Equity Jurisprudence, § 734. But we are of the opinion that such is the established rule, and that it is the just and equitable one. The real division between the authorities is concerning the question whether if the vendee elects to accept the conveyance he can require an abatement of the price to the extent of the value of the outstanding dower interest.

Upon that question this court is committed to the rule that the vendee may require a deed and have an abatement to the extent of the value of the contingent interest of the wife. *Vaughan* v. *Butterfield,* 85 Ark. 289. In that case we followed the Iowa decisions on this point, which hold unqualifiedly that the vendee may require specific performance of his contract and an abatement of the purchase price. *Troutman* v. *Gowing,* 16 Ia. 415; *Leach* v. *Forney,* 21 Ia. 271; *Zebley* v. *Sears,* 38 Ia. 509.

This disposes of the questions presented in the case, and our conclusion is that the decree of the chancellor is correct and it should be affirmed. It is so ordered.

STATE BANK OF DECATUR v. SANDERS.

Opinion delivered October 19, 1914.

1. VENDOR AND PURCHASER—COMPLETED SALE—RELATION BETWEEN PARTIES—CONSTRUCTIVE TRUST.—A. entered into a contract with B. by which he sold land to B. for $900, B. paying $200 of the purchase money and agreeing to execute a note for the balance when the deed was executed, and that A. have either a vendor's lien in the deed or a mortgage on other land, and in pursuance thereof B. entered into immediate possession and made substantial improvements on the land. *Held,* the contract and acts of the parties established the relation of vendor and vendee between the parties, and from the time the sale was consummated A. became a constructive trustee for B.
2. VENDOR AND PURCHASER—SALE OF LAND—VENDOR AS CONSTRUCTIVE TRUSTEE.—The moment that a contract for the sale and purchase of land is entered into, and the relation of vendor and vendee is constituted, the vendor becomes a constructive trustee for the purchaser.
3. VENDOR AND PURCHASER—SALE OF LAND—PAYMENT—POSSESSION—STATUTE OF FRAUDS.—An oral contract of sale of land is completed and taken out of the statute of frauds, by the vendee's paying part of the purchase price, and entering into the possession of the property.
4. LIENS—JUDGMENT-LIEN—ATTACHES TO WHAT ESTATE.—A judgment-lien may attach only to an estate in land, and not to a lien on land.
5. LIENS—VENDOR'S LIEN—EXECUTION—JUDGMENT-CREDITOR.—A. sold land to B. retaining a vendor's lien, *held,* a judgment-creditor of A. can not levy execution upon A's. lien on the land sold B.

Appeal from Benton Chancery Court; *T. Haden Humphreys,* Chancellor; affirmed.

STATEMENT BY THE COURT.

Appellee instituted this suit against appellant in the Benton Chancery Court, stating, in substance, that on the 4th day of April, 1910, William Frazer was the owner of certain lands which were on that day sold to P. J. Sharpe in consideration of $900; that at that time Sharpe paid $200 in cash and agreed to give a mortgage on other lands or a vendor's lien on the land purchased for the balance of $700, which was evidenced by a note; that on the day the sale was consummated as aforesaid Sharpe took possession of the land; that Frazer investigated the other land which was offered by Sharpe as security for the $700, and that same was unsatisfactory. He, therefore, on the 1st day of April, 1911, executed a warranty deed to Sharpe, reserving therein a vendor's lien for the balance of the purchase money, towit: $700, as formerly agreed; that Sharpe continued in possession of the land until January, 1912, when, for a valuable consideration, he sold the same to appellee Sanders, who went into possession and continues to hold the same as the owner thereof; that Sharpe and Sanders both made valuable improvements on the land. It is further alleged that appellant bank, on the 28th of March, 1911, recovered a judgment for more than $1,000 against Frazer; that the equities and rights of appellee are superior to the claim of the appellant by virtue of its judgment, and that such claim of appellant was a cloud upon appellee's title. Appellee prayed that his title be quieted.

Appellant bank filed a combined demurrer, answer and cross-complaint, in which it was alleged that Frazer was the owner of the land at the time the bank's judgment was obtained against him, and denying, on information and belief, that Sharpe and Sanders had made any improvements on the land, and alleged that if any one did that it was done after the rendition of the judgment in appellant's favor. The appellant prayed that appellee's

complaint be dismissed for want of equity and that the land be sold to satisfy appellant's judgment.

Frazer testified, in substance, that in December, 1910, and for some time prior thereto, he was the owner of the land in controversy; that in December, 1910, he sold the land to Sharpe in consideration of $900; that a cash payment of $200 was made at that time, and it was then agreed that at Frazer's election he might thereafter take a mortgage on other property or reserve to himself a vendor's lien on the property for the balance of the purchase money; that on the 1st of April, 1911, he executed a warranty deed to Sharpe to the land and reserved in the deed a vendor's lien; that the lien was paid off and satisfied on April 16, 1912, by Sanders. On the day he (Frazer) sold the property to Sharpe, Sharpe took the actual control, possession and management of the farm and so continued until January, 1912. Improvements were made right away after Sharpe bought the land. He asked permission the day he made the deal to go to work on the place, saying that he wanted to fence the place. Witness thought he went to work immediately. The improvements were made before Sharpe got the abstract. At the time witness sold and contracted the land to Sharpe he did not advise him anything about the bank having a judgment against him (Frazer) because at that time they did not have a judgment or a suit pending. Neither did witness advise Sharpe at the time witness made the deed to him or when the note was finally paid off that a judgment had been rendered against the witness.

Witness further said, on cross-examination, that Sharpe went in possession of the land as soon as he bought it, but that he did not move on the farm. He made posts and fenced the land and cleared up some of the land and fixed up a spring on the same. He further testified that Sanders discovered that the bank had a judgment against him (Frazer) from the abstract. The deed which witness executed to Sanders bears the true date.

Sanders testified that he bought the land in controversy from Sharpe in February, 1912; that he paid Sharpe at the time $200 and agreed to pay Frazer the balance of the purchase price of $700 which Sharpe owed Frazer on the land; that he and Sharpe had made improvements, consisting of clearing and fencing, of the value of $300 on the land; that at the time he bought from Sharpe, Sharpe made and executed a deed to him for the land; that in April, 1912, he paid to Frazer the $700 balance of purchase money which Sharpe was due him.

On cross-examination, he testified that Sharpe never actually resided on the land. Witness got the abstract from Frazer some time after Sharpe had deeded him the land; he did not remember just how long after it was. He discovered that the Bank of Decatur had a judgment in its favor when he got the abstract. All the improvements that he (Sanders) had put upon the land had been since April 1, 1911. Appellee thought that he had learned that the appellant bank had a judgment against Frazer prior to the time he paid Frazer the $700, the balance of the purchase money. He says: "I had already obligated myself to pay it before I had notice or knowledge of the judgment."

Sharpe testified, in substance, that just after he contracted for the land he had full possession of it; made fence posts and boards and did other work on the place. At the time he contracted for the land and at the time it was deeded to him he had no notice of any judgment against Frazer. At the time he sold the land to Sanders, Sanders agreed to pay Frazer the $700 balance which Sharpe owed him on the land. Sharpe says he never lived on the land but camped there while he was working on the place.

One witness, on behalf of appellant, testified substantially as follows: That he lived on lands adjoining the land in controversy, and that if Sharpe ever lived on the land or ever made any improvements on it he did not know anything about it. He might have made posts on

the land and might have built fences and cleaned out the spring, but, if so, witness did not know anything about it; he had not seen any of these improvements and did not think that he had made any.

Another witness testified in substance that he lived on a farm adjoining the land in controversy; that Sharpe never lived thereon and never had his family or stock thereon that witness knew of. Witness did not know of any improvements on the farm that Sharpe made; would have seen any noticeable improvements. Another witness testified to substantially the same effect.

Appellant introduced the record of deeds showing that the date of the execution of the deed from Frazer to Sharpe was April 1, 1911, and recorded on December 19, 1911, and that a vendor's lien was reserved in the face of the deed in favor of Frazer for the purchase money, which was due and payable seven years after date.

The abstract mentioned by the appellee in his deposition was read by appellant as evidence, and it showed that the land was conveyed by Frazer to Sharpe on April 1, 1911, and that appellant's judgment was rendered March 28, 1911.

The court found that appellee at the time of the bringing of the suit was the owner and in the actual possession of the land in question; that appellant's judgment is not a lien on the land or any interest therein, and entered a decree dismissing appellant's cross-complaint for want of equity and quieting appellee's title.

This appeal has been duly prosecuted.

Walter Mathews and *McGill & Lindsey,* for appellant.

1. Appellant had no notice, actual or constructive. Kirby's Dig., § 763. Sharpe never was in actual possession. 30 Ark. 110; 16 *Id.* 543; 106 *Id.* 332; 90 *Id.* 149; 101 *Id.* 163; 107 *Id.* 314; 92 *Id.* 30.

2. It was necessary that part of the purchase price should be paid, but actual and continuous possession must

be taken under the contract and improvements made. 106 Ark. 332; 90 *Id.* 149.

3. The lien of the judgment attached to the land if Frazer had any interest. Pom. Eq. Jur., vol. 3, § § 1260-1263. Under our statute both legal and equitable estates can be sold under execution. Kirby's Dig., § 3228. See 13 N. Y. 180; 70 Am. St. 397, and notes; 93 Am. Dec. 337; 23 Cyc. 1373; 91 N. W. 404. 66 Ark. 167, is not in conflict with the rule.

Rice & Dickson, for appellee.

1. When Frazer sold the land to Sharpe, received part payment and parted with possession, etc., the relation of vendor and vendee was created, and Frazer had no interest to be taken on execution or other process. 106 Ark. 336; 16 *Id.* 543; 40 *Id.* 149; 55 *Id.* 116; 60 *Id.* 90; 66 *Id.* 170. See also 55 Ark. 116; 60 *Id.* 90.

2. The vendor here became a trustee for the purchaser. 84 Ark. 160; 67 *Id.* 325.

WOOD, J., (after stating the facts). The finding of the chancellor that at the time of the bringing of this suit appellee was the owner and in the actual possession of the land in question was not clearly against the preponderance of the evidence. The preponderance of the evidence tends to prove that Frazer entered into a contract with Sharpe in December, 1910, by which he sold the land at that time to Sharpe for a consideration of $900; that Sharpe at that time paid $200 of the purchase money and agreed to execute his note for the balance when the deed to him was executed, and that Frazer should have the option either to reserve a vendor's lien in the deed or take a mortgage on other land, and that in pursuance of this contract Sharpe entered into the immediate possession of the land and made substantial improvements thereon.

This evidence establishes the relation of vendor and vendee between Frazer and Sharpe. The contract of sale was fully consummated in December, 1910, and from that time on, according to the doctrine announced by this

court, Frazer, the vendor, became a constructive trustee for the vendee, Sharpe.

In *Stubbs* v. *Pitts*, 84 Ark. 160, this court, through Judge RIDDICK, quoted the following from Lord Hatherly, in *Shaw* v. *Foster*, L. R. 5, H. L. 321; *Lysaght* v. *Edwards*, L. R. 2, Ch. Div. 499-506. "That moment that a contract for the sale and purchase of land is entered into, and the relation of vendor and vendee is constituted, the vendor becomes a constructive trustee for the purchaser." And, continuing, Judge RIDDICK says: "This is founded on the principle that equity treats that as done that ought to be done. By the terms of the contract, the purchase price ought to be paid to the vendor, and the land ought to be conveyed to the vendee; equity, therefore, regards this as done. The consequences of this doctrine, says Professor Pomeroy, are carried out. As the vendee holds the equitable estate, 'he may convey or encumber it, may devise it by will; on his death, intestate, it descends to his heirs, and not to his administrators. In this country his wife is entitled to dower in it; a specific performance is after his death enforced by his heirs; in short, all the incidents of a real ownership belong to it.' 1 Pom. Eq. § 368. In commenting further on this doctrine, the learned author says that it is a mistake to suppose that this doctrine does not apply until the purchase price is paid. It applies at once, so soon as a valid contract of sale is made, though, until the purchase money is paid, it is a lien on the equitable estate of the vendee, and by the enforcement of this lien in a court of equity the equitable estate of the vendee may be sold or cut off."

And in *Strauss* v. *White*, 66 Ark. 167-170, we held, quoting from other cases, that "when the owner sells land, takes the notes of the vendee for the purchase money, and executes to him a bond for title, the effect of the contract is to create a mortgage in favor of the vendor upon the land to secure the purchase money, subject to all the essential incidents of a mortgage, as effectually as if the vendor had conveyed the land by an absolute

deed to the vendee, and taken a mortgage back to secure the purchase money."

In one of those cases, *Hardy* v. *Heard,* 15 Ark. 188, it is said: "The vendee, in analogy to the mortgagor, is the owner of an equity of redemption, and that this is the real and beneficial estate, which is descendable by inheritance, devisable by will, and alienable by deed, precisely as if it were an absolute estate of inheritance at law, subject, of course, to the rights of the vendor."

The fact that the vendor in those cases executed his bond for title to the vendee can make no difference in principle. Here the contract of sale was entered into and completed and taken out of the statute of frauds by the vendee paying part of the purchase price and entering into the possession of the property. His rights then, as vendee, by these acts, became as completely established under the agreement as if the vendor had executed to him a bond for title.

In the recent case of *Barrett* v. *Durbin,* 106 Ark. 336, Durbin, by oral agreement, contracted to sell land to Bell. Bell paid part of the purchase money and went into possession. After this Durbin executed a deed conveying the land to Myers, who claimed to be an innocent purchaser. We held that Durbin had no interest in the land that he could convey to Myers; that Durbin had sold all the interest that he had in the land to Bell, notwithstanding there was no deed or written contract.

The principles announced in those cases are controlling here, and show that appellant, by its judgment, obtained after Frazer sold the land to Sharpe, acquired no lien on the lands in controversy. A judgment lien, in the language of learned counsel for appellant, "only attaches to an estate in land—not a lien on land. An estate in land is the right to the possession and enjoyment of it. A lien on land is the right to have it sold or otherwise applied in satisfaction of a debt."

Here, under the facts, the only interest Frazer had in connection with the land which he had sold to Sharpe was to have the land sold to satisfy his vendor's lien in

case Sharpe failed to pay the purchase money. But this lien in favor of Frazer, as the vendor, did not give appellant the right to subject the land to sale in satisfaction of its judgment against Frazer. This lien being a mere security for the payment of Frazer's debt, it was not vendable under execution issued on appellant's judgment. The uncontradicted evidence shows that Sharpe carried out his contract of purchase with Frazer. He, therefore, had the right to have the title to the land quieted in himself and the appellee succeeded to all the rights that Sharpe had under his purchase.

The decree is, therefore, correct, and it is affirmed.

INCORPORATED TOWN OF POCAHONTAS v. STATE, USE OF RANDOLPH COUNTY.

Opinion delivered October 12, 1914.

1. FINES—MAYOR'S COURT—TO WHOM PAYABLE.—A city or town is entitled to retain all the fines and penalties imposed by the mayor's court for violation of its ordinances, notwithstanding the ordinances make the same acts offenses as are made offenses against the State by the statutes, and the county is entitled only to such fines and penalties as are imposed by the mayors of said courts, acting in their capacity of justice of the peace, for violation of the State laws within their jurisdiction.
2. FINES—CONFLICTING STATUTES.—The issue of whether a fine imposed by the mayor of a town was done under a town ordinance or a statute of the State, should be submitted to the jury.

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

STATEMENT BY THE COURT.

This is a suit by the State for use of Randolph County against the town of Pocahontas for fines and penalties imposed by the mayor's court and collected and paid into the town treasury, the county claiming that the fines and penalties were imposed for violations of the State laws and required to be paid into the county treasury.

The testimony of the mayor was to the effect that all the fines and penalties in controversy had been imposed by the mayor's court for the violations of town ordinances making the same acts offenses against the town as were made offenses against the State by the statute. The marshal likewise testified that the fines collected were assessed for violations of the town ordinances and not by the mayor in his capacity of justice of the peace for violations of State laws. The only evidence contrary to their testimony was an official transcript purporting to show the fines assessed by the mayor, which reports the case styled, "*The State of Arkansas* v....., the various defendants, naming them, and the mayor in explanation of this testified that the cases were styled on the city docket, "*The Incorporated Town of Pocahontas* v. .....," the defendants," and that when the clerk handed him the blank for the making of the transcript, in the column left for the style of the cases were the words, "*The State of Arkansas* v. .....," and he overlooked this fact and merely wrote in the names of the defendants in the different blanks left therefor, taking the cases from his city docket. The appellant offered to introduce in evidence its ordinance making drunkenness a misdemeanor but the court refused to allow it done, over its objection. Appellant asked the court to instruct the jury that if they should find from the testimony that the fines were imposed by the mayor of the town of Pocahontas, acting as such and not as justice of the peace, their verdict should be for the defendants, and also that if they should find that the mayor imposed the fines in question under or by authority of the ordinances of the town of Pocahontas, or any of them, they should find in favor of the defendant, both of which instructions were refused and the court directed a verdict for the plaintiff and from the judgment thereon the town appealed.

T. W. Campbell, for appellant.

The evidence conclusively shows that all of the fines involved in this suit were imposed by the mayor's court

for violations of town ordinances. The fines were payable into the town treasury. Kirby's Dig., § § 7183, 5465.

S. A. D. Eaton, for appellee.

Where an offender has been convicted in a mayor's court for the violation of a void ordinance, or where there was no ordinance covering the offense, and the offense charged is a violation of a State law, the presumption is that the mayor acted in his capacity as justice of the peace. 68 Ark. 244; 88 Ark. 211; 86 Ark. 442; 92 Ark. 483; 94 Ark. 178; 107 Ark. 99. In such case the fines are payable into the county treasury. 56 Ark. 133; *Id.* 137.

KIRBY, J. The appellant contends that without regard to the testimony, it is entitled under the law to all the fines and penalties imposed by the mayor's court, whether for violations of the ordinances of the town or State laws of which it had jurisdiction. Sections 5465 and 7183 Kirby's Digest provide:

"All fines, penalties and forfeitures imposed by any court or board of officers whatsoever, except those imposed by mayor's or police courts in any city or town, shall be paid into the county treasury for county purposes." Kirby's Digest, section 7183.

"All fines and penalties imposed by the mayors or police court in any city or town in this State shall be paid into the city or town treasury, and the city or town councils shall have power to prescribe all necessary regulations for the collection, and account for said fines and penalties." Kirby's Digest, section 5465.

The mayors of incorporated towns and cities of the second class are also given concurrent jurisdiction with justices of the peace of offenses in violation of the State laws within their jurisdiction. Sections 5586, 5590, Kirby's Digest.

All municipal corporations are authorized to prohibit and punish any act, matter or thing which the laws of the State make a misdemeanor, and to prescribe penalties for violation of such ordinances not greater nor less for the violation thereof than those prescribed by the statute. Sections 5463, 5464, Kirby's Digest.

(1) The sections of the Digest above quoted give color to appellant's contention but they received a different construction by this court in *Hackett City* v. *State,* 56 Ark. 135. It was there held that the city or town is entitled to all fines imposed by the mayor's court for violations of the ordinances of the municipality without regard to the fact that the town ordinances imposed penalties for acts which were also offenses against the State. The court said also in construing section 5860 of Mansfield's Digest, since conformed to section 2, of the act of March 30, 1891, (section 5465, Kirby's Digest), and carried into Kirby's Digest as section 7183, "It was the clear intention of that section to give to the county all fines arising from the enforcement of the State law by the mayor in his capacity of justice of the peace." The court considered in its opinion said act of March 30, 1891, and we adhere to its ruling therein. Accordingly the city or town is entitled to retain all the fines and penalties imposed by the mayor's court for violations of its ordinances, notwithstanding the ordinances make the same acts offenses as are made offenses against the State by the statutes and the county is entitled only to such fines and penalties as are imposed by the mayors of said courts, acting in their capacity of justice of the peace for violation of the State laws within their jurisdiction.

(2) The testimony herein tended strongly to show that the fines and penalties in controversy were imposed by the mayor's court for the violation of ordinances of the town that prescribe like punishment for the same offenses as are prescribed by statute for violation of State laws and the court should have submitted this issue to the jury for its determination under proper instructions; and the testimony not being undisputed, should not have directed a verdict. For these errors the judgment is reversed and the cause remanded for a new trial.

QUERTERMOUS v. STATE.

Opinion delivered September 28, 1914.

1. FORGERY—INDICTMENT—ALLEGATIONS.—In a prosecution for forgery, the instrument alleged to have been forged must be set out in the indictment.
2. FORGERY—INDICTMENT—ALLEGATIONS.—Where defendant was charged with forgery by altering the writing made by an administrator, on a claim presented to him, the indictment will be held sufficient, when it sets out the material parts of the instrument, so far as it concerns the forgery.
3. FORGERY—ALTERATION OF CLAIM ON ADMINISTRATOR.—Defendant presented for allowance to the administrator of an estate, a claim. The administrator wrote thereon "not allowed." Defendant erased the word "not" and filed the claim. *Held*, the evidence was sufficient to support an indictment charging forgery.
4. FORGERY—ADMINISTRATION—ALTERING INDORSEMENT OF DISALLOWANCE.—The alteration of the indorsement of disallowance on a claim filed with an administrator, is sufficient to support a charge of forgery.
5. CONTINUANCES—SHOWING—DISCRETION OF THE COURT.—A trial court will not be held to have abused its discretion in refusing to grant a continuance on account of the absence of a witness, where the sheriff's return showed the witness to have been served with notice, which had not in fact been done; when the appellant made no showing that he was mislead by the return of the sheriff, or that he was not advised that the witness was absent from the State.
6. CONTINUANCES—TAKING TESTIMONY BEFORE THE JURY.—In a criminal trial where defendant's motion for a continuance was not read to the jury, the introduction of testimony on the point before the jury, having no bearing on the issues in the case, while erroneous, *held* not prejudicial.
7. TRIAL—EXCEPTIONS—CERTIFICATE OF BY-STANDERS.—Before a certificate of by-standers can avail, it must appear from the record that the exception had been presented to the trial judge in the bill of exceptions, and refused.
8. CONTINUANCES—DISCRETION OF COURT.—Appellant in a criminal trial asked a postponement to enable him to procure witnesses to rebut testimony of his bad character, offered by the State; *held*, where it does not appear that the circumstances were such that appellant could not have anticipated that the State would attack his character for truth and morality, the court will not be held to have abused its discretion in refusing a postponement.
9. APPEAL AND ERROR—BILL OF EXCEPTIONS—AFFIDAVITS—MOTION FOR NEW TRIAL.—A cause will not be reversed on the ground that the

jury was subjected to improper influences, upon affidavits which appear in the record, but which are not properly certified in the bill of exceptions.

10. MOTION FOR NEW TRIAL—AFFIDAVITS—BILL OF EXCEPTIONS.—Affidavits or other evidence adduced in support of a motion for a new trial become a part of the record only by being incorporated in the bill of exceptions.

11. APPEAL AND ERROR—AFFIDAVITS—BILL OF EXCEPTIONS.—Affidavits filed in support of motion for new trial are no part of the record on error, unless made so by bill of exceptions.

12. EVIDENCE—CROSS-EXAMINATION—DISCRETION OF COURT—REMARKS OF COURT.—The court may to some extent limit the cross-examination, and when a witness was asked to state all that was on a certain page of a document, and over objection the court permitted the question to be asked, with the remark witness would have a remarkable memory to remember every word on a page, the remark of the court will not be held prejudicial as being an expression of the court's opinion as to the credibility of the witness.

13. FORGERY—CHARACTER OF DOCUMENT FORGED.—Defendant was charged with the crime of forgery by altering the notation in a claim presented to an administrator by erasing the word "not" in the phrase "not allowed." *Held,* a verdict of guilty will be sustained when it appears that defendant did make the alteration, although the administrator later paid the claim, without an appeal to the court.

Appeal from Arkansas Circuit Court, Northern District; *Eugene Lankford,* Judge; affirmed.

J. M. Brice, for appellant.

1. Appellant had the right to rely upon the sheriff's return as true, and since he did not discover the error until immediately before the trial, too late to procure either the attendance or the deposition of the absent witness, and since the testimony of Bradford was of the utmost importance to appellant, it was a manifest abuse of discretion to deny appellant's motion for a continuance.

2. The indictment is fatally defective in that it does not set out the claim. 77 Ark. 537; 96 Ark. 101; 17 Am. & Eng. Ann. Cases, 496.

3. A probate court is presumed to pass upon claims against estates of deceased persons upon their merits. The forgery of an endorsement to a claim does not con-

stitute forgery within the meaning of the criminal statute. Kirby's Dig., § § 125, 130; 19 Cyc. 1380, 1381.

When the administrator signed the indorsement alleged to have been forged, he waived service of notice of the filing of the claim, and such waiver was tantamount to a rejection of the claim and referred it to the probate court for action. 29 Ark. 238; Kirby's Dig., § 123. See also, 9 Am. & Eng. Ann. Cases, 1110; 58 S. E. 621.

4. When appellant's counsel on examination of the administrator, Fowler, sought to test his memory and credibility after he had stated that he had read and remembered all on the page of the claim where his indorsement appears, it was error on the part of the court, in response to the State's objection, to remark, "he may answer that question, but a man would have a remarkable memory to remember every word on a page." This was an expression of opinion on the part of the court unfavorable to appellant and necessarily prejudicial. 107 Ark. 469; 76 Ark. 110.

5. The State, in seeking to impeach appellant, was permitted to ask various witnesses if they were acquainted with his reputation "for truth and honesty" and "for truth and veracity." This was error. The statute must be strictly followed in impeaching a witness. Kirby's Dig., § 3138; 100 Ark. 321; 53 Ark. 387; 59 Ark. 50.

6. Where the proof shows that the jury were permitted to separate without the defendant's consent, and that they were exposed to improper influences, the burden is on the State to prove that they were not so exposed, or if so that they were not influenced thereby. 57 Ark. 1; 76 Ark. 487; 44 Ark. 115; 40 Ark. 454; 109 Ark. 193.

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

1. On the facts the evidence is sufficient to sustain the verdict. 109 Ark. 130; *Id.* 135.

2. It is not error to overrule a motion for continuance where the absent witness is not within the jurisdiction of the court. 108 Ark. 594.

3. The indictment was sufficient. Kirby's Dig., § 2229; 11 S. W. 575; 29 Mich. 31; 68 Mich. 454.

4. The question raised in support of the motion in arrest of judgment, to the effect that the forging or altering a claim against an estate does not constitute forgery, since there is no validity to the instrument unless it is approved by the probate court, is without merit.

A motion in arrest of judgment can only question the fact as to whether or not a public offense has been committed, and the crime of forgery is charged in apt language in the indictment.

5. There was nothing prejudicial in the court's remark, to which appellant objects. If appellant thought it was prejudicial, he should have objected at the time and requested an instruction to the jury not to consider it. 108 Ark. 594, 601.

6. In the inquiry touching appellant's reputation, the court required the State's attorney to ask of the witnesses appellant's reputation for *truth and veracity.* There was no error. Standard Dict., 1913 ed. p. 2642; 36 Ark. 141; 100 Ark. 199; *Id.* 321; 88 Ark. 72.

McCULLOCH, C. J. The charge in this case against appellant is forgery, in altering the indorsement of an administrator on a claim presented against the estate so as to show an allowance of the claim by the administrator, whereas the indorsement signed by the administrator was a disallowance of the claim. The indictment sets forth *in hec verba* the true indorsement signed by the administrator showing that the claim was "not allowed," and also the altered indorsement showing that the word "not" had been erased. The claim itself is not set forth in the indictment, but is described as "Claim No. 5, *A. B. Quertermous* v. *The Estate of G. W. Fraser,* deceased, Arthur Fowler, Administrator, said claim being for $299.25."

The evidence adduced by the State was sufficient to prove that the administrator refused to allow the claim

and made his indorsement thereon accordingly, showing that is was "not allowed;" that the claim as thus indorsed was delivered by the administrator to appellant, who carried it to the office of the probate court clerk and filed it, and that when filed by appellant the word "not" was erased so as to show the allowance of the claim.

There was a demurrer to the indictment, and it is now insisted that the indictment was insufficient because the claim, which bore the indorsement of the administrator, was not set out in the indictment.

(1-2) The law is well settled that the instrument alleged to have been forged must be set out in the indictment; the object of the rule being not only to put the defendant upon notice as to the nature of the instrument he is charged with forging, but also that the court may be able to determine upon the face of the indictment whether the instrument is a writing that can be forged. *Crossland* v. *State,* 77 Ark. 537. Now, the indictment in this case sets forth fully the indorsement which is alleged to have been altered. Even if the indorsement be treated as a part of the claim, yet the material part of the instrument, so far as concerns the forgery, is the indorsement; and it is sufficient if that be set forth in the indictment, together with such a description of the claim as is sufficient to show its materiality and to apprise the accused of the nature of the charge against him. The indictment in this case describes the claim with sufficient particularity to put the accused on notice and to show the nature of the claim. The particular form of the claim is immaterial for the reason that the accused is not charged with altering it in any manner.

In the case of *State* v. *Maupin,* 57 Mo. 205, the charge in the indictment was that the defendant had forged a judge's certificate to a fee bill, and the indictment set forth, *in extenso,* the certificate, but not the fee bill. On demurrer the indictment was held to be sufficient.

It is also urged that the indictment in this case charges that appellant forged the claim, but we are of the opinion that when the whole instrument is read to-

gether it is made very clear that the charge only involved the forgery, by alteration, of the indorsement.

The statute under which the indictment was preferred reads as follows: "If any person shall forge or counterfeit any writing whatever, whereby fraudulently to obtain the possession or to deprive another of any money or property, or cause him to be injured in his estate or lawful rights, or if he shall utter and publish such instrument, knowing it to be forged and counterfeited, he shall, on conviction, be confined in the penitentiary not less than two nor more than ten years." Kirby's Dig., § 1714.

(3) It will be seen that the statute is very broad and makes it an offense to forge any writing whatever to deprive another of money or property "or to cause him to be injured in his estate or lawful rights." The statute governing the duties of administrators and executors, and of probate courts, with respect to claims against estates, provides that the executor or administrator, if satisfied that an exhibited claim is just, shall indorse thereon his approval and allowance of the same and shall keep a list of the demands and make return thereof to the probate court at least once every year. The statute also makes it the duty of the court to examine the claim, whether allowed by the administrator or not, to determine its validity.

(4) It is argued that the alleged alteration is immaterial for the reason that is did not affect the force or validity of the claim inasmuch as it had to be allowed by the court. We think that contention is unsound for the reason that the procedure is different where the claim is allowed by the administrator from what it is in case the claim is disallowed. The proceedings cease to be adversary when the administrator or executor allows the claim, though it is the duty of the court to examine the same before allowing and classifying it. The statute does not contemplate a regular trial on a claim which has been allowed by the administrator, but a mere examination by the court to such an extent as to enable the court to

determine whether the claim appears to be a just one. Therefore an alteration of the indorsement of disallowance changes the status of the claim and thus deprives the estate of a lawful right within the meaning of the statute. The indorsement of an executor or administrator, showing his allowance, has at least persuasive force with the court in passing upon its validity, and a change in the indorsement necessarily affects the rights of the estate, which, under the statute, are to be safeguarded both by the executor or administrator and by the probate court. Our conclusion, therefore, is that the writing alleged to have been forged was of such a character as falls within the terms of the statute.

(5) Appellant moved for a continuance of the case on account of the absence of an important witness, one W. H. Bradford, who was out of the jurisdiction of the court. Appellant's counsel caused a subpoena to be issued directed to the sheriff of Arkansas County, commanding him to summons Bradford and numerous other witnesses. The sheriff's return indorsed upon the writ showed the service on all the witnesses, but it was shown by the deputy sheriff who served the writ that Bradford was not in fact served, and that the return indorsed on the writ by the sheriff was erroneous in that respect. It was also shown that Bradford had moved away from Arkansas County about two years before the trial and had been in Mississippi with his family for a considerable length of time. Appellant made no showing that he was misled by the return of the sheriff or that he was not advised that the witness Bradford was absent from the State. Under the circumstances, we are of the opinion that the court did not abuse its discretion in refusing to postpone the trial.

(6) The bill of exceptions recites that the testimony of the deputy sheriff was introduced before the jury at the commencement of the trial, and not before the court on the hearing of the motion for continuance. It is evident, however, that the testimony was introduced merely for the purpose of showing that the absent witness had

not been served and was beyond the jurisdiction of the court and that his absence afforded no grounds for postponing the trial. It had no bearing whatever on the issues involved in the trial and should not have been admitted before the jury. Appellant insists that this constituted error which calls for a reversal of the judgment, but we are unable to discover possibility of a prejudicial effect from that testimony. The motion for continuance was not read nor referred to in the presence of the jury, and the testimony of the officer had no tendency to contradict appellant nor to discredit him in any way, so it is difficult to see how his rights were prejudiced by the jury being permitted to hear it. The court held in *Burris* v. *State,* 38 Ark. 231, and *Polk* v. *State,* 45 Ark. 165, that it constituted error to permit the State, in a criminal prosecution, to read to the jury the defendant's affidavit for a continuance and then prove that the statements in it were false. That was not done, however, in the present case.

(7-8) Error is also assigned on account of the court's refusal to postpone the trial long enough to enable appellant to procure witnesses to rebut the testimony adduced by the State attacking his character for truth and morality. There is nothing in the bill of exceptions to support this assignment but an affidavit of by-standers was filed showing that at the close of the trial the attorney asked the court to adjourn the case over and give him an opportunity to procure witnesses. It is well settled, by repeated decisions of this court, that before the certificate of by-standers can avail, it must appear that the exception has been presented to the trial judge in the bill of exceptions and refused. There appears in the bill of exceptions in this case, an erased statement to the effect that "the court inquired if there were any more witnesses to be introduced and defendant asked for more time in which to procure witnesses to bolster his character, which was denied by the court, and defendant asked that his exceptions be noted of record, which was done."

There are lines drawn through this statement showing that it was excluded, but it does not appear who did this, whether the judge or some one else before the bill of exceptions was presented for signature. The certificate of the judge is to the effect that the bill of exceptions signed and filed is the one presented by the appellant, and we must assume from this certificate that the judge made no corrections in it. The proper practice is to show by indorsement of the trial judge that the exception was presented to him and refused, and this admits the certificate of the by-standers. It may be added, however, that the exception, even if shown as certified by the by-standers, is not sufficient to show that there was an abuse of the court's discretion in refusing to postpone the trial for the further introduction of evidence; for it does not appear that the circumstances were such that appellant could not have anticipated that the State would attack his character for truth or morality when he took the witness stand in his own behalf.

(9) The bill of exceptions is also insufficient to bring up for review the assignment with respect to alleged exposure of the jury to improper influences. There are two affidavits certified by the clerk as being filed with the motion for new trial, showing that certain jurors, during the progress of the trial, were exposed to influences of citizens who were antagonistic to the defendant and expressed desire for his conviction. The bill of exceptions is entirely silent about there being any affidavits or proof concerning the alleged misconduct. In fact, the bill of exceptions contains no reference to the motion for new trial or the affidavits in support thereof. The court held, in *Ferguson* v. *State,* 95 Ark. 428, that it is the duty of the trial judge to examine and consider affidavits filed with the motion for new trial, showing misconduct of the jury, whether the same be actually read to him or not. But in that case the affidavits were identified in the bill of exceptions. Here there is nothing in the bill of exceptions to identify the affidavits, or any other proof in support of the allegations in the motion for new trial. Therefore,

we have nothing to guide us in determining what was before the court when that assignment was considered. The jurors were, by an order of the court, allowed to separate, and the burden was therefore upon appellant to show that they were subjected to improper influences. In order to impeach the verdict, therefore, the appellant must support his attack by affidavits properly certified in the bill of exceptions. We can not permit the judgment to be overturned merely by an affidavit in the record which is not certified in the bill of exceptions as having been brought before the court and containing all the evidence adduced on that subject.

(10) The statute provides that motion for new trial on grounds of misconduct of the jury "must be sustained by affidavits showing their truth, and may be controverted by affidavits." Kirby's Digest, section 6219. The rule of practice established by decisions of this court is that neither motions for new trial nor exceptions to the order of the court overruling them need be set forth in the bill of exceptions if they otherwise constitute a part of the record. *Johnson* v. *State,* 43 Ark. 391; *Carpenter* v. *Dressler,* 76 Ark. 400. But it does not follow that affidavits or other evidence adduced in support of the motion for new trial become a part of the record merely by exhibiting same with the motion. They must be incorporated in the bill of exceptions. Mr. Elliott, in his Treatise on Appellate Procedure (section 815), lays down the proper rule as follows: "Recitals of fact in direct motions or appended exhibits do not go into the record as part of the motion. Such recitals and exhibits can only be brought into the record by a bill of exceptions. The motion itself may be in the record without a bill, and yet its statements of fact or exhibits would not be a part of the record. Thus matters of evidence, affidavits, or instructions can not be made part of the record by embodying them in the motion." And the same rule is stated, with numerous authorities in support of it, in an encyclopedia, as follows: "As a general rule, affidavits are not part of the record proper, whether such affidavits are

used in support of a motion for new trial, for a continuance, for a change of venue, to set aside or vacate a default, to sustain or dissolve an injunction, to set aside or open a judgment, or whether they are used on the hearing of an application for an injunction." 2 Encyc. of Law, p. 1064.

(11) The precise point was decided by the Supreme Court of the United States in the case of *Stewart* v. *Wyoming Ranch Co.,* 128 U. S. 383, where the statement was made in the opinion that "affidavits filed in support of a motion for new trial are no part of the record on error unless made so by bill of exceptions." This court at an early date held that an affidavit for continuance formed no part of the record unless brought up by bill of exceptions. *Phillips* v. *Reardon,* 7 Ark. 256. And the same doctrine has been announced by this court in more recent cases. In several cases we have held that while pleadings and exhibits thereto constitute parts of the record for the purpose of deciding upon the question of their sufficiency as pleadings without being incorporated in the bill of exceptions, it is necessary to incorporate such exhibits in the bill of exceptions before they can be considered as evidence in the case. *International Order of Twelve* v. *Jackson,* 101 Ark. 555; *National Annuity Association* v. *McCall,* 103 Ark. 201. The assignment is therfore unavailing.

(12) Appellant assigns error in a remark made by the court in passing upon an objection in the cross-examination of the administrator, who testified positively that he refused to allow the claim and his indorsement stated that the claim was not allowed, but that the same had been changed by erasure of the word "not." He was cross-examined at length by appellant's counsel, and was finally asked to state what else was on the page besides the word "not;" and the prosecuting attorney objected to the line of examination on the ground, as he stated, "it is not expected for a man to remember every word that is on a page." Counsel for appellant insisted on an answer to the question, and the court permitted him to ask

the question, with this remark: "He may answer the question if he can, but a man would have a remarkable memory to remember every word on a page." It is insisted that this was improper expression of the court's opinion as to the credibility of the witness. We do not, however, think so, for the remark was made merely in the court's ruling, without any intention, manifestly, to express an opinion to the jury. It shows that the court, with some reluctance, allowed the question to be asked. The matter of cross-examination is to some extent within the discretion of the court, as to how far it may proceed, and it certainly would not be an abuse of discretion to refuse to permit a witness to be interrogated concerning his recollection of every word on a written or typewritten page. It is a matter of common knowledge that few persons have memories sufficiently cultivated to remember every word on a page unless he had carefully committed it to memory for some purpose. We understand this remark of the court merely to indicate his reluctance to allow such a cross-examination to proceed any further on account of the improbability of the witness remembering every word on the page. At any rate, we do not think there is anything in the remark that was probably prejudicial to appellant's rights.

There are several other assignments of error, which are not, we think, of sufficient importance to call for a discussion. Upon consideration of the whole record, we are convinced that there was no prejudicial error committed in the trial of this case.

(13) The evidence adduced by appellant tended to show that his claim was a just one, and that he did not alter the indorsement, but that the claim was allowed by the administrator and promptly paid by the latter as soon as it was allowed and classified by the court. There are circumstances which tend to corroborate the appellant, but the testimony adduced by the State was sufficient to warrant a finding that appellant altered the indorsement for the purpose of influencing the court in passing upon the validity of the claim. The fact that it was a just

claim, or, rather, that the invalidity of it had not been established by evidence, does not affect the question of appellant's guilt of the crime of forgery. Nor is the case affected by the fact that the administrator paid the claim without appealing to the circuit court, except that it might have affected the credibility of the administrator's testimony before the jury.

Judgment affirmed.

SIMPSON *et al.* *v.* J. W. BLACK LUMBER COMPANY.

Opinion delivered July 13, 1914.

1. MECHANIC'S LIEN—NOTICE TO OWNER.—A material man, other than the contractor, can not claim a lien against property, unless he first gives notice to the owner as required by the statute.
2. MECHANIC'S LIENS—NOTICE—SUIT.—The commencement of a suit by a material man within ninety days after the last materials are furnished, fixes a lien against the owner's property and dispenses with the necessity of ten days notice to the owner of an intention to claim a lien, and of the filing of the account upon which it is claimed, with the circuit clerk.
3. MECHANIC'S LIENS—CLAIM OF MATERIAL MAN—PARTIES.—In an action by a material man to collect from the owner of the improvement, the amount due him, the contractor is a necessary party defendant, the law requires the contractor to defend all such actions, and to be bound by the judgment rendered.
4. MECHANIC'S LIENS—ACTIONS—PARTIES—LIMITATIONS.—A material man brought an action against the owner to recover the value of materials used in the improvement. He failed to make the contractor a party. *Held*, the cause will be reversed, but not remanded for further proceedings, because under the facts more than fifteen months have elapsed between the filing of the lien and the time of the judgment, and, under the statute, no judgment could be rendered against the contractor.

Appeal from Clay Chancery Court, Western District; *Chas. D. Frierson*, Chancellor; reversed.

STATEMENT BY THE COURT.

This suit was brought to enforce a lien for materials furnished the contractor for remodeling appellants' home in the town of Corning, Arkansas. The lots belong to

the wife, and the contract was made with one T. J. Evans, who was to furnish the materials and complete the work for a certain fixed price. He purchased the lumber from appellee company to be used in the building. His health was poor, and on the 26th of August, 1912, he abandoned the work and went away to Hot Springs, telling Doctor Simpson that he still owed a little balance to the lumber company, and if anything else was due him under the contract, to pay it to the lumber company.

The testimony is in dispute as to whether Doctor Simpson took charge of the building on the 26th of August to complete it, or whether Perrien, who was the contractor's foreman, continued in the work of the construction under the contract for another week, or until September 2. It is undisputed, however, that there is a balance of $29.36 due for materials furnished after Doctor Simpson took charge.

The suit was commenced against the appellants to enforce a lien on November 26, 1912. They demurred to the complaint, for a defect of parties defendant, and the demurrer being overruled, answered, admitting the contract made with Evans to remodel the building and to furnish the material. Alleged that on August 26, by mutual consent, Evans abandoned the work to Doctor Simpson to be finished by him, and that all materials furnished to Evans were furnished prior to the 26th day of August, and that no notice of intention to claim a lien was given to appellants, and that suit was not begun in time to fix one against the property.

The court found in favor of the lumber company for its claim with interest, amounting to $715.96, and that it was entitled to a lien against the land upon which the improvement was constructed to secure the payment thereof. The appellants then again insisted that Evans, the contractor, should be made a party defendant before judgment could be rendered against them. The court then offered to permit the appellants to plead against Evans and continue the case for their remedy against him, and they stated they would agree to this only if the entire

case was continued until they could get service upon Evans, and the court refused to grant the continuance and rendered judgment for the recovery of said sum and declared it a lien against the improvement and ordered it sold to satisfy same. From its decree appellants bring this appeal.

W. E. Beloate, for appellant.

1. The complaint is defective in not setting out the contract. 58 Ark. 14; 2 Jones on Liens, 1589; 27 Cyc. 277-279.

2. This action is for material furnished a contractor, and not the owner. It is statutory and the claimant must bring himself within the statute. Kirby's Dig., § 4976; 87 N. E. 905; 102 Ark. 539. Ten days' notice is mandatory. 93 Ark. 280; 87 N. E. 905; 2 Jones on Liens, 1591-3; 30 Ark. 682. A notice to the husband is not sufficient to bind the wife. 87 N. E. 905; 67 Ark. 571; 7 *Id.* 402. Personal knowledge is not enough. 25 N. E. 217.

3. Kirby's Dig., § 4983, vests jurisdiction in the circuit court. Chancery had no original jurisdiction of mechanics' liens and the Legislature can not confer it. 80 Ark. 150; -95 *Id.* 621; 56 *Id.* 546.

4. The contractor was a necessary party. 74 Ark. 528; 51 *Id.* 302; 17 N. W. 62; 2 Jones on Liens, 1574; Kirby's Dig., § 4978; 62 N. E. 898; 27 Cyc. 357.

5. The suit was brought too late. 31 Ark. 316.

G. B. Oliver, for appellee.

1. The evidence cured any defect in the complaint.

2. The notice was sufficient. Kirby's Dig., § 4976. Doctor Simpson was the "agent" of his wife and waived objections to the form of notice. 51 Ark. 302-308. The notice required is to be given "*before the filing of the lien,*" etc., in the clerk's office. Kirby's Dig., § § 4981-3. Where suit is begun within ninety days allowed, it is unnecessary to file any other account than the one attached to the complaint, or for the clerk to perform any act required by § 4982. 49 Ark. 475; 27 Cyc. 125-6.

3. Since section 4975, Kirby's Digest, was repealed by the act of 1911, neither the contractor nor other lien holders are necessary parties. 56 Ark. 544.

4. The chancery court had jurisdiction. 56 Ark. 544.

5. Liberal construction is given to mechanics' lien acts. 51 Ark. 307.

KIRBY, J., (after stating the facts). (1) The court erred in not sustaining the demurrer to the complaint because of the defect of parties. The suit was brought by the materialman, with whom the owners had made no contract and from whom they had purchased no materials, against them to fix a lien against their property for the amount claimed to be due for materials furnished the contractor, of which they knew nothing, that were alleged to have been used in the construction of the improvement. Section 4978, Kirby's Digest, provides that when a lien is filed under the provisions of the law by a person other than a contractor, "it shall be the duty of the contractor to defend any action brought thereupon, at his own expense; and during the pendency of such action, the owner may withhold from such contractor the amount of the money for which such lien shall be filed; and in case of judgment against the owner or his property upon the lien, he shall be entitled to deduct from any amount due by him to the contractor the amount of such judgment and costs, and, if he shall have settled with the contractor in full, shall be entitled to recover back from the contractor any amount so paid by the owner for which the contractor was originally liable."

(2) No notice was given by appellee of an intention to claim a lien for the materials furnished, and no statement of account and the amount claimed due was filed with the circuit clerk within ninety days after the last materials were furnished to the contractor, and it is questionable whether the suit was commenced in time, depending upon whether the improvement was in charge of the contractor's foreman for one week after he abandoned the job, during which materials were furnished, or Doctor

Simpson, the husband of the owner. The evidence is conflicting on this point, and we can not say that the chancellor's finding is clearly against the weight of it. This court has determined that the commencement of a suit by the material furnisher within ninety days after the last materials are furnished fixes a lien against the owner's property and dispenses with the necessity of ten days' notice to the owner of an intention to claim a lien and the filing of the account upon which it is claimed with the circuit clerk. *Anderson* v. *Seamans,* 49 Ark. 475; *McFadden* v. *Stark,* 58 Ark. 7.

(3) The contractor was a necessary party and should have been made codefendant with the owners, who knew nothing about what amount of materials had been furnished, nor how much of the materials furnished had gone into the construction of the improvement. He was a necessary party, both for his own and the owner's protection. The owners had the right to look to him for the payment of any judgment that might be recovered against their property for materials furnished, having contracted with him to supply such materials and paid him the contract price for the improvement, and can not be compelled to resort to another action against the contractor for the recovery of such sum of money in which the contractor would be at liberty to claim that he did not owe the materialman the amount for which the judgment was rendered and the lien enforced. It is the intention of the law to have the contractor to defend all such actions and be bound by the judgment rendered. Kirby's Digest, § 4978; *Horstkotte* v. *Menier,* 50 Mo. 159; *Janes Sons Co.* v. *Farley,* 76 S. E. 169; *Augir* v. *Warder,* 70 S. E. 719; *Clayton* v. *Farrar Lumber Co.,* 45 S. E. 723; *State Bank* v. *Plummer,* 129 Pac. 819; Boissot on Mechanics' Liens, § 537; Phillips on Mechanics' Liens, § 397.

(4) The undisputed testimony shows that Doctor Simpson made the contract with T. J. Evans to remodel the home situated on lots belonging to his wife, agreeing to pay him a certain amount for the completed improvement, all materials to be furnished by the contractor, and

that the lumber, for the price of which a lien is attempted to be enforced herein, was furnished to the contractor by appellee, and not to the owners. And although the bringing of this suit within ninety days of the date the last materials were furnished dispensed with the necessity for giving notice and filed the lien with the circuit clerk, so far as the owner was concerned, the law requires that an action to enforce such lien shall be commenced within fifteen months after it is filed, and the contractor is a necessary party to such suit as already stated. The decree will be reversed because of the failure to make the contractor a party, but will not be remanded for that purpose and further proceedings since the time for beginning suit to enforce the lien has already expired, and the fact that the suit was sooner brought against the owners can not relieve against the limitation, because the joining now of the necessary party, without which judgment should not be rendered, would but be in effect a new action begun after the expiration of the time. The decree is reversed and the cause remanded with directions to render judgment and enforce the lien for the amount only of $29.36, the balance remaining due upon the materials furnished and used by Doctor Simpson in the completion of the work.

WESTERN UNION TELEGRAPH COMPANY v. FRANKLIN.

Opinion delivered June 15, 1914.

TELEGRAPH COMPANIES—RIGHT TO REFUSE MESSAGE—STATUTORY PENALTY.—A telegraph company will be liable for the statutory penalty, because of the refusal of its agent to receive and transmit a message delivered to it by the plaintiff, addressed to an officer of the telegraph company and complaining of the conduct of the company's agent.

Appeal from Jefferson Circuit Court; *Antonio B. Grace,* Judge; affirmed.

STATEMENT BY THE COURT.

This action was brought to recover the penalty provided by section 7946 of Kirby's Digest for the wilful

refusal of a telegraph company to send a message, the message tendered for transmission by the appellee being as follows:

"C. M. Andrews, McGehee, Ark.

"Please advise why you can not get a civil answer out of your agent here. If you ask him anything he has to curse you out.

(Signed) "Maral Franklin."

It appears from the evidence that the appellee was the postmaster at Tamo and became involved in a dispute with the railroad and telegraph agent at that station relative to whose duty it was to move the mail sacks into the depot when thrown on the platform from the trains after night. The postmaster had written to the superintendent of the mail service and had been informed that when the train was two hours or more late to leave the mail to the care of the station agent. The postmaster, on the 19th, went to see the depot agent, Causey, and asked why he had not taken care of the mail thrown from the train the night before, which was five hours late. He said, "I asked him why the mail was left out and he said, 'By God, it is not my business to take care of it,' and I told him it was him and the superintendent for that, and that I had already reported it, and he said, 'God damn you and the superintendent, too; I don't care anything about either of you.' Then I asked him for a telegram blank, and told him I was going to report him to the superintendent, and I wrote the telegram and handed it to him with a five dollar bill, and he said it was 'a damned lie, and he would not send it.' He did not refuse the telegram because he did not have the change. He handed me the message and the five dollars back, and said he would not send it. About thirty minutes afterward he came out and said, 'You give me that damned telegram.' I thought he wanted to tear it up and would not let him have it. He did not say anything about wanting to send it, and made me believe he wanted to tear it up."

Several witnesses testified to the transaction about as related by the appellee. The agent himself said that

when the appellee handed him the message, he really did not know he wanted to send such a message as that—didn't think he did, and told him that he would not send it. He denied having used the oaths about the appellee and the superintendent. Also said that he did not say that the message was a damned lie, and that he later went out and asked for the message, that he might send it, and the appellee declined to give it to him.

The jury returned a verdict against the telegraph company for the penalty, from which it appealed.

George H. Fearons, Bridges & Wooldridge and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

The message tendered was a libel on its face, intended as an insult to the agent and as a libelous complaint to his employer.

If a telegraph company transmits a libelous message, it is responsible for publishing the libel. 132 Fed. 805; 104 Fed. 628; 77 N. W. 985; 63 Pac. 658; 71 N. W. 596.

Earl S. Wood, for appellee.

The first part of the message asks for information. The declaration in the concluding part is not libelous. It does not fall under either of the classes named in the *Lillard case,* as prohibited or that may be refused by a telegraph operator. 86 Ark. 211. The message not being libelous, the company was bound to receive and transmit it. Cooley on Torts, 196; 37 Cyc. 1690; 104 Fed. 628-630; 63 Pac. 658.

KIRBY, J., (after stating the facts). It is contended for reversal that the telegram was not a proper message to transmit, and that the company had a right to refuse to send it. The law allows a telegraph company to refuse to send a message that is obscene, slanderous, blasphemous, profane, indecent, or the like, but this message was not of that character and was entitled to be transmitted. Even if the purpose of the sender was to report the conduct of the agent to his superior it did not affect his right to recover the penalty prescribed by the statute for the wilful refusal to send the telegram. *Western Union Tel.*

Co. v. *Lillard,* 86 Ark. 211; *Railway Co.* v. *Smith,* 60 Ark. 221; *Railway Co.* v. *Trimble,* 54 Ark. 354.

Neither do we find it necessary to decide whether or not instruction numbered 5 was a correct declaration of the law, or whether the one on that subject requested by appellant should have been given. Under the circumstances of this case the difference between the two instructions was not material and could not have influenced the jury in reaching its verdict. They evidently believed the statement of appellee and his witnesses about the transaction, which was so radically different from the version given by the agent that the instruction given by the court could not have been prejudicial if it was incorrect.

The issues in the case were fairly presented by the instructions declaring the law, and we find no prejudicial error in the record.

The judgment is affirmed.

DEWEIN *v.* STATE.

Opinion delivered October 12, 1914.

1. HOMICIDE—FIRST DEGREE MURDER—SUFFICIENCY OF THE EVIDENCE.—In a prosecution for homicide, evidence held sufficient to warrant a conviction of murder in the first degree.
2. CRIMINAL LAW—CONFESSION—WHEN VOLUNTARILY MADE.—Where threats of harm, promises of favor or benefits, inflictions of pain, a show of violence or inquisitorial methods are used to extort a confession, it will not be held to have been voluntarily made.
3. CRIMINAL LAW—CONFESSION—UNDUE INFLUENCE—RULE.—In determining whether a confession was voluntarily made, the court must look to the whole situation and surroundings of the accused, and it is proper to consider his age, intellectual strength or weakness, the manner in which he was questioned, the fact that he is in jail, and everything connected with his situation.
4. CRIMINAL LAW—INVOLUNTARY CONFESSION.—In order to render a confession involuntary, there must be some threat or inducement held out to overcome the will of the accused.
5. JURORS—OPINION—COMPETENCY.—In a prosecution for homicide a juror will be held competent who states that he had formed an opinion of defendant's guilt from reading an alleged confession in a newspaper, but that nothing he had read or heard would influence his verdict, and that he could give defendant an impartial

trial and would be guided by, and decide the case entirely upon, the evidence introduced before the jury and upon the law as given by the court.

6. CRIMINAL PROCEDURE—JUROR—PEREMPTORY CHALLENGE.—Where the defendant had not exhausted all of his peremptory challenges, the court, in the exercise of its discretion, may permit the State to peremptorily challenge a juror after he has been accepted on the jury.

7. CRIMINAL LAW—HOMICIDE—INSTRUCTION ON SECOND DEGREE MURDER.—In a prosecution for homicide, when all the evidence showed first degree murder, and there was no evidence introduced tending to show defendant to be guilty of second degree murder, it is proper for the court to refuse an instruction on that issue.

8. CRIMINAL LAW—CONFESSION—WEIGHT OF EVIDENCE—INSTRUCTION.—In a prosecution for homicide an instruction is erroneous and properly refused, which tells the jury how much weight they must give to a confession of the accused, which has been introduced in evidence.

9. CRIMINAL LAW—CONFESSION—WEIGHT OF EVIDENCE—INSTRUCTION.—The question of the admissibility of a confession is for the court, and after it is admitted the jury are the judges of the weight to be given to it, and an instruction is properly refused which charges the jury that, in order to warrant their considering the confession, they must believe beyond a reasonable doubt that the confession was voluntarily made.

10. NEW TRIAL—NEW EVIDENCE—IMPEACHING TESTIMONY.—Newly discovered evidence that goes only to impeach the credibility of a witness is not ground for a new trial.

Appeal from Saline Circuit Court; *W. H. Evans,* Judge; affirmed.

Charles P. Johnson, and *Jones & Owens,* for appellant.

1. The record, we think, conclusively shows the incompetency of the venireman, G. D. Smith, to sit as a juror, because of his having read in a newspaper what purported to be the original confession made by the defendant and had formed a fixed opinion as to his guilt. 45 Ark. 165, 170; 13 Ark. 720; 19 Ark. 156; 1 Bishop, Cr. Proc. § 910; 8 Cal. 359; 40 Cal. 268; 56 Ark. 381, 402; 69 Ark. 322; 102 Ark. 180; 140 Am. St. Rep. 1086.

2. Appellant was entitled to a new trial, and the cause should be reversed because the juror Dodson testified falsely upon his *voir dire* examination, as to any

bias or prejudice he might have against the defendant, and his false statements were unknown to appellant and his counsel at the time of such examination. Fed. Cas. No. 5, p. 126; 3 U. S., 3 Dall., 515; 9 Cal. 298; 4 Ill. 412; 28 Tenn. 411; 41 Tex. 573; 25 Tex. 26.

3. It was within the province of the jury to say from the evidence whether the crime was murder in the first degree or second degree, and to this end they were entitled to an instruction, as offered by the defendant, giving the distinction between the degrees of murder. 162 U. S. 313; 58 Pa. 17.

4. After the venireman Glass had qualified as a competent juror, and defendant had exhausted his challenges, it was prejudicial error for the court to sustain the challenge for cause interposed by the State.

Likewise it was error to permit the State to challenge peremptorily the juror Gunter, the next day after he had been examined, found qualified and accepted as a juror by both sides, and without assigning a reason therefor as this court has repeatedly held should be done.

5. The so-called confession should have been excluded because it was incomplete. This court has repeatedly held that a confession in part can not be received, but that the defendant is entitled to the whole of the confession. Moreover such confession "must be free from the taint of official inducement either from the flattery of hope or the torture of fear." 107 Ark. 568.

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

1. It was not error to accept the venireman Smith as a juror. Opinions formed from mere rumor or from newspaper accounts, do not render a juror incompetent, if, on his *voir dire* he declares that he can and will lay aside any opinion he may have formed and be governed only by the law and the evidence of the case. 85 Ark. 64; 101 Ark. 443; 104 Ark. 616; 109 Ark. 450.

2. The court properly refused to grant a new trial on the alleged ground of the incompetency of the juror Dodson. His affidavit to the effect that he had never had the conversations attributed to him, nor discussed the merits of the case until after he was chosen as a juror and the verdict had been rendered, is supported by the

affidavits of several other reputable men, and justified the action of the court. 90 Ark. 400; 97 Ark. 92; 99 Ark. 407; 109 Ark. 476; 72 Ark. 158.

3. If appellant was guilty of murder at all, it was murder done in the attempt to commit robbery or in the completed act of robbery, which the statute makes murder in the first degree. Kirby's Dig., § 1766. There was nothing in the case on which to base an instruction on murder in the second degree. 52 Ark. 345; 74 Ark. 444; 85 Ark. 514; 88 Ark. 447.

4. The State had the right to challenge juror Gunter after he had been accepted by both sides, and there was no error in permitting it. 81 Ark. 589.

5. Appellant's confessions were properly admitted. 39 Ark. 379.

The court properly refused to give instruction 20 requested by the defendant, it being the province of the court to determine whether or not a confession shall be admitted.

HART, J. Clarence Dewein was indicted, tried before a jury and convicted of murder in the first degree. From the judgment of conviction he has duly prosecuted an appeal to this court. The facts are substantially as follows:

L. H. Thompson, in November, 1913, resided in the south end of the town of Benton in Saline County, Arkansas, and was killed one evening something after 9 o'clock. He owned and operated a store and also resided there and ran a hotel or rooming house in connection with his business. On the evening he was killed his wife left him counting his money and went to an adjoining room to go to bed. After he finished counting his money he went out on the front porch to smoke. There was a lighted lamp in one of the front windows. A neighbor, who was also sitting on his front porch smoking, saw two men approaching the store of the deceased. Just before they got there, the neighbor testified, they separated and one of them, who was dressed in a dark gray shirt, with a cap pulled down over his face, walked up on the porch where Thompson sat and said something to him. Thompson got up and walked into the store and the man followed him. Just as the man followed Thompson into the door he nodded to his companion who had come up and was

playing with a cat on the porch. His companion then followed him into the store and the light was put out. This neighbor further stated that he did not hear any commotion but became suspicious of the men from their actions and went into the house and procured his gun. When he came out he saw two men walking rapidly away and was unable to capture them. The second man had a long coat buttoned up, and also had his cap pulled down over his face.

Mrs. Thompson heard a commotion in the store room, returned there and found her husband sitting on the floor complaining of his head. A coupling pin was lying on the floor right beside him. A physician was summoned at once and upon examination of Thompson found the base of his skull crushed all to pieces. There was a stroke on the left side and another on the right about three inches long. The physician opened up Thompson's skull at the place where it was fractured and took out a piece of the skull about the size of a dollar. He then raised the skull and said that the old man's breathing became good. Thompson died the next day about 2 o'clock. The physician testified that blows from a blunt instrument caused his death and that the most severe blow was at the base of the brain. He found a coupling pin, which was all bloody and had hairs on it, near the body. The deceased was about seventy years of age at the time he was killed and was a strong and vigorous man for that age.

The manager of the electric light plant at Benton, which was near Thompson's store, testified that about twenty minutes before the killing was reported to him he saw defendant in front of the light plant, that he had on a pair of light looking pants, a coat and a black cap; that he had a companion with him who had on a gray shirt and a brown necktie; that the defendant's companion did not have on a coat but had on a pair of leggings. The light plant was about eighty yards from the store of the deceased.

Mrs. Sarah Ewing testified: At the time the killing occurred I was running a boarding house in Benton and the defendant boarded with me. Joe Strong assisted me in my work. My boarding house was about a quarter of

a mile from where Mr. Thompson was killed. The defendant, on the night in question, had supper at my house and went away after supper. Later on he came back and stayed all night. He did not eat any breakfast. He went to Little Rock Sunday morning, came back that evening, ate supper and stayed all night at my house. On Monday, after dinner, I went to the defendant's room and began talking to him about the killing and asked him if he was not implicated in it. He first denied it and then said that he was. I then asked him to tell me all about it and asked him how he came to be in it. He said that he and some companions had gone to Mr. Thompson's store prior to the night of the killing and had seen him counting money; that on the night of the killing he went down to see if they could get the money; that when he got down there Mr. Thompson was sitting on the porch playing with a little cat; that Joe Strong was with him and that Strong grabbed Thompson around the neck; that Thompson got loose and ran into the house; that Joe Strong hit Thompson one lick with the coupling pin and that he then took the pin and finished him; that Joe got blood on his clothes and, after they left the scene of the killing, pulled off his shirt and leggings and threw them into a creek and that he pulled off his coat and gave it to Joe to wear until they got to the house.

On cross-examination Mrs. Ewing stated that she told the defendant that if he would tell her about the killing she would not say anything about it. Afterwards she reported the matter to the officers and her statement was written down by them. She said that the defendant had said to her that they did not intend to kill the deceased but that it turned out worse than they thought.

After the defendant was arrested it was reported to the officers that a shirt and some leggings would be found at a certain place in a creek near by. They made a search there and found the shirt and leggings which were all bloody. They also found a pocket book which had belonged to the deceased. The defendant's grip was also searched after his arrest and a pistol was found in it which Mrs. Thompson identified as being like one her husband owned. The pocket book found after the killing

was empty when found but contained about ten dollars when last in Mr. Thompson's possession.

The defendant made a written confession which is substantially as follows: My name is Clarence Dewein; I will be twenty years old on my next birthday; I was born in Belleville, Illinois, and left home about a month ago; I came to Benton and have been boarding with Mrs. Ewing nearly ever since. Several days prior to the killing one of the boarders stated that he had seen Mr. Thompson counting his money and said that a man could get it if he was on to his business. On Wednesday night preceding the killing William Herman and I told Joe Strong about the old man's money and told him to go over and look around. Joe went to the old man's store and bought some tobacco and came back and reported that there was no chance of getting it that night and said we would have to let it go till some other night. On Saturday night Strong and I went down to Reed's store and from there down towards the light plant. We then went to old man Thompson's store and Joe went in and got a package of tobacco. He came back and said there was no one in the store but the old man. We walked on down the block and came back and saw the old man sitting on the porch. We then walked away again and looked for something to hit him on the head with. We came to a box car and saw a coupling pin. We took it and went on back to the store and told the old man we wanted some cheese and crackers. Joe went in with the old man and I stayed on the porch playing with the cat. When the old man went behind the counter he started to wait on Joe. I walked in at the door and closed it and blew out the light. In the mean time they had gotten to the rear of the store and Joe hit the old man with the coupling pin and called to me. I started towards him and he picked up the coupling pin and hit the old man again and said that would kill him. Joe went through his pockets and got his money, pistol and knife. After we left Joe washed the blood off his hands in the creek and pulled off his shirt and threw it in the creek. I gave him my coat to put on until we got to the house. Joe and I went back to Mrs. Ewing's and slept there that night. I went to Little Rock Sunday morning and returned that afternoon. On

the night of the killing I had on a blue serge coat and brown corduroy cap and Joe had on a blue shirt and brown tie, a small black cap and was in his shirt sleeves. We threw the money sack or pocket book of Thompson away when near our boarding house on the night he was killed.

The parents of the defendant were present at the trial and testified that when he was about nine years old he received a severe lick on the head and since that time his intellect had been weak and that his mind was that of a child about nine or ten years of age; that he had always borne a good reputation and had stayed with them until he went to Benton from their home in Illinois a few weeks before the killing occurred. The defendant's father was a saloon keeper and the defendant was working in the saloon with him prior to leaving for Arkansas.

The defendant testified in his own behalf substantially as follows: I came to Benton from Illinois a few weeks before the killing occurred and boarded with Mrs. Ewing; Joe Strong was working for her and I got acquainted with him. On the night of the killing Joe and I went to the business part of the town and as we started home we passed old man Thompson's place and Joe told me to wait a minute, that he wanted to get something to eat. This was about 9 o'clock. I did not go into the store with him and when he came out he handed me a gun to keep for him. When we got to the boarding house he gave me some money and asked me to keep it for him until the next day. I did not go into Thompson's store that night but stayed on the porch and played with a little cat while Joe went in there. There was no blood on Joe when he came out and I never saw any blood on any of his clothes. I did not hear any commotion in the store and did not know that Joe had killed the old man. I had on a coat on the night that Thompson was killed and have worn the same coat ever since. I was not in the house and had nothing whatever to do with the killing of the deceased.

(1) It is earnestly insisted by counsel for the defendant that the testimony is not sufficient to warrant the verdict. From the summary which has been given of the evidence as it appears in the record it clearly ap-

pears that it was sufficient to warrant the verdict and no useful purpose could be served by going into an extended analysis of it.

It is also insisted by counsel for the defendant that his confession was improperly admitted in evidence because it was not voluntary. After the defendant was arrested he was taken from the jail one night and carried to the court room and was locked in a room in the courthouse with the mayor of the town of Benton. The mayor was a man about sixty-five years of age and had formerly been sheriff of the county. He testified positively that he made no threats against the defendant and offered him no inducement whatever to make the confession. He stated that at first the defendant denied that he was implicated in the killing; that he told the defendant that Mrs. Ewing had made a written statement of the confession which he had made to her and that he had seen that statement; that he recounted to the defendant what purported to be Mrs. Ewing's written statement of his confession to her and that the defendant then admitted that he was implicated in the killing and said that he was willing to make a confession of it and did so. He agreed that his confession might be reduced to writing and the mayor then called in the sheriff and a lawyer who had been employed to prosecute the defendant and the defendant's statement was reduced to writing and was read over to him and signed by him. The defendant made some correction in the statement when it was read over to him. The defendant's statement was made in response to questions asked him but the questions were not reduced to writing and his confession appears in narrative form.

The defendant stated that he was taken from jail to the sheriff's office and met Mr. Shoppach, the mayor, there a little after 7 o'clock in the evening; that they locked him in the room with the mayor and he began questioning him and told him that if he would tell him everything he would take care of him; that they told him about having Mrs. Ewing's statement and that they had Joe Strong; that they asked him if he did it and that he told them that he did not; that Mr. Utley who wrote down the statement assisted in prosecuting him and was present when Mr. Shoppach questioned him; that Mr.

Utley also questioned him; that he did not remember what was in the statement, though he thought it was read over to him; that he had no one there to represent him but just told them everything; and that he first told them he had nothing to do with the killing.

In the case of *Greenwood* v. *State,* 107 Ark. 568, the court held: "A confession of guilt, to be admissible, must be free from the taint of official inducement proceeding from either defendant's hope or fear; and a confession to be admissible must be voluntary and made in the absence of threat of injury or promise of reward, and made in the absence of any influence which might swerve him from the truth.

"Where a confession is obtained from defendant by persistent questioning by officers, but without deception, threat, hope of reward or inducement of any kind, it is admissible as a voluntary confession." See, also, *Hardin* v. *State,* 66 Ark. 53.

It is insisted by counsel for defendant that his confession was not voluntary because he was not warned that it would be used against him. In the Greenwood case, *supra,* we held that in the absence of a statute requiring it, the failure to warn or caution the accused while in custody that his statement would be used against him does not render it involuntary. That this is the prevailing rule, see case note to *Ammons* v. *State,* 18 L. R. A. New Series, 768, 791.

In the Greenwood case, *supra,* we also held that the fact that the statement of accused was elicited by questions put to him by officers or by private persons does not render them inadmissible. To the same effect see note to *Ammons* v. *State,* 18 L. R. A. (N. S.) 799.

(2) It has been said that no general rule can be formulated for determining when a confession is voluntary because the character of the inducements held out to a person must depend very much upon the circumstances of each case. Where threats of harm, promises of favor or benefits, inflictions of pain, a show of violence or inquisitorial methods are used to extort a confession, then the confession is attributed to such influences.

(3-4) It may be said, also, that in determining whether a confession is voluntary or not, the court should look to the whole situation and surrounding of the accused. Hence it is proper to consider his age, the strength or weakness of his intellect, the manner in which he is questioned, the fact that he is in jail, and everything connected with his situation. In order to render a confession involuntary there must be some threat or inducement held out to overcome his will.

In the instant case it is true that the defendant was in jail and that he had no friends with him at the time he was questioned by the mayor. The mayor says that no one was in the room with him at the time the defendant first made his confession to him and that he made no threats against the defendant and offered no inducements whatever to him to make the confession. He only confronted him with the confession which Mrs. Ewing said he had made to her. No harsh treatment was used and no inquisitorial methods were employed to induce him to confess. The court had all the facts before him and his decision in the matter did not rest upon any one fact but upon a combination of them all. The defendant was before him and the court had an opportunity to judge of his intellect by the manner in which he testified, and when the whole situation and surroundings are taken and considered together we do not think the court erred in permitting the confession to go before the jury.

(5) It is next insisted that the court erred in its ruling upon the challenge of the defendant to the juror G. D. Smith. The juror testified that he had read in a Benton paper what purported to be the confession of the defendant and that at the time he read it he had a definite opinion as to the guilt or innocence of the defendant. He further stated that if he were accepted as a juror he would not let anything he had read or heard influence his verdict and that he could give the defendant a fair and impartial trial upon the law and the evidence, uninfluenced by the opinion he entertained when he read the purported confession. He said that he could go into the jury box and decide the case entirely upon the evidence introduced before the jury and upon the law as given by

the court. The court held him to be a competent juror and we think this holding was correct.

In the case of *Hardin* v. *State,* 66 Ark. 53, the court held: "A juror in a criminal case who states that, from rumor and from reading the newspapers, he has formed an opinion as to defendant's guilt which it will require evidence to remove, but that, for the purpose of the trial, he can disregard such opinion, and give defendant a fair and impartial trial, is not incompetent, if it does not appear that he entertained any prejudice against defendant. This rule was recognized in *Sullins* v. *State,* 79 Ark. 127; but the juror was there held incompetent because his brother-in-law, in whom he had great confidence, and who was also a witness for the State, had published the newspaper reports and under such circumstances the court said the statement on which the juror based his opinion was not a mere rumor, but amounted to a statement of the facts by a witness.

In the following cases it has been held that opinions based upon newspaper reports of confessions did not disqualify a juror: *State* v. *Church,* 199 Mo. 605, 98 S. W. 16; *State* v. *Potter,* 18 Conn. 166; *State* v. *Wooley,* 215 Mo. 620, 115 S. W. 417; *State* v. *Bobbitt,* 215 Mo. 10, 114 S. W. 511.

In the instant case the juror stated positively that he could disregard the opinion formed by him from the newspaper account of the purported confession and that if the testimony turned out different from the newspaper account that his verdict would be based solely upon the evidence given to the jury. From the juror's testimony it appears that he was entirely indifferent in the case and the court properly refused the defendant's challenge for cause.

(6) It is also contended by counsel for defendant that it was error for the court to permit the State to peremptorily challenge the juror G. W. Gunter. The juror was accepted on the first day of the trial and on the next day after the defendant had exhausted all of his challenges but one the State was permitted to exercise a peremptory challenge and excuse Gunter from the jury. Thus it will be seen that the defendant had not exhausted

all of his peremptory challenges and the court, in the exercise of its discretion, could permit the State to peremptorily challenge the juror after he was accepted on the jury. See *McGough* v. *State,* 113 Ark. 301; 167 S. W. (Ark.) 857; *Carr* v. *State,* 81 Ark. 589; *Allen* v. *State,* 70 Ark. 337.

It is next contended by counsel for the defendant that the court erred in refusing him a new trial on account of Dodson's incompetency as a juror. The defendant attached several affidavits to his motion for a new trial alleging that G. E. Dodson, one of the jurors, had formed and expressed an opinion prior to his being accepted as such juror and that he had stated to different persons that all of the parties connected with the killing should be hanged and that if he had his way about it he would not wait for any court. The juror was examined under oath and denied that he made any such statements as those ascribed to him and stated that he had never discussed the merits of the case at any time or place until after he had been chosen as a juror and the verdict had been rendered. The court was in possession of all the facts relating to the disqualification of the juror and it can not be said that the court abused its discretion in refusing to grant the defendant a new trial on this ground.

(7) It is next insisted by counsel for the defendant that the court erred in refusing to instruct the jury upon murder in the second degree. Section 1766 Kirby's Digest provides that all murder which shall be committed in the perpetration or in the attempt to perpetrate arson, rape, robbery, burglary or larceny shall be deemed murder in the first degree. The jury, by its verdict, has accepted as true the testimony of the witnesses for the State. That testimony shows that the deceased was killed while the defendant and a companion were attempting to rob him. There is nothing whatever to contradict the testimony in this respect except the testimony of the defendant to the effect that he was not present and did not aid in the commission of the crime. It is true that we have frequently said that the trial court should not in any case indicate an opinion as to what the facts establish, but in properly giving the law to the jury the court must of necessity determine whether there is any evidence

at all justifying a particular instruction. There was no evidence adduced before the jury, either for the State or the defendant, tending to show the defendant guilty of murder in the second degree. Hence, there was no evidence upon which to base an instruction for murder in the second degree, and the court properly refused it. *Allison* v. *State,* 74 Ark. 444; *Jones* v. *State,* 52 Ark. 345.

(8) It may be also said that the court correctly modified instruction No. 19 asked for by the defendant. This instruction, as originally asked for, was argumentative and also contained an indication as to the weight the jury should give to the confession of the defendant. As requested the instruction was erroneous because it told the jury that they must weigh with care the confessions of the defendant. Of course it was proper for the jury to take into consideration all the surrounding facts attending the confession as introduced in evidence and to consider it in connection with all the other evidence introduced in the case. But it was not within the province of the court to tell the jury how much weight they should give to the confession. This was peculiarly within the province of the jury.

(9) It is next insisted by counsel for the defendant that the court erred in refusing to give instruction No. 20 asked for by him. This instruction in effect told the jury that in order to warrant their considering any alleged confession made by the defendant and introduced in evidence they must believe beyond a reasonable doubt that such confession was made voluntarily upon the part of the defendant. The question of the admissibility of the confession of the defendant was for the court. After the court admitted it in evidence the jury, of course, were the judges of the weight to be given to it. See *Greenwood* v. *State, supra.* The court, therefore, properly refused this instruction.

(10) It is next insisted by counsel for the defendant that the court should have granted him a new trial on the ground of newly discovered evidence. It may be said, in brief, that the newly discovered evidence only went to attack the credibility of the witness Mrs. Ewing and it is well settled in this State that newly discovered

evidence that goes only to impeach the credibility of a witness is not ground for a new trial. *Smith* v. *State*, 90 Ark. 435; *Young* v. *State*, 99 Ark. 407; *Russell* v. *State*, 97 Ark. 92.

Independent of the confessions of the defendant it was shown that the deceased was murdered in his storehouse by persons who came there for the purpose of robbing him. The manager of the electric light plant testified that he saw the defendant and Joe Strong in front of the light plant about twenty minutes before the killing occurred; that each of them had on a cap and that the defendant had on a blue or black serge coat, buttoned up around his neck; and that Joe Strong had on a gray shirt, a brown tie and was without a coat.

A neighbor of the deceased testified that he saw men answering to this description enter the storehouse of the deceased just before he was murdered and robbed and that they immediately ran off after the robbery and murder had been accomplished. This testimony abundantly established that the crime of murder was committed by some one and the facts point toward the defendant and Joe Strong as being the perpetrators of the crime. This evidence, when taken in connection with the confession of the defendant, if believed by the jury, abundantly warranted the verdict.

We are of the opinion, upon an examination of the whole record that the defendant had a fair trial and that every phase of the evidence was properly submitted to the jury upon correct instructions. Therefore the judgment must be affirmed.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY v. STATE.

Opinion delivered October 19, 1914.

1. RAILROADS—SWITCHING CREWS—STATUTE—REASONABLENESS—EXPEDIENCY.—The act of February 20, 1913,* requiring railroads over 100 miles in length to have switching crews of six men in cities of the first and second classes, held not to make an arbitrary requirement as to the number of men required, and the courts will accept the determination of the lawmakers as to the expediency of the statute.

* Act 67, Page 211, Session Laws 1913.

2. RAILROADS—STATUTES REGULATING—PUBLIC SAFETY.—The Legislature may pass laws as police regulations, and may specify specific acts of care to be observed by railroads for the safety of employees and of the public.
3. CONSTITUTIONAL LAW—EXCEPTIONAL CASES—TEST OF VALIDITY.—The validity of a statute can not be tested by exceptional cases, for the lawmakers are presumed to legislate with reference to general conditions.

Appeal form Garland Circuit Court; *Calvin T. Cotham, Judge;* affirmed.

E. B. Kinsworthy, R. E. Wiley and *T. D. Crawford,* for appellants.

1. The act in providing that it shall not apply to railroads less than one hundred miles in length, discriminates against railroads of greater length, and denies to them the equal protection of the law. 183 U. S. 79, 111; 184 U. S. 540, 562; 165 U. S. 150, 159; 124 Tenn. 1; 129 Mo. 163; 225 Mo. 561; 212 Ill. 418; 105 Minn. 256.

The reasoning of the courts in sustaining the constitutionality of the Three Brakeman Act, Act 116, Acts 1907, 86 Ark. 412, 219 U. S. 443, does not sustain the ruling of the trial court in this case. The operation of switching loaded cars is the same in the case of a short road as in the case of a long road. The discrimination between the two classes is arbitrary and without reasonable foundation, since, if the public safety demands this protection in the one case, it equally demands it in the other.

2. The act is unreasonable and arbitrary. It is shown by the evidence that in the States of Oklahoma and Louisiana, where the lines of this appellant run through as populous towns as in this State, switching is done across public crossings with two helpers with as much safety as it is done in this State with three helpers.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, *W. D. Jackson* and *Gus W. Jones,* for appellee.

1. The act is not discriminatory because it exempts from its operation railroads less than one hundred miles

in length. 86 Ark. 412, 219 U. S. 291; 49 Ark. 325, 125 U. S. 680; 49 Ark. 291; 81 Ark. 310; 69 Ark. 521; 32 L. R. A. 857; 113 U. S. 27; 129 U. S. 29; 174 U. S. 96, 102, 103, 104; 165 U. S. 628; 170 U. S. 294.

The question is not whether the Legislature might have adopted some other classification, or whether the classification adopted is wise, but whether it is purely arbitrary and bears no legitimate relation to the purpose sought to be accomplished. 207 U. S. 354. And every presumption will be indulged in favor of the validity of the Legislature's classification. 194 U. S. 267; 1912 D. Am. Ann. Cases, 22.

2. There is no merit in the contention that the act is unreasonable and arbitrary and, therefore, is violative of the due process clause of the Fourteenth Amendment.

If it is a fair subject of controversy as to whether the act is reasonable and promotive of the safety of the public, that is a question for legislative determination and not for the courts. 159 Cal. 508; 89 Neb. 34; 130 S. W. 792; 175 Ind. 478; 94 N. E. 761; 86 Ark. 434.

McCULLOCH, C. J. Appellant railway company was convicted of violating the statute (Act No. 67, Acts 1913, approved February 20, 1913), which requires all railway companies operating roads one hundred miles and over in length to use crews of six men composed of an engineer, a fireman, a foreman and three helpers, while doing switching in terminals or yards in cities of the first and second class. The act contains four sections and reads as follows:

"An Act for the better protection and safety of the public.

"Section 1. That no railroad company or corporation owning or operating any yards or terminals in the cities within this State, where switching, pushing or transferring of cars are made across public crossings within the city limits of the cities, shall operate their switch crew or crews with less than one engineer, a fireman, a foreman and three helpers.

"Sec 2. It being the purpose of this act to require all railroad companies or corporations who operate any yards or terminals within this State who do switching, pushing or transferring of cars across public crossings within the city limits of the cities to operate said switch crew or crews with not less than one engineer, a fireman, a foreman and three helpers, but nothing in this act shall be so construed as to prevent any railroad company or corporation from adding to or increasing their switch crew or crews beyond the number set out in this act.

"Sec. 3. The provisions of this act shall only apply to cities of the first and second class, and shall not apply to railroad companies or corporations operating railroads less than one hundred miles in length.

"Sec. 4. Any railroad company or corporation violating the provisions of this act shall be fined for each separate offense not less than fifty dollars, and each crew so illegally operated shall constitute a separate offense."

Appellant violated the terms of the statute for a day in switching cars in the city of Hot Springs, and on the trial of the case the court imposed the minimum fine. It is conceded that the terms of the act were violated, but appellant challenges its constitutionality on four grounds, namely, that the provisions with reference to the length of miles of road within the reach of the statute constitutes an unjust classification and in effect denies the equal protection of the laws to railroads one hundred miles in length; that the statute is arbitrary and unreasonable as a police regulation in requiring the specified number of employees without necessity therefor; that the act operates as an interference with interstate commerce; and lastly, that the penalty imposed is so excessive that it in effect deprives the company of the opportunity to contest its validity without subjecting itself to unreasonable penalties.

(1) The court heard the testimony of a large number of witnesses introduced by the respective parties to the litigation, and there is a wide conflict in the testimony as to whether there is any real necessity for requir-

ing more than two helpers. The witnesses introduced by appellant are its officers and employees, and those of other roads, all of them being men of wide experience in switching cars in terminals; they all testified that there was absolutely no reason for requiring more than five men in the switch crew, and that switching could be more speedily and safely done with five men than with six. On the other hand, the State introduced a number of men now engaged as switchmen in yards and they all testified that it is necessary, in order to give proper protection at crossings, to have the additional man. It is unnecessary for a statement of the conclusions as to the validity of the law to state where the preponderance of the testimony lies, it being sufficient to say that it fails to show that the Legislature had no grounds for adopting this requirement and enacting it into a statute. There appears to be some grounds for requiring the extra man in the crew to protect the public at crossings, and the requirement is not arbitrary; therefore it is our duty to accept the determination of the lawmakers as to the policy and expediency of the statute. The testimony in the case is very voluminous, but an analysis of it would serve no useful purpose; and, notwithstanding the elaborate argument made by counsel on both sides of the case, we deem it sufficient to say that every point raised is decided adversely to appellant's contention by this court, and the Supreme Court of the United States, in the case of *Chicago, R. I. & P. Ry. Co.* v. *State,* 86 Ark. 412, and 219 U. S. 453. The case cited involved the constitutionality of the statute requiring railway companies, whose line or lines are fifty miles or more in length, to equip freight trains consisting of twenty-five cars or more, with crews composed of an engineer, a fireman, a conductor and three brakemen. There was in that case, as in this, a wide conflict in the testimony as to the necessity for and justice of such law; but both this court and the Supreme Court of the United States held in effect that the lawmakers were the judges of the policy and expediency and necessity for the law, it not being shown that it was entirely

arbitrary and without foundation. The proof in the present case varies from that in the other case only in degrees, and to hold that this act is invalid would be a distinct departure from the principles announced in the former case.

(2) Learned counsel for appellant contend that the only reason stated by the State's witnesses why the provisions of the statute are necessary is that flying or drop switches at crossings can not be safely made without the assistance of the third helper, and that this reason is unsound because the evidence adduced by appellant shows that such method of switching at crossings is expressly forbidden by the rules of the companies. Conceding that this is the only reason stated by the witnesses, it does not follow that the existence of the rules of the companies forbidding such methods of switching obviates the necessity for requiring the employment of the third helper. There is testimony tending to show that the rule is habitually violated, with the knowledge of the superior officers of the railway companies, and the lawmakers had the right to take those facts into consideration in legislating for the protection of the public, or even for the protection of employees who were permitted to habitually violate the rules. Questions of assumed risk and contributory negligence do not necessarily enter into the consideration of questions of expediency in enacting statutes for the protection of human life. The lawmakers can disregard those questions entirely and, as a police regulation, prescribe specific acts of care to be observed for the safety of employees or of the public.

It is insisted that the classification upheld in the former case does not justify the classification prescribed in the present act for the reason that the conditions are different, the former being a classification with respect to crews of trains while operating out on the road, whereas the present statute only applies to switching in the yards or terminals. We are of the opinion that the reason found in the other case for that classification applies with equal force to the present case, for it may be

seen that there is more work demanded in switching cars on a road many miles in length, where the trains are run more frequently and consist of more cars, than on a short line doing perhaps only a local business.

(3) Attention is called to one or more situations in the State which show the unreasonableness of the classification by reason of the fact that, on account of the peculiar conditions, short roads do as much switching as longer ones. The principal instance cited is at Helena, where a road only a few miles in length, located entirely within the corporate limits of the city of Helena, does a large amount of switching for connecting trunk lines. The validity of the statute can not be thus tested by exceptional cases, for the lawmakers are presumed to legislate with reference to general conditions and not to exceptional cases, and this, they have the power to do.

"It is almost impossible, in some matters, to foresee and provide for every imaginable and exceptional case," said the Supreme Court of the United States, in the case of *Ozan Lumber Co.* v. *Union County National Bank,* 207 U. S. 251, "and the Legislature ought not to be required to do so at the risk of having its legislation declared void, although appropriate and proper upon the general subject upon which such legislation is to act, so long as there is no substantial and fair ground to say that the statute makes an unreasonable and unfounded general classification, and thereby denies to any person the equal protection of the laws. In a classification for governmental purposes, there can not be an exact conclusion or inclusion of persons and things."

In view of the elaborate discussion of the questions by this court, and by the Supreme Court of the United States, in the case which we have referred to as decisive of all the questions involved, a further discussion is unnecessary at this time. We find that appellant's attack upon the validity of the act is unfounded.

The judgment is therefore affirmed.

TRUMBULL *v.* HARRIS.

Opinion delivered October 19, 1914.

1. JUDGMENTS—MOTION TO VACATE—DILIGENCE.—A judgment will not be vacated, where the party against whom it has been rendered fails totally to show legal diligence.
2. TRIAL—ABSENCE OF PARTY—DUTY TO ATTEND.—It is the duty of a party to an action to attend court on the day of trial either in person or by attorney, and when defendant was present, neither in person or by attorney, although he knew the date of trial, a default judgment against him will not be set aside.
3. TRIAL—DUTY OF PARTY TO ATTEND—JOINT DEFENDANT.—When A. and B. are joined as defendants in an action, A. can not rely upon B. to defend for him, and a default judgment against A. will not be set aside, when A. totally fails to show legal diligence.
4. TRIAL—DILIGENCE—DUTY OF LITIGANT.—It is the duty of a litigant to keep himself informed of the progress of his case, and a party seeking relief against a judgment on the ground of unavoidable casualty or misfortune, preventing him from defending, must show that he himself is not guilty of negligence, and he can not have relief if the taking of the judgment appears to have been due to his own carelessness..
5. RES ADJUDICATA—DEFAULT JUDGMENT—LEGAL DILIGENCE.—Defendant in an action suffered a default judgment to be taken against him. He filed a motion for a new trial, setting up his defense. The motion was denied and an appeal from that order was dismissed. *Held*, the matter will be treated as *res adjudicata* where defendant later moved to vacate the judgment against him.

Appeal from Montgomery Circuit Court; *Calvin T. Cotham*, Judge; affirmed.

H. A. King and *J. I. Alley*, for appellant.

1. The judgment should have been vacated for unavoidable casualty and misfortune. Kirby's Digest, § 4431, subdiv. 417; 23 Cyc. 943, 2 Oh. Dec. 64-5; 97 Ark. 117; 85 *Id.* 385; 59 *Id.* 162. The way the judgment was obtained has every ear-mark of *legal* fraud. 102 Ark. 669.

2. The question is not *res adjudicata.* 52 Ark. 316. The proceeding is an independent action under section 4433 Kirby's Dig., subdiv. 4-7, 4434; 89 Ark. 163; 3 Oh. St. 445. An appeal to the Supreme Court and affirmance of the judgment does not preclude a proceeding to vacate. 95 Ark. 308.

3. Appellant was not guilty of negligence in not starting earlier. A wreck and missing connections, over which he had no *control,* caused the delay. 85 Ark. 385; 97 *Id.* 117; 59 *Id.* 162.

Pole McPhetridge, James S. Steel, J. S. Lake and *James D. Head,* for appellees.

1. No showing of unavoidable casualty is made. 23 Cyc. 943; 97 Ark. 117; 43 Ark. 107; 93 *Id.* 462; 39 *Id.* 107.

2. There is no question of fraud in the procurement of the judgment. 104 Ark. 450; 83 *Id.* 508; 73 *Id.* 286.

3. The question of *res adjudicata* is not presented on this appeal. Trumbull, to say the least, was guilty of gross negligence.

HART, J. This is a proceeding by M. C. Trumbull under the seventh subdivision of section 4431 of Kirby's Digest to set aside, after the expiration of the term, a judgment by default which had been rendered against him in favor of William Harris. The facts are as follows:

In 1907 M. C. Trumbull and A. Danville were partners under the style of Trumbull-Danville Lumber Company and they entered into a contract with William Harris to cut a tract of timber which they owned. Harris sued them for a breach of the contract. The Bear State Lumber Company, a corporation, had absorbed the assets of the Trumbull-Danville Lumber Company and was later made a party defendant to the action. The case progressed to judgment against all of the defendants and judgment was rendered in the circuit court against them in favor of the plaintiff Harris. The case was appealed to the Supreme Court and in an opinion delivered March 18, 1912, the judgment was reversed and the cause remanded for trial. After the case was remanded it was set for trial on the calendar of the Montgomery Circuit Court at its August term, 1913, which term began on the 4th day of August.

Some time between the 13th and 22d day of July, 1913, M. C. Trumbull went to the State of New York to

visit his father. On the 10th day of August, 1913, he wired the attorney of the Bear State Lumber Company to telegraph him at once if it was necessary for him to return to Arkansas for the Harris trial. He left next day for Mount Ida, the county seat of Montgomery County, but, on account of being delayed by a freight wreck at a point in Illinois, he missed his connection and did not reach Mount Ida until the 15th of August. The circuit court adjourned on the 15th and judgment by default had been rendered against him in favor of Harris on the 14th of August. The Bear State Lumber Company was represented by an attorney, but the plaintiff Harris dismissed his cause of action against it and took judgment by default against Trumbull.

Trumbull testified that is was sixteen hundred miles from Bath, New York, to Mount Ida, of Montgomery County, Arkansas; that if he had not missed his connection he would have arrived at Womble at noon on the 14th of August; that Womble was only nine miles from Mount Ida; and that he could have appeared there that afternoon for the trial, the case being set for trial on that day. He also stated that he did not know that court convened until the 14th day of August, which was on Thursday. He said that he was delayed in New York on account of the illness of his father who was a very old man and had been injured by a speeder striking him while on the railroad track. He also testified to a state of facts to show that he had a meritorious defense to the action brought against him.

On the other hand, the manager of the Bear State Lumber Company testified in favor of William Harris substantially as follows: I have been manager of the Bear State Lumber Company since August, 1909. Prior to that time M. C. Trumbull was its manager and owned stock in it. When I became manager Trumbull sold his stock and retired from the company. I retained the same lawyers who had been employed in the case of *Harris* v. *Trumbull-Danville Lumber Company* and the *Bear State Lumber Company*. In the summer of 1913 Trum-

bull was talking about going to New York to visit his father, and I told him that he was a party to the Harris suit and that he could not afford to go away and not be present at the trial. I further told him that Harris had said to me that if he obtained judgment he was going to get as much out of Trumbull as he possibly could and then call on the Bear State Lumber Company for the balance. I insisted on his remaining here for the trial. He told me that he had made his arrangements to go away and that he would not remain.

On July 24, Trumbull wrote one of the attorneys for the Bear State Lumber Company that he had received his letter of the 17th of that month and asked him if he could not have the Harris case continued until the next term, or, if he could not do that, if he could not take his deposition in the case as he did not want to come back to Arkansas until about the middle of September.

One of the attorneys for the Bear State Lumber Company also told Trumbull, before he went to New York, that he would be needed at the trial. Trumbull asked him if he could not take his deposition and the attorney replied that he could not, that his presence would be necessary.

It was also shown in evidence, in behalf of Harris, that when Trumbull arrived at Mount Ida on the 15th day of August before the court adjourned he was permitted to file a motion for a new trial and in that motion he set up all the things which appear in the record in the present suit and proved substantially the same facts in regard to his absence that are now proved. The court refused to grant him a new trial. He appealed to the Supreme court, and in January, 1913, the Supreme Court dismissed his appeal.

Upon this record the circuit court made a finding in favor of Harris, and Trumbull has appealed to this court from the judgment dismissing his application to set aside the judgment which was rendered against him in favor of Harris at the August, 1913, term of the Montgomery Circuit Court.

(1) The decision of the circuit court was right. The evidence shows that Trumbull was a party defendant to the action instituted by Harris, that he was present when the case was first tried, that he was informed that he would be needed at the trial in August, 1913, and that he was distinctly told that his deposition could not be used but that his presence at the trial would be required. He admits that he knew the case was set for trial on the 14th day of August and, according to his own showing, if he had made all connections he could not have arrived in time to have been present at the trial until the afternoon of that day. He knew that it was a long journey where he had to make railroad connections; that there would likely be some delay in making the trip. He simply neglected to attend the trial and it is well settled that judgments will not be vacated where there is a total absence of legal diligence.

(2-3) We have frequently said that it is the duty of suitors to attend court in person or to be represented by an attorney. Trumbull, although he knew this case stood for trial, was present neither in person nor by attorney, and he can not now complain that judgment by default was rendered against him. It is true that the Bear State Lumber Company was also a party defendant to the action but he had no right to rely on that company to make a defense for him. It did not promise to do so, but, on the other hand, notified him in advance that his presence would be necessary and urged him to be present.

His visit to New York was not occasioned by his father being struck by a speeder. He had determined to make the visit before that occurred and the accident that happened to his father was in no wise responsible for his visit.

(4) It is the duty of a litigant to keep himself informed of the progress of his case and a party seeking relief against a judgment on the ground of unavoidable casualty or misfortune preventing him from defending must show that he himself is not guilty of negligence and

he can not have relief if the taking of the judgment appears to have been due to his own carelessness. *Hanna* v. *Morrow,* 43 Ark. 107; *Corney* v. *Corney,* 97 Ark. 117; *Weller* v. *Studebaker,* 93 Ark. 462; *Izard County* v. *Huddleston,* 39 Ark. 107.

In the case last cited the court said: "The statute to vacate judgments by this proceeding is in derogation not only of the common law, but of the very important policy of holding judgments final after the close of the term. Citizens must have confidence in the judgments of our official tribunals as settlements of their controversies and there should be some end of them. Unless a case be clearly within the spirit and policy of the act, the judgment should not be disturbed."

(5) In addition to this, it will be noted that when the defendant returned to Mount Ida on the day court adjourned, he was permitted to file a motion for a new trial and to set up and prove all the matters that he now relies upon to have the judgment vacated. The court denied his motion for a new trial and he appealed to the Supreme Court. The Supreme Court dismissed his appeal. So the matter is now *res adjudicata.*

The judgment will be affirmed.

HUNT *v.* MARIANNA ELECTRIC COMPANY.

Opinion delivered October 19, 1914.

1. PUBLIC SERVICE CORPORATIONS—REGULATION BY CITY.—In granting a franchise to a public service corporation to use the city streets, the city may impose proper conditions on the company to secure a suitable and adequate service to the public, which conditions the city may impose in the first instance or after the grant of the franchise, subject to the condition that it may not impair the obligation of any contract made with the public service corporation.
2. MUNICIPAL CORPORATIONS—REGULATION OF PUBLIC SERVICE CORPORATIONS—POLICE POWER.—A municipal corporation may not convey away its right to regulate public service corporations, under its police power.
3. PUBLIC SERVICE CORPORATIONS—ELECTRIC COMPANY—CHANGE IN CURRENT—INJUNCTION.—In the absence of a showing of caprice or bad

faith, an electric company will not be enjoined from changing the kind of electric current to be furnished to its subscribers.

4. PUBLIC SERVICE CORPORATIONS—ELECTRIC COMPANY—CHANGE IN CURRENT.—The managing officials of an electric company, engaged in furnishing electric current to the public, have a right to change its system and method of operation, as in the honest judgment of the officials, is necessary to a proper service of the public.

5. PUBLIC SERVICE CORPORATIONS—ELECTRIC COMPANY—CHANGE IN CURRENT—DAMAGE TO SUBSCRIBER—LIABILITY.—Where an electric company changes the kind of current supplied to its subscribers so as to render useless the fixtures belonging to appellant, a subscriber, in the absence of a showing that the change was needlessly and capriciously made, the electric company will not be required to make good to appellant the loss occasioned by the change.

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

STATEMENT BY THE COURT.

Appellants, who were the plaintiffs below, alleged in their complaint that they were subscribers and users of electricity furnished by the Marianna Electric Company, the appellee, which company was the defendant below. That this electric company is a public service corporation engaged in the business of furnishing electricity for light and power to all the citizens of the city of Marianna, and that at the present time, and for a number of years heretofore, the said company has been operating a system or plant in which the generator of electricity used in operating the plant produced what is known as a 133-cycle current of electricity, and that plaintiffs had installed motors and machines for conducting their business, so constructed and adjusted as to be operated by this 133-cycle system used by the defendant company, and that their various motors and machines were installed with the view and for the purpose of meeting the requirements of said electric company and of using the electricity as furnished by it. That the said electric company is now undertaking and proceeding to change the kind and character of machinery operated by them into what is termed a 60-cycle system so that the said system will not operate the motors used by the plaintiffs

herein and by the citizens generally in the city of Marianna, and that the said company is demanding of the subscribers to its current of electricity that they bear the expense of the readjustment and repairs to their various motors and fans so that they can be operated by the said electric company, which expense will aggregate in amount a sum in excess of a thousand dollars. Plaintiffs further allege that they had demanded of the electric company that it readjust their motors, fans and machines so that they would be adapted to the new plant proposed to be installed to the end that the electric company might carry out its contract and agreement with them and the public to properly serve electricity, but that the said electric company refuses so to do, and is proceeding to change its system, the result of which will be to put out of use all the motors and other electrical appliances owned by the citizens and will result in great and irreparable injury to them in the stopping of their various lines of business. And other grounds of equitable relief were alleged.

Plaintiffs twice amended their complaint, and the effect of these amendments, so far as it is material to state, was to allege that the motors owned by them were, in many instances, purchased from the defendant itself and that, in some cases, these purchases had been recently made with the knowledge on the part of the defendant as to the uses intended to be made of them, and that they had offered to allow the defendant to change, alter or repair their various appliances so that they would be adapted to the change in the system, and that the former service of the defendant had been satisfactory, but that since the change in the system had been made they were without service. And they further alleged that the defendant company had the exclusive franchise from the city of Marianna for the operation of an electric light plant in said city so that the plaintiffs had no opportunity to purchase electric power from any other concern or to organize one themselves.

The court sustained a demurrer, which was interposed to these various pleadings, and dismissed the complaint for want of equity.

The court in its decree recited its finding to be that the matter of the kind or character of current furnished by the company, so long as it was within the bounds of its franchise, was a matter of detail or administration and that the court was without power to interfere to prohibit the proposed change being made.

Certain questions of pleading are raised which we find it unnecessary to discuss.

Plaintiffs have duly prosecuted this appeal from the decree of the court dismissing their complaint, as amended, for the want of equity.

Roleson & McCulloch, for appellants.

The right of the electric company, having due regard to the interest of the public, to install any new machinery or any advanced appliances to the end that the service might always be adequate, and the public receive the best service from the corporation, is conceded; but that question does not arise here. The complaint alleges that the old method of transmission was complete, effective and satisfactory, and that the change to the 60-cycle method of transmission was arbitrary and unnecessary, and is alone for the benefit of the defendant.

The case presents a question of the violation of an implied contract, for the breach of which injunction will lie. When the company represented to the public the particular kind of service they intended using, and the public acted in reliance thereon, there arose a binding agreement between the parties to give and to receive this kind of service. 61 L. R. A. 57, 58; 7 Harvard Law Review 58, 59.

It is a condition precedent to any liability on the part of an electric company that the consumer provide himself with the proper kinds of appliances and be ready to accept the service of the company. 46 L. R. A. (N. S.) 437. When the consumers have so supplied themselves

pursuant to the representations made by the company, is it equitable and just to permit the company, arbitrarily and solely for its own profit, to disregard and destroy the property rights of its patrons, and so change the service as to compel them to incur great additional expense?

Daggett & Daggett, for appellees.

1. The courts have the power to compel the full and faithful performance of the duties which the company owes to the public, which may be summed up to be (1) the duty to furnish the commodity contracted for in a safe and convenient form, (2) to furnish the same without discrimination, and (3) at a reasonable price; but the power of the court does not extend to the ordering or directing the company to perform those duties in any particular manner, nor to matters of administration or detail. If it is not its *duty* to improve its system, it certainly has the *right* to so alter or change its method of generation as to make it most convenient to the company.

It is not the duty of the company to install, maintain or repair the fixtures or appliances used by the public in the consumption of the electric current, but the duty of the consumers, and it being their duty, they supply themselves at the risk of such changes as modern and improved conditions may bring about in order to meet the demands of increase in consumption. 26 Am & Eng. Ann. Cas. 56, 58, 60, 61; 160 Cal. 410; 173 U. S. 684; 24 L. R. A. (N. S.) 485, 487; 132 S. W. 288.

2. It is conceded by appellants that it is the right of the company to "keep abreast of the times" and maintain an adequate and modern system consistent with the needs of the public. Since it is the duty of the company both by law and by contract, to maintain a *standard* system, and since the 133-cycle system is now obsolete and the 60-cycle system standard, which is a matter of common knowledge of which this court may take judicial notice, the case, we think, falls squarely within the right conceded by appellants. 1 Chamberlain on Ev. § 809; *Id.* § 794.

SMITH, J., (after stating the facts). (1-2) It does not appear from the pleadings in this case why the change in the system was made. For aught we know from the pleadings, it may have been ordered by the city council, but, however that may be, it may be assumed from the state of the pleadings that the change was permitted by the council. We can not know what the terms of the franchise were under which appellee company was operating, as that information is not disclosed in any of the pleadings; but we do know that such matters are within the control and under the regulation, to some extent, of the city council. In the matter of granting franchises involving the use of the city streets the city has the right to impose proper conditions to secure a suitable and adequate service to the public. It may not only impose these conditions in the first instance, but it may impose conditions after the grant of the franchise, subject only to the condition that it may not impair the obligation of any contract made with the public service corporation. But, not even by contract, can the city convey away its right of regulation under the police power. *Hot Springs Electric Light Co.* v. *Hot Springs,* 70 Ark. 300.

(3-4) Notwithstanding the allegation of the pleadings that the service formerly rendered by the electric company was satisfactory and sufficient, it is not alleged that the change was needlessly and capriciously made, and even though there may have been no municipal requirement in regard to this change, the electric company would have the right to make such change in its system and method of operation as, in the exercise of an honest judgment on the part of its managing officials, was necessary to a proper service of the public, and there is no allegation that the change was not an advantageous one from the standpoint of the general public, although it is alleged that it was an unnecessary one from the standpoint of these plaintiffs.

Counsel have not cited us to any case discussing or deciding the questions here involved, and we have been unable to find any, and accordingly we have been com-

pelled to decide this case upon a consideration of what appears to be the general principles involved.

(5) It is urged as a reason against the right of the electric company to make this change that there existed an implied contract between appellant and the company that a current should be furnished them which would permit the use of the fixtures which they owned and which, in some instances, had been bought, and recently bought, from the company itself. If this is true, no change could ever be made, for it would hardly happen that all fixtures would cease to be serviceable at the same time, and if a change was ever to be made it must necessarily be true that, when it was made, there would be some fixtures which would still be serviceable and have a usable value with the supply of the old current. The pleadings concede the duty of the users of the electricity to furnish their own appliances, but this, they say, they have done and they call upon the company to make such adjustments as are necessary to adapt their fixtures to the new system or to furnish them with new appliances; and we conceive the question in the case to be whether or not the company is under any duty to perform this service, or whether that expense should be borne by the plaintiffs. In our judgment, it not having been alleged that the change was needlessly or capriciously made, we think this expense should be borne by the plaintiffs. Otherwise, having become a part of the operating expense of the company, this would be an item to be considered in fixing the rates to be charged all consumers of electricity and would be an expense to be borne at least by the public generally, rather than those owners who were required to supply themselves with new appliances.

We are much impressed with the reasoning of the Court of Appeals of Missouri in the case of *Fisher* v. *St. Joseph Water Co.*, 132 S. W. 288, where, in a discussion of a question involving, to some extent, the principles here involved, it was said:

"Whether a public utility, such as a system of waterworks, be owned and operated by the municipality or

by a private corporation, the consumers in the long run must pay, not only the operating expenses of the business, but also the whole cost of construction and expense of maintenance and betterments, together with a reasonable profit on the investment, if the business be in the hands of a private corporation. It would seem to be more fair and just that each consumer should bear the construction expenses relating exclusively to his own service than that the gross sum of all such expenses should be ratably assessed against all the consumers through the medium of an increased charge for the service. In one form or another the consumers must foot all the bills, and we think it is reasonable, so far as it may be done, to make each pay for what he gets."

It is no doubt true that these plaintiffs, from their standpoint, will be required to incur an expense without fault on their part; but some one at last must bear this expense, and we think that burden must fall upon them. Opportunity for wide choice exists in the selection of appliances for the use of the electric current, and interminable confusion might ensue and great injustice be done if the company was required to take into account these various opinions and preferences resulting from the change in appliances. It was the duty of the plaintiffs in the first instance to furnish their own appliances, and the change of system not having been made needlessly or capriciously we think it equitable that they should acquire, at their own expense, such fixtures as are adapted to their purposes to receive the current under the new system.

Moreover, there are no allegations in the complaint from which it could be said that there was any privity of contract requiring the company to furnish the appellants with any particular kind of current.

There was an allegation in the complaint that the change in the system was made without notice to certain owners, who, in ignorance of the change, turned on the current of the new system whereby their motors were

burned out and otherwise damaged. We have not thought it proper or necessary to consider in this case the question of the liability of the electric company to such owners, and, if they have any cause of action growing out of a failure to give notice of the change, it is not concluded by this opinion.

The decree of the court sustaining the demurrer will, therefore, be affirmed.

McCULLOCH, C. J., disqualified and not participating.

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

Opinion delivered October 26, 1914.

1. CARRIERS—INTERSTATE COMMERCE COMMISSION RULES—NOTICE TO SHIPPERS.—All shippers are bound to a knowledge of tariff schedules on file with the Interstate Commerce Commission.
2. CARRIERS—INTERSTATE COMMERCE—CAR—SPECIAL TARIFF—DUTY OF SHIPPER—DAMAGES.—A railroad company will not be liable in damages to a shipper of live stock for failure to deliver a car of special design belonging to a foreign owner, when the shipper fails to comply with the printed tariff schedule filed by the owner of the car with the Interstate Commerce Commission.

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

Thos. S. Buzbee and *Geo B. Pugh,* for appellants.

1. Johnson, the soliciting freight agent for the Frisco railroad, had no authority to enter into any such contract as is alleged by appellee; but even if he had made the contract alleged, it would not have been binding. He had no authority to make a contract contrary to the provisions of the tariff. 106 Ark. 237; 100 Ark. 22; Barnes on Interstate Transportation, § 446.

2. Appellant's agent not only had the legal right but it was his duty, to refuse to deliver the car at Oklahoma City without the production of the written contract of the Arms Palace Horse Car Company.

3. The evidence is wholly insufficient to show that the death of the horse resulted from the failure of the appellee to obtain the palace car for him to ride in.

4. The death of the horse was not the proximate result of the refusal of appellant to deliver the car to appellee. If appellee was entitled to the car and appellant wrongfully refused to deliver it, the latter would be liable only for damages resulting from the delay incident to procuring another car. 66 Ark. 68; 87 Ark. 576; 101 Ark. 90; 41 L. R. A. 794; 75 Am. St. Rep. 685.

John D. Arbuckle and *C. A. Starbird,* for appellee.

1. Johnson testified that he was authorized to make the contract for the A. P. H. Car Company, and the jury's verdict settles this point contrary to appellant's contention.

2. Appellee and the A. P. H. Car Company made their own contract. Appellant, a third party, could not set aside that contract. It had done its part, so far as the collection of tariff charges was concerned, and any further collection for the use of the car was a question for the M., K. & T. Ry. Co. to dispose of.

3. The allegation in the complaint "that on account of or in consequence of bad ventilation and exposure in said (box) car said horse sickened and died," was not specifically controverted in the answer, and must be taken as true. Kirby's Dig., § 6137. Not only so, but it was also the opinion of two expert witnesses. 83 Ark. 584.

4. The direct injury resulting from appellant's act in taking away the safety appliance, *i. e.,* the A. P. H. car, which appellee at great expense had provided, was the exposure, sickness and death of the horse. The loss is the proximate result of appellant's refusal to deliver the car. 83 Ark. 584; 64 L. R. A. 545.

McCULLOCH, C. J. The plaintiff, L. H. Ingraham, is a farmer and stock raiser in Sebastian County, Arkansas. He owns fine horses which he exhibits at fairs. In September, 1912, he shipped nine horses from Fort Smith

to Oklahoma City, Oklahoma, over the St. Louis & San Francisco Railroad to Wister, thence over the Chicago, Rock Island & Pacific Railway to destination, for the purpose of exhibiting his stock at the fair at Oklahoma City, and he remained there with his stock during the progress of the fair, a period of two weeks. He then shipped the horses from Oklahoma City to Muskogee, to exhibit at the fair there, and at the end of the week shipped them back to Fort Smith. One of his horses, a very fine one, which is shown to be of the value of at least six hundred dollars, was found to be sick after the stock reached Muskogee and continued ailing until it died a few days after reaching Fort Smith. Before the horse died, it was found that the ailment was pulmonary pneumonia, and the plaintiff asserts and undertook to prove that the disease was contracted by reason of change from the well ventilated car, especially designed for the shipment of livestock, which was used in the shipment from Fort Smith to Oklahoma City, to a common box car which plaintiff was compelled to use in shipment from Oklahoma City to Muskogee. The car which was used in the shipment from Fort Smith remained in the hands of the defendant company and the latter's agent at Oklahoma City refused to surrender the car for plaintiff's use in shipping the stock to Muskogee over the line of the M., K & T. Ry. Co.

The plaintiff predicates his right to recover from defendant the value of the horse on the latter's refusal to surrender the car to another carrier. The car was one furnished by a corporation domiciled at Chicago, known as the Arms Palace Horse Car Company. That company furnished cars to shippers of livestock upon regular tariff rates, a schedule of which rates had been filed by the company with the Interstate Commerce Commission. The shipper is required to pay for the use of the car in addition to the freight tariff charged by the railroad company, but the railroad company usually procured the car from the Arms Palace Horse Car Company upon the

request of the shipper. Usually time is required for the carrier to procure the palace horse car. On this occasion, plaintiff applied to the soliciting freight agent of the Frisco Railroad at Fort Smith for one of the palace stock cars, and the latter undertook to procure it for him in time for shipment on September 17. Plaintiff claims that the agent of the Frisco entered into an oral agreement with him to furnish the car for the trip from Fort Smith to Oklahoma City, thence to Muskogee, and thence back to Fort Smith, and that plaintiff was to have the use of the car thirty days for payment at the rate of $16 in addition to the regular freight tariff. The Frisco agent wired to the headquarters of the Arms Palace Horse Car Company, and, in accordance with the request, a car was furnished in which to ship plaintiff's stock. When he applied to the proper agent of the Frisco to ship his stock, a bill of lading was issued to him in regular form showing a consignment of the nine horses from Fort Smith to Wister Junction over that road, and thence over the Chicago, Rock Island & Pacific Railway to Oklahoma City. The bill of lading recited the railroad freight tariff and also the $16 to be paid for the use of the palace horse car.

The tariff sheets of the palace horse car company on file with the Interstate Commerce Commission show the regular tariff rate of $16 for a continuous trip of four hundred miles and provide that all of the rates prescribed in the schedule were payable to the initial carrier. The schedule contains the following provision: "These tariff rental charges do not apply on any Arms car leased by contract in writing, signed by the Arms Palace Horse Car Company, and submitted by lessee to the railroad company agent when loading car, as evidence of his right to unconditional and exclusive use of car during the time specified in contract, and for making any necessary notation with reference thereto on the billing."

When the car reached Oklahoma City, the horses were delivered to plaintiff in good condition and the car

was stored on a spur of defendant company where other cars of that kind were stored. Plaintiff remained there two weeks exhibiting his stock and decided to ship to Muskogee over the M., K. & T. railroad line. Plaintiff applied to the car clerk of defendant company at Oklahoma City for release of this car, but the clerk declined to release the car unless a contract in writing with the Arms Palace Horse Car Company was exhibited in accordance with the printed schedule. It was too late then for the M., K. & T. railroad to get a car of this description in time for plaintiff to ship his stock for exhibition at the fair at Muskogee and plaintiff decided to ship in an ordinary box car, in which he prepared temporary stalls.

(1-2) We need not discuss the question, so earnestly presented by counsel, whether or not the damages alleged were the proximate cause of the refusal to release the car, for we are of the opinion that no actionable wrong or breach of contract on the part of defendant is established. The tariff schedules of the Arms Palace Horse Car Company were on file with the Interstate Commerce Commission, and all shippers who obtain the use of those cars are bound by the provisions therein contained. *B. & M. R. R.* v. *Hooker,* 233 U. S. 97. The printed schedule provides for a tariff rate of $16 for not exceeding four hundred miles of continuous trip. The continuous trip in this instance ended at Oklahoma City, and therefore a reshipment at Oklahoma City would not come within the printed tariff lists. In order to secure any rates other than those specified for a continuous trip, it was necessary for a shipper to procure a written contract with the Arms Palace Horse Car Company, and it is not contended in this case that the plaintiff procured any such contract. The defendant company, as the delivering carrier, had fully discharged its duty to plaintiff under the contract by delivering the stock at Oklahoma City, the point of destination. It was not bound to release the car to plaintiff, or to any other railroad company, except upon the order of the Arms Palace Horse Car Company.

It is a mistake to assume, as is done by counsel for the plaintiff, that defendant company was not a party to the plaintiff's alleged contract for the use of the car and that it therefore had no right to dispute plaintiff's right to take the car for a reshipment. The defendant took possession of the car under the printed tariff rates of the owner and was bound to observe them. It had the right to hold the car until proper authority was given for its release. Plaintiff does not contend that he had any written contract with the horse car campany; he asserts the right to the car solely upon an oral contract with the agent of the Frisco railroad at Fort Smith. Now, that agent is not shown to have been authorized to enter into an oral contract for the lease of the car further than that specified in the printed schedule. Counsel insist that the evidence of the Fort Smith agent showed that he was authorized by the car company to enter into this contract, but an examination of his testimony shows to the contrary. He states, it is true, that he was authorized by the Arms Palace Horse Car Company to enter into the contract with plaintiff; that is to say, the contract in accordance with the printed schedule, which he says he construed to mean that the shipper could have the use of the car for shipment a distance of four hundred miles. The witness did not testify and it nowhere appears that the agent of the Frisco at Fort Smith had any special authority from the horse car company, or any authority at all, to enter into a contract except such as is prescribed in the printed schedule for a continuous shipment. But even if there had been any special authority conferred, it is not shown that the same was brought to the attention of the defendant's agent at Oklahoma City; and the latter refused to release the car, as he had a right to do, on the ground that the continuous shipment was ended and that no special contract in writing was exhibited as provided by the schedule.

Our conclusion is that the defendant was within its rights in refusing to release the car. The fact, as claimed by plaintiff, that the motive of defendant's agent in refus-

ing to surrender the car was bad, in attempting thus to force the plaintiff to reship to Muskogee over defendant's line, does not render the defendant liable where it is not legally bound to release the car. Therefore, according to the undisputed evidence in the case, there is no liability.

The judgment is reversed and the cause dismissed.

BEASLEY v. BRATCHER.

Opinion delivered October 26, 1914.

1. TAX SALES—OMISSIONS IN DECREE OF SALE.—A decree of the chancery court condemning land to be sold for delinquent assessments, recited the amounts against the property to be 2.50 and 1.00. *Held*, the omission of the dollar mark did not render the condemnation void, and the omission was a clerical misprision.
2. TAX SALES—TIME OF SALE—IRREGULARITY.—When a decree condemning land to be sold for delinquent assessments, fails to recite that ten days be allowed before the sale shall be made, the irregularity is cured where the commissioner waited ten days before advertising the land for sale under the decree.

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

W. M. Pipkin, for appellant.

1. There was in effect no judgment. The actual judgment rendered, if it can be termed a judgment, was for $2.50 and $1.00, and nothing else. It is, therefore, meaningless and void.

2. The judgment failed to provide, as required by the statute, Kirby's Dig., § 5700, that the owner should be allowed ten days in which to pay the judgment, before the commissioner should proceed to sell. The decree was, therefore, in excess of the court's jurisdiction and void. The right to order the sale rested upon the statute. The jurisdiction was special and limited, and all provisions and conditions named in the statute must be closely followed. Black on Tax Titles, § § 54, 59; 54 Pac. 921, 922; 51 Pac. 834, 836; 32 N. Y. Supp. 425, 430; 100

U. S. 13, 23, 25 L. Ed. 538; 119 Cal. 139; 16 Utah, 151; 96 Wis. 175.

J. I. Alley, for appellee.

1. A mere clerical misprision in failing to write the dollar marks before the figures expressing the amount of the judgment will not invalidate the judgment. Moreover, the court specially found in its confirmation decree that the amounts of the condemnation judgment was intended for two dollars and fifty cents and one dollar respectively. That finding is conclusive. 78 Ark. 275; 86 Ark. 212; 90 Ark. 40; 104 Ark. 9; 68 Ark. 134; 68 Ark 211.

2. The failure to provide in the decree that ten days should pass before the commissioner should proceed to sell was a mere irregularity which was cured by the confirmation of the sale and the finding by the court that the commissioner did not proceed to advertise and sell the property until after the expiration of the ten days. 14 Cyc. 723; 84 Ark. 1; 99 Ark. 154; 66 Ark. 1; 68 Ark. 211; 63 Ark. 1.

WOOD, J. This was a suit in the chancery court of Polk County by the appellant against the appellee to remove a cloud on the title to certain lots in the city of Mena. The complaint, omitting details, set up that the appellee claimed title to the property by virtue of a deed executed by the commissioner of the chancery court pursuant to the orders of that court, condemning the lots to be sold for alleged delinquent assessments due to an improvement district in the city of Mena. Among other things, the complaint alleged that no sum certain was found to be due against the property, for which the same was condemned and sold, and that the court failed to allow ten days for the payment of such judgment as was rendered against the property. By the agreed statement of facts, it appears that the judgment for which the property in question was condemned to be sold contained the following: "Against lot 8, block 16, 2.50; against lot 9, block 16, 1.00." The judgment condemning the land to be sold also failed to direct that the sum so adjudged to

be due might be paid within ten days, and that said property should not be advertised for sale until the expiration of said ten days.

(1) The appellant contends that inasmuch as the decree of condemnation sets forth the amounts in figures, as above shown, without the dollar mark, the same was rendered void. Counsel for the appellant states that the "actual judgment rendered was simply for 2.50 and 1.00 and nothing else," and that therefore the judgment was void. We can not uphold this contention. The chancery court found that the sum of $2.50 and $1.00, respectively, was intended as the amounts found to be due by the court rendering the judgment of condemnation, besides the penalty and costs, and that the omission of the dollar mark was simply a clerical misprision not affecting the validity of the decree. These figures, with the period between the figure two and the noughts, and the figure one and the noughts, indicating the decimal point, as shown by the agreed statement of facts set forth in the court's judgment, show conclusively that the figures were intended to specify $2.50 and $1.00 respectively. The omission of the dollar mark did not render the judgment of condemnation void. The court was correct in finding that this was a mere clerical misprision, as indicated on the face of the judgment itself.

Appellant contends that the failure to set forth the dollar mark renders the judgment void because it does not show that it was a money judgment. But the numerals in the connection used could have had no other meaning than that the land was condemned and sold for an amount of money due as delinquent assessment. As to whether the amounts set forth were correct, could have been easily ascertained by an examination of the assessment and tax books for the improvement district of Mena, and it was not necessary to the validity of the decree that the dollar mark should have preceded the numerals. See *Sawyer* v. *Wilson,* 81 Ark. 319.

(2) Moreover, there was a confirmation of the decree condemning the lands to be sold for the assess-

ments, and this confirmation necessarily involved a finding that the land was sold for the correct amount. The court found that the commissioner waited until after the lapse of ten days before the property was advertised under the condemnation decree and before making the sale of the property, and that the failure to recite in the decree that ten days would be allowed for the payment of the judgment before the property was sold was a mere irregularity which was cured by the commissioner waiting until after the ten days had lapsed before advertising and selling the land. And the court also found that this irregularity was cured by a confirmation of the sale that was afterward made. These findings were correct. Section 5700 of Kirby's Digest provides as follows: "The suit shall be brought in the name of the board of improvement, and, in its decree of condemnation, the court shall direct that if the sum adjudged shall not be paid within ten days, the property shall be sold by a commissioner, appointed for that purpose, upon twenty days' notice." The purpose of this statute was to give the land owner time within which to pay off the judgment and prevent the advertisement and sale of his property. It is clear that when this time is allowed before the property is advertised, as specified in the statute, the land owner could not be prejudiced in any way by a failure to have the recital contained in the decree. It is essential, however, to the validity of the sale under the decree of condemnation, that ten days should expire before the commissioner advertises the land to be sold under the decree. But it is not a jurisdictional prerequisite to the validity of the decree and the sale made thereunder that the decree should contain the recital as to the ten days mentioned in the statute. But that the time should be actually allowed is essential; for if a less time were given, the land owner might be prejudiced. Section 5731 of Kirby's Digest, provides that "no irregularity not going to the true merits of the proceeding to condemn said lands and to sell and transfer them, or which could have been taken advantage of on appeal, shall suffice to impair the valid-

ity of any such deed." The appellant could have objected to this irregularity on appeal; and, as already stated, inasmuch as the full time was given before the land was advertised and sold, appellant has not been injured and the irregularity therefore does not affect the merits of the proceeding to condemn. Moreover, the decree of confirmation fully cured such irregularity. See *Osceola Land Co.* v. *Chicago Mill & Lbr. Co.,* 84 Ark. 1.

The decree is affirmed.

DUNN v. DUNN.

Opinion delivered October 26, 1914.

1. DIVORCE—COMPLAINT—SUFFICIENCY OF ALLEGATIONS.—Where a divorce is sought on the grounds of cruel and barbarous treatment, on appeal the defendant can not complain that the allegations are not sufficient, when he has failed to make a motion requiring that the complaint be made more definite and certain.
2. DIVORCE—OFFENDING ACTS—SUFFICIENCY OF EVIDENCE—QUESTION FOR COURT.—In an action for divorce it is for the court to determine whether or not the alleged offending spouse has been guilty of acts or conduct amounting to rudeness, contempt, studied neglect or open insult, and whether such conduct and acts have been pursued so habitually and to such an extent as to render the condition of the complaining party so intolerable as to justify the annullment of the marriage bond.
3. DIVORCE—GROUNDS FOR—CONCLUSIVENESS OF LAW—SUFFICIENCY OF EVIDENCE.—In an action for divorce on grounds of cruel treatment of the plaintiff, it is necessary that proof should be made of specific acts and conduct showing the indignities relied upon in order that the court may properly determine whether they are sufficient to establish the ground of divorce.

Appeal from Jefferson Chancery Court; *John M. Elliott,* Chancellor; reversed.

Coleman & Gantt, for appellant.

The complaint states a mere conclusion of the plaintiff, without any facts to justify that conclusion, and is not sufficient to justify the granting of a divorce. 105 Ark. 194. The testimony fails to cure the insufficiency of the complaint.

Appellee, pro se.

HART, J. Bessie Stark Dunn instituted an action for divorce against A. V. Dunn and based her cause of action upon the fifth subdivision of section 2672 of Kirby's Digest. The charge against her husband is alleged in the complaint as follows:

"That notwithstanding the defendant was continuously and habitually finding fault and treated her with such reproach and contempt, indifference, studied neglect, so systematically that he has rendered their living together intolerable."

The testimony in the case is as follows:

Bessie Stark Dunn testified: "I was married to the defendant in Jefferson County, Arkansas, on the 21st day of February, 1910, and lived with him until a few days ago. That I was always true to my marital vows and did all in my power to make our married life happy and agreeable. That he failed to buy me clothes, and habitually and systematically treated me with unmerited reproach, studied neglect and open insult, rude and overbearing when I asked him for clothes. That I put up with his bad treatment as long as I could, and his manner and treatment became intolerable. We have a little girl about two years of age, named Goldie. I have lived in Jefferson County almost all my life, and am earning my own living."

Agnes Stark, a witness for the plaintiff, testified: "That she is acquainted with the plaintiff and the defendant in the above entitled cause, and has known them since they were married. That they were married in the year 1910, and lived together until a few days ago. That the plaintiff was at all times considerate and kind and attended to her duties as the wife of the defendant and never gave him cause to mistreat her. That the defendant habitually and systematically treated the plaintiff with contempt and rudeness and neglect. That he refused to buy clothes for her and failed to support her, and many times was insulting and abusive. That the

plaintiff has resided for more than one year in Jefferson County, Arkansas."

The chancellor found in favor of the plaintiff and granted her an absolute divorce from the defendant. The case is here on appeal.

It is first insisted by counsel for the defendant that the allegations with reference to cruel and barbarous treatment are not sufficient. No demurrer was filed to the complaint; no objection was made and no motion filed to make it more definite and certain.

In the case of *Brown* v. *Brown,* 38 Ark. 324, in regard to a similar contention the court said the indignities of which the plaintiff complained should have been specifically set out in order that the court might know whether they were such as to render her condition intolerable as alleged, or whether they were a sufficient cause for the divorce sought.

Another reason is that the principal facts should be alleged with such certainty as to time, place and circumstance as will apprise the defendant of the case to be made against him and enable him to prepare his defense. Nelson on Divorce and Separation, vol. 1, § 333.

(1) As was said in the *Brown* case, however, the objection could only have been taken by a motion to require the complaint to be made more definite and specific, and, no such motion having been filed, the objection is not now tenable.

It is again insisted by counsel for the defendant that the testimony was not sufficient to warrant the chancellor in granting the divorce to the plaintiff because the statements of the plaintiff and her sister, the corroborating witness, amount to no more than their conclusions of law, instead of the ultimate facts. In this contention we think counsel are correct.

(2) As was said in the case of *Bell* v. *Bell,* 105 Ark. 194, it is for the court to determine whether or not the alleged offending spouse has been guilty of acts or conduct amounting to rudeness, contempt, studied neglect or open insult, and whether such conduct and acts have

been pursued so habitually and to such an extent as to render the condition of the complaining party so intolerable as to justify the annulment of the marriage bond.

(3) The witnesses can not substitute their judgment for that of the court. Therefore, it is necessary that proof should be made of the specific acts and conduct showing the indignities relied upon, in order that the court may properly determine whether they are sufficient to establish the ground of divorce.

In the case before us we do not think the statements of the plaintiff and her sister amount to anything more than their conclusions or opinions as to the matters testified to by them. From their statements the court could not properly form any conclusion as to whether or not the divorce should have been granted to the plaintiff. It is true that plaintiff and her sister testified that the defendant failed to buy the plaintiff clothes but they did not state the circumstances under which the refusal was made. The remainder of their statements amount to nothing more than their conclusion as to the matters testified to by them. They did not state any facts or circumstances on the part of the defendant from which the court could determine whether or not the plaintiff was entitled to a divorce.

Therefore the decree will be reversed and because the facts were not developed in the chancery court, the cause will be remanded with leave to the plaintiff to take additional proof if so advised, and for further proceedings not inconsistent with this opinion.

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

Opinion delivered October 26, 1914.

1. RAILROADS—EXCESSIVE FARE—PARTY AGGRIEVED—MINORS.—When minors are accompanied by adults, and are required by a railroad company, to pay fare in excess of that permitted by the statute, although the excessive fare is paid by the adults accompanying the minors, the minors are in fact the parties aggrieved within the

meaning of Kirby's Digest, § 6620, and are entitled to recover the penalties denounced in said section.

2. RAILROADS—CHARGE OF EXCESSIVE FARE—REASONABLENESS OF STATUTE—PENALTY.—Kirby's Digest, § 6620, provides that when a railroad company shall charge a passenger an excessive fare, it shall be liable for a penalty not less than fifty dollars and not exceeding three hundred dollars and a reasonable attorney's fee. *Held*, this provision is not in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States, and does not deprive the railroad company of its property without due process of law, nor deny to it the equal protection of the law.

Appeal from Saline Circuit Court; *W. H. Evans*, Judge; affirmed.

STATEMENT BY THE COURT.

Eddie Davis, a minor under twelve years of age, and Genie Denham, a minor under five years of age, each brought suit by his next friend for the penalties denounced by section 6620, Kirby's Digest, against railroads for charging and collecting a greater rate of passenger fare than the law permits, one having been required to pay more than the rate of half fare for his journey, and the other, Genie Denham, having been charged half fare, when, being under five years of age, and in charge of an adult, who had paid the regular fare, no charge whatever should have been made against him. The railroad company answered, denying that any overcharge had been made and later amended its answer in each case as follows: "That the penalties prescribed by section 6620 of Kirby's Digest of the Statutes of Arkansas, for the disobedience thereof are so enormous, and so grossly out of proportion with the amount alleged in the complaint to have been charged in excess of the rate allowed by law, and the penalties aforesaid are so arbitrary and oppressive that the enforcement of said statute, under which this action is instituted, would result in depriving the defendant of its property without due process of law, in violation of that portion of section 1 of article 14 of the amendments to the Constitution of the United States, which provides that no State shall deprive any person of his property without due process of law.

"And the defendant further says that the penalties prescribed by section 6620 of Kirby's Digest of the Statutes of Arkansas, under which this action is instituted, are so enormous, and so grossly out of proportion with the amount alleged in the complaint to have been charged in excess of the rate allowed by law, and the penalties aforesaid are so arbitrary and oppressive and are so much in excess of any amount allowed by law to be recovered for the infliction of equal injury under any other circumstances or conditions, that the enforcement of the said statute, under which this action is instituted would result in denying to the defendant the equal protection of the laws in violation of that portion of section 1 of article 14 of the amendments to the Constitution of the United States, which provides that no State shall deny to any person within its jurisdiction the equal protection of the laws."

The testimony shows that Eddie Davis was at Poyen in Grant County, a station on the Chicago, Rock Island & Pacific Railroad, with his mother, Mrs. Cynthia Davis, that they desired to return to Fenter, six miles distant, and that his mother purchased tickets of the agent, who retained 22 cents for both fares. She remonstrated against the overcharge and insisted that the regular fare was only 12 cents and that Eddie was but a little over nine years old and entitled to ride for half fare, or 6 cents. The agent replied that her ticket was 12 cents and Eddie's was 10 cents and refused to correct the overcharge and return the money. Others witnessed the transaction and one said the agent replied that Eddie Davis would have to pay that fare or walk home, and his mother paid it. No witness was introduced by the railroad company.

The evidence shows in the Denham case that Genie Denham, a minor under five years of age, while in charge of his grandmother in December, 1912, became a passenger on one of the appellant's trains from Fenter, in Grant County, to Little Rock, in Pulaski County; that the grandmother provided herself with a ticket but none was purchased for the minor, he being entitled to ride with-

out charge. The auditor came through the train, taking the tickets, and required her to pay 54 cents as fare for the minor from Fenter to Little Rock. No witness was introduced by the railroad company. D. M. Cloud, an attorney, testified in each case that $25 would be a reasonable attorney's fee in each case. The defendant requested the three following instructions in each case, which were refused by the court:

"1. The defendant requests the court to declare the law to be that the penalty provided by section 6620 of Kirby's Digest, for the disobedience thereof, is so enormous and out of proportion with the amount overcharged the plaintiff, that the infliction of same would amount to denying to the defendant the equal protection of the laws.

"2. The defendant requests the court to declare the law to be that the penalty for the disobedience of section 6620 of Kirby's Digest is so enormous, and so grossly out of proportion with the amount shown to have been charged the plaintiff in excess of the amount allowed by law to be collected, and is so arbitrary and oppressive that it would amount to depriving the defendant of its property without due process of law.

"3. The defendant requests the court to declare the law to be that the plaintiff is not entitled to recover an attorney's fee in this case."

The court, a jury being waived, rendered a verdict and judgment in each case for a $50 penalty and costs, and taxed an attorney's fee of $25 in each case against the railroad company. From the judgments it appealed.

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

1. These children are not the parties aggrieved within the meaning of the statute. In each instance, the payment was made by some one other than the infant, and with funds not belonging to the infant. There is no contractual relation, so far as the payment of the fare is concerned, between the carrier and the infant, but between the carrier and the adult in charge of the infant and whose duty it is to pay the fare. The act of Febru-

ary 9, 1907, clearly contemplates a collection *from* the adult *for* the child in his care, not a collection *from* the child.

2. Section 6620 of Kirby's Digest, in so far as it undertakes to fix a penalty of not less than $50 nor more than $300 with costs and attorney's fees is unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States. 230 U. S. 340, 348.

J. S. Utley, for appellees.

1. Appellant raised no question in the lower court as to these appellants not being the parties aggrieved, and ought not to be heard here to raise that question for the first time. 108 Ark. 497; 107 Ark. 85; *Id.* 360; 106 Ark. 151; *Id.* 336; 95 Ark. 597; 83 Ark. 13; 70 Ark. 197; 74 Ark. 615; 52 Ark. 442. But these infants are the parties aggrieved within the meaning of the statute. 95 Ark. 218; 31 Ark. 155; *Id.* 411; 46 Ark. 133.

2. The statute is constitutional.

KIRBY, J. (after stating the facts). It is contended for reversal (1), that the appellees were not entitled to recover, not being the parties aggrieved, since no money or fare in fact was paid by either of them and (2) that the law prescribing the penalty and attorney's fee is unconstitutional and void. Section 6620, Kirby's Digest, provides: "Any of the persons or corporations mentioned in 6611, 6612, 6613 and 6614, that shall charge, demand, take or receive from any person or persons aforesaid any greater compensation for the transportation of passengers than is in this act allowed or prescribed, shall forfeit and pay for every such offense any sum not less than fifty dollars, nor more than three hundred dollars and costs of suit, including a reasonable attorney's fee, to be taxed by the court where the same is heard on original action, by appeal or otherwise, to be recovered in a suit at law by the party aggrieved in any court of competent jurisdiction. And any officer, agent or employee of any such person or corporation who shall

knowingly and wilfully violate the provisions of this act, shall be liable to the penalties prescribed in this section to be recovered in the same manner (e), Act April 4, 1887."

The law provides further: "The maximum sum which any corporation, officer of court, trustee, person or association of persons operating a line of railroad in this State shall be authorized to collect for carrying each passenger over said line within the State in the manner known as first-class passage is fixed at the following rates * * * On lines over 85 miles in length, two cents per mile or a fraction thereof, and for carrying children in charge of an adult there may be charged and collected one-half of the above named rates for such of said children as may be under the age of twelve years and over the age of five years, and for such of said children as may be under the age of five years no charge whatever shall be made beyond what is collected from the adults who may have charge of them." Section 6611, Kirby's Digest, as amended by act February 9, 1907.

(1) There is no merit in the contention that these minor appellees are not the persons aggrieved by the overcharge of fare since such overcharge was not paid by them, but by the persons in charge of them, the grandmother in the one case and the mother in the other. The persons referred to in the first part of the section of the statute providing the penalties, are those intended to become passengers, and it can make no difference to the railroad company by whom the fares were actually paid, and since they were paid, and for the minors, they are the parties aggrieved within the meaning of the statute and entitled to recover the penalties. *St. Louis, I. M. & S. Ry. Co.* v. *Freeman,* 95 Ark. 219; *St. Louis, I. M. & S. Ry. Co.* v. *Frisby,* 95 Ark. 283.

(2) It is next contended that the penalties prescribed for the violation of said section 6620, Kirby's Digest, are so enormous, arbitrary and oppressive, and so in excess of any amount allowed by law to be recovered for the infliction of equal injury under any other circum-

stances or conditions as to deprive the defendant of its property without due process of law, and deny it the equal protection of the laws in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States. Neither is this contention warranted. No claim whatever is made that the maximum rate fixed by law for the carrying of passengers, deliberately violated by the railroad company is unreasonable or insufficient to produce a reasonable return upon its investment, and this is not an attempt to question the sufficiency of the rate. It is commonly known that carriers are not prone to adhere uniformly to rates lawfully prescribed and it is necessary that deviation from such rates be discouraged and prohibited by adequate liabilities and penalties, and we regard the penalties prescribed as no more than reasonable and adequate to accomplish the purpose of the law and remedy the evil intended to be reached. They can not, in our opinion, be regarded as so enormous, excessive and arbitrary as to deprive the carrier of its property without due process of law or deny it the equal protection of the law, contrary to the Fourteenth Amendment of the Constitution of the United States, and within the authority of *Mo.-Pac. Ry. Co.* v. *Tucker,* 230 U. S. 340; Ex parte *Young,* 209 U. S. 123. As said by this court in *St. Louis, I. M. & S. Ry. Co.* v. *Frisby, supra,* "The statute is directed against the railway company and its object is 'to compensate the party injured for his expenses in the prosecution and to compel the payment of such a sum by the company violating the law as will effectually stop the practice.'" *Fetter on Carriers of Passengers,* § 263; *St. Louis, I. M. & S. Ry. Co.* v. *Waldrop,* 93 Ark. 42.

We find no error in the record and the judgment in each case is affirmed.

HICKEY v. STATE.

Opinion delivered October 26, 1914.

1. STATUTES—ENACTMENT—AMENDMENTS.—Article 5, § 20, Constitution of 1874, providing that "no law shall be passed except by bill, and no bill shall be so altered or amended on its passage through either house as to change its original purpose," *held* to forbid the making of amendments not germane to the subject of legislation expressed in the title of the act.
2. LIQUOR—STATUTE—AMENDMENT.—Act 59, p. 180, Acts 1913, entitled, "An Act to regulate the issuance of liquor license in Arkansas," *held* not to be in violation of art. 5, § 20, of the Constitution of 1874, which provided that no bill shall be so amended in its passage through either house as to change the purpose thereof as expressed in the title of said act.
3. LIQUOR—DEFINITION—"REGULATE."—"To regulate" the issuance of liquor licenses, as used in the title to Act 59, p. 180, Acts 1913, *held*, to mean that the business may be engaged in or carried on subject to established rules or methods, or under conditions prescribed by the statute.
4. STATUTES—CONSTRUCTION—REPUGNANCY.—Where two legislative acts relating to the same subject are necessarily repugnant to, and in conflict with, each other, the later controls, and, to the extent of such repugnancy or conflict, repeals the earlier act whether expressly so declared or not.
5. LIQUOR LICENSE—REPEAL OF FORMER STATUTES.—Act 59, p. 180, Acts 1913, providing for the issuance of liquor licenses is in conflict with and repugnant to prior statutes on the same question, and therefore repeals the same.
6. LIQUOR LICENSE—POWER OF COUNTY COURT.—A county court has no power to issue liquor licenses for the sale of intoxicating liquors, except under the conditions prescribed by Act 59, p. 180, Acts 1913.

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

T. S. Osborne, for appellant.

1. The act is void, because of variance between the subject expressed in the title and the provisions of the act. Art. 5, § 20, Const. 1874; Cooley, Constitutional Lim., 173; 25 Ark. 289; 66 Ark. 575; 13 Lea (Tenn.) 162; 44 Cent. Dig. "Statutes," § 136; 65 Barb. (N. Y.) 473; 1 Idaho, 338; 74 Pac. 962; 7 Words and Phrases, 6041; 51 Pac. 72, 73; 6 Kan. App. 314; 72 Tenn. 1, 13; 67 Pac. 444; 64 Kan. 78; 54 Mo. 17, 33; 14 Am. Rep. 471; 72

Tenn. 1, 13; 19 Pac. 719; 40 Kan. 173; 2 L. R. A. 110; 10 Am. St. Rep. 175; 6 Am. St. Rep. 310; 43 N. J. L. 542; 80 Ala. 89, 96; 41 O. St. 576; 52 Am. Rep. 90; 58 S. W. 1011, 1013; 42 Tex. Cr. Rep. 256; 51 L. R. A. 654; 39 N. J. L. 38, 44; 28 N. W. 101, 103; 61 Mich. 285; 1 Am. St. Rep. 578; 38 N. W. 269, 275; 70 Mich, 396; 41 Ind. 7; 50 Tenn. 165; 27 So. 34; 41 Ark. 485.

2. Section 3 of the act attempts to base the punishment for violations thereof upon a determination of a state of facts without prescribed rule or method. It can not be enforced for that reason and is void. 40 Ark. 290-296; 36 Ark. 178, 184; 68 Ark. 433, 436.

3. The act is unreasonable in that it shows an attempt to make it so embarrassing, burdensome and expensive to put in operation as to cause it to work prohibition rather than "regulation."

4. Section 4 of the act seeks to retain in force "all local option laws," thereby making it lawful for county courts to issue liquor license as provided therein; and the same being in irreconcilable conflict with sections 1 and 2 of this act, said sections are rendered nugatory. 86 Me. 387; 29 Atl. 1101, 1102; 1 Lewis' Southerland on Stat. Con., § 280; 2 *Id.* § 345; 40 Pac. 96; 64 N. W. 365; 2 N. W. 742, 748; 96 Fed. 935; 6 Am. & Eng. Ann. Cases 860-861; 24 N. J. L. 80; 59 N. Y. 53.

The last sentence in section 4 is in violation of and repugnant to article 5, section 23 of the Constitution of 1874 (Section 22 as published in Kirby's Digest). 29 Ark. 252; 49 Ark. 135; 58 Ark. 443-444.

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

The constitutionality of this act has already been settled by this court in favor of the act. 112 Ark. 342.

There is no merit in the contention that section 4 of the act renders it void. The Legislature properly provided that the act should not repeal section 5131 of Kirby's Digest, nor any local act or local option law, because such would have been its effect if no such language

had been used. It does, by necessary implication, repeal any laws on the same subject as are repugnant to or in conflict with it, to the extent of such repugnancy or conflict, the earlier giving way to the later act. 100 Ark. 504, and cases cited.

HART, J. J. E. Hickey was convicted before a justice of the peace of the offense of selling whiskey without a license, and upon appeal to the circuit court, was convicted upon a state of facts as follows: In January, 1914, a petition was filed with the county court asking that license for the sale of intoxicating liquors in the city of Fort Smith, Sebastian County, be issued to them. J. D. Arbuckle and others were made parties to the proceeding. The petition for the issuance of the liquor license was made pursuant to the requirements of Act No. 59, entitled, "An Act to regulate the issuance of liquor license in Arkansas," approved February 17, 1913. See Acts 1913, page 180. On January 20, 1914, the county judge of Sebastian County held that the petition contained a majority of the adult white inhabitants of the city of Fort Smith, and afterwards, on the same day, license was granted to the defendant, Hickey, among others, to sell intoxicating liquors in that city during the remainder of the year. The remonstrants appealed to the circuit court and at the August term, 1914, the circuit court found that the petition did not contain a majority of the adult white inhabitants living within the incorporated limits of the city of Fort Smith and the judgment of the county court was reversed and the petition of the defendants asking that license for the sale of intoxicating liquors be issued to them was dismissed. No appeal was taken from the judgment of the circuit court and its finding and judgment were certified to the county court and there made its judgment. Thereafter the defendant, Hickey, sold three drinks of whiskey to J. K. Jones at his place of business in the city of Fort Smith.

The only contention made by counsel for defendant is that Act No. 59, entitled "An Act to regulate the issuance of liquor license in Arkansas," above referred to,

is unconstitutional. The constitutionality of this act was before us in the case of *McClure* v. *Topf & Wright,* 112 Ark. 342, and it was there held that the act was constitutional. We held, in effect, that the statutory provision that a license to sell intoxicating liquors shall not be granted unless the applicant obtains the recommendation or consent of a majority of the adult white inhabitants of the city where he proposes to carry on business, is a lawful and proper police regulation and is not objectionable on the ground that it violates either the State or Federal Constitution. We said that under the statute now under consideration, the petition was a jurisdictional condition upon which the county court acts when satisfied that it contains the names of the majority of the adult white inhabitants in the city in which the applicant seeks license to sell intoxicating liquors, and held that a statute imposing conditions on the business of retailing intoxicating liquors, though such conditions may be more onerous than those imposed upon another business, and though such conditions may be so burdensome as to render the business unprofitable and on that account amount in its practical results to prohibition, may be sustained because the business of selling intoxicating liquors more seriously affects the health, morals and general welfare of the people than another business.

In the case of *Hanson* v. *Hodges,* 109 Ark. 479, we held that the act in question, 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.

We think the decisions of these two cases are conclusive against the contention of the defendant in this case now before us. But inasmuch as counsel has made other contentions which we did not expressly take up and discuss in these opinions, we shall now briefly consider them.

(1) It is insisted by counsel for the defendant that the act under consideration is in violation of article 5,

section 20, of our Constitution. That section is as follows: "No law shall be passed except by bill, and no bill shall be so altered or amended on its passage through either house as to change its original purpose." The object of this section of the Constitution was that the Senate and House of Representatives of the State might not be hampered or embarassed in amending and perfecting their bills and thus be driven to accomplish by a number of bills that which might well be accomplished by one bill, but the purpose of the section was to forbid amendments which should not be germane to the subject of legislation expressed in the title of the act which it purports to amend. *Loftin* v. *Watson,* 32 Ark. 414.

(2-3) From an inspection of the Senate and House journals it will be seen that no amendments were made to the bill now under consideration and the section just quoted has, therefore, no application. Even if an amendment had been made to the bill as originally introduced, we think the body of the act does not embrace new matter not germane to the original purpose of the act. The act is entitled: "An Act to regulate the issuance of liquor license in Arkansas," and from this title one would reasonably expect that the body of the act might cover the entire subject, including the conditions and restrictions upon which the sale of intoxicating liquors would be permitted. To regulate, means that the business may be engaged in or carried on subject to established rules or methods, or under conditions prescribed in the statute.

Section 4 of the act under consideration provides that this act shall not repeal section 5131 of Kirby's Digest of the Statutes of Arkansas, nor any local act or local option law forbidding the sale of intoxicating liquors. But this act shall be cumulative to all laws now in force. Section 5131 of Kirby's Digest is the section that permits the use of wine for sacramental purposes, and the prescribing and furnishing of alcoholic stimulants by physicians to their patients.

(4) It is contended by counsel for the defendant that by section 4 of the act under consideration our former statutes in regulation of the sale of intoxicating liquors are repealed and other provisions are at the same time re-enacted by the repealing act and that on this account the former provisions continue in operation. Therefore he insists that the provisions of the local option statutes as they existed prior to the passage of the present act are still in force and that because the requirements of those statutes were not complied with by the parties opposing the issuance of the liquor license in the city of Fort Smith, the license granted to the defendant to sell intoxicating liquors in that city during the year 1914 was still in force and that he was not guilty of any violation of the law. We do not agree with him in this contention. It is a cardinal rule of statutory construction that where two legislative acts relating to the same subject are necessarily repugnant to and in conflict with each other, the later act controls, and, to the extent of such repugnance or conflict, repeals the earlier act whether expressly so declared or not. *De Queen* v. *Fenton,* 100 Ark. 504.

Before the passage of the act in question the burden was upon those who opposed the granting of liquor licenses to present a petition to the county court praying that the sale of intoxicating liquors be prohibited, as provided in the statute. Under the present act the burden is upon those who favor the sale of intoxicating liquors to present a petition to the county court asking therefor.

(5-6) It is manifest that the provisions of this act are in conflict with and repugnant to the terms of the prior act on this question. Therefore, the prior act is repealed and the county court has no power to issue licenses for the sale of intoxicating liquors except under the conditions prescribed by the statute. The circuit court adjudged that these conditions had not been complied with and, no appeal having been taken from that judgment, it became final and conclusive.

It follows that the defendant sold the whiskey to the witness, Jones, in violation of the statute and the judgment convicting him of that offense will be affirmed.

LITTLE ROCK ICE COMPANY *v.* CONSUMERS ICE COMPANY.

Opinion delivered October 26, 1914.

1. LEASES—DEFECTS IN PREMISES—ABANDONMENT.—A lessee can not abandon the leased premises because of defects which were discoverable by a reasonably careful examination.
2. LEASES—DEFECTS—ABANDONMENT.—Defendant leased an ice plant from plaintiff for a term of years. Before the expiration of the term the boilers became so defective that they could not be used with safety, and defendant abandoned the premises. *Held*, defendant was liable to plaintiff for the rent as it became due, in the absence of any showing of fraud on the part of the lessor.
3. DEFINITIONS—"EXPLOSION."—Explosion, as used in a lease of a manufacturing plant, and as applied to steam boilers means a sudden bursting or breaking up from an internal force.
4. LEASES—COVENANT TO REPAIR—BOILERS—EXPLOSION.—A covenant in a lease to repair a boiler in the event of an explosion, will not require the lessor to repair the boiler, where, before the expiration of the lease, it becomes so worn and thin as to be in danger of exploding, due to want of repair, natural decay or wearing out from use.
5. LEASE—MANUFACTURING PLANT—BOILERS—FRAUD AND CONCEALMENT.—Where lessor leased a factory to lessee, and before the expiration of the lease the boilers became useless, because of the danger of explosion, it can not be said that the lessor practiced any fraud on the lessee, when it appears that the boilers were inspected by an inspector whom it was agreed was competent, and pronounced in good condition, nor will the lessor be held to be guilty of concealment when he did not refuse the lessee permission to inspect the leased property, prior to the execution of the lease.
6. LEASES—MANUFACTURING PLANT—REPRESENTATIONS—EFFECT OF WEAR AND DECAY—BOILERS.—When the lessor of an ice plant represented to the lessees thereof that the same was capable of manufacturing forty tons of ice per day, and the lessee did for a time, after the lease manufacture that amount, the lessee will not later be relieved from the payment of the amount stipulated in the lease, because on account of the wear and decay of the boilers of said plant, he was not able to manufacture forty tons of ice per day.

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

W. H. Pemberton, for appellant.

1. The note was void under the terms of the written contract of lease. 99 Ark. 193.

2. The note was void because the consideration for which it was given failed. When the notes were executed by appellant, there was an implied warranty on the part of appellee that the plant was and would continue to be suitable and usable for the purposes for which it was leased. 24 Cyc. 1201; 9 Cyc. 369; 11 Conn. 432; 11 Johns. 50.

3. The note was void because of the false and fraudulent representations made as to the condition of the plant and machinery, and especially of the boilers, by the president of the appellee company who acted for it in making the contract of lease. 55 Ark. 299; 2 Herman on Estoppel, § 788; 47 Ark. 335; Bigelow, Estoppel, 627; 93 Ind. 480; 103 Mass. 501; 38 Mo. 55; 58 Miss. 30; 74 Ark. 46-54; 99 Ark. 438; 98 Ark. 48; 96 Ark. 371.

J. W. Blackwood, for appellee.

1. There were no representations not shown in the lease. The evidence is clear and convincing that there were no false representations made.

2. The representations set out and relied upon by appellant were true in fact, *i. e.,* that the plant had produced forty tons of ice per day, that it was in good condition at the time of making the lease, with the exception of minor repairs, which were afterward made and accepted.

3. If representations were false, they must have been intentionally made and must have been fraudulent and relied upon by appellant to its injury, to avoid the contract. 22 Ark. 454; 23 Ark. 289; 95 Ark. 135; 30 Ark. 686; 11 Ark. 66; 19 Ark. 528; 47 Ark. 164; 17 Ark. 91; 95 Ark. 375; 101 Ark. 608; 74 Ark. 238; Bishop on Contracts, 664.

4. Even where the circumstances complained of are such as to justify the tenant in abandoning the property and in claiming a constructive eviction, he must do so in a reasonable time after the circumstances arise which give him the right to abandon, and if he fails to do so, he loses the right. 24 Cyc. 908; 46 Ark. 347, 348.

5. A lessee is presumed to take only after examination. The maxim *caveat emptor* applies, and if he desires to protect himself in this regard, he must exact of the lessor an express stipulation as to the condition of the premises, or that they will remain in such condition during the term of the lease. Tiffany on Landlord and Tenant, 556, § 86; 109 S. W. 1044; 151 Mass. 207; 168 S. W. 219; 161 Mass. 504; 33 L. R. A. 449; 1 Ill. App. 620; 1 Daly 485; 48 Me. 316; 157 Fed. 229; 13 Wall. 379, 383; 20 L. Ed. 627; 95 Ark. 131; 40 Minn. 106.

6. The lessee is not released from its covenant to pay rent by the wearing out of the boilers. The lessor did not agree, and it is not required to repair the boilers. 95 Ark. 131; 21 L. R. A. (N. S.) 130; 5 Cush, 226. Partial destruction of premises does not release the tenant. 25 Ark. 441; 99 Ark. 198; 160 U. S. 527; 108 Md. 501; 18 Am. & Eng. Enc. of L. 254.

7. The only implied covenants in law are that the lessor had good title and that he will do nothing intentionally to injure or molest the beneficial enjoyment of the devised premises, There is no implied covenant that the premises at the time of the lease are in a condition of fitness for the use for which the lessee may propose to use them, nor that they will remain in repair during the term of the lease. 95 Fed. 340; 65 N. E. 63; 59 Mass. 230; 26 Atl. 101; 168 S. W. 219; 1 Tiffany on Landlord and Tenant, 556, 557, § 86.

8. There is no express covenant or warranty in the lease that the plant was in good condition, and oral testimony can not be introduced to add to or vary the written terms, or to establish what the lessee understood. 154 S. W. (Ark.) 1140; 5 L. R. A. 400; 106 Ark. 350; 73 Ark. 431; 102 Ark. 333; 92 Ark. 504.

HART, J. On the first day of April, 1907, the Consumers Ice Company, a domestic corporation, by a contract in writing leased its ice plant to the Little Rock Ice Company, also a domestic corporation, for the term of ten years, at an annual rental of $2,500 per year, payable in advance. Notes were executed for the rent and this

suit was instituted by the plaintiff, the Consumers Ice Company, against the defendant, the Little Rock Ice Company, to recover on the note for rent which matured on the first day of March, 1913.

The defendant answered and denied any liability on the note and averred that it had performed all of its undertakings. It alleged that the three boilers of the ice plant became so worn in 1911 that it became dangerous to use them and that they abandoned the ice plant because the plaintiff refused to replace or repair them. The defendant also alleged that the plaintiff had procured the execution of the lease by fraudulent representations.

On motion the cause was transferred to the chancery court, and, upon the hearing, the chancellor rendered judgment in favor of the plaintiff for the rent note sued on and dismissed the cross complaint of the defendant for want of equity. The defendant has appealed. The facts are substantially as follows:

In 1902 F. L. Riggs came to Little Rock and purchased a site for an ice plant. After the ice plant was erected the plaintiff corporation was organized and Riggs became its manager. At that time the defendant corporation was engaged in operating an ice plant about two blocks away from the site of the plaintiff's plant. Both plants continued in operation until the spring of 1907 at which time, by a contract in writing, the plaintiff leased to the defendant its ice plant in the city of Little Rock for the term of ten years at an annual rental of $2,500, payable in advance. The lease did not contain any covenant requiring the lessor to make repairs, but did contain the following covenant:

"In the event of loss by fire or boiler explosion, the lessor shall elect within a reasonable time, whether to repair damages, or cancel lease, and return notes for rent due, but rent shall continue until such election, and in event of election to rebuild, there shall be no rebate of any part of rent herein provided. Said repairs are to be executed in a reasonable time.

"And, in event the lessor elects to rebuild the plant, it shall be put in as good condition and have as much producing capacity as at time of fire or explosion."

In the negotiation for the lease, H. C. Daniels, president, and L. W. Cherry, treasurer, of the defendant corporation, represented it in making the lease, and F. L. Riggs represented the plaintiff corporation.

According to the testimony of the defendant, when F. L. Riggs first came to Little Rock he went by the name of F. Leonard. Afterwards Cherry learned that his real name was Riggs and his proper name was then assumed by him. Cherry and Daniels said that Riggs represented to them that the ice plant was capable of manufacturing forty tons of ice per day and that its boilers and other machinery were in good condition; that they began the operation of the plant as soon as they leased it and continued to operate until the year 1911, when the boilers became so thin and so badly worn out that it was dangerous to use them; that they notified the plaintiff to replace or repair them and that upon its failure to do so they would surrender the leased premises; that the plaintiff failed to repair the boilers; and that they abandoned the leased premises.

By other testimony it was shown that the usual life of a boiler in the city of Little Rock, with good care and attention, would be from twelve to eighteen or twenty years; that the boilers in question were used in a careful and skillful manner; and that, notwithstanding this, in 1910 they became badly worn and in 1911, by reason of decay, were totally unfit for use in the ice plant. During that year an inspection was made of them by the inspectors of the Hartford Steam Boiler Insurance Company and the inspectors reported that they were badly worn, contained patches in many places, were unfit for use in the ice plant, and were likely to explode at any time.

Other witnesses for the defendant testified that for a while after the premises were leased by the defendant thirty-eight tons of ice per day were manufactured, but that, by reason of the wearing of the boilers, the plant

for two or three years was incapable of manufacturing that amount of ice.

On the other hand, it was shown by the plaintiff that an inspection of the boilers had been made by it a short time before the lease was executed; that this inspection was made by the inspectors of the Hartford Steam Boiler Inspection and Insurance Company and that the inspectors reported that the boilers were then in good condition. It is shown by the witnesses for both parties that the inspectors of this insurance company were skillful and reliable men and that the report of an inspection made by them would be considered as reliable.

Riggs testified that when he came to Little Rock he went under the name of Leonard because Mr. Cherry knew that his father had been engaged in the ice business at other places and that he was afraid that if he made his identity known Cherry, on account of his influence, might throw obstacles in the way of establishing another ice plant in the city of Little Rock. He said that he did not refuse permission to the officers of the defendant corporation to examine the ice plant before the lease was executed; that its ice plant was situated about two blocks away and that he supposed the officers knew as much about the condition of the plant as he did.

On the other hand, Mr. Daniels stated that for several days prior to the execution of the lease, he spoke of making an examination of the plant, but that Mr. Riggs always had an engagement that prevented him from accompanying him. He states, however, that Mr. Riggs did not refuse him permission to examine the plant before the lease was executed.

Riggs also said that the plant was capable of manufacturing forty tons of ice per day at the time the lease was executed and that he, as its manager, had been manufacturing that amount of ice during the preceding year.

As we have already seen, there was no express covenant in the lease that the plaintiff was to repair the leased premises or to replace any machinery that might become worn out during the term of the lease. In the

case of *Delaney* v. *Jackson,* 95 Ark. 131, the court held that unless a landlord agrees with his tenant to repair leased premises he can not, in the absence of a statute, be compelled to do so.

It is the settled rule of the common law that there is no implied covenant by the lessor that the leased premises are in good repair or fit for the intended use, nor that the premises shall continue to be suitable for the lessee's use or business. 24 Cyc. 1048; *Horton* v. *Early,* 47 L. R. A. (N. S.) 314, and cases cited. *Clifton* v. *Montague,* 33 L. R. A. 449, and note.

In the case of *Viterbo* v. *Friedlander,* 120 U. S. 707, the court said that the common law regards a lease for years as an estate for years, which the lessee takes a title in to pay the stipulated rent for, notwithstanding any injury by flood, fire, or external violence.

In 24 Cyc. 1047, it is said: "It may be broadly stated that in the absence of fraud or concealment by the lessor of the condition of the property at the date of the lease, the rule of *caveat emptor* applies, since there is no implied warranty on the part of the landlord that the premises are tenantable, or even reasonably suitable for occupation."

In other words, in the absence of fraud or concealment, the tenant leases at his peril and the rule in the nature of *caveat emptor* throws upon the lessee the responsibility of examining the demised premises for defects and providing against their consequences, before he enters into the lease. *Watson* v. *Almirall,* 61 N. Y. App. Div. 429, 70 N. Y. Supp. 662.

This rule was applied in *Foster* v. *Peyser,* 9 Cush. (Mass.) 247, 57 Am. Dec. 43. In that case the contention was that a drain made a house so uninhabitable that the lessee abandoned it. This fact was held not to discharge him from the payment of the rent afterwards accruing.

(1-2) In the application of this principle it follows that the lessee can not abandon the premises because of defects which were discoverable by a reasonably careful examination.

It will be noted that the lease contained a provision that in event of loss by fire or boiler explosion the lessor should elect within a reasonable time whether he would repair the damage or cancel the lease. The testimony shows that in 1911 the boilers became so thin by reason of decay that they were likely to explode at any time and that it was very dangerous to use them. The lessees notified the lessor of this fact and the lessor failed to repair or replace the boilers. It is contended by counsel for the defendant that because the boilers became so worn that they were likely to explode at any time that the lessor was bound to repair or replace them under the clause of the lease requiring him to repair damages from a boiler explosion; in other words, they claim that when the boilers became so thin that they were likely to explode by being used, that this was equivalent to an actual explosion. We do not agree with them in this contention.

In the case of *Kirby* v. *Wylie,* 108 Md. 501, 21 L. R. A. (N. S.) 129, the court held that the destruction of a building by gradual decay from natural causes is not an act of God, or damage by the elements within the meaning of a provision in a lease requiring the landlord to replace in case the building is destroyed by such an act.

In the case of *Harris* v. *Corlies* (Minn.) 2 L. R. A. 349, the lease contained a provision that if at any time during the term, the premises should be rendered partially untenantable by fire or the elements, that the landlord should repair them within a reasonable time. The premises, by reason of water percolating from springs through the walls of the basement, became so unhealthy as to be untenantable and the court held that the landlord was not bound to repair under the covenant. Mr. Justice Mitchell, who delivered the opinion of the court, said: "Every case of damage to or destruction of human structures, not caused by animal force, may, in one sense, be said to be caused by the elements, as, for example, ordinary gradual decay. But it would hardly be claimed that such a case would be within the meaning of the provisions of the lease. Or, suppose because of the manner

of its construction it should have proved, when winter arrived, that the basement was untenantable because of the cold, it would scarcely be urged that this came within the terms of the lease. We think that the language of the lease refers only to some sudden, unusual or unexpected action of the elements occurring during the term, such as floods, tornadoes or the like, extraordinary disasters not anticipated by either party, the efficient cause of which originated after the term began, and which either destroyed the building or left it in a materially and essentially worse condition than it was in when leased. We think this is substantially the sense in which such expressions in leases have always been used and in which they would now be ordinarily understood by business men in executing such contracts."

In the case of *Bigelow* v. *Collamore,* 5 Cush. (Mass) 226, the facts were that a mill was leased for a term of years and the wheels became so rotten, out of repair and worn out as to be almost worthless. The lease contained a clause that in case the premises or any part thereof should, during the term, be destroyed or damaged by fire or other unavoidable casualty, so that the same should thereby be rendered unfit for use, then there should be a proportionate abatement of the rent until the premises should have been put in proper condition for use by the lessor. The court held, in effect, that if the water wheel of a mill which is the subject of a lease, breaks down by age, decay or want of repair, this is not an unavoidable casualty and the lessee continues liable for the rent.

(3) Explosion means a sudden bursting or breaking up from an internal force. The explosion of a boiler has been defined to be "the bursting of a boiler, the shattering of a boiler by a sudden and unusual pressure in distinction from rupture." *Louisville Underwriters v. Durland,* 123 Ind. 544, 7 L. R. A. 399.

(4) It will be seen that in the lease under consideration the provision is that in event of loss by fire or boiler explosion the lessor shall within a reasonable time

make repairs. Looking at the connection in which the word explosion stands, it clearly refers to damage done to the boiler by a sudden bursting of it which could not be reasonably foreseen by human agencies, and does not signify a mere want of repair or natural decay or wearing out arising from lapse of time or improper use of the boilers.

In the case of *Delaney* v. *Jackson, supra,* the court held that in order to vitiate a lease contract on the ground of fraudulent misrepresentations, such misrepresentations must relate to a matter material to the contract and in regard to which the other party had a right to rely and did rely to his injury. The court further held that if the means of information as to the subject of the representation is equally accessible to both parties, they will be presumed to have informed themselves; and if they have not done so they must abide the consequences of their carelessness.

(5) The witnesses for both parties admitted that the inspectors of the insurance company which inspected the boilers in 1907, just before the lease was executed, were competent and reliable men. It was conceded that whatever report they might make would be regarded as representing the true state of facts. The inspection made at that time shows that the boilers were in good condition. The testimony also shows that it was necessary to go into the boilers and make a careful examination of them before their true condition could be ascertained and that the inspectors did this and reported them to be in good condition. Therefore, it can not be said that Riggs made any false representations as to the condition of the boilers.

There was no fraud by concealment because Riggs did not refuse permission to the officers of the defendant corporation to examine the boilers.

(6) The defendant corporation was engaged in the ice business about two blocks away and had been prior to the time the plaintiff corporation erected its plant. Riggs was under the belief that the officers of the de-

fendant corporation knew, in a general way, the capacity of the plant. For at least a part of the time prior to the execution of the lease, while both corporations were engaged in manufacturing ice, by agreement each delivered the ice manufactured by it to a selling agent and from this fact, and from the proximity of the ice plants, Riggs might well assume that the officers of the defendant corporation knew in a general way the capacity of the plaintiff's plant. Besides, Riggs testified that at the time the lease was executed the plant was capable of manufacturing forty tons of ice per day, and, as a matter of fact, the defendant corporation did manufacture nearly that amount after it took charge of the plant under its lease. The loss in capacity of the plant arose from the fact that the boilers, through decay and old age, became worn out. As we have already seen, the lessee having failed to provide against such a contingency, must suffer the consequences of its neglect and is liable for the rent accruing after the boilers became worn to such an extent that it was dangerous to use them.

The decree will, therefore, be affirmed.

WILLIAMS v. CANTWELL.

WILLIAMS v. TUCKER.

Opinion delivered October 26, 1914.

1. TRIAL—EXAMINATION OF VENIREMEN—IMPROPER QUESTIONS—DISCRETION OF COURT—ERROR.—A trial judge is clothed with much discretion in determining what questions may be asked by an attorney of veniremen in their *voir dire* as a basis for challenging them; but this discretion is subject to review, and in an action for damages for personal injuries, if it appears that the attorney's real purpose is to call unnecessarily the attention of the jury to the fact that the defendant is insured against liability, such action should be promptly stopped by the court, and where it appears that prejudice to the defendant's rights result therefrom, the judgment against him will be reversed on appeal.
2. TRIAL—IMPROPER CONDUCT OF COUNSEL—PREJUDICE.—In a personal injury case, it is prejudicial error to permit counsel for plaintiff to unnecessarily advise the jury, by questions and otherwise, of

the fact that defendant carries indemnity insurance, and will not have to pay any judgment rendered against him.

3. TRIAL—IMPROPER CONDUCT OF COUNSEL—PREJUDICIAL ERROR.—In a personal injury case, where the evidence would warrant a verdict either way, and under the facts the jury awarded substantial damages, the error committed by the court in permitting counsel for plaintiff to unnecessarily call the jury's attention to the fact that defendant carried indemnity insurance, and would not have to pay any judgment rendered against him, will be held to have been prejudicial, and to call for a reversal of the case.

4. EVIDENCE—CONTRADICTING OWN WITNESS.—Where a witness is present and testified at the trial, it is not error to introduce his deposition formerly taken, which is more favorable to the party introducing him than his oral testimony, and which tends to contradict the testimony given at the trial.

5. EVIDENCE—EXPERT TESTIMONY—DEPOSITION.—In a case where the testimony of an expert witness is admissible, such testimony, although taken on deposition, is admissible, when the questions propounded fairly reflect the evidence in the case and the opinion is responsive to the facts proved.

Appeal from Cleburne Circuit Court; *George W. Reed,* Judge; reversed.

STATEMENT BY THE COURT.

The appellees were engaged as engineer and fireman by the appellant, and at about 7:30 o'clock on the morning of the 18th day of January, 1912, they rode in one of the appellant's engines over a tramway, which was used in connection with appellant's saw mill, and in crossing a bridge in said tramway spanning a creek near Leslie, Arkansas, the bridge gave way at or near its center and the engine fell into the creek, a distance of about 16 feet. Each of the appellees sustained some personal injury, about the nature and extent of which there was a sharp conflict in the evidence, and they sued for and recovered judgment for these injuries. It was alleged by them, and the proof tended to show, that the accident was caused by the negligence and carelessness of the appellant in failing to properly construct, and in failing to properly inspect and repair, the bridge through which their engine fell.

Appellant, in his answer, alleged that the bridge became unsafe by reason of excessive rains which had re-

cently fallen, and stated the fact to be that the injury was occasioned by the contributory negligence of the appellees in failing to inspect the bridge; and there was also a plea of assumption of risk.

Separate suits were brought and separate recoveries had in each case, and separate appeals have been prosecuted from the respective judgments; but the questions involved in each of the cases are substantially identical and the cases have, therefore, been considered by us together.

The appellee, Cantwell, recovered a judgment for $750, and the appellee, Tucker, recovered a judgment for $625, and there was evidence offered in their behalf which would have supported even a larger recovery; but, on the other hand, there was evidence to the effect that neither of them sustained any serious injury and that they were both able to return to their work within a few days.

The wreck occurred and the suits were brought in Searcy County, but upon motion of appellees the venue was changed to the Cleburne Circuit Court, and the action of the court in making the order changing the venue is assigned as error; but that point is not pressed in the brief.

The record recites that at the trial substantially the following occurrences took place: Before the beginning of the selection of the jury to try the case, Judge E. G. Mitchell, of counsel for appellees, asked Mr. T. D. Wynne, who was the attorney present representing the appellant, if he was not the attorney for and representing the Home Life and Accident Insurance Company, which question was asked out of the presence and hearing of any of the veniremen who were serving at that term of the court. Upon the refusal of Mr. Wynne to answer this question, the following proceedings were had in the presence of the veniremen from whom the jury was examined and empaneled to try the cause and in open court: Judge Mitchell addressed the court and said: "Your Honor, this gentleman here (indicating Mr.

Wynne) in my opinion and information, does not represent H. D. Williams, but represents an insurance company for H. D. Williams, and for the purpose of inquiring from the gentleman, and for that purpose only, as to whether he is representing the insurance company, I am asking, in good faith, who his client is, and I ask you, as you did for me, and as the Supreme Court upheld you in doing, to require him to state who he represents."

Mr. Wynne, of counsel for defendant, objected and excepted to the foregoing statement being made by Mr. Mitchell in the presence and hearing of the veniremen.

The court thereupon stated to Mr. Wynne that he would have to answer said question before he would be permitted to proceed with the trial of the cause, and Mr. Wynne was thereupon compelled to state, in the presence of all the veniremen, in open court, that he was the attorney for the Home Life and Accident Insurance Company, but at the time he objected to the action of the court in compelling him to so state, and saved his exceptions to the action of the court.

The examination of the veniremen was thereupon proceeded with, and Judge Mitchell, in examining said veniremen upon their *voir dire* as to their qualifications to serve as jurors in the cause, asked each of them if he was in the employ of the Home Life and Accident Insurance Company, and, upon his answering said question in the negative, the court further permitted the said attorney to ask each of said veniremen if they, or either of them, expected to be employed by the Home Life and Accident Insurance Company, and if they were in the employ of any accident insurance company; and proper exceptions were saved to this action of the attorney.

Appellant complains of the action of the court in permitting counsel for appellees, after he had put one W. C. Nichols upon the witness stand as a witness on behalf of appellees, to read from a certain deposition which had been previously given by the said W. C. Nichols, but which had never been filed, if he, the said W. C.

Nichols, had not made certain statements which were there read to him and which were contradictory of statements which he had made at the trial; and a similar objection was made to the use of the deposition of a witness named Dodson.

Appellant also complains of the action of the trial court in permitting counsel for appellees to read the deposition of J. J. Johnson, a physician, in which various hypothetical questions were asked him and the opinion of the witness given in response thereto; it being insisted that there was no foundation upon which to predicate the hypothesis upon which the witness' opinion was taken.

It is also urged that the verdict of the jury is excessive, but, as we have said, that question is concluded by the verdict of the jury.

Wynne & Harrison, for appellant.

1. It was reversible error to permit the attorney for the plaintiff, in the presence of the jury, to question the attorney for the defendant is regard to his connection with the case, and thereby, to advise the jury that an insurance company would be held responsible for any amount the jury might assess against the defendant as damages; and to permit the attorney for plaintiff to ask the jury on their *voir dire* if they were in the employ of the Home Life and Accident Insurance Company, etc. 104 Ark. 1; 187 N. Y., 128; 79 N. E. 854; 28 Am. & Eng. Ann. Cas. 358 and footnotes; 86 S. W. 616; 84 S. W. 1100; 84 S. W. 352; 142 S. W. 959; 154 S. W. 1070.

2. The court erred in permitting plaintiff's attorney to read to the jury the deposition containing a hypothetical question and the answer of Doctor Johnson thereto. Jones on Evidence, 463, and cases cited in notes; *Id.* 471; 36 Ark. 117.

3. It was error to permit plaintiff's attorney to impeach his own witness. 68 Ark. 587.

E. G. Mitchell, for appellees.

1. Counsel for plaintiff acted within his rights for the protection of his client's interests in pursuing the course objected to by appellant. He acted in good faith, was careful not to *unnecessarily* call attention to the matter of insurance, and limited his inquiry to the one purpose. 104 Ark. 1, 9; 74 Pac. 635, 637; 95 N. W. 1079; 93 N. W. 284; 101 Pac. 368; 110 Pac. 528; 92 Pac. 856.

2. It was not error to allow the deposition of Doctor Johnson, containing the hypothetical question and answer, to be read. There was sufficient foundation in other evidence introduced to permit its being read. 87 Ark. 243, 294; 36 Ark. 117.

3. Appellee's counsel had the right, when the witness, Dodson, answered a question in such a way as to contradict a former statement he had made on the same point, to question him in regard to his former statement, not for the purpose of contradicting him, but to refresh his memory. Kirby's Dig., § 3137; 42 Ark. 542, 553; 104 Ark. 327, 340; Jones on Evidence (2 ed.), § 854.

SMITH, J., (after stating the facts). It is earnestly insisted that counsel for appellees committed prejudicial error in his conduct before the court in interrogating counsel for appellant in regard to his connection with the case and in the examination of the jurors upon their *voir dire;* and we agree with this contention.

The authority of the attorney and the duty of the trial court in such matters was recently considered by this court in the case of *Pekin Stave & Mfg. Co.* v. *Ramey,* 104 Ark. 1, in which case Mr. Justice Frauenthal, speaking for the court, said:

"If counsel for plaintiff honestly and in good faith thinks that any of the veniremen is in any way connected with a casualty company insuring the defendant against loss for the injury complained of in the case, he can ask the jurors on their *voir dire* relative to this. If, however, his real purpose is to call unnecessarily the attention of the jury to the fact of the insurance, and thereby to prejudice them against the defendant's rights then this would be clearly an abuse of this privilege, and

should be promptly stopped by the trial judge. In case it appears that prejudice to the rights of the defendant does result therefrom, it would call for a new trial or a reversal of the judgment on appeal. In an action by a servant against his master for damages growing out of a personal injury, it is improper for the jury to take into consideration the fact that the defendant is indemnified against accident to his employees. Evidence of such fact could throw no light upon the issue involved in the case, and would be wholly incompetent. 2 Labatt, Master and Servant, § 826."

(1-2) It is, of course, true that the trial judge must be clothed with much discretion in determining what questions may be asked veniremen by an attorney or veniremen on their *voir dire* as a basis for challenging them. But that discretion is subject to review and, as stated in the case above cited, if it appears that the attorney's real purpose is to call unnecessarily the attention of the jury to the fact that a party to the litigation is insured against liability, such action should be promptly stopped by the trial judge and, where it appears that prejudice to the rights of the defendant results therefrom, the judgment must be reversed on appeal. And we are of the opinion that this inquiry was unnecessarily pursued in the present cases. It will be observed that the attorneys in the case cited are the same attorneys who were engaged in the trial of the present cases, and appellee's attorney appears to have known, not only that Mr. Wynne did represent an insurance company, but to have known the particular company which he represented, and his speech before the court, as well as his questions to the jurors, appears to us to have unnecessarily advised the jurors of the fact that appellant was insured against liability and that he would not be required to pay any verdict which they might render against him. Information as to any juror's connection with any insurance company could have been obtained in a less dramatic manner by asking each of the jurors if he represented or was connected with any casualty company insuring employers

against liability, or if he was connected with any insurance company, or any other proper question which might have tended to disclose whether any juror had any bias or prejudice likely to influence his verdict one way or the other; and had any juror answered that he was so connected with any such insurance company it would not have been improper to have permitted a more minute inquiry of such juror. But no such necessity appears to have existed in this case, and the purpose and effect of counsel's remarks addressed to the court and his questions to the jurors appear to have been to advise the jury that appellant was insured against liability in the Home Life and Accident Insurance Company and would not have to pay any judgment for damages which they might render against him.

(3) It is insisted that no prejudice resulted from the action of counsel even though his conduct was improper, as very small verdicts were rendered in each of these cases. But these verdicts were, by no means nominal. Upon the contrary, they were substantial, and, while it is true that one view of the evidence might have authorized even larger verdicts than were returned, it is yet true that, according to another view of the evidence, the verdicts were grossly excessive for the trifling injuries which appellees sustained, according to that view of the proof. In the opinion of the court, this is a proper case in which to hold that counsel overstepped the bounds of propriety.

The court gave numerous instructions in the cases, and error is assigned in the action of the court in giving and refusing instructions. But we think that the instructions, when read as a whole, fairly and properly present the questions of fact for submission to the jury.

(4) We think the court committed no error in permitting counsel for appellees to read from the depositions of the witnesses, Nichols and Dodson. It is true these witnesses were sworn in behalf of the appellees, but they made certain statements at the trial which apparently were in conflict with statements contained in

their depositions, and as the statements made at the trial were damaging to appellees' theory of the case they had the right to contradict them by proof of prior statements. The rule in such cases is stated in Jones on Evidence (2 ed.), § 854, which reads in part as follows:

"Although the weight of authority sustains the view that a party can not prove the contradictory statements of his own witness to discredit him, yet the party is not wholly without remedy, if surprised or deceived by the testimony. In such a case, he may interrogate the witness in respect to previous statements inconsistent with the present testimony, for the purpose of proving his recollection. He may, in this way, show the witness that he is mistaken, and give him an opportunity to explain the apparent inconsistency." Besides, the statute provides that while a party producing a witness is not allowed to impeach his credit by evidence of bad character, unless it was in a case in which it was indispensable that the party should produce him, he may contradict him with other evidence, and by showing that he has made statements different from his present testimony. Section 3137, Kirby's Digest.

(5) We think no error was committed in permitting appellees to use the depositions of the witness, Doctor Johnson and to read in evidence the hypothetical question in response to which he had expressed an opinion as to the extent and severity of the injuries sustained by appellees. It is true that these depositions were taken before the trial and that, therefore, no witness had testified to the statements contained in the hypothetical question; but this is necessarily true in any case if the evidence of an expert witness is ever to be taken by deposition. Of course, at the trial the court must say whether or not there is sufficient evidence before the jury to permit an expert witness to express an opinion. If, at the trial, when the deposition is read, there is no proof of the facts recited in the hypothetical question, then, of course, such question should be excluded as abstract. The requirements in regard to hypothetical questions were

thoroughly considered in the case of *Taylor v. McClintock,* 87 Ark. 243, in which case the rule upon this question was announced as follows:

"Hypothetical questions must fairly reflect the evidence, and unless they do, the resultant opinion evidence is not responsive to the real facts, and can have no probative force. *Quinn* v. *Higgins,* 24 N. W. 482. The hypothetical case must embrace undisputed facts that are essential to the issue. In taking the opinion of experts, either party may assume as proved all facts which the evidence tends to prove. The party desiring opinion evidence from experts may elicit such opinion upon the whole evidence, or any part thereof, and it is not necessary that the facts stated, as established by the evidence, shall be uncontroverted. Either party may state the facts which he claims the evidence shows, and the question will not be defective if there be any evidence tending to prove such facts."

The trial court should exclude any expression of opinion which is not predicated upon the evidence before the jury, but the enforcement of this rule does not require the exclusion of the opinion of an expert as stated in a deposition taken before the trial, if that opinion is based upon an hypothesis which assumes the existence only of such facts as have been testified to at the trial.

For the error indicated the judgment will be reversed and the cause remanded for a new trial.

Mr. Justice KIRBY dissents.

PRICE v. GUNN.

Opinion delivered October 26, 1914.

1. TAX SALES—FORECLOSURE OF LIEN—RECITALS IN DECREE—PRESUMPTION—COLLATERAL ATTACK.—In a decree ordering the sale of land in an action foreclosing a tax lien, the recital of facts necessary to the court's jurisdiction are conclusive upon a collateral attack.
2. JUDGMENTS—JURISDICTION—COLLATERAL ATTACK.—In a collateral attack upon the judgment of a chancery court, every presumption will be indulged in favor of the jurisdiction of the court and the

validity of its judgment, unless it affirmatively appear from the record itself that the facts essential to jurisdiction do not exist.

3. JUDGMENTS—VALIDITY—CONSTRUCTIVE SERVICE.—A judgment or decree entered upon constructive service by publication will be given the same conclusive effect and is entitled to the same favorable presumptions as judgments on personal service.

4. JUDGMENTS—COLLATERAL ATTACK—JURISDICTION—NOTICE BY PUBLICATION—AFFIDAVITS.—In an action attacking a decree collaterally for want of jurisdiction, the affidavit in proof of the publication of the notice of the pendency of the suit, is not a part of the record, from which can be shown a want of jurisdiction in the court rendering the decree.

5. TAXES—FAILURE TO PAY—FORFEITURE.—Neglect on the part of friends of a land owner whom he commissioned to pay his taxes, will not relieve the land owner against his own failure to pay, when there was nothing to prevent his doing it himself.

Appeal from Clay Chancery Court, Eastern District; *Charles D. Frierson,* Chancellor; reversed.

STATEMENT BY THE COURT.

O. G. Price brought this suit to recover possession of two lots in the town of Rector, claimed by virtue of a commissioner's sale under a judgment for the collection of delinquent taxes in Drainage District No. 1 in Clay County. The defendant filed an answer and cross-complaint admitting the sale by the commissioner and that the land had thereafter been conveyed to appellant as alleged, but denied his ownership and title. He alleged that he was the owner of the lands and deraigned his title thereto and that the commissioner's sale and deed under which plaintiff claimed title were void because in proper time he had attempted to pay the drainage tax on the lots in the year 1909, making application therefor to the collector, and failed to do so because of the collector's mistake, and because the notice of the pendency of the suit was insufficient, not having been published the number of times required by law, and asked that the commissioner's deed to E. C. Price and Price's deed to plaintiff be cancelled as clouds upon his title. The cause was transferred to equity and the court rendered a decree dismissing it for want of equity and

cancelling the commissioner's deed conveying the land to E. C. Price, and his deed to appellant, as clouds upon the title.

Appellant, pro se.

1. It is not the policy of the law to relieve one from the consequences of his own negligence and carelessness. It was appellee's duty in paying his taxes to see that his lands were properly described.

2. Where lands are sold under a decree which recites that public notice was given as required by the statute, such recital is conclusive in a collateral proceeding. 57 Ark. 49; 61 Ark. 464; 66 Ark. 1; 68 Ark. 211; 74 Ark. 253; 94 Ark. 588.

R. H. Dudley, for appellees.

1. Appellee intended, and in good faith offered to pay the taxes on all his lands, including the lots in controversy, sending to the collector a correct list and description of his real estate for that purpose. The facts bring this case within the rule heretofore laid down by this court. 70 Ark. 500; 92 Ark. 630.

2. The court had no jurisdiction to render the decree. When the action was instituted, no legal notice of the pendency of the action was ever given. The law prescribes the publication of the notice for four weeks before any decree can be rendered. Act 111, Acts 1907, § 7; Black on Judgments, 218.

KIRBY, J., (after stating the facts). It is contended that the decree of foreclosure of the lien and the sale thereunder, of the land for delinquent taxes, are void because an affidavit in proof of the publication of the notice of the pendency of the suit shows it was published twice only instead of four times, as the law requires, and because of appellant's attempt to pay the taxes in proper time and failure to do so by reason of the collector's mistake. The decree in the foreclosure proceeding recites: "Upon call of this cause it appearing that all persons and corporations having or claiming interest in any of the lands hereinafter described have been fully and con-

structively summoned as required by law, and that said interested persons and corporations come not but make default." The commissioner's sale for the collection of delinquent taxes in the drainage district under which appellant claims title, was made under Act 111 of the Acts of 1907, section 7 of which provides: "Notice of the pendency of such suit * * * (for the foreclosure of the lien) shall be given by publication weekly for four weeks prior to the day of the term of court on which final judgment may be entered for the sale of the land, in some newspaper published in the county where such suit may be pending."

(1) The court acquired jurisdiction under the law for enforcing the payment of the delinquent levee taxes by foreclosure of the lien upon the publication of the notice of the pendency of the suit as provided in said act, and its decree recites that all parties interested in the lands described and proceeded against "have been duly and constructively summoned as required by law." This was a fact necessary to be found by the court in order to establish its jurisdiction and its finding and the recital of the decree that all parties "have been duly and constructively summoned as required by law" is conclusive of the fact upon a collateral attack. *McLain* v. *Duncan,* 57 Ark. 49; *McConnell* v. *Day,* 61 Ark. 464; *Porter* v. *Dooley,* 66 Ark. 1; *Porter* v. *Tallman,* 68 Ark. 211; *Palmer* v. *Ozark Land Co.,* 74 Ark. 253; *Pattison* v. *Smith,* 94 Ark. 588.

Appellee attempts to show in this an entirely different proceeding, that the judgment of the court condemning the lands to sale for payment of the delinquent taxes was without jurisdiction for failure to give notice of the pendency of the suit by publication as the law requires, notwithstanding the recitals of the decree that such notice had been duly given, by introducing what purported to be an affidavit in proof of the publication of such notice, showing only that it was published two times instead of four, as the statute provides.

(2-3) The decree attacked makes no mention of this affidavit or proof of publication of notice, and its recitals relative to the publication are conclusive and can not be impeached in this proceeding. This is but a collateral attack upon a judgment of a domestic court of general jurisdiction and "it is well settled that every presumption will be indulged in favor of the jurisdiction of such court and the validity of the judgment which it enters and, unless it affirmatively appears from the record itself that the facts essential to the jurisdiction of such court do not exist, such collateral attack against the judgment rendered by it will not prevail. A judgment or decree entered upon constructive service by publication will be given the same conclusive effect and is entitled to the same favorable presumptions as judgments on personal service." *Crittenden Lbr. Co.* v. *McDougal,* 101 Ark. 395.

(4) It is true that a judgment may be attacked collaterally where "by the record it is shown that there was want of jurisdiction by the court rendering it, either of the subject matter or of the person of the defendant." The affidavit in proof of the publication of the notice of pendency of the suit is not a part of the record, however, from which it can be shown that there was want of jurisdiction by the court rendering the decree, no mention or recital of such proof of publication being found therein. Another affidavit or other proof of the publication than the one presented here could have been filed in the other case and it is conclusively presumed, as against this collateral attack, that the notice was published and that all persons interested were, as the decree recites, "duly and constructively summoned as required by law."

(5) The evidence is not sufficient to show such an attempt to pay the taxes levied against the property as would prevent a forfeiture, or its being returned delinquent and sold for the failure to pay. Appellee Gunn testified that he lived in Rector and, desiring not to go to Piggott for the purpose of paying his taxes, asked C. A.

Cargill, the county treasurer, to see the collector and have him to make out the receipt for his taxes and send it to the Bank of Rector for collection. That he mailed him a list containing the numbers of his property and the tax receipt came to the Bank of Rector and he paid it and did not examine it, nor know that the lots in controversy were not included in the receipt, till this suit was brought. He produced a slip of paper containing the correct numbers of these lots, with others, and said it was pinned to the tax receipt when he paid the money and got it from the bank. Cargill testified that a list was mailed to him that looked like the one produced, but he couldn't say if it was, and that he turned it over to the collector with directions to issue the receipt and mail it to the Bank of Rector for collection. The collector did not testify. There was nothing to prevent appellee from examining his tax receipt to ascertain if it contained all his lands, and the negligence or carelessness of others who were accomodating him in the matter will not relieve against his own in failing to do so.

It follows that the chancellor erred in dismissing the complaint and cancelling appellant's deeds and the decree is reversed and the cause remanded with direction to enter a decree awarding the possssion of the lands described to appellant.

MITCHELL v. HOPPER.

Opinion delivered October 26, 1914.

NEGLIGENCE—INJURY TO PROPERTY—PUBLIC OFFICER'S LIABILITY.—Defendants were public officers, and while engaged in the performance of their duties in inspecting cattle, injured a steer belonging to plaintiff, so that it had to be killed. *Held*, defendants are liable only for damages resulting from their carelessness or negligence, and can not be held liable for damages resulting from an accident or casualty, while they were in the exercise of proper care, or such care as an ordinarily prudent man would have exercised under like circumstances.

Appeal from Boone Circuit Court; *George W. Reed*, Judge; reversed.

STATEMENT BY THE COURT.

This suit was brought by appellee for damages for the value of a steer alleged to have been carelessly killed by appellants while roping him. They answered, denying any negligence, but admitting that the steer broke his leg after he had been lassoed or roped, while they were attempting, in the exercise of proper care, to inspect the herd of cattle, as officials of the State engaged in the work of tick eradication in Boone County; that the occurrence was an accident for which they were not responsible; that they immediately reported it to the plaintiff, who requested them to sell the steer to the meat market at Harrison, which they did, for $18.40, and offered to pay this amount to the plaintiff, but he declined to accept it, and they tendered it in the justice's court.

From the judgment for double damages in appellee's favor, the appellants appealed to the circuit court. It appears from the testimony that the appellants were inspectors engaged in the work of tick eradication in Boone County; that it was necessary to catch the cattle and examine them closely in order to make the proper inspection; that one of them threw a rope or lasso on this steer as he started away from the herd and his horse braced himself and when the steer came to the end of the rope, the slack, he slipped on a rock and fell and broke his leg. He was skilled in roping cattle and both the inspectors testified that it was properly done, without any carelessness. They immediately reported the occurrence to the owner and he said that he would expect pay for his steer and that they should sell the animal to the butcher. They replied that they wanted to do what was right about it and went immediately to town, but were not able to get more than $18.40 for the injured animal.

There is some question about whether that sum was tendered appellee before suit was brought and the tender was not made good by bringing the money into the circuit court. The court instructed the jury that if they

found from the evidence that appellants, during the inspection, injured any of plaintiff's stock, they would be liable for whatever damages he sustained by reason of the injury and declined to give appellant's requested instruction No. 2, as follows: "Before you would be authorized to find for the plaintiff, you must find from a preponderance of the testimony that the defendants carelessly or negligently roped the steer belonging to the plaintiff, and in so doing broke, or caused to be broken, its leg, and if you fail to so find from a preponderence of the testimony, then your verdict will be for the defendants."

From the verdict and judgment for appellee, appellants have appealed.

Troy Pace, for appellants.

1. Under the law appellants had the right to go into appellee's pasture for the purpose of inspecting his cattle. Act 409, Acts 1907, § § 3, 15; Act 250, Acts 1909.

2. There can be no liability for purely accidental injuries arising from the doing of a lawful act in a proper manner. 1 Thompson on Neg. (2 ed.), § 14; 99 Am. Dec. 565; 53 Am. Dec. 357; 82 U. S. 524; 16 Ark. 308; 53 Ark. 386; 95 Ark. 362.

Appellee, pro se.

The propositions of law urged by appellants are not disputed, but there is evidence in the record which authorized a finding that appellants were guilty of negligence which resulted in the injury. Appellants are answerable for damages resulting from their negligence, or want of due care and caution. 16 Ark. 308; 95 Ark. 362.

KIRBY, J., (after stating the facts). Appellants' instruction No. 2 correctly states the law and should have been given. Appellants were officers and engaged in the performance of their duties in inspecting the cattle at the time they undertook to do so. The act being

lawful they were only liable for injuries resulting from carelessness or negligence and could not be held liable for damages for injury resulting by accident or casualty while they were in the exercise of proper care, or such care as an ordinarily prudent man would have exercised under the circumstances. *Bizzell* v. *Booker*, 16 Ark. 308; *Manning* v. *Jones*, 95 Ark. 359; 1 Thompson on Neg., § 14; *Tinsman* v. *Belvidere Ry. Co.*, 69 Am. Dec. 565; *Radcliff* v. *Mayor of Brooklyn*, 53 Am. Dec. 357; *Parrott* v. *Wells Fargo & Co.*, 82 U. S. 524.

The court's instructions declared the law incorrectly and were erroneous also in directing, in effect, a verdict against appellants for the value of the injured animal. They, of course were liable in any event, as one of their requested instructions told the jury, for the payment of the $18.40 realized from the sale of the injured steer, which amount they claim to have been willing at all times to pay.

For the errors indicated the judgment is reversed and the cause remanded for a new trial.

PEKIN COOPERAGE COMPANY *v.* GIBBS.

Opinion delivered October 26, 1914.

1. ACCORD AND SATISFACTION—DISPUTED CLAIM—INTENTION OF THE PARTIES.—Where a claim between certain parties is in dispute, and the debtor tenders a certain amount in full satisfaction of the debt, and it was so understood by the parties, an acceptance of the amount and an appropriation thereof by the creditor will constitute an accord and satisfaction.
2. ACCORD AND SATISFACTION—ACT OF AGENT—RATIFICATION.—Where an agent without authority receives a payment in accord and satisfaction of a demand owing his principal, and the principal receives from the agent and appropriates the money so paid, with knowledge of the transaction, the principal will be held to have ratified the act of the agent.
3. ACCORD AND SATISFACTION—RESCISSION—CONDITION PRECEDENT.—As a condition precedent to the rescission of an accord and satisfaction, or a release, where the accord was made or the release given as the result of fraud practiced in their procurement, the consideration must be returned or tendered before the suit can be maintained.

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

STATEMENT BY THE COURT.

Appellees, C. D. Gibbs and the Arkadelphia Milling Company, commenced suit on the 7th day of July, 1913, against the appellant, in which they alleged the existence of an indebtedness on account of white oak staves sold and delivered by them to the defendant of the value of $450. This complaint was amended by alleging that the milling company, which actually made the contract with the defendant for the sale of the staves sued for, sold them as agent for its co-plaintiff, Gibbs, and that the milling company was acting as a broker for Gibbs and, as such broker, sold the staves to the defendant.

Appellant answered, and denied owing any indebtedness to the plaintiffs, and alleged the facts to be that on February 8, 1913, it purchased from the milling company a car of white oak wine staves, to be manufactured according to jointing instructions, to be primed, cleaned and freshly planed on one side, or heavy enough to plane on top to thickness of full eleven-sixteenths of an inch, and that when said staves were delivered they were found not to have been manufactured according to the specifications, whereupon defendant proposed by wire to the milling company to handle and rejoint the staves at plaintiff's expense and to settle for the staves when this service had been performed, and that the milling company accepted this offer, and that agreement was carried into effect. That on March 24, 1913, appellant mailed to the milling company a statement of a balance due, showing that amount to be $72.56, and this letter advised that "check herewith in full settlement." That the check referred to was received in full payment, was cashed by the milling company, and the same was in full payment for the car of staves sued for and was, in effect, an accord and satisfaction of the demand sued on in this action. That appellant, in pur-

chasing the staves from the milling company, did not know of its agency, but dealt with it as the owner, and denied that it was, in fact, the mere agent or broker of appellee, Gibbs, and it plead this settlement in bar of the plaintiffs' cause of action.

At the trial there was a conflict in the evidence concerning the condition of the staves at the time of their receipt by appellant; but there was evidence from which the jury might have found, as it did find, that the staves had been manufactured in accordance with the specifications and that appellant consequently should have paid a larger sum than it did pay in the check accompanying the letter advising that the check was tendered in full satisfaction of appellees' demand. A sharp conflict had arisen between the parties concerning the rejointing of these staves and in a letter dated March 17, written to the milling company by the appellant cooperage company, that company sharply defined its position and later, on the 24th of the same month, wrote the letter above mentioned in which the check was enclosed. The milling company promptly acknowledged the receipt of the check and advised the cooperage company that it had been received and credited on the account, and the milling company also immediately advised appellee, Gibbs, who had manufactured the staves, of what had been done, this information being communicated by the enclosure of the cooperage company's letter, in which the account was stated as it understood it to be and the statement made that the check was enclosed in full satisfaction of all demands growing out of it. Gibbs promptly advised the milling company that he would not accept this settlement, and insisted that the rejointing charges were not correct, but he did not direct the milling company to return this check, nor was any tender of that money ever made. The milling company cashed the check and credited the proceeds thereof on their books to the account of Gibbs, about which action no complaint was made except that the check should not have been received in full satisfaction of the claim.

Appellees insist that there was no accord and satisfaction in this case for the reason that Gibbs promptly declined to accept the check in satisfaction of his demand, and for the further reason that a misrepresentation was made to the milling company by the cooperage company, which induced the first named company to accept the check. In the letter above referred to, of date March 17, the manager of the cooperage company wrote to the milling company that one Bishop, acting for Gibbs, had examined the staves and expressed himself as entirely satisfied with the loss occasioned by the rejointing, and had explained why this service was necessary by saying that, instead of jointing the staves according to the specifications, the car had been loaded and shipped without regard to the specifications, and that Bishop had been furnished a full report as to the actual outturn of the car, and they understood this report was satisfactory, whereas appellees say the facts were that the jointing had been done in accordance with specifications and Bishop had not assented to the contrary statement.

Numerous instructions were requested, of which a number were given, but we do not set them out as our views of the law of this case are expressed in the opinion.

There was a verdict and judgment for appellees for the full amount sued for, and this appeal has been duly prosecuted.

John H. Crawford, for appellant.

1. If Gibbs was the owner of the staves, the milling company was acting as the agent for an undisclosed principal who will be bound by its acts. 87 Ark. 438; 42 Ark. 97.

2. When appellees accepted the statement and check from appellant, showing payment in full, it amounted to an accord and satisfaction of the demand sued on. 94 Ark. 158; 100 Ark. 251; 27 L. R. A. (N. S.) 439, note; 98 Ark. 269; 122 S. W. 771; 137 Mo. App. 472;

129 S. W. 138; 113 Mo. App. 612, 88 S. W. 128; 138 N. Y. 231, 20 L. R. A. 785; 31 L. R. A. 771; 161 Ill. 339, 43 N. E. 1089; 115 N. C. 120, 20 S. E. 208; 100 Mo. App. 599, 75 S. W. 178; 188 Mo. 611, 87 S. W. 981; 75 Ark. 354. See also 148 N. Y. 332; 145 Mo. 659; 66 N. W. 834; 166 Mo. 335; 83 O. St. 169, 32 L. R. A. (N. S.) 380.

3. If the staves belonged to Gibbs, and the milling company was acting as his agent, being in possession of the staves with authority to sell, it acted as a factor and not a broker, and when it effected a sale, it had the right to collect the purchase money. Black's Law Dict. 470; *Id.* 155; 19 Cyc. 116; *Id.* 136; Story on Agency, (5 ed), § 112; 46 Ark. 210, 214; 134 Ill. 188; 27 N. E. 89; 124 Ky. 435, 8 L. R. A. (N. S.) 474; 7 Mass. 319; 5 Am. Dec. 47, 49; 56 Mo. 434; 1 Car. Law Rep. 527, 6 Am. Dec. 555; 101 U. S. 181, 183; 10 Wall. 141.

4. Gibbs could not accept from the milling company the money covered in the check for $72.56, and afterward repudiate his factor's authority to accord and satisfy the disputed claim between himself and the cooperage company. 9 Wall. 76, 82; 96 U. S. 640; 1 Ruling Case Law, 181, § 9; 146 N. C. 191; 14 Ann. Cas. 211; 53 S. W. 512; 28 Ark. 59; 29 Ark. 99; *Id.* 131; 54 Ark. 216; 55 Ark. 112; 80 Ark. 65; 97 Ark. 589; 121 Ill. 25.

McMillan & McMillan, for appellees.

1. The evidence shows that the staves were in accord with the specifications of the contract. From the evidence the jury might have concluded that the alleged accord and satisfaction between the appellee, the milling company, and the cooperage company, was not binding on Gibbs because (1) Gibbs did not authorize it and did not ratify it, and (2) the alleged accord and satisfaction was obtained by fraud.

Under the circumstances of this case it was a question of fact for the jury as to whether there was an accord and satisfaction. It can not be said that the conditional nature of the tender appeared so clearly that a court could say that the acceptance of the check was an

accord and satisfaction. Appellant selected the language and can not complain if it was not so clear that the milling company could not misunderstand that the check was tendered on condition that its acceptance was an accord and satisfaction. 84 Ark. 431; 90 Ark. 256; 107 S. W. 440.

An accord and satisfaction obtained by fraud is void. 83 Ark. 575; 87 Ark. 614; 1 Cyc. 340, note 15.

2. Gibbs did not ratify the settlement. The evidence shows that Gibbs refused to accept the credit and told Nowlin he would not accept it. His acts were not inconsistent with any other hypothesis than that of approval of the milling company's acts.

Ratification is a question of fact for the jury, under the circumstances. 99 Ark. 358; 90 Ark. 104-7.

SMITH, J., (after stating the facts). As has been stated, the proof was sufficient to support the jury's finding that the staves had not been manufactured in accordance with the specifications; and we also think the proof was sufficient to support a finding upon the part of the jury that the appellant company was advised, before mailing the check to the appellee milling company, that the company was not the owner of the staves, but had shipped them for the owner; but it is not insisted that the milling company had no authority to assent to the appellant's proposition about rejointing the staves; and, in fact, we think the proof abundantly sufficient to show that such authority existed had that question been raised. But appellees say this service was not performed as charged for and that in this rejointing a great many good staves were thrown aside as culls, and the verdict of the jury sustains them in this contention and their recovery would be sustained but for the evidence in regard to the accord and satisfaction.

(1) There is no question but that the check, payable to the order of the milling company, was tendered in full satisfaction of this demand, as the letter accompanying it unequivocally states the fact so to be and the correspondence between the parties shows that it was so

intended. The law in such cases was announced in the case of *Barham* v. *Bank of Delight,* 94 Ark. 158, where the court said:

"It is true that, in order to constitute an accord and satisfaction, it is necessary that the offer of the payment should be made by one party in full satisfaction of the demand, and should be accepted as such by the other. But when the claim is disputed and unliquidated, and a less amount than is demanded is offered in full payment, the question as to whether the creditor in such case does so agree to accept the amount offered in full satisfaction of his demand is a mixed question of law and fact. If the offer or tender is accompanied by declarations and acts so as to amount to a condition that if the creditor accepts the amount offered it must be in satisfaction of his demand, and the creditor understands therefrom that if he takes it subject to that condition, then an acceptance by the creditor will estop him from denying that he has agreed to accept the amount in full payment of his demand. His action in accepting the tender under such conditions will speak, and his words of protest only will not avail him."

To the same effect see *Cunningham* v. *Rauch-Darragh Grain Co.,* 98 Ark. 273, and *Barham* v. *Kizzia,* 100 Ark. 252.

(2) It is insisted, however, that there is no accord and satisfaction here for the reason that the appellee milling company was induced to accept the check by the statement contained in the letter before referred to that Gibbs' representative was satisfied with the action appellant had taken in regard to rejointing the staves, and notwithstanding appellant's contention that such was the fact the verdict of the jury is conclusive that such action was not, in fact, satisfactory. However, it is undisputed that Gibbs did not direct the milling company to return this check, or its proceeds, and no such tender has ever been made. Upon the contrary, the appellees contend that a false statement having been made which induced the milling company to accept it, they are re-

quired only to credit it on the account. We think it can make no difference in this case that the check was sent to the milling company rather than to Gibbs himself, as he knew the condition upon which it had been mailed. In Volume 1, Ruling Case Law, p. 181, in discussing the authority of an agent to bind his principal to a contract of accord and settlement, it was said:

"If, however, an agent without authority receives a payment in accord and satisfaction of a demand owing his principal, and the principal receives from the agent and appropriates the money so paid, with knowledge of the transaction, he, of course, ratifies the act of the agent."

To the same effect is the case of *Cashmar-King Supply Co.* v. *Dowd,* 146 N. C. 191, where it is said:

"It is not within the power of the plaintiff to repudiate his (the agent's) act as being one not authorized, and apply the money as a payment on the debt. The money must be accepted according to the intention of the parties to the transaction and applied accordingly; that is, to the full discharge of Dowd's liability, or rejected for the want of authority, in which case the parties would be restored to their original rights. Sound morality and fair dealing imperatively require the law to apply this rule to our business affairs. The plaintiff is not permitted to 'blow hot and cold,' or to accept and reject at the same time."

In support of the position that the consideration does not have to be returned where an accord and satisfaction is had or a release of a demand given which was induced by fraud, appellees cite the case of *Industrial Mutual Indemnity Co.* v. *Thompson,* 83 Ark. 575. In that case it was said:

"The jury having determined, upon evidence sufficient here, that the receipt was fraudulently obtained and therefore void, it was not a prerequisite to the maintenance of appellee's suit that she should have tendered to appellant the amount she had been paid. *St. Louis, I. M. & S. Ry. Co.* v. *Smith,* 82 Ark. 105, and authorities

cited. The jury made a deduction in their verdict of the amount that had been paid. Moreover, the question is raised here for the first time. It could not avail also for that reason."

It will be observed that the court there cited the case of *St. Louis, I. M. & S. Ry. Co.* v. *Smith,* 82 Ark. 105, in which the facts were that the purported release relied upon in that case was signed under a misapprehension of the recitals of that instrument induced by a false statement of the claim agent for the company who made the settlement as to the purport of the writing. Moreover, it was said in the case quoted from that the question of fraud was raised for the first time on appeal, and there was no necessity to review the authorities in that case and there was no intention to announce a rule in conflict with the case cited nor the older cases of *St. Louis, I. M. & S. Ry. Co.* v. *Brown,* 73 Ark. 42, and *Harkey* v. *Mechanics & Traders Ins. Co.,* 62 Ark. 274. There was no necessity in this *Industrial Mutual Indemnity Co.* v. *Thompson* case to discuss under what circumstances the consideration must be returned where it was shown the settlement had been procured by fraud.

The case of *St. Louis, I. M. & S. Ry. Co.* v. *Brown, supra,* distinguishes those cases where the consideration must be returned as a condition precedent to the maintenance of a suit from the cases where this requirement is not imposed, and in that case it was there said:

"Money paid to a party as a consideration for a release does not have to be tendered or refunded, to enable such a party to bring and maintain his suit, where it is shown that at the time the money was paid him and the release was executed he was incapable of making a contract, and that by fraud and circumvention or imposition he was induced to sign a paper of whose contents and character he was ignorant. *Chicago, R. I. & P. Ry. Co.* v. *Lewis,* 109 Ill. 120."

The facts in this Brown case were that a release of personal damages had been signed by a person at a time

when, by reason of physical injuries and of narcotics which had been administered to him, he was incapacitated to contract, and it was held that that contract was not binding upon him, and it was there expressly said that the case was distinguished from cases like *Harkey* v. *Mechanics & Traders Ins. Co.,* 62 Ark. 274, and *St. Louis & C. R. Co.* v. *Selman,* 62 Ark. 347.

In the case of *Harkey* v. *Ins. Co., supra,* a receipt had been signed in full settlement of a loss sustained by the insured from a fire, and it was shown that this settlement had been procured by fraud practiced upon him through the representations of the adjuster of the insurance company. Without returning or tendering the sum paid in satisfaction of this loss, the insured sued to recover upon the policy, and a demurrer to the complaint having been sustained by the trial court on the ground that it did not show that plaintiff had returned or offered to return to the defendant the money received on the compromise before the commencement of the suit, the cause was dismissed and, in affirming that action of the trial court, Mr. Justice RIDDICK, speaking for this court, said:

"This is not a case where a debtor compromises with his creditor by the payment of a part of an undisputed debt in satisfaction of the whole, nor is it a case where a party has been induced by fraud to sign a release of his claim through ignorance of the character and contents of the instrument signed. In each of these cases a different rule would apply. *Reynolds* v. *Reynolds,* 55 Ark. 373; *Mullen* v. *Old Colony Railroad,* 127 Mass. 89. This case rests on the rule that one who receives money or property in consideration of making an agreement, and afterward seeks to avoid and hold for naught such agreement, must first give back to the other party the consideration received. The plaintiff had no right of action at law upon his policy until he had rescinded the agreement annulling such policy by offering to return the money received from defendant upon such agreement." A number of cases are cited in

the opinion in support of the proposition there announced.

In the late case of *Bearden* v. *St. Louis, I. M. & S. Ry. Co.,* 103 Ark. 341, there was a release which was held to be void because the court said the evidence was sufficient to warrant a finding that the plaintiff in the suit, at the time she signed the release, under the evidence, was not aware of the contents of the paper, and her signature had been induced by reason of her ignorance and illiteracy, and suffering at the time, and it was there said: "There was evidence to warrant the finding that the settlement and release were fraudulent and void. This case is ruled on this question by the case of *St. Louis, I. M. & S. Ry. Co.* v. *Brown,* 73 Ark. 42. According to the doctrine of that case, "money paid a party as a consideration for a release does not have to be tendered or refunded to enable such party to bring and maintain his suit where it is shown that, at the time the money was paid him and the release was executed, he was incapable of making a contract, and that, by fraud and circumvention or imposition, he was induced to sign a paper of whose contents and character he was ignorant."

Whatever reason originally may have prompted the distinction which the courts have made between the cases where the consideration must be returned and those cases where that requirement is not exacted, the rule appears to be that, as a condition precedent to the rescission of an accord and satisfaction, or a release where the accord was made or the release given as the result of fraud practiced in their procurement, the consideration must be returned or tendered before the suit can be maintained; but that rule is subject to certain exceptions which are stated in 1 Cyc. p. 339, as follows:

"As a general rule, one who seeks to avoid the effect of an accord and satisfaction on the ground of fraud, mistake or for any other reason (it is apprehended) must restore or offer to restore to the other

party whatever he has received by virtue of the transaction.

"The rule, however, is subject to some limitations and exceptions. It does not apply where the agreement is absolutely void, or where the other party has failed to comply with other material obligations which were of the essence of the agreement, or where defendant admits that what was paid was justly due under the contract sued on. So, where the claimant executes a release for two distinct claims, on the understanding (superinduced by the other party's fraud) that it applies only to one of them, he need not tender back the consideration received before suing on the other. It has also been urged that another exception should be made in case of the party's mental incapacity or financial inability to meet this requirement; but it was held that, even if the rule admitted of any such exception, the exception can not obtain unless the fraud remained undiscovered or the mental incapacity continued until after the consideration for the agreement had been expended or otherwise put beyond plaintiff's control."

A discussion of the same principle is found in 34 Cyc., p. 1071, in the article on the subject of Releases, and in the discussion of the necessity for the restoration of the consideration as a condition precedent to attacking a release, it was there said:

"It is generally held that if a person enters into a release and afterward seeks to avoid the effect of it on any ground that will entitle him to rescind it, he must first restore what he has received, although there is some authority to the effect that such restoration or tender need not be made, and that it is sufficient to credit the amount paid with interest on the judgment recovered."

After this statement of the rule there follows, on page 1073, a statement of the exceptions to it, and where it was said:

"When a releasor who is himself free from negligence, is deceived as to the nature of the instrument executed by him, as for instance, where the release is repre-

sented to be a receipt for a gratuity, or for expenses, for loss of time, for wages, to indicate absence of any ill-will, or that it was a partial release, as that it was a release for damages to clothing or property and in fact included personal injuries, the consideration received need not be restored or tendered. Likewise, according to some cases, where the releasor was mentally incapable of executing the release. Nor is a releasor required to return that which in any event he would be entitled to retain, either by virtue of the release itself or of the original liability, but credit must be given on the judgment. Furthermore, the releasor is entitled to retain the consideration received by him from the releasee by virtue of a transaction independent of the release. It has been held that if the releasor be an infant, he may repudiate his release without restoring or tendering the consideration. * * *"

A number of cases in our own reports illustrate these exceptions, and several of them are cited in the notes to the text which we have just quoted. Among such cases are the following. *St. Louis, I. M. & S. Ry. Co.* v. *Reilly,* 110 Ark. 182; *St. Louis, I. M. & S. Ry. Co.* v. *Bearden,* 107 Ark. 363; *St. Louis, I. M. & S. Ry. Co.* v. *Hambright,* 87 Ark. 614; *Bearden* v. *St. Louis, I. M. & S. Ry. Co.,* 103 Ark. 341; *St. Louis, I. M. & S. Ry. Co.* v. *Sandidge,* 81 Ark. 264; *Hot Springs Rd.* v. *McMillan,* 76 Ark. 88; *St. Louis, I. M. & S. Ry. Co.* v. *Higgins,* 44 Ark. 293; *George* v. *St. Louis, I. M. & S. Ry. Co.,* 34 Ark. 613, also the cases which have been quoted from.

It follows, from what we have said, that there was a valid accord and satisfaction in this case and that appellees, not having returned or tendered the amount of the check, will be held to have accepted it in full satisfaction of this demand, and the judgment of the court below will, therefore, be reversed and the cause of action dismissed.

APPENDIX

I

CASES DISPOSED OF ON MOTION.

Chicago, Rock Island & Pacific Railway Company *v.* Mrs. Carrie Jones; Prairie Circuit Court, Southern District; Eugene Lankford, Judge; settled, and appeal dismissed on appellant's motion, September 21, 1914; *per curiam.*

St. Louis Southwestern Railway Company *v.* W. G. Heeren; Calhoun Circuit Court; Charles W. Smith, Judge; settled, and appeal dismissed on appellant's motion, September 28, 1914; *per curiam.*

St. Louis Southwestern Railway Company *v.* Charles M. Truby; Columbia Circuit Court; Charles W. Smith, Judge; settled, and appeal dismissed on appellant's motion, September 28, 1914; *per curiam.*

Tom Kiger *v.* The State of Arkansas; Sebastian Circuit Court, Greenwood District; Daniel Hon, Judge; appeal dismissed on appellee's motion for failure of appellant to comply with the condition prescribed by the statute in misdemeanor cases, September 28, 1914; *per curiam.*

Frank Ralph *v.* The State of Arkansas; Sebastian Circuit Court, Greenwood District; Daniel Hon, Judge; appeal dismissed on appellee's motion for failure of appellant to comply with the condition prescribed by the statute in misdemeanor cases, September 28, 1914; *per curiam.*

W. W. Hurst *v.* The State of Arkansas; Pulaski Circuit Court, First Division; Robert J. Lea, Judge; appeal dismissed on appellant's motion, October 5, 1914; *per curiam.*

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York Lumber Co. *v.* Dexter; appeal from Cross Circuit Court, W. J. Driver, Judge; affirmed July 13, 1914; *per* McCulloch, C. J.

Capital Security Co. *v.* Gray; appeal from Independence Circuit Court; R. E. Jeffery, Judge; reversed July 13, 1914; *per* Wood, J.

Midland Valley Rd. Co. *v.* Scoville; appeal from Sebastian Circuit Court, Fort Smith District; Daniel Hon, Judge; affirmed July 13, 1914; *per* Smith, J.

Thompson *v.* Radford; appeal from Pike Circuit Court; Jefferson T. Cowling, Judge; reversed in part and affirmed in part, July 15, 1914; *per* Smith, J.

St. Louis, I. M. & S. Ry. Co. *v.* Brown; appeal from Independence Circuit Court; R. E. Jeffery, Judge; affirmed July 13, 1914; *per* McCulloch, C. J.

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City of Jonesboro *v.* Hemingway; appeal from Craighead Circuit Court, Jonesboro District; affirmed October 19, 1914; *per* Hart, J.

Wilson *v.* State; appeal from Polk Circuit Court; Jefferson T. Cowling, Judge; affirmed September 28, 1914; *per* Kirby, J.

Stogsdill *v.* Holmes; appeal from Randolph Chancery Court; George T. Humphries, Chancellor; affirmed October 5, 1914; *per* Hart, J.

Caledonia Insurance Company of Scotland *v.* Banks; appeal from Pulaski Circuit Court, Second Division: Guy Fulk, Judge; affirmed September 28, 1914; *per curiam.*

Corney *v.* Corney; appeal from Crawford Chancery Court; William A. Falconer, Chancellor; affirmed September 28, 1914; *per* Kirby, J.

Spencer *v.* State; appeal from Cross Circuit Court; W. J. Driver, Judge; affirmed September 28, 1914; *per* Smith, J.

Strong *v.* State; appeal from Saline Circuit Court; W. H. Evans, Judge; affirmed October 12, 1914; *per* Wood, J.

Roberson *v.* Forehand; appeal from Poinsett Chancery Court; Charles D. Frierson, Chancellor; affirmed October 19, 1914; *per* Smith, J.

Laser *v.* Fowler; appeal from Garland Circuit Court; Calvin T. Cotham, Judge; affirmed October 26, 1914; *per* McCulloch, C. J.

Long *v.* Fritts; appeal from Madison Circuit Court; J. S. Maples, Judge; affirmed October 26, 1914; *per* McCulloch, C. J.

Nukes *v.* Newton; appeal from Pulaski Chancery Court; John E. Martineau, Judge; affirmed October 26, 1914; *per* Smith, J.

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