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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

LOUISVILLE, NEW ORLEANS & TEXAS RAILROAD COMPANY *v.* JACKSON.

Opinion delivered March 6, 1916.

1. RAILROADS—USE OF HIGHWAYS—LIABILITY FOR CAUSING OVERFLOW.—A railway company which raises its tracks by means of an embankment, placed in a public highway, is liable for any injury done to plaintiff's property, by reason of overflow of surface water or otherwise.
2. RAILROADS—OCCUPANCY OF STREET—DRAINAGE—DAMAGE TO ABUTTING PROPERTY OWNER.—Where the act of a railway company in raising its road bed causes an injury to an abutting property owner, by reason of overflow, the defendant company can not escape liability because the city authorities failed to take additional steps to remedy the defect, and afford additional facilities for carrying off the water. *Semble.* The property owner is required to do whatever is reasonably necessary to protect his property from injury, and he can not permit the injury to occur and then claim full damages, when he might have prevented it or lessened its effect by a reasonable expenditure.
3. RAILROADS—OVERFLOW OF PROPERTY—CITY STREET—CONDITION OF GUTTERS.—A railway company will not be liable for damages to an abutting property owner for the overflow of the latter's property, when the overflow is caused by the street gutter becoming so filled with dirt that it would not carry off the surface water, the gutter having been sufficient to carry off the water when the railway company raised its roadbed in the street in front of plaintiff's property.
4. RAILROADS—OBSTRUCTION OF STREET—OVERFLOW—RIGHT OF ACTION.—A cause of action growing out of the action of a railway company causing an overflow of water upon an adjacent owner's property, accrues when the damage is done, and accrues to the one who is the owner of the land at the time of the construction which causes the injury.

5. DAMAGES—RIGHT OF ACTION—DEVISOR OF LAND.—Land was damaged by overflow caused by a raise in the embankment of a railway company in a city street. *Held*, the owner of the land, at the time the action accrued, having died, the right of action survived to his personal representatives, and did not descend to his heirs or devisees.

6. TENANCY IN COMMON—DAMAGE TO PROPERTY—SUIT.—In case of a tenancy in common, where there is a holding in severalty, each separate owner must sue for his share of the property or injury thereto.

7. DAMAGES TO LAND—PERMANENT INJURY—TENANCY IN COMMON.—A suit to recover damages for permanent injury to land can not be instituted by one of the tenants in common.

8. DAMAGE TO LAND—CO-TENANCY—RIGHT OF ACTION.—The allotment of land in severalty, which is damaged by overflow, to one of the co-tenants, does not operate as an assignment of the right of action of the other tenants for an injury already suffered; the land having been partitioned in its damaged condition, the other tenants retain their right of action which has already accrued.

Appeal from Phillips Circuit Court; *W. R. Satterfield,* Special Judge; reversed.

Fink & Dinning, for appellant.

1. Appellants are not liable for any damages resulting from the filling up of the alleged ditch. No land owner has any property rights such as will warrant him in insisting upon the maintenance of an artificial water course for surface water. 39 S. E. 752; 80 N. E. 420; 9 Oh. Dec. 120; 29 Wis. 515; 197 Mass. 568; 14 A. & E. Ann. Cas. 907; 93 Ark. 47.

2. The portion of the embankment complained of, being situated in a city, surface water is a common enemy, against which any proprietor has a right to defend himself by any means deemed necessary. 87 Ark. 41; 86 N. Y. 140; 65 *Id.* 341; 95 Ark. 345; 66 N. J. L. 641; 58 L. R. A. 329; 87 Am. Dec. 625. If appellee has suffered any damage, it is *damnum absque injuria* and he is entitled to recover nothing.

3. Appellee was not the owner of the property at the time the acts of negligence were committed. Having acquired title by will, appellee held as purchaser and not

by inheritance, and is not entitled to damage for injury. 77 Ark. 387; 97 *Id.* 406; 158 U. S. 1.

4. It was error to refuse instructions 5, 6, 7 and 12, as requested by appellant. The testimony shows that the injury, if any, was caused by the failure of the city of Helena to keep its gutters cleaned, and this should have been submitted to the jury under proper instructions.

Andrews, Cunningham & Burke and *Moore, Smith, Moore & Trieber,* for appellee.

1. A railway company can not so embank or raise its track as to unnecessarily or negligently disturb the surface drainage and throw water onto other property. Nor can it injure the lands of other proprietors by flooding them with surface water by interruption of the natural drains. This is the settled rule in Arkansas. 39 Ark. 463; 93 *Id.* 52; 80 *Id.* 335; 66 *Id.* 271. The case in 87 Ark. 41 does not apply here. The decision in that case is based upon a well recognized exception to the general rule as to city lots. For the reason see p. 44 *Ib.* and 65 N. Y. 341.

2. Where the natural surface has been used as a grade line for streets, and the abutting property owners have used their property with reference to such grade line, the city afterward can not change the grade from the natural surface so as to damage such abutting property without liability for damages. 98 Ark. 206; 104 *Id.* 136; 77 Ill. 194; 83 Tex. 239.

3. Appellee was the owner at the time the embankment was constructed. The work was not completed before the death of appellee's grandfather. 77 Ark. 387.

4. The objection that there is a defect of parties came too late. Kirby's Digest, § 6093; 95 Ark. 32.

5. Instructions 5, 6, 7, and 12 asked by appellant were merely speculative in the absence of evidence that the condition of the gutter had anything to do with the overflowing of the sidewalk and of appellees' property. 90 Ark. 104; *Ib.* 378; 94 *Id.* 358; 88 *Id.* 594.

6. The verdict is not excessive.

McCULLOCH, C. J. The plaintiff, J. M. Jackson, instituted this action in the circuit court of Phillips County against the two defendant railway corporations to recover damages alleged to have been sustained to his real property in the City of Helena on account of the raising of an embankment which changed the flow of the water and caused it to flow to and accumulate on plaintiff's said property. One of the defendant companies is an Arkansas corporation, which holds the franchise, and the other is a foreign corporation operating the railroad along the line. No question is raised in the suit about misjoinder of the defendants or as to which one of the defendants is liable for the alleged injury, if there is any liability at all.

The real property alleged to have been injured consists of two lots on which there are three store houses fronting east on Natchez street, at the southwest corner of Natchez and Missouri streets. Natchez street runs north and south and is sixty feet wide, the railroad operated by the defendants running along the east side of that street. The center of the track is ten feet west of the east line of the street. Originally the track was about on a level with the grade of the street, and, according to the testimony adduced by the plaintiff, there was a ditch running along the west side of the track at the end of the ties which carried a considerable quantity of water down the track to the next street on the south, Arkansas street, where it was taken care of without injury to adjacent property. In the year 1913, the defendants were compelled, on account of the raising of the track of another intersecting railroad, to raise this track about two or two and a half feet, and in doing so the embankment was sloped off from the west side of the track to about the center or crown of the street. The ditch just spoken of was, according to the testimony of the plaintiff, completely obliterated by the raising of the dump, and no other means were provided for taking care of the addi-

tional water which was thrown over into the gutter on the west side of the street.

The theory of the plaintiff is that the additional water thrown over into the gutter overtaxed its capacity and could not be taken care of, and that when it rained the surplus water rose above the curb and ran under the plaintiff's store houses. It is uncontradicted that the flow of the water was from east to west—that the water came from the levee east of Natchez street and flowed over the railroad track, and that when the ditch was filled up there was nothing to prevent it from flowing on to the gutter and on the west side of Natchez street. The plaintiff alleged in his complaint that he was the owner of the property and the answer of the defendants contains a denial of that allegation. It is also denied in the answer that there was any ditch along the edge of the railroad track, and denied that the raising of the embankment caused any additional flow of water. Plaintiff alleged that permanent injury to the property was inflicted by the raising of the embankment and the digging of the ditch, which depreciated the value of the property, and the jury awarded damages for such permanent injury in the sum of $2,500. Defendants have appealed.

It is earnestly insisted that the testimony fails to make out a case of liability against the defendants, but after careful consideration of the evidence we conclude that if the testimony be accepted in its light most favorable to the plaintiff's cause of action there is enough to submit to the jury on the issue as to whether or not the injury was caused by the act of the defendants in raising the embankment and filling the ditch. There is a sharp conflict in the testimony as to whether or not there was any ditch there at all, but that conflict must be treated as settled in plaintiff's favor by the verdict of the jury. There is also a sharp conflict in the testimony as to whether or not the surface water rose above the curb and flowed on to plaintiff's property—there being testimony adduced by the defendants which tends to show that there was not sufficient water from the heaviest rains

to rise above the curb; but that issue, too, must be treated as settled by the verdict.

The argument is made, also, that it was surface water that flowed over towards plaintiff's adjacent property, and also that the ditch was not a natural drainway, and that for those reasons the defendants are not liable. It is asserted that the defendant railroad companies had the same right as any other property owner to defend against surface water, and that upon that theory there could be no liability. The defendants invoke the doctrine announced by this and many other courts that surface water is a common enemy which any land owner may defend against with such measures as he may deem expedient, without laying himself liable to any other owner upon which the water is caused to flow. *Levy* v. *Nash,* 87 Ark. 41; *McCoy* v. *Board of Directors of Plum Bayou Levee Dist.,* 95 Ark. 345.

(1) That doctrine, though well established, has no application to the act of the railroad companies in raising their embankment to the injury of adjacent property owners, for the simple reason that such an act is not for the purpose of defending against surface waters. The occupancy of the railroad companies of the public highway was entirely permissive, and they could only do so by paying to the adjacent land owners any damage caused by such occupancy. They therefore became liable for any damage caused by a change in the condition of the highway brought about by such occupancy, regardless of the question whether or not the water thus diverted was surface water or was flowing through a natural drainway. If the change in the condition of the highway from the occupancy by the railroads caused the injury, then the companies are liable, whether there was any negligence in the construction of the embankment or not, for the Constitution of the State gives a guaranty that private property shall not be taken or damaged for public use without due compensation. The same principle applies where there has been a former appropriation of part of the public highway and afterwards there is a

change made which causes additional damage. *L. R. & Ft. S. Ry. Co.* v. *Greer,* 77 Ark. 387. So, under the law, the defendants are liable for any injury done to plaintiff's property by raising the embankment in the public streets. The question whether or not the accumulation of water under the store houses was caused by the raising of the embankment was one of fact for the determination of the jury.

The following instruction, requested by defendants, was refused:

"V. The court instructs the jury that the defendant railroad company has no control over any part of the street adjoining the premises mentioned in the complaint, except that portion actually occupied by its roadbed and that any damages resulting from any defect in the drainage of surface water on or along said street caused by the failure of the officers of the city of Helena to use reasonable care in the maintenance and repair of the said street are not chargeable to this defendant and this defendant is not liable for any part thereof."

(2) We do not think that the court erred in refusing to give the instruction, for the reason that there is no evidence in the record to the effect that the injury was caused by a failure on the part of the city authorities to maintain and repair the street. It is true, as recited in the instruction, that the railroad companies had no control over any other part of the street except that part occupied by their track, but that condition does not exonerate the companies from liability for injury caused by their acts in changing the situation. If the act of the companies in raising the embankment caused the injury, the companies are not excused because the city authorities failed to take additional steps to remedy the defect and afford additional facilities for carrying off the water. The abutting property owners had no control over the street, and can not be made to suffer from an injury caused by an act of the railroad companies because the city authorities failed to exercise proper care to avert the injury.

Of course, the property owner is required to do whatever is reasonably necessary to protect his property from injury, and can not permit the injury to occur and then claim full damages when he might have prevented it or lessened its effect by a reasonable expenditure. That question, however, is not raised on the present appeal, and we need not discuss it further, for it is sufficient to say that the rule announced in the instruction just referred to is not correct.

(3) Instruction No. 6, which was requested by defendants and refused by the court, reads as follows: "VI. The court instructs the jury that this defendant railroad company has no authority or right and it is no part of his duty to clean off or keep in good condition, the gutter in front of this plaintiff's property and if you find that the damages alleged in the complaint were caused by the failure on the part of the city of Helena, or any other person to keep the gutter adjoining the plaintiff's premises clean, then you will find for the defendant."

We think that instruction should have been given. The testimony introduced by defendants tended to show that the flow of water was not sufficient to overflow the gutter, and that if the water rose above the curbing and flowed under the store houses of plaintiff it was caused solely by the fact that the gutters were allowed to fill up with trash and were not cleaned out. The defendants were entitled to have that issue submitted to the jury, because if the gutters, as they existed at the time the embankment was raised, were sufficient to take care of the water, the defendants would not be rendered liable by the fact that they were subsequently allowed to fill up so as to incapacitate them from taking care of the water. There was an issue on that subject which should have been submitted to the jury, and we think that the court erred in refusing to do so.

The defendants in their answer denied the plaintiff's ownership of the property in question, and they undertook to raise that question by requested instructions

which the court refused. The testimony is undisputed on the question of ownership, but there is a conflict as to the time the embankment was raised so as to inflict a permanent injury to the property. The property was originally owned by plaintiff's grandfather, Mr. John P. Moore, who died in September, 1913, leaving his last will and testament whereby he devised the property in question to the plaintiff and seven other persons. The property was held by the devisees as tenants in common, plaintiff being the owner of an undivided eighth, until there was a partition of the lands of the estate in September, 1914, when this particular property fell to plaintiff in the division.

The testimony introduced by the plaintiff tends to show that the embankment was raised so as to cause the injury in October, 1913, which was after the death of Mr. Moore, the devisor. Defendant's testimony tends to show that the embankment was raised during Mr. Moore's lifetime. It was admitted that certain work was done as late as October, 1913, but that this merely applied to raising one of the crossings and that the work of raising the embankment along the street was done some time prior to Mr. Moore's death. The state of the testimony is that there is a conflict whether the embankment which caused the injury was constructed before the death of Mr. Moore, but it is undisputed that it was completed before the plaintiff became the sole owner of the property.

(4-5) Defendants asked an instruction as to ownership in the following words: "II. The court instructs the jury that if it finds from the testimony in this case that the plaintiff was not the owner of the property mentioned in the complaint at the time the alleged acts of negligence were committed by the defendant, then you will find for the defendant."

This instruction was correct in any view of the case, and the court erred in refusing to give it. There is no controversy about the injury being a permanent one, if there was any injury caused by the defendants at all. In fact, the plaintiff brought his suit upon the theory

that the injury was a permanent one, and made no attempt to establish any other kind of injury. There was no effort to prove that there had been loss of rents or any other temporary injury by reason of the construction of the embankment. The measure of damages sought to be established, and which the court submitted to the jury, was the permanent depreciation of the value of the property by reason of the additional water which flowed from the street.

Now, if the injury occurred during the lifetime of Mr. Moore, the devisor, the right of action therefor did not descend to his heirs or devisees, but survived to his personal representatives, the executor or administrator. The law on that subject is very well settled. In *Railway* v. *Greer, supra,* we said: "The cause of action accrues when the damage is done, and accrues to the one who is the owner of the land at the time of the construction which causes the injury or damage." To the same effect see *Brown* v. *Arkansas Central Ry. Co.,* 72 Ark. 456; *Illinois Cent. Ry. Co.* v. *Allen,* 39 Ill. 205; *Toledo, Wabash & West. Ry Co.* v. *Morgan,* 72 Ill. 155; *Roberts* v. *Northern Pacific Rd. Co.,* 158 U. S. 1; *McFadden* v. *Johnson,* 72 Penn. 336.

In *Moore* v. *City of Boston,* 62 Mass. 274, it was expressly decided that a right of action of a land owner against the city for property taken for public use survives to his executor or administrator, and not to the heirs.

Defendants attempted to raise the further question of the right of the plaintiff to recover for the whole damage, even though the injury occurred after the death of Mr. Moore and while plaintiff and the other devisees held the property as tenants in common.

Instruction No. 4, which reads as follows, was refused: "IV. The court instructs the jury that if it finds from the testimony that the plaintiff was the owner of the property mentioned in the complaint at the time of the commission of the said acts of negligence jointly with other owners as tenants in common then you will find for the plaintiff only such pro rata part of the dam-

ages sustained by the property through the negligent acts of the defendant as his interest in the property bears to the whole interest in the property."

(6) There is some conflict in the authorities as to the right of a tenant in common to sue for the recovery of the whole premises or injury thereto. We are of the opinion that according to the more recent authorities the better rule is to hold that in case of tenancy in common, where there is a holding in severalty, each separate owner must sue for his share of the property. While that point was not expressly decided in the case of *Cottonwood Lumber Co.* v. *Walker,* 106 Ark. 102, such is necessarily the effect of the decision. The weight of authority as it now stands is, we think, in favor of that rule. 38 Cyclopedia of Law, 116-118; *Ridge* v. *Transfer Co,* 56 Mo. App. 133; *Anderson* v. *The Thunder Bay River Boom Co.,* 57 Mich. 216; *Wadley* v. *Marathon County Bank,* 58 Wis. 546; *Reed* v. *Chicago, Milwaukee, Etc. R. Co.,* 71 Wis. 399.

(7) For a much stronger reason, a suit to recover damages for permanent injury to the land can not be instituted by one of the tenants in common. Here the injury was to the freehold and plaintiff was not the sole owner, nor was he in exclusive occupancy of the premises, and there is no principle of law which ought to permit him to sue for the entire amount to be recovered by all the tenants in common. The case of *Birmingham Ry. Light & Power Co.* v. *Oden,* 146 Ala. 495, is precisely in point. In that case five out of seven owners, as tenants in common of real estate abutting on a street, sued the railway company for damages resulting from the construction of an embankment, and the court held that the limit of their recovery was their several interests, which was five-sevenths of the total depreciation of value. According to that rule of law, the plaintiff is not entitled to recover more than his share of the total amount of damages inflicted, even if the injury was caused after the death of Mr. Moore. If it was caused prior to that time, then he is not entitled to recover at all, for the right

of action was, as before stated, in the executor or administrator and not the devisees under the will. The defense was clearly raised in the answer, for the answer contained an express denial of the plaintiff's alleged ownership.

(8) Counsel for plaintiff invoke the rule established by many decisions to the effect that the allotment in severalty of lands inherited in common does not change the nature of the estate from inheritance to purchase, and that the one to whom the allotment is made takes the whole by inheritance, the same as if it had directly descended to him from the ancestor. *Martin* v. *Martin,* 98 Ark. 93; *Cottrell* v. *Griffitts,* 57 L. R. A. 332. The application of that principle can not, however, serve as grounds for holding that the allotment of the land in severalty to one of the co-tenants operates as an assignment of the right of action of the other tenants for an injury already suffered. The land is partitioned in its damaged condition and the other tenants retain their right of action which has already accrued. In this respect lands held by inheritance do not differ from those otherwise held.

The judgment must be reversed for the errors indicated, and the cause will be remanded for a new trial.

RALSTON & RICHARDSON *v.* DUNAWAY.

Opinion delivered March 6, 1916.

CLAIM AGAINST THE UNITED STATES—WAR CLAIM—COLLECTION — ATTORNEY'S FEES.—One D. entered into a contract with appellants, authorizing appellants to prosecute a claim against the United States Government for property taken during the Civil War, and agreeing to pay appellants 33⅓ per cent. of the amount collected. The claim was allowed by the court of claims, and an act passed by Congress appropriating money to pay the same. *Held,* the parties were bound by a provision in the said act of Congress, limiting the amount that could be paid as attorney's fees to 20 per cent. of the amount collected, and that appellants could collect only such per cent. for their services.

Appeal from Jackson Circuit Court; *Dene H. Coleman,* Judge; affirmed.

STATEMENT BY THE COURT.

This appeal is prosecuted from a judgment of the circuit court, confirming the probate court's judgment of disallowance of the claim against the estate of Laura J. Dills, deceased, for a balance claimed to be due as attorney's fees.

Appellants were employed by deceased to collect her claim against the United States for property taken during the Civil War. The written contract, after stating that she has such a claim and has appointed Ralston & Siddons of Washington, D. C., her attorneys, recites: "to prosecute the same before any of the courts of the United States, and, upon appeal, before the Supreme Court of the United States, or before any of the Departments of the Government, or before the Congress of the United States, or before any officer, commission, convention or tribunal authorized to take cognizance of said claim, as may be deemed best for my interests: NOW, THEREFORE, THIS AGREEMENT WITNESSETH, that in consideration of their services in the prosecution of said claim, I hereby agree to pay said Ralston & Siddons a fee or compensation equal to 33 1-3 per centum of the amount which may be allowed on said claim. The officers of the Government are hereby directed to deliver to said attorneys the check, draft, certificate or other medium of payment that may be issued in settlement of said claim, and a lien upon said check, draft, certificate or other medium of payment is hereby recognized by me in favor of said attorneys, for said fee until payment thereof; and I hereby agree to pay from time to time all necessary costs arising in the prosecution of said claim for taking testimony, and to execute such powers of attorney as may be necessary or convenient for the successful prosecution and collection of said claim."

Appellants prosecuted the claim before the Court of Claims of the United States, which on the 17th day of

January, 1910, allowed the claim, in the sum of $2,945. Congress made an appropriation for the payment of this and other allowed claims by Act of March 4, 1915, (No. 289, Statutes Third Session, 63 Congress, part 1, p. 962), section 4 of which provides: "That no part of the amount of any item appropriated in this bill in excess of 20 per centum thereof shall be paid or delivered to or received by any agent or agents, attorney or attorneys on account of services rendered or advances made in connection with said claim. It shall be unlawful for any agent or agents, attorney or attorneys to exact, collect, withhold or receive any sum which in the aggregate exceeds 20 per centum of the amount of any item appropriated in this bill on account of services rendered or advances made in connection with said claim, any contract to the contrary notwithstanding. Any person violating the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding $1,000."

The officers in the Treasury Department, in the payment of said claim, delivered to said attorneys a warrant for their fee payable out of said appropriation for only the sum of $589, being 20 per cent. of the amount of the claim collected in accordance with the act. They thereupon duly presented this claim for $392.68 to the administrator of the estate of said claimant, which was disallowed by the probate court and on appeal by the circuit court, because of the provisions of the Act of Congress making the appropriation in payment of the claim limiting the attorneys' fee to 20 per cent of the amount collected.

John W. Blackwood and *John W. Newman,* for appellants.

1. Section 4 of the Act of March 4, 1915, No. 289, is unconstitutional and void under the Fifth Amendment to the Constitution U. S. The contract was lawful when made. *McGowan Ex.* v. *Parish, Ex.,* 237 U. S. 285, 110 U. S. 42. The fact that payment by the government was made the contingency upon which the contract

was based did not affect the rights of the attorney against the client upon the happening of that event. 110 U. S. 42. Congress can not divest vested rights nor deprive one of property without due process of law. 13 Wall. 654; 99 U. S. 700, 25 L. Ed. 496, 501; *Moyer* v. *Fahey,* Sup. Ct. Dist. Col. Oct. 29, 1915, p. 691.

2. Contract rights must be protected. 36 Sup. Ct. Rep. 176; 30 Ark. 198, 204; 25 *Id.* 625; 13 *Id.* 262, 199, 211; 19 *Id.* 360; 12 Wall. 687; 157 U. S. 271; 164 Mass. 241.

Gustave Jones, for appellee.

1. The contract sued on is a unilateral contract. It is void as against public policy. The claim was founded upon a *bounty* to decedent as to which no contengent fee agreement is valid. 2 Wall. 45, 54; 42 W. L. R. 743; No one has a vested right to his pension or bounty. 19 How. 355; 107 U. S. 64. The conditions of the Act of Congress making the appropriation did not take away any vested rights or property without due process of law. 63 Vt. 169; 12 Wall. 457; 179 U. S. 141; 12 Wheaton, 214; 219 U. S. 467.

2. Even if this was an interference with vested property rights, it is not beyond the power of Congress to do so. 161 U. S. 72; 157 *Id.* 271; 79 *Id.* 457; 157 *Id.* 160. The sovereign can not be sued in its own courts, nor in any other, without its consent: but it may waive this privilege. This permission is voluntary and it may prescribe such terms and conditions as it sees proper. 20 How. 527. The regulation as to fees is valid. 223 U. S. 1; 38 L. R. A. 867; 33 *Id.* 706; 219 U. S. 549.

KIRBY, J., (after stating the facts). It is contended by appellant that said section 4 of the act appropriating money in payment of the claim of Laura J. Dills is unconstitutional and in conflict with the Fifth Amendment of the Constitution of the United States in that it deprives appellants of their property without due process of law. It is not denied that the parties had the right to make the contract entered into nor that the claim was collected from the Government out of the appropriation of money

made by Congress for payment thereof. Contracts for the payment of fees to attorneys contingent upon the collection of claims against the United States have been upheld. *Taylor* v. *Bemiss*, 110 U. S. 42; *Nutt* v. *Knut*, 200 U. S. 12.

It will not be contended, that if this contract had been made for the collection of a claim against the Government for which an appropriation had already been made limiting the attorney's fee to the payment of not more than 20 per cent. of the amount recovered and making it unlawful to charge more than said amount, that an action could have been maintained for the collection of more than said per cent. as provided by the terms of the Act of Congress making the appropriation for the payment of the claim. Appellants contend however that their right to the compensation provided in the contract for service performed was complete upon the allowance of the claim by the Court of Claims and vested in them a right to the recovery from their client of an amount equal to one-third of the amount allowed on the claim. The phrase "The amount which may be allowed on said claim" in connection with the per cent. agreed to be paid as compensation refers necessarily to the amount collected and realized from the Government in payment of the claim and not the mere order of the Court of Claims ascertaining the amount due the claimant and liquidating it by allowance. The Government was no more indebted to the claimant for the property taken or destroyed during the war, after the amount of it was determined and the allowance made by the Court of Claims and no more obligated to its payment than it was before. This was but a recognition of the justness of the claim that existed not because it was allowed by said court, but because the claimants property had been taken by the Government under such circumstances as required it should make compensation therefor.

Neither was such allowance or judgment of the Court of Claims a satisfaction or payment of the claim, but only a determination by the tribunal authorized by the Gov-

ernment to make it of the amount the Government recognized would compensate the claimant for the loss. Its payment could no more be compelled after than before such allowance. The parties to the contract knew and recognized this in making it and authorized the attorneys to prosecute the claim before any and all tribunals, courts and departments of the Government, before the Congress of the United States, or before any officer, commission, convention or tribunal, authorized to take cognizance of the claim and authorized the officers of the Government to deliver to the attorneys the check, draft, certificate or other medium of payment that was issued in settlement of the claim, giving a lien thereon in favor of the attorneys for said fee until its payment. In other words, it is manifest from the contract that the parties realized that the claim could only be paid by an appropriation voluntarily made by the Government and necessarily contracted with reference to such appropriation and the terms thereof. This appropriation was in effect conditioned upon the limitation of 20 per cent. only of it to the payment of any attorney's fees contracted for by the claimant and binding upon the parties to such contract and certainly upon the attorneys who accepted the 20 per cent. prescribed by the appropriation act and were paid same by the officers of the Government in the payment of the claim out of the appropriation made therefor. The attorneys nor the claimant had anything from which payment of the claim could be realized regardless of the justice thereof, nor under the terms of the contract was any debt created for the attorney's services, regardless of their value, until the appropriation of the money was made by the Act of Congress. If such appropriation had never been made, nothing could have been realized by the client nor any debt created by the contract for the payment of any attorney's fee.

In *Ball* v. *Halsell,* 161 U. S. 72, a case where the attorney was to be paid out of the amount of the claim recovered from the Government, the court said: "Although he prosecuted the claim before the Department of the

Interior, and that department recommended payment of a certain sum upon the claim, yet before the sum had been paid or Congress had made any appropriation for its payment and therefore, before he had either recovered or received any money from the United States, or was entitled to any compensation by the terms of the contract, now sued on, Congress passed the Act of March 3, 1891," and held the attorney bound by the limitation of the fee prescribed by the Appropriation Act.

We are aware that in *Moyer* v. *Fahey,* 48 Wash. Law Rep. 691, the court decided a like question differently to the conclusion reached herein, but we do not regard the opinion as supported by sound reason or authority and do not follow it.

The judgment is affirmed.

GAILEY v. RICKETTS.

Opinion delivered March 6, 1916.

1. COMMISSIONER'S SALE—TITLE PASSES, WHEN—CONFIRMATION.—Until confirmation by the court, a sale made by a commissioner under a decree of court is not final and complete so as to pass the title to the property sold, and such sale may be set aside before confirmation thereof upon good and valid grounds.
2. COMMISSIONER'S SALE—RIGHT OF PURCHASER.—The purchaser at a commissioner's sale does not acquire a mere option, but a right to a deed, which becomes perfect upon confirmation of his purchase, and which, if confirmed, relates back to the time of his purchase, and the deed to him conveys such interests as he would have acquired if he had received his deed at the time of his purchase.
3. COMMISSIONER'S DEED—CROPS AND RENTS.—The purchaser of land at a commissioner's sale, in the absence of a reservation of rents or the right to growing crops, acquires, upon confirmation of the sale, a right to the same.

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

McGill & Lindsey, for appellant.

1. Where a landlord leases land and afterwards conveys it in fee without reservation of the growing crops, his interest in the crops passes to the purchaser. 10 Ark.

9; 14 *Id.* 286; 16 *Id.* 511, 520; 92 *Id.* 315; 50 Am. Dec. 233; 18 A. & E. 280, note 2. Where the deed contains no reservation of the growing crops it can not be established by parol evidence. 10 Ark. 9; 20 Mo. 457; 64 Am. Dec. 196; 56 Me. 126; 96 Am. Dec. 438; 89 Minn. 380; 99 Am. St. 603; 39 Ill. 372; 89 Am. Dec. 312.

2. When a judicial sale is conformed the rights of the purchaser relate back to the date of the sale and the purchaser is then considered the owner from and after that date. 99 Ark. 324.

E. P. Watson, for appellee.

1. The record was not filed within six months next after the judgment was rendered and the appeal should be dismissed. Acts 1915, p. 206; 26 Ark. 414.

2. Only the land was sold, not the crops nor rents. An intervener can not raise new issues in a cause. The question of rents and crops was not litigated. 17 A. & E. Enc. Pl. & Pr. 185. The question of rents could only be raised by the tenant and Gailey. 24 Ark. 545; 46 *Id.* 254; 29 *Id.* 575; 24 Cyc. 924.

3. The growing crops did not pass under the sale. They belonged to the tenant. 24 Ark. 545; 29 *Id.* 575; 46 *Id.* 254; 70 *Id.* 79. The court could not divest him of his legal title by a sale of the land for the purpose of partition. 48 Ark. 264; 54 *Id.* 346; 43 *Id.* 284; 24 Cyc. 1469 to 1472, 1244 and note 30, p. 1249. There was no attornment to the purchaser. 10 Ark. 602; 44 *Id.* 444-6. Chambers being in possession under lease, Gailey purchased subject to the lease. 24 Cyc. 924-6. The court did not and could not legally sell the growing crops, nor the rents. 18 A. & E., p. 263-4; 10 Ark. 6; 44 *Id.* 444; 48 *Id.* 135. The rents were not appraised. The evidence shows that there was a reservation of the rents. 33 Pa. St. 251; 61 N. Y. Supp. 218, App. Div. 3d Dep. 1899; 18 A. & E. 285; 76 Ala. 298; 10 B. Mon. 235; 81 N. Y. 308; 16 L. R. A. 305. A purchaser at judicial sale is only entitled to rent from the time when the right of possession attaches. 11 Lea. (Tenn.) 267; 53 Ark. 110.

4. Appellant is estopped. Ewart on Estoppel, p. 133; 89 Ark. 147; 100 *Id.* 397; 55 N. E. 35; 40 Cyc. 252, 271, 264-5.

SMITH, J. In a suit in the chancery court between the heirs at law of William Ricketts, deceased, for the partition of the lands of the deceased, there was rendered, on the 14th day of April, 1914, a decree finding and declaring the several interests of the parties, and a finding that the lands could not be partitioned in kind and an order that the lands be sold on a credit of three months for not less than two-thirds of their appraised value. The lands were appraised on May 23, 1914, and were thereafter advertised for sale by the commissioner appointed for that purpose. The notice of sale contained the following clause: "Possession will be given to the entire premises November 1, 1914, for fall sowing October 15, 1914."

The commissioner filed a report of sale on October 5, 1914, a day of the regular July term, with the appraisement and a copy of the notice of sale. The report showed that the land had been appraised at $8,000, and had been sold on the 19th day of June, 1914, to appellant for $6,050. No exceptions were filed to the report, and it was approved and the sale confirmed. In the order of the court approving the sale there was a finding by the court that the land had been rented by William Ricketts to one Ira Chambers, and that possession could not be delivered until November 1, 1914, and that fact was so understood by the purchaser at the time of the sale, and so stated in the notice of sale. Appellant appeared in open court and offered to pay his note, with the interest then due, whereupon the deed of the commissioner was examined and approved and ordered delivered to appellant. Except as stated there was no reservation of any kind in the decree of partition, or the order approving the sale, and the deed contained all the usual clauses without reservation of any kind.

On August 4, 1914, appellant gave notice in writing to the tenant and to the administrator that he claimed

all rents on the land. The tenant had been on the land for several years, but he was a share cropper and renewed his tenancy from year to year. On August 28, 1914, appellant filed an intervention in the partition suit in which he set up his claim of ownership to the rents, and alleged that there was a growing crop of forty-five acres of corn which had not then matured, and he prayed an order that the rents be ordered delivered to him. On the same day, by consent of all parties, the court ordered the administrator to receive and hold the rent and corn in dispute subject to the final order of the court and, by the subsequent agreement of the parties made and filed November 12, 1914, the administrator was directed to sell the corn and hold the proceeds of the sale subject to the conditions of the order of August 28, 1914.

On December 4, 1914, appellees filed an answer to appellant's intervention, in which it was alleged that the tenant rented the land from year to year as a share cropper, but that he sowed wheat in the fall of 1913 and had planted the corn at the usual time in the spring of 1914. It was alleged that William Ricketts died December 10, 1913, after renting the lands for the following year, and that all of the heirs had notice of this tenancy, and that the tenant was not a party to the partition suit and was not bound by any orders entered therein. That when the lands were sold under the decree of partition the crops raised by the tenant were not sold, but were reserved from sale, and appellant had knowledge of that fact, and well knew that he was not purchasing the crop, and that had the crops been taken into account the land would have been appraised for a larger amount.

There is conflicting proof as to what announcements were made at the sale. An auctioneer was employed by the commissioner to cry the sale, and it is testified that he stated the crops were not being sold. The auctioneer testified that during the bidding someone in the crowd asked, "What about the crops?" and he said, "We sell the land," and another person asked, "Does the crop go?" and witness answered, "We are selling the land,"

and that he meant thereby to inform all persons that he was not selling the crops. Other witnesses who were present at the sale testified that they heard what was said and did not understand that there was any reservation of any kind. It is not claimed that the commissioner himself made any announcement about any reservation.

Appellant testified that he understood he was getting the crops, otherwise he would not have paid as much as he did, although he admits that he was told immediately after the sale by the attorney for the heirs, while he was fixing his note, that he did not get the crops, and he admits stating to the administrator that "your lawyer says I don't get the crop on the place, and if that is so I want a chance to buy it," and it is shown that he did buy some straw and hay, but this was done before he got his deed. He purchased the corn at the sale by the administrator, but this was done subject to an agreement that the rights of the parties should not be affected by this sale.

It is insisted that any right which appellant has should be enforced in an independent suit at law against the tenant. It is true, of course, that the tenant would be entitled to a day in court before his liability for rents could be fixed, and it is no doubt true that he could not properly be made a party to this litigation for that purpose, as this would involve the bringing in of new parties and the determination of new issues, which would change the nature of the cause of action. But the tenant is not a necessary party here. There is no question about the nature and extent of his liability, and no judgment of any kind is asked against him. This litigation now involves a fund in the hands of the commissioner, and all of the parties who claim an interest in the fund are before the court. The tenant claims no interest in this fund, and is not concerned about any decision which the court may render.

It is very earnestly insisted that appellant is estopped from claiming the rents, and this appears to be the principal question in the case. It is insisted that the chancellor's finding that announcement was made that

the crops were reserved from the sale is not against the preponderance of the evidence. It may be assumed that such is the case, and yet we think that finding would not be controlling. The decree made no reservation, and the authority of the commissioner relates to its provisions. The deed is made the final evidence of the property and the rights conveyed, and no reservation is found there. It is true the notice itself contained the reservation set out above. But if this notice was controlling, we think it insufficient to reserve the rents. It is not so stated in the notice. The language employed was that of the officer making the sale, and the reservation there contained relates only to the question of possession. It is not recited that the purchaser would not get the rents. Of course, it is generally true that the right to the rents follows the right to the possession, but here the right of possession was in the tenant, and the notice undertook to say when and for what purpose the purchaser might share the possession with the tenant. The right of Chambers to his interest in the crops grown during the year 1914 could not be affected by any act of the parties nor, for that matter, by an order of the court.

It is settled that until confirmation by the court, a sale made by a commissioner, under a decree of court, is not final and complete so as to pass the title to the property sold, and that such sale may be set aside before confirmation thereof, upon good and valid grounds. Still the purchaser at such a sale does not acquire a mere option, but a right to a deed, which becomes perfect upon the confirmation of his purchase, and which, if confirmed, relates back to the time of his purchase, and the deed to him conveys such interests as he would have acquired if he had received his deed at the time of his purchase. *Brasch* v. *Mumey,* 99 Ark. 324; *Robertson* v. *McClintock,* 86 Ark. 255. In the early case of *Gibbons* v. *Dillingham,* 10 Ark. 9, it was held that, where a landlord leases land and afterwards conveys it in fee, without reservation of the growing crops, his interest in such crops passes to

the purchaser. *Latham* v. *First National Bank,* 92 Ark. 315.

If there was no reservation of the right to the rents, then the deed of the commissioner conveyed to the purchaser that interest which a deed from the heirs, as of that date, would have conveyed. The crop at that time had not matured and had not been gathered, and such a deed would have conveyed the entire interest of the landlord in the rents, and as we are of the opinion that the reservation set out above in the notice of sale was insufficient to reserve the right to the rents, we must hold that this right passed to appellant under his purchase and deed.

The decree of the court below will, therefore, be reversed and the cause remanded with directions to enter a decree in accordance with this opinion.

THE NATIONAL TRUST & CREDIT COMPANY *v.* POLK.

Opinion delivered February 14, 1916.

1. EVIDENCE—RECEIPT—PAROL EVIDENCE—PAYMENT.—A written receipt may be contradicted by parol testimony, being only *prima facie* evidence of its own recitals.
2. ASSIGNMENTS—CONTRACT FOR BENEFIT OF THIRD PERSON.—A. purchased a mercantile business from B., and, as part of the price, agreed to pay certain of B.'s debts. *Held,* A. was liable to the assignee of B.'s creditor.
3. ASSIGNMENTS—CONTRACT FOR BENEFIT OF THIRD PARTY.—Under the evidence, it was for the jury to say whether the purchaser of a certain mercantile business assumed payment of certain of the seller's debts.

Appeal from Clay Circuit Court, Western District; *J. F. Gautney,* Judge; reversed.

F. G. Taylor and *C. T. Bloodworth,* for appellant.

1. The court erred in holding that the receipt had any binding force or effect as to the rights of appellant as against Polk or the bank. If the receipt is not a fraud then it is a mistake and evidence is always admissible to show that a receipt is a fraud or mistake. 93 Ark. 383. It did not at least bind the appellants.

2. Of course the agreement between J. M. Hawks and W. D. Polk by which the sale of the stock of goods was consummated with an additional agreement that the debts of Hawks should be paid from the purchase price of the goods by Polk, was made for the benefit of third parties. It was binding and the third parties could maintain a suit. 46 Ark. 132; 31 *Id.* 155.

3. The court erred in granting the peremptory instruction. 91 Ark. 337; 101 *Id.* 22. The court was misled by 93 Ark. 383, as there is no similarity between that case and this. The evidence offered to vary the written receipt was clearly incompetent.

The judgment should be reversed.

C. L. Daniel and *T. J. Crowder,* for appellees.

1. The receipt is conclusive and oral testimony was not necessary or even competent. 93 Ark. 383. There is no testimony to show fraud or mistake. The receipt was not a new contract, but only evidence of the contract previously made.

2. On the whole the judgment was correct and should be affirmed.

McCULLOCH, C. J. Appellant's assignor, the Marx-Gaunt Co. was a creditor of one J. M. Hawks and appellant instituted this action against W. D. Polk, C. E. Skinner and the Bank of Corning (also including said J. M. Hawks as a defendant) to recover the amount of said indebtedness which it was alleged the other defendants, as a part of the consideration for the purchase of a stock of merchandise from Hawks, agreed to pay. Hawks was engaged in the mercantile business at Corning, Arkansas, and in the early part of the year 1913, sold the business either to Polk or to Skinner or to the Bank of Corning, there being some conflict in the testimony as to which of said parties was the real purchaser. It is alleged in the complaint that the sale was to Polk and that the latter agreed with Hawks, as a part of the purchase price, to pay off all of Hawks' indebtedness pertaining to the business, including the debt to appellant's

assignor. Each of the defendants named above, except Hawks, filed an answer denying that there was any agreement to pay the debt of Hawks.

(1) There was a trial before a jury and appellant attempted to prove by Hawks that the sale of the business was to W. D. Polk, and that the latter agreed, as a part of the consideration, to pay his other indebtedness pertaining to the business, including the debt to Marx-Gaunt Company, and that testimony was sufficient to warrant a finding to that effect. On the cross-examination of Hawks, the defendants proved that he had signed a certain receipt to C. E. Skinner, which was introduced in evidence as follows:

"Corning, Arkansas, March 31, 1913.

Received this date of C. E. Skinner, twelve thousand, two hundred fifty-eight and 86/100 dollars in full payment of my interest in the J. M. Hawks stock of merchandise, now known as J. M. Hawks & Co.

"The above payment has been applied as follows: Two thousand, six hundred twenty-one and 50/100 dollars paid to bank of Corning to take up my three notes for the W. F. Barnes stock of merchandise, the receipt of which notes cancelled is hereby acknowledged, and nine thousand, six hundred thirty-seven and 36/100 dollars paid to the Bank of Corning to the credit of my account.

"(Signed) J. M. Hawks."

The defendants introduced no testimony, but upon their motion the court peremptorily instructed a verdict in favor of the defendants on the ground that the receipt constituted a written contract, which was the sole evidence of the agreement between the parties, and that it could not be contradicted by oral testimony.

Counsel for the defendants rely upon the case of *Cache Valley Lumber Co.* v. *Culver Co.*, 93 Ark. 383, as sustaining the trial court's ruling, but we are of the opinion that the doctrine of that case does not apply to the facts of the present one. In that case there was a written assignment and release executed by the Culver Company to the Cache Valley Lumber Company, covering "all

rights, choses in action, credits and demands" of the assignor against the assignee, and this court decided that oral testimony was not admissible to establish the fact that there was an agreement to omit from the contract a certain demand. In other words, the release in that case was held to be a contract, the terms of which could not be contradicted by oral testimony, and we entertain no doubt now of the correctness of that decision. In the present case the instrument relied on is nothing more than a receipt for the alleged consideration for the purchase of the stock of goods. It does not constitute the sole evidence of the contract between the parties as to the transaction which formed the basis of the consideration for which the money was paid. The receipt was, in other words, only *prima facie* evidence of its recitals and could be contradicted by other testimony. *Greer* v. *Laws,* 56 Ark. 37; *J. H. Magill Lumber Co.* v. *Lane-White Lumber Co.,* 90 Ark. 426.

(2) Hawks testified that the receipt was executed a considerable length of time after he had made the sale of the stock of goods and business to Polk, and that he merely signed it at the request of Polk, as communicated to him by Skinner. If it be true, as alleged in the complaint and testified to by Hawks, that Polk purchased the property and agreed as a part of the consideration to pay certain debts, a subsequent receipt signed by Hawks, and reciting that the amount named therein was in full payment of the price of the stock, would not release Polk from the obligation of his contract. If he entered into the contract to pay other debts of Hawks, he is liable under the doctrine announced by this court in *Hecht & Imboden* v. *Caughron,* 46 Ark. 132.

(3) We are of the opinion that there was sufficient evidence to warrant a submission of the issue to the jury, insofar as concerns the alleged liability of W. D. Polk. There is no evidence tending to show that an agreement to pay the debts was made either by the Bank of Corning or by Skinner, and no error was, therefore, committed as to them.

No question has been raised as to the failure of appellant to make its assignor a party to the action (the cause of action being assignable under the statute). Kirby's Digest, section 509; *St. L., I. M. & S. Ry. Co.* v. *Camden Bank,* 47 Ark. 541.

The judgment is reversed as to W. D. Polk and the cause remanded for a new trial.

JUDKINS v. STATE.

Opinion delivered February 21, 1916.

1. CRIMINAL LAW—FALSE PRETENSES—INDICTMENT.—The indictment held to charge merely the offense denounced under Kirby's Digest, § 1689, of obtaining a "right in action" by false pretenses.

2. CRIMINAL LAW—FALSE PRETENSES—PROOF OF FELONY.—In a prosecution for the procuring the surrender of a "right in action" by false pretenses, the indictment *held* to allege the value of the property surrendered, and *held* also that it was only necessary for the State to show that the value of the property amounted to the sum of $10 in order to prove that the offense charged constituted a felony, and the jury had the right to exercise their general knowledge of values to arrive at the conclusion that the property described was of at least that amount of value.

3. CHATTEL MORTGAGES—RECORD—NOTICE.—A chattel mortgage, recorded in a county other than that of the mortgagor's residence, is not valid as notice to third parties, but an unrecorded mortgage is good as between the parties.

4. FALSE PRETENSES—RELEASE OF LIEN VALID BETWEEN THE PARTIES.—The lien of a mortgage being effective between the parties, it constitutes a criminal offense to obtain its release by means of false representations, even though the mortgage was not properly recorded.

5. FALSE PRETENSES—PROCURING SURRENDER OF "RIGHT IN ACTION"—USURIOUS DEBT.—One who obtains from another, by false pretense, the surrender and release of a written obligation which on its face constitutes a valuable right of action, can not be heard to say that it is no offense under the law, because the right could be avoided by a plea of usury.

Appeal from Pope Circuit Court; *M. L. Davis,* Judge; affirmed.

U. L. Meade and *John B. Crownover,* for appellant.

1. The demurrer to the indictment should have been sustained. (1) The indictment indefinitely charges two offenses. Kirby's Digest, § § 1689, 2231; 96 Ark. 237; 50 *Id.* 427; 26 *Id.* 323; 94 *Id.* 226; (2) it charges no value. Kirby's Dig., § 1689; 94 Ark. 242; 38 *Id.* 555; (3) it is vague indefinite and uncertain. Kirby's Dig., § § 2227-2243.

2. The court should have required the State to elect. Kirby's Dig., § 2230; 36 Ark. 55; 32 *Id.* 203; 48 *Id.* 94.

3. Instructions 1 and 2 given for the State were error. They are multifarious, vague and redundant, thereby confusing the jury. 37 Ark. 593; 71 *Id.* 38. An instruction though a correct statement of law in the abstract, but not applicable to the evidence should not be given. 84 Ark. 128; 99 *Id.* 648; 82 *Id.* 324; 34 *Id.* 467; 36 *Id.* 242; 54 *Id.* 336; 13 *Id.* 317; 70 *Id.* 441; 63 *Id.* 177. It was prejudicial in that it only submitted * * * the value of the note and property in the mortgage amounting to more than $10. Kirby's Dig., § § 1689, 1826.

4. Hoffman was not injured and lost nothing by reason of the false representations, if false. 50 Ark. 427; 96 *Id.* 237. There must be a false pretense, with intent to defraud. 102 Ark. 451. A mortgage (chattel) must be filed in the county of the mortgagor's residence. Kirby's Dig., § 5395. Nothing of value was obtained.

5. Between conflicting presumptions that which favors the accused prevails. 97 Ark. 212; 34 *Id.* 511; 59 *Id.* 413.

6. The note to Hoffman was void for usury and no false representations in regard to the security were criminal. 55 Ark. 143; 55 *Id.* 268; 48 *Id.* 479; 55 *Id.* 318, 54 *Id.* 155; 52 *Id.* 373; 63 *Id.* 249; 54 *Id.* 50, etc. A fraudulent intent without injury is not the subject of judicial cognizance. 43 Ark. 454. Instructions overlooking one issue in a case are misleading. 77 Ark. 201; *Ib.* 128.

Wallace Davis, Attorney General and *Hamilton Moses,* Assistant, for appellee.

1. The demurrer was properly overruled. It is sufficient when the offense is stated with such certainty that the accused knows the crime with which he is charged, and the court and jury the issue to be tried, etc. 102 Ark. 454; 98 *Id.* 577; 95 *Id.* 48; 84 *Id.* 487; Bishop, New Cr. Law, § 163; Kirby's Dig., § § 2243, 2228; 95 Ark. 61.

2. Two offenses are not charged. 38 Ark. 543, 547; 38 *Id.* 519; 47 *Id.* 492; 12 *Id.* 65. It merely alleges a *series* of facts constituting *one* offense. 111 Ark. 215; 114 *Id.* 38; 98 *Id.* 578. It is not necessary to prove all the false pretenses, etc., but only a material portion of them. 35 Ark. 396; 36 *Id.* 242; 96 *Id.* 237.

3. There is no error in the instructions given for the State. 61 Ark. 157; 102 *Id.* 451; 65 *Id.* 222; 63 *Id.* 177; 70 *Id.* 441; 104 *Id.* 142; 101 *Id.* 570. It is not necessary to give more than one correct instruction upon the theory of reasonable doubt. 62 Ark. 494; 80 *Id.* 201.

4. Usury is not a valid defense. 51 Ind. 11; 105 Ga. 606; 167 Mass. 144; Wharton, Cr. Law, (11 ed.), vol. 2, § 1661, Rapalje, Larceny, etc., § 475; 172 Mass. 248; 36 Pac. 952; 135 Cal. 266; 38 Atl. 847; 150 Ill. 248; 32 Ind. 62; 96 N. E. 799. The case was properly submitted to the jury and the proof was positive as to the crime.

McCULLOCH, C. J. Appellant was convicted under an indictment which charged him with obtaining from one J. M. Hoffman a promissory note in the sum of $300 and a certain chattel mortgage on personal property to secure the same, by virtue of a false representation concerning the value of other security given in lieu thereof. It is charged in the indictment that appellant was indebted to Hoffman in the sum of $370, evidenced by a promissory note for $350 and bearing 10 per cent. interest, and to secure the payment thereof he executed to Hoffman a chattel mortgage on his one-third interest in a cotton gin and grist mill, one horse, three cows and calves, and one John Deere binder, all of the value of $370.41, and that he induced Hoffman to surrender said

note and release said chattel mortgage and accept in lieu thereof another mortgage on a tract of land by a false and fraudulent representation that there were only two prior mortgages on the land, when in fact there were three prior mortgages given to secure a sum equal to or in excess of the value of the land.

On the trial of the case, the State adduced testimony tending to establish the allegations of the indictment. The testimony showed that Hoffman held the note of the appellant for the sum named, and the chattel mortgage to secure payment of the same, and that appellant induced him to surrender the note and chattel mortgage and to accept a new note secured by a mortgage on land, upon representations that the land was unencumbered except by a mortgage to a certain loan company and to another party when in truth and in fact a third party named Hendrix also held a mortgage on the land for a large sum.

Appellant adduced testimony tending to show that he made no false representations, but correctly represented to Hoffman that there were three prior mortgages on the land. Appellant also introduced proof tending to show that the original note, which was surrendered pursuant to the alleged false representations, was void on account of usury. The proof tended to show that the note contained a stipulation for interest at the rate of 10 per cent. per annum from date, and that in addition to that appellant gave to Hoffman a cow of the value of about $20, and agreed to release an account for repairing a well in the sum of $5.

(1) It is contended in the first place that the indictment was void because there was an attempt therein to charge two offenses. We are of the opinion that only one offense was charged in the indictment. It is true that there was an allegation to the effect that Hoffman was induced to sign a note to the clerk and recorder, directing him to satisfy the records of the mortgage, but that did not constitute an attempt to charge a separate offense

but was only put in as a part of the allegations showing the surrender of the securities.

The statute makes it an offense for one to "designedly, by color of any false token or writing, or by any other false pretense, obtain a signature of any person to any written instrument, or obtain from any person any money, personal property, right in action, or other valuable thing or effects whatever." Kirby's Digest, section 1689.

If it be conceded that this section prescribed separate and distinct offenses, rather than different modes of committing the same offense, yet it does not follow that this indictment even attempted to set out two modes of committing the alleged offense, for we think it merely constitutes a charge that the surrender and the cancellation of the securities was obtained; and if that be true, then it constituted an offense under that part of the statute which denounces the obtaining from any person any "right in action" by false pretense.

(2) Again, it is insisted that the indictment is defective in failing to allege the value of the security surrendered, but an inspection of the indictment reveals the fact that no such omission is found there. It is alleged that the secured debt was evidenced by a note in the sum of $350, with accrued interest, and that the property described in the chattel mortgage, towit: a third interest in a cotton gin and grist mill, and one horse, three cows and calves, and one John Deere binder, was of the value of $370.40, and that Hoffman was induced by said false pretense to surrender said note and to release said mortgage lien. This constituted an allegation of the "right of action" which appellant obtained by reason of the false pretense. There was no testimony introduced concerning the value of the property described in the surrendered chattel mortgage, but in order to prove that the offense constituted a felony it was only necessary for the State to show that the value of the property amounted to the sum of $10, and the jury had the right to exercise their general knowledge of values to arrive

at the conclusion that the property described was of at least that value.

(3) The proof shows that appellant resided in Perry County, Arkansas, and that the chattel mortgage was recorded in Conway County. The record was, therefore, insufficient to constitute notice to third parties, for the statute provides that a mortgage on personal property must be recorded in the county in which the mortgagor resides. Kirby's Digest, section 5395.

But an unrecorded mortgage is good between the parties thereto and constitutes a lien which may be enforced as against the mortgagor. *Smead* v. *Chandler,* 71 Ark. 505.

(4) Appellant requested the court to instruct the jury that if the recording of the mortgage in a county other than where the mortgagor resided gave it no validity as a lien, that obtaining an order on the recorder for the surrender and cancellation of the mortgage did not constitute an offense. The instruction was obviously incorrect and the court properly refused to give it. The lien of the mortgage being effective between the parties, it constituted an offense to obtain its release by means of false representations, even though it was not properly recorded.

(5) The principal ground urged for reversal of the judgment is that the court erred in refusing to submit to the jury the question whether or not the original debt secured by the surrendered mortgage was void on account of being usurious, and in refusing to instruct the jury that if the debt was usurious the obtaining by false pretense of the surrender of the mortgage did not constitute an offense. We find very little authority bearing on that question. The nearest approach to a decision of that question is a Missouri case. *State* v. *Clay,* 100 Mo. 571, 13 S. W. 827. It was there held that it was not an offense to obtain from a married woman, by false pretense, a written contract granting an option for the sale of her land, for the reason that such a contract was not binding on a married woman and it was, therefore, not

a thing of value. The statute of Missouri on that subject is not precisely the same as our statute, though it is to some extent similar. It provides that it shall constitute an offense to obtain from any person, by false pretense, "any money, personal property or other thing of value," but does not, as our statute does, embrace the words "right or action," Now, a void obligation may not in fact constitute a thing of value, but it does constitute a "right or action" within the meaning of the statute. A right of action may be asserted under an usurious contract and recovery may be had unless a plea of usury is interposed, therefore the contract constitutes a right of action within the meaning of the statute. Especially is that true where the usury is not revealed in the face of the contract. The party who surrenders a contract valid on its face by reason of a false pretense is thus deprived of asserting a claim under the contract, and that is what was intended to be reached by the statute. *Quertermous* v. *State,* 114 Ark. 452.

"It is no defense," said Mr. Wharton, "that the prosecutor was not injured." 2 Wharton on Criminal Law, section 1503.

And it is generally held that "one who obtains money by false pretenses is liable to punishment, though the person from whom it was obtained parted with it in furtherance of an illegal purpose." Rapalje on Larceny and Kindred Offenses, section 435.

The principles above announced are not precisely the same as those involved in the present case, but they are applicable to the extent that one who obtains from another, by false pretense, the surrender and release of a written obligation which on its face constitutes a valuable right of action, can not be heard to say that it is no offense under the law because the right could be avoided by a plea of usury. We are therefore of the opinion that the court did not commit error by refusing to submit that question to the jury.

Judgment affirmed.

SMITH, J., dissents.

DUNCAN v. LIDDLE.

Opinion delivered February 28, 1916.

INFANTS—SALE OF LAND FOR REINVESTMENT—JURISDICTION OF CHANCERY COURT—RATIFICATION BY INFANT.—The chancery court has no jurisdiction to order the sale of a minor's land for reinvestment, and its decree rendered in an attempt to exercise such jurisdiction is void, and a purchaser thereunder acquired no title, and the acts of the minor in accepting the proceeds of the sale after majority, held insufficient to render the sale valid.

Appeal from St. Francis Chancery Court; *Edward D. Robertson,* Chancellor; reversed.

STATEMENT BY THE COURT.

The plaintiffs, John Duncan, a minor whose disabilities had been removed by an order of court, and James Duncan, a minor by his next friend, brought suit for the possession of certain lands in St. Francis County, conveyed to them and their mother by their father Elijah Duncan, in August, 1902. The deed recites: * * * "I hereby grant, bargain, sell and convey unto the said Emma F. Duncan, John Duncan and James Duncan all my right, title, interest, etc." * * * "The interest of said Emma F. Duncan herein intended to be conveyed is to continue during the natural term of her life or widowhood, should she survive me, then at her death or marriage all the title to said lands shall pass to the said John Duncan and James Duncan and to any other children that may be born to Emma F. Duncan by her present marriage with said Elijah Duncan, share and share alike." The habendum "To have and to hold said lands and lots to the said Emma F. Duncan and James Duncan, as aforesaid and to the heirs and assigns of the said John Duncan and James Duncan."

The defendant answered admitting that the father of plaintiffs had been the owner of the land and that he conveyed same by the deed as alleged in the complaint under the terms of which it alleged a life estate was conveyed to the mother with contingent remainder therein to the plaintiffs. That upon the petition of plaintiffs by

their father as next friend, and their mother and father the lands were ordered sold by the chancery court of St. Francis County for the benefit of petitioners and the proceeds reinvested in other lands; that they were duly sold to L. E. Davenport for a consideration of $5,500; that Davenport transferred his certificate of purchase to H. W. Robinson and that the court confirmed the sale and ordered the deed made to said Robinson by its commissioner, which was done upon the payment of the purchase price by him.

It was alleged that the defendants paid the purchase money to the commissioner, which was used by plaintiffs father for the purchase of certain other lands in Lee County, describing them, which were conveyed to their mother and to them. A copy of the deed was exhibited. That Emma F. Duncan, the mother, conveyed her interest in the last purchased lands to one J. F. McDougal, for a consideration of $1,500 and that plaintiffs also conveyed to McDougal an undivided two-thirds interest in said Lee County lands for $3,000, of which $500 was paid in cash to the plaintiff John Duncan and two notes of $500 each were executed to him due November 1, 1911 and 1915 and one note was executed to Jas. Duncan due April 1, 1915, with interest, which was made non-negotiable. That the two $500 notes of John Duncan's were paid to him in 1911; that the entire $1,500 was received by him from J. F. McDougal after he was of full age and had full knowledge that said lands in Lee County were bought with the proceeds of the St. Francis County lands sold by order of the chancery court for reinvestment and that his acceptance of said purchase money was a ratification of the sale and estopped him from claiming any title to the lands in controversy. That James Duncan in the year 1912 after becoming of full age, made demand upon McDougal for the payment of the annual interest due upon the $1,500 note and thereby ratified the chancery sale of the St. Francis County lands and that said James Duncan still had and held the $1,500 note given by McDougal as part of the purchase money for the Lee

County lands which were bought with the proceeds from the sale of the St. Francis County lands as a valid demand against the maker.

It was also alleged that defendant had made valuable improvements upon the land at an expense of $1,600 and paid the taxes thereon, since the year 1906; much of the improvements having been made after plaintiff John Duncan became of age and James Duncan was old enough to understand his rights and both knew the improvements were being made and the taxes paid and made no objection thereto. That the improvements were made and the taxes paid in good faith, relying upon the validity of the chancery court proceedings and in the honest belief that they had acquired title to the lands thereunder.

They alleged further that they were entitled to be reimbursed for the purchase money paid for the lands if plaintiff recovered them, that an accounting would be necessary and moved to transfer the cause to equity, which was done.

The petition for the sale of the lands with the decree, report of the commissioner, the confirmation of the sale and deed, were all introduced in evidence and there was testimony tending to show that a part at least of the proceeds realized from the sale of the lands in controversy was invested in the Lee County lands, which were afterwards sold by the plaintiffs as alleged in the answer.

Plaintiffs excepted to the documentary evidence filed by defendants, relating to the decree and sale of the St. Francis County lands and the deed executed, because it appeared therefrom that the chancery court of St. Francis County was without jurisdiction of the matter, which exceptions were overruled.

The court found that the defendants were the owners of the lands and decreed accordingly, from which decree this appeal is prosecuted.

J. W. Story and *Walter Gorman,* for appellant.

1. A court of equity has no power to order the sale of a minor's land for reinvestment. 98 Ark. 63. This is

now a law of property in this State and should not be disturbed.

2. No estoppel was pleaded nor found by the chancellor. 7 N. E. 199; 18 *Id.* 392; 68 Ark. 150; 99 *Id.* 260; 82 *Id.* 367; 89 *Id.* 349.

R. J. Williams, H. F. Roleson and *W. W. Hughes,* for appellees.

1. Appellants are estopped by retaining the proceeds of the sale of the lands. 2 Herman on Estoppel, 1259; 38 Am. Rep. 13; 60 Miss. 420; 21 N. E. 538; 11 S. W. 506; 15 Ark. 74; 30 N. W. 583; 22 Cyc. 605; 26 L. R. A. 177 and note; 21 Am. Dec. 589; 9 Wall. 617.

2. Chancery had jurisdiction. John and James did not take an absolute vested estate under the deed. There was a life estate in the wife and mother and a contingent remainder in John and James and any unborn children. 105 Ark. 587; 3 Washburn on Real Prop. (6 ed.), § § 2271, 2360; 94 Ark. 615; 30 N. J. 513, 558.

3. The probate court had no power to make the sale. 33 Ark. 425; 47 *Id.* 460; 52 *Id.* 341; 71 *Id.* 218; Const. Art. 7, § 34; Kirby's Dig., § § 3794, 3801. Hence equity only can furnish a remedy. 1 Pom. Eq. Jur. (3 ed.), § § 423-4; 30 Ark. 120; 95 *Id.* 18; 128 S. W. 581.

KIRBY, J., (after stating the facts). It is properly contended that this case is controlled by *Watson* v. *Henderson,* 98 Ark. 63. It was there held that the chancery court was without jurisdiction to order the sale of the lands of a minor for reinvestment and the proceedings of the St. Francis chancery court ordering the sale of the lands herein being without jurisdiction, its decree was void and plaintiffs acquired no title to the lands through the deed of its commissioner conveying same in accordance with the proceedings and decree therefor.

It is insisted for appellees that under the original conveyance from Elijah Duncan, the father of appellants to them and their mother, they acquired only a contingent remainder in the lands and that the chancery court had jurisdiction to make the sale within the doc-

trine announced in *Bedford* v. *Bedford,* 105 Ark. 587. It is there held that courts of equity have jurisdiction to order the sale of contingent remainders for reinvestment, notwithstanding one of the remaindermen is an infant and that its jurisdiction is inherent and not derived from or conferred by statute.

Under the conveyance from Elijah Duncan the plaintiffs John Duncan and James Duncan acquired a fee simple estate in the lands conveyed as tenants in common of an undivided one-third each and the mother's one-third contingent upon the termination of her estate by death or remarriage and subject to be diminished by the birth of other children. The possibility of further issue of the marriage was determined upon the death of Elijah Duncan and the estate of the mother upon her remarriage long before suit brought herein. The exclusive jurisdiction to sell the lands of the minors for reinvestment was in the probate court as already held in *Watson* v. *Henderson, supra,* and the chancery court having no jurisdiction in the matter, the whole proceeding therein was void and the purchasers at the sale acquired no title to the lands. It is insisted in any event that the plaintiffs acquired title to certain lands in Lee County purchased with the proceeds of their St. Francis County lands realized from the void sale thereof and with full knowledge that such was the fact, disposed of said Lee County lands after coming of age and thereby ratified the chancery court's action in making the sale and are estopped to deny the defendants right to possession thereunder on that account.

The testimony however does not show that the entire amount realized from the sale of the lands in St. Francis County was invested in said other lands in Lee County and neither can it be said to establish the fact that said lands were sold by the minors and the proceeds enjoyed by them after knowledge of the unauthorized sale of their St. Francis County lands by the chancery court nor that they still had the consideration therefor at the time of the institution of this suit nor

had they disposed of it. The defendants were in nowise induced to make the purchase of the lands or in any way misled into a change of attitude or position, so far as said purchase was concerned, by any acts of the minors after coming of age and the facts are not sufficient to constitute an estoppel against plaintiffs and can not constitute such a ratification of the void sale as would make it effectual against them.

The chancellor erred in finding otherwise and the decree is reversed and the cause remanded with directions to render a decree in accordance with this opinion, and for further proceedings in determining appellees' right to compensation for betterments. It is so ordered.

TURNER v. COTTON.

Opinion delivered March 20, 1916.

JURISDICTION OF COURT—HOW DETERMINED.—The jurisdiction of the court must be determined by the allegation of the complaint, and not by the evidence subsequently adduced.

Appeal from Yell Circuit Court, Dardanelle District; *Marcellus L. Davis,* Judge; affirmed.

John M. Parker, for appellant.

1. The circuit court was without jurisdiction, for the justice of the peace had none. The claim of plaintiff was largely in excess of $300. 57 Ark. 531; 43 *Id.* 101; 57 *Id.* 257; 52 *Id.* 103; 108 *Id.* 541; 33 *Id.* 31; 24 *Id.* 177; 35 *Id.* 287; 43 *Id.* 230. A plaintiff can not separate the items of his claim and sue on one or more items less than the whole so as to confer jurisdiction. 24 Ark. 177; 35 *Id.* 287. Jurisdiction may be proven by testimony. 43 Ark. 230.

2. The evidence does not sustain the verdict. The rent was paid and the affidavit of plaintiff made no claim for supplies or articles furnished by the landlord. Kirby's Digest, § § 4565, 4682; 29 Ark. 544.

3. The court erred in its instructions to the jury.

The appellee, *pro se.*

1. The evidence supports the verdict and there is no error in the instructions. Besides appellee did not object to the evidence nor the instructions and it is now too late. 41 Ark. 535; 44 *Id.* 103; 50 *Id.* 348; 51 *Id.* 324; *Ib.* 140; 52 *Id.* 180. No exceptions were saved. *Ib.*

2. It is the amount sued for, not the amount proved, that determines jurisdiction. 7 Ark. 260; 60 *Id.* 146; 62 *Id.* 208.

3. The grounds of the attachment were not controverted. Kirby's Digest, § § 412-13-14; 34 Ark. 707; 85 *Id.* 605; 90 *Id.* 454.

McCULLOCH, C. J. The plaintiff, W. E. Cotton, owns a farm in Yell County, Arkansas, and rented it to the defendant, G. W. Turner, for the year 1914, for a certain share of the crop gathered. This is an action to recover the sum of $300 for the plaintiff's share of the crop and to enforce a landlord's lien. The suit was instituted before a justice of the peace, and upon the filing of the proper affidavit and bond an order of attachment was issued under which the crop was seized. The case was tried before a jury in the circuit court, on appeal from the justice of the peace, and the verdict was in plaintiff's favor for the sum of $200.

The principal ground urged here for reversal is that the evidence does not sustain the verdict. In fact, most of the numerous assignments of error may be disposed of in determining the legal sufficiency of the evidence. There is a sharp conflict in the testimony, and we think that it is sufficient to support the verdict.

Another contention is that notwithstanding the suit is for but $300, the evidence adduced by the plaintiff tends to show an indebtedness considerably in excess of that amount, and that the court was without jurisdiction for that reason. The jurisdiction of the court must be determined by the allegation of the complaint and not by the evidence subsequently adduced. *Lafferty* v. *Day*, 7 Ark. 260. The suit was to enforce an unliquidated liability, and the allegation of the complaint is that the

amount due for rent was $300. Therefore the allegations control for the purpose of fixing the jurisdiction of the court.

Some of the assignments of error relate to the instructions of the court, but exceptions were not properly saved, and other assignments are not of sufficient importance to discuss.

After a careful consideration of the points raised in the argument, we are of the opinion that the case was properly tried and that the evidence was sufficient to support the verdict. Therefore the judgment must be affirmed, and it is so ordered.

DETROIT FIRE & MARINE INSURANCE COMPANY *v.* STEWART.

Opinion delivered March 20, 1916.

1. GARNISHMENT—GARNISHMENT OF DEBT DUE A TRUSTEE IN HIS REPRESENTATIVE CAPACITY.—M. assigned a cause of action which she held against appellant to one S. as trustee for collection. C. brought garnishment proceedings against appellant, for an individual debt of S. to C. *Held*, the garnishment based upon an individual debt of S. would not affect S.'s suit against appellant in his capacity as trustee.

2. GARNISHMENT—CONFLICT OF LAWS.—A judgment debtor is not subject to garnishment in the courts of a State other than the one wherein the judgment against him is rendered.

3. CONFLICT OF LAWS—JUDGMENT—FOREIGN GARNISHMENT.—A debt, covered by a judgment, is beyond the reach of a writ of garnishment issued in a foreign jurisdiction.

4. GARNISHMENTS—ANSWER OF GARNISHEE.—A garnishee must show in his answer, not only that the fund has been assigned, or is exempt, but he must disclose all the facts relative to the interest of strangers to the suit, whether the same be existing liens, equities under special contract, or any other interest whatever; then such claimants may interplead as parties, and have their rights adjudicated.

Appeal from Miller Circuit Court; *Geo. R. Haynie*, Judge; affirmed.

Glass, Estes, King & Burford, (of Texas) and *J. D. Head,* for appellant.

1. The Texas court was a superior court and had complete jurisdiction. 1 Black on Judgments (Ed. 1891), § 286, p. 358; 52 Tex. 603; 70 *Id.* 115; 80 S. W. 872; 149 *Id.* 1073. The judgment is entitled to full faith and credit and can not be attacked collaterally. *Supra;* 2 Black on Judg., § 937, p. 1118; 1 *Id.,* § 287, 859, 861, 890.

2. Judgments of a sister State are conclusive. 48 Ark. 50.

3. The debt was subject to garnishment in Texas. 115 S. W. 275; 91 Ark. 252; 141 S. W. 595. The matter is *res adjudicata* and the former judgment is a complete bar. Black on Judg., § 865; 55 Ark. 633.

McCULLOCH, C. J. This is an action instituted on an insurance policy issued by defendant, Detroit Fire & Marine Insurance Company, to recover the amount of damage to the insured property, a dwelling house situated in the State of Texas. The property was owned by Mrs. Kate Mitchell and was insured in her name. Damage was sustained by fire in the sum of $97.43, and after the damage occurred Mrs. Mitchell made a written assignment of the claim to Z. C. Stewart, as trustee for herself and her daughter, Alfrey Mitchell. Stewart, as such trustee, instituted this action against the insurance company before a justice of the peace of Miller County, Arkansas, and recovered judgment for the amount of the claim, which was undisputed. The defendant took an appeal to the circuit court and superseded the judgment by the execution of a bond pursuant to the terms of the statute. Craven & Cage, a copartnership, had previously obtained a judgment against Z. C. Stewart individually in an action for debt before a justice of the peace in Harris County, Texas, and while this suit was pending below Cravens & Cage sued out a writ of garnishment on the said judgment and caused the same to be served upon the defendant insurance company. The garnishee answered and upon its motion Stewart and Mrs. Mitchell and Alfrey Mitchell were made parties and summoned

by publication of a warning order, no personal service, however being made on said parties, nor is there any evidence that they received any information of the pendency of said garnishment proceeding.

The Texas court rendered a judgment against the garnishee, directing the payment over to Cravens & Cage, the plaintiffs in that suit, of the amount due under the policy, and the defendant has pleaded the judgment in the garnishment proceedings as a bar to recovery in the present action. They pleaded the Texas judgment in this action below, but the trial court refused to sustain the plea and rendered judgment in favor of the plaintiff, Z. C. Stewart, in his representative capacity as trustee under the aforesaid assignment to him. The defendant has prosecuted an appeal to this court.

It is contended on behalf of the defendant that in Texas a justice of the peace exercises jurisdiction as a superior court, and that the judgment in the garnishment proceedings is an adjudication of the right of the plaintiff to recover in the present action. Treating the Texas court as a superior court, with complete jurisdiction over the subject-matter of the garnishment proceedings, we are of the opinion that the record in this case does not show enough to bar the plaintiff from recovering, and that the judgment of the circuit court of Miller County was correct. The garnishment against the defendant operated upon an indebtedness to Z. C. Stewart individually. The writ and the subsequent judgment thereon merely substituted the plaintiffs in that action in the place of Stewart, the defendant in that action, and the only issue in that proceeding concerned the alleged indebtedness of the insurance company to Stewart. It did not involve an issue as to indebtedness of the garnishee to a third person, and Stewart in his representative capacity must be treated as a third person.

"It is a self-evident proposition," says Mr. Shinn, in his work on Attachment and Garnishment, volume II, section 727, "that no judgment is *res adjudicata* as to matters which have not been adjudicated. The rights

of no person are *res adjudicata* unless such person has been a party to the proceedings legally determined by the court. * * * If the indebtedness was not to the principal defendant, judgment against the garnishee will not bind his actual creditors. They may thereafter bring suit against him, or their creditors may bring garnishment against the garnishee."

(1) It is true that Stewart and Mrs. Mitchell and Alfrey Mitchell were made parties to the garnishment proceedings and were summoned by publication of a warning order, but they were not bound to take notice of the fact that an indebtedness of the garnishee to Stewart, as trustee, was involved in the controversy, nor indeed was it involved under a writ which commanded the garnishee to answer as to his indebtedness to Stewart individually. The issue in the two proceedings being different, the judgment of the Texas court against Stewart individually does not bar his right to recover in the present action when suing in his representative capacity as trustee of an express trust.

(2-3) There is still another reason why the circuit court was correct in holding that the garnishee was not discharged from liability in this action. It is the universal rule of the courts that a judgment debtor is not subject to garnishment in the courts of a State other than the one wherein the judgment against him is rendered. *Wabash Rd. Co.* v. *Tourville,* 179 U. S. 322. It does not appear that the defendant, when summoned as garnishee, pleaded the Arkansas judgment as it was the bounden duty of the garnishee to do. The judgment of the Arkansas justice of the peace had been appealed from and the judgment superseded, but the supersedeas operated, not as an extinguishment of the judgment, but merely as a suspension of its enforcement, and the debt covered by the judgment was beyond the reach of a writ of garnishment issued in a foreign jurisdiction. The original debt had become merged in the judgment of the Arkansas justice of the peace and it was no longer subject to garnishment in another State. *Wabash Rd. Co.* v. *Tourville,*

148 Mo. 614, 179 U. S. 322. Nor does it appear in this action that the garnishee ever answered, showing that the indebtedness was to Stewart in his representative capacity as trustee of an express trust and not to him individually. It was the duty of the garnishee to make full disclosure of the facts, and in the absence of such a disclosure it can not plead the judgment in the garnishment proceedings as a defense to the suit of a third person.

(4) "The garnishee is under obligation to show in his answer not only that the fund has been assigned or is exempt, but must disclose all facts relative to the interest of strangers to the suit, whether the same be existing liens, equities under special contract, or any other interest whatever; after which such claimants may interplead as parties and have their rights adjudicated." 2 Shinn on Attachment and Garnishment, section 719. See also, Rood on Garnishment, section 217.

The defendant has not shown that it pleaded the facts in the garnishment proceeding, or even that it gave the interested parties actual notice of the pendency of the proceedings. Therefore it is not entitled to plead the Texas judgment, for that reason if for no other,

Affirmed.

DUTY v. JONES.

Opinion delivered March 20, 1916.

1. CONVERSION—PROPERTY IN CONTROL OF CONSTABLE—LIABILITY OF CONSTABLE.—A constable is responsible, to the extent of the injury inflicted, for an unauthorized relinquishment of the control of property in his custody.
2. ATTACHMENTS—LIABILITY OF CONSTABLE—INTERESTS OF CLAIMANTS.—A constable, by levying upon property and taking it into his possession, obtains a special property therein, and is accountable to the parties, to the extent of their respective interests.
3. ATTACHMENTS—LIABILITY OF CONSTABLE—EXTENT.—A constable, who has taken possession of property on attachment, and who improperly relinquishes control of the same, is liable to each party only to the extent of his interest.

Appeal from Lafayette Circuit Court; *Geo R. Haynie,* Judge; judgment modified.

Allen H. Hamiter and *T. D. Crawford,* for appellant.

1. The only question in this case is the sufficiency of the evidence to sustain the verdict. Our contention is that it is not for several reasons. (1) The jury erred in the amount of their verdict. Jones could only recover his interest in the cotton. There is no dispute as to the value of the cotton; it brought $452.97 at seven cents. It was certainly error to allow appellee more than he claimed which was $216.81. But the evidence shows that he was not entitled to that much. 53 Ark. 167.

2. An appeal had been taken and a supersedeas bond filed. This suspended further proceedings on the execution, and released the cotton from the constable's hands. Kirby's Digest, § § 4668-9. Thereafter he was not liable for it. 45 Miss. 408; 1 Houst. (Del.) 594.

3. As to the five bales held under attachment the constable left them in charge of a warehouseman and took a receipt for same and was not liable for their removal or sale. 37 So. 935; 142 Ala. 259; Murfree on Sheriffs, § 961.

4. Plaintiff is estopped. 76 Ark. 570.

Searcy & Parks, for appellee.

1. No objection was raised to the instructions and the verdict is sustained by the evidence. 178 S. W. 372. Stewart was not a party to this suit and Jones' indebtedness to him is not in issue. If the constable converted the cotton, or sold it, or permitted it to be sold without authority of appellee, he was liable. The supersedeas did not release him from this liability. 77 Ark. 504.

2. No agreement to settle with Stewart was proven, and Jones was not estopped. This question was settled by the verdict. No exceptions were saved and the verdict settles all questions of fact in favor of appellee.

McCULLOCH, C. J. Appellee was the tenant of T. J. Stewart for the year 1914 on the latter's farm in Lafayette County, and when the crop was gathered a controversy arose between the two parties as to the amount due the landlord. Stewart sued appellee in October, 1914,

and obtained a judgment before a justice of the peace for a certain amount and caused execution to be issued and placed in the hands of appellant, Duty, who was constable of the township, and the latter served the writ by taking into his possession seven bales of cotton. An appeal was prosecuted by the appellee from that judgment, and a bond was executed superseding the judgment. While that suit was pending in the circuit court, Stewart instituted another suit against appellee in the justice of the peace court and sued out a landlord's attachment, which was by appellant, as constable, levied on five bales of appellee's cotton, making twelve bales in all which came into the custody of appellant as constable.

Before either of those suits was finally disposed of, Stewart sold the cotton, with permission of the constable, as some of the evidence tends to show, and converted the proceeds to his own use. Stewart tendered to appellee the sum of $43, which he claimed represented all the interest appellee had in the cotton, but the tender was declined. Appellee instituted this suit against the constable, and the sureties on his official bond, for the full value of the twelve bales of cotton, alleging that the constable had wrongfully permitted the cotton to be taken and converted by Stewart, and on trial before a jury a verdict was rendered in appellee's favor assessing his damages at the full amount of the value of the twelve bales of cotton. During the pendency of the two suits instituted by Stewart against appellee, those two parties met and attempted to settle their differences. The contention of appellee in the negotiations was that if the cotton should be sold for seven cents per pound, his interest would be $216.81; but Stewart, on the other hand, contended that appellee's interest would only amount to $43 if the cotton be sold at seven cents per pound. It was in fact sold by Stewart for seven cents per pound, and the latter tendered to appellee $43, the amount he claimed was due, but, as before stated, the tender was refused.

It appears to us that the testimony greatly preponderates in favor of Stewart's statement that there was an

agreement between him and appellee that the cotton should be sold for seven cents, and that pursuant to that agreement he made the sale and dismissed the suits, but appellee testified that he did not agree to the sale of the cotton, and that made a sufficiency of testimony to warrant submission of that issue to the jury. The only contention made by appellee, however, is that he was insisting on the amount which he claimed was due him out of the cotton if it was sold at seven cents. He does not claim that the cotton was sold for less than its value, or that he had any objections to the sale at that price, but his sole objection was that he was entitled to the sum of $216.81 in his settlement with Stewart if the cotton was sold at that price. In other words, the undisputed testimony is that the cotton was sold at its full value, and that appellee only claimed that his interest amounted to the sum of $216.81, and we think the contention of appellant is sound that the amount of appellee's recovery should be confined to the actual amount of the interest he had in the property.

(1-3) The constable was responsible to the extent of the injury inflicted, for an unauthorized relinquishment of control of the property in his custody. *DeYampert* v. *Johnson,* 54 Ark. 165. But appellee was only entitled to recover the amount of his interest. The constable, by levying upon the cotton and taking it into his possession, obtained a special property therein and was accountable to the several parties interested in the same to the extent of their respective interests. 2 Freeman on Executions, section 202. His liability was to each party only to the extent of his interest, and for that reason appellee can only recover the value of his interest. This is the rule in all actions for conversion unless the plaintiff has a special ownership which entitles him to recover the full amount. But where the suit is against one who holds under another person, or for another who has such interest, the amount of the recovery must be limited to the value of the interest asserted. *Jones* v. *Horn,* 51 Ark. 19; *DeYampert* v. *Johnson, supra; Cocke*

v. *Cross,* 57 Ark. 87; *Sunny South Lumber Co.* v. *Neimeyer Lumber Co.,* 63 Ark. 268; *Anderson* v. *Joseph,* 95 Ark. 573.

The remainder of the proceeds of the cotton must be treated as having been applied by Stewart in satisfaction of the debt due him by appellee, including that portion of the debt for which judgment was rendered in Stewart's favor by the justice of the peace. It is therefore, unimportant, whether or not Stewart dismissed that suit, for, according to the undisputed evidence, he has received satisfaction and can not enforce the judgment.

It follows that the undisputed evidence only sustains a recovery by appellee for the sum of $216.81, and the judgment in excess of that amount is erroneous and it will be modified so as to reduce it to the amount to which appellee is entitled. There were no exceptions saved to any of the instructions, and assuming that the case went to the jury under proper instructions, we find that the evidence is sufficient to warrant a verdict to the extent of the amount above indicated. The judgment will be modified in accordance with this opinion.

DODSON *v.* CLARK COUNTY LUMBER COMPANY.

Opinion delivered March 20, 1916.

CARRIERS—NEGLIGENCE—RELEASE FROM LIABILITY.—A sawmill company, under its charter, operated a logging road, upon which it carried neither freight nor passengers for hire, and was a common carrier of neither. It permitted plaintiff gratuitously to ride on one of its trains, however, but required him to execute a release, releasing the company from any liability, even for negligence. Plaintiff was injured by negligence and sued for damages. *Held,* he could not recover.

Appeal from Clark Circuit Court; *Geo. R. Haynie,* Judge; affirmed.

H. B. Means and *McMillan & McMillan,* for appellant.

1. It was error to direct a verdict. Railroads are responsible for damages caused by their negligence in

running trains. Art. 17, § 12, Const.; Kirby's Digest, § 6773; 48 Ark. 467. Defendant was operating a railroad. Kirby's Dig., § 6596; Acts 1907, p. 336; 124 S. W. 903.

2. The release was no defense. 94 Ark. 27-37. A railroad can not relieve itself of liability for its negligence by contract; it is against public policy. 94 Ark. 37; 82 *Id.* 441; 119 Ark. 95; 78 Ark. 505; 135 S. W. 635.

3. If appellee was not a public carrier or *common carrier* it was at least a *private carrier for hire.* 155 S. W. 179, 180; 135 *Id.* 639. Defendant carried goods for any and everybody for hire. 78 Ark. 419; 48 *Id.* 460. The case should have gone to the jury under proper instructions. 118 S. W. 178; 87 S. W. 359; 54 S. E. 420; 75 *Id.* 1074; 123 S. W. 961.

McRae & Tompkins, for appellee.

1. Appellee was not a common carrier. 100 Ark. 45. It had a right to limit its liability. 58 Ark. 407, 415; 176 U. S. 505. The contract of release was not void as against public policy. 90 Ia. 265; 24 L. R. A. 647; 70 *Id.* 930, 933; 70 Fed. 201; 82 Ark. 339; 82 *Id.* 339; 101 *Id.* 310; 83 *Id.* 502; 50 *Id.* 397; 111 *Id.* 102; 63 *Id.* 331; 90 *Id.* 308; 101 *Id.* 436.

2. A verdict was properly directed for defendant. It was merely a private carrier and occasionally carried passengers free of charge, and could exempt itself from liability by a release as here. Cases *supra;* 1 Hutchinson on Carriers, § 14; 4 Elliott on Railroads, § 1645, 1397; 98 N. E. 127; 84 U. S. 357; 155 S. W. 179; 149 Ind. 21; 55 L. R. A. 253; 93 N. E. 616; 40 L. R. A. 101; 30 *Id.* 193; 156 Mass. 525; 66 Fed. 506; 155 S. W. 179; 11 L. R. A. (N. S.) 432; 12 Ann. Cases, 732, and note 738.

McCULLOCH, C. J. The defendant, Clark County Lumber Company, is a domestic corporation organized, principally, for the purpose of operating saw mills and planing mills, but under its charter it was also authorized to operate a railroad. The corporation built, in connection with its saw mill, a railroad twelve miles in length running out from Smithton, a point in Clark County,

Arkansas. The road was built out into the timber for the purpose of hauling material to the mill, but the testimony shows that occasionally material was hauled for others. The plaintiff, D. H. Dodson, was injured while he was a passenger on the train, and instituted this action to recover damages.

The material facts are undisputed, and the trial court instructed the jury to return a verdict in favor of the defendant. The plaintiff was getting out heading material near the terminus of the railroad and entered into negotiations with defendant to haul material for him and an agreement was finally reached by the manager of defendant's business, including the railroad, to haul the material for $2 per cord, and there was a further agreement in consideration of the price to be charged that plaintiff should have the right to ride on the train when going to and from the place he was engaged in getting out the material. The defendant was not engaged in carrying passengers, but persons occasionally were allowed to ride without charge. The rule of the company was that no person should be allowed to ride without signing a written stipulation waiving the right to hold the company liable for damages on account of injuries received while being transported over the road.

Plaintiff signed the stipulation, which is in the following words: "I have asked permission to ride the Log Train of Clark County Lumber Company from Smithton, Arkansas, to Good-By, Arkansas, without charge. I know that it does not carry passengers, and is not equipped therefor, and in consideration of permission to ride thereon, I hereby release and discharge said company, its servants or employees from all liability for damages, that may result to me, my heirs or legal representatives, by reason of riding on said train, whether arising from its negligence or not, and hereby assume all risks of injury."

On September 26, 1913, the caboose in which plaintiff was riding was derailed and plaintiff received serious injuries. The evidence is sufficient to warrant the conclu-

sion that the derailment occurred by reason of negligence of the defendant in its track equipment. The ground upon which the court decided in favor of the defendant was that the stipulation waiving the right to recover damages was binding on the plaintiff. We are of the opinion that the court reached the right conclusion on that question.

We decided in *St. Louis, I. M. & S. Ry Co.* v. *Pitcock*, 82 Ark. 441, that (quoting from the syllabus) "a railroad company is liable to a passenger injured through its negligence, though at the time of his injury he was riding on a free pass which stipulated that he 'assumed all risks of accidents and damages without claim upon the company;' such stipulation being contrary to public policy." That case related, however, to a public carrier of passengers, and the basis of the decision was that it was contrary to public policy to permit such a carrier to thus exempt itself from liability. In the present case, the defendant was not a public carrier of passengers. Indeed, the evidence is scarcely sufficient to show that it was a public carrier of goods, for the testimony is that it was only a log road that was being operated, and that defendant did not undertake to carry freight for all who applied but merely on some occasions did carry it for others.

We have stated the rule to be that "in order to constitute one a common carrier, the business as such must be regular and customary in its character, and not casual only. An occasional undertaking to carry goods will not make one a common carrier. But the business of carrying must be conducted as a business, and must be of such a general and public nature that a person carrying it on, is bound to convey goods of all persons indifferently who offer to pay for the transportation thereof." *Arkadelphia Milling Co.* v. *Smoker Merchandise Co.*, 100 Ark. 37.

But whatever the testimony may have been with respect to the carrying of goods, it is undisputed that the defendant was not a carrier of passengers for hire and

did not carry passengers at all except gratuitously, and that, too, under a stipulation of exemption from liability. That being true, the doctrine of the Pitcock case, *supra,* has no application and there is no reason for holding that defendant, like any other person or corporation performing a service gratuitously, may not exempt itself from liability. In the Pitcock case we recognized the contrariety of judicial opinion upon the question whether a public carrier of passengers could thus exempt itself, and we deliberately took our position on that question, but that has no bearing upon the law of private contracts which do not cover the performance of a public service. The Supreme Court of Texas, in the case of *G., C. & S. F. Ry. Co.* v. *McGowan,* 65 Tex. 640, took the same position that we did in the Pitcock case. But in the recent case of *Sullivan-Sanford Lumber Co.* v. *Watson,* 106 Tex. 4, 155 S. W. 179, that court decided that a corporation operating a log road for its own convenience, and not engaged as a public carrier, could exempt itself from liability. That position appears to us as being entirely sound, and we hold that the defendant in this case, even though it was carrying the plaintiff for a consideration growing out of the contract of carrying his material, was not a public carrier, and being engaged in performing purely a private service had the right to prescribe the terms on which it would perform the same.

Now, the evidence adduced by the defendant is to the effect that the plaintiff signed the stipulation covering the trip during which he was injured, and the particular instrument signed by plaintiff and dated of that date was produced at the trial, but the plaintiff denied that he had signed the stipulation on that day. He admitted that he signed the particular instrument thus produced, which bore that date, but he claimed he did not sign it on that date. It may be said that there is a conflict as to whether or not he signed the stipulation for that particular trip, but there is no dispute as to the fact that he on numerous occasions signed those stipulations and it is unimportant whether he signed one for that particular

trip or not, for he was advised as to the conditions upon which he could ride on the train and he accepted those conditions when he took passage.

We are of the opinion, therefore, upon the undisputed evidence, that the instruction of the court was correct, so the judgment is affirmed.

ALLEN-WEST COMMISSION CO. *v.* PATRICK.

Opinion delivered March 20, 1916.

DOWER—CONVEYANCE OF PORTION OF LAND BY HEIR—WARRANTY DEED—RIGHT OF WIDOW.—Deceased, by inheritance, became entitled to a seven-twelfths interest in certain lands, and deceased's mother, as widow was entitled to dower in two-twelfths of the said seven-twelfths. This dower was never assigned. Deceased by warranty deed conveyed a five-twelfths interest to one H. *Held*, the widow would be required to take dower in the two-twelfths interest retained by deceased, and that there was no breach of warranty in the deed from deceased to H.

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

George M. Chapline and *Moore, Smith, Moore & Trieber,* for appellant.

The decree does not do justice to the parties inasmuch as it denies to appellant its right to exoneration from the widow's dower out of the lands retained by Mary Z. Patrick when she conveyed to John R. Harshaw. Nor should appellant be required to pay any back rents to the heirs of Mary Z. Patrick, nor any part of the $600 representing the future dower interest of Mrs. M. L. Harshaw; but the heirs of Mary Z. Patrick should be required to pay the full amount of the widow's dower and take nothing from appellant for rents and profits that were properly paid to the widow up to the time the land was sold by order of court. 147 Iowa 1, 125 N. W. 826; 34 L. R. A. (N. S.) 917; 11 Ann. & E. Enc. Law, p. 181; 74 Ark. 348.

Trimble & Williams and *Blackwood & Newman,* for appellees.

The decree is correct and is in every way in accord with the equities of the case. Appellant is barred by laches and neglect, as well as by limitation. The cases cited by it are not in point. Appellant merely succeeds to Harshaw's rights. 11 Cyc. 1123; 8 A. & E. Enc. Law, 161. The dower interest was a lien against all the lands, and did not release any of it. When appellant's grantor took a deed to a five-twelfths interest in the whole tract, he should have established his rights before he was barred. 43 Ark. 439. He and appellant have slept upon their rights too long. 103 Ark. 191, 195; 145 U. S. 368. Appellant should be remitted to its remedy to sue upon the covenants of warranty. 24 Ark. 456.

McCULLOCH, C. J. The facts of this case, about which there is no dispute, are as follows: Daniel Harshaw and his son, L. D. Harshaw, owned, as equal tenants in common, a tract of land in Lonoke County, Arkansas, consisting of 480 acres. L. D. Harshaw died intestate prior to the year 1883 (the precise date of his death not being stated in the record of this case), leaving surviving his widow, Mrs. M. L. Harshaw, and two children, Mary Z. Patrick and Robert M. Harshaw, and the last named child subsequently died intestate and without issue, leaving as his sole heir at law his sister, the said Mary Z. Patrick. Daniel Harshaw died intestate in the year 1883, leaving surviving as his heirs at law his granddaughter, the said Mary Z. Patrick, and a son, John R. Harshaw, and four daughters. It is thus seen that Mrs. Patrick inherited an undivided one-half of the land from her father, L. D. Harshaw, subject to the dower interest of her mother, Mrs. M. L. Harshaw, and also inherited an undivided one-twelfth interest in the land from her grand-father, Daniel Harshaw, which gave her an undivided seven-twelfths. subject to the dower interest of her mother in two-twelfths. The dower interest of Mrs. M. L. Harshaw under the statutes of this State amounted to a life estate in one-third of her husband's interest,

which, when assigned, would have given her a life estate in an undivided two-twelfths. John R. Harshaw subsequently purchased an undivided five-sixths from Mrs. Patrick, and the latter conveyed to him by deed dated April 9, 1898, containing full covenants of warranty. This gave John R. Harshaw an undivided six-twelfths interest in the land, and he subsequently purchased the interests of three of his sisters and received deeds of conveyance, thus giving him title to an undivided nine-twelfths.

John R. Harshaw subsequently mortgaged his interest to appellant, Allen-West Commission Company, and the mortgage was duly foreclosed and appellant acquired title under said foreclosure by deed dated September 23, 1907. Mary Z. Patrick died intestate in the year 1901, leaving surviving her four children who are the appellees. Appellant took possession of the lands after its purchase at the foreclosure sale, and through its agents collected the rents and disbursed the same, paying to Mrs. M. L. Harshaw, the widow of L. D. Harshaw, two-twelfths thereof as her interest in the dower lands, and also paying to Mrs. E. S. Davis, the daughter of Daniel Harshaw who had not conveyed away her one-twelfth interest, an amount equal to her interest in rent of the lands, and retaining the balance of the rents of the undivided nine-twelfths.

Appellant instituted this action in the chancery court of Lonoke County for a partition of said lands, or sale thereof in the event partition could not be made, and the widow, Mrs. M. L. Harshaw, and the childern of Mary Z. Patrick, and Mrs. E. S. Davis were made defendants. The dower of Mrs. Harshaw has never been assigned and it was agreed between all the parties to this suit that the value of her dower interest was the sum of $600, which should be paid to her out of the proceeds of the sale of the land in lieu of the assignment of her dower in kind. The lands were sold under decree of the court by a commissioner, and in dividing the proceeds the chancery court decided that the $600 paid to the widow,

Mrs. Harshaw, should be deducted equally from each of the one-twelfths interests which descended from L. D. Harshaw, which constituted a deduction of $500 of the amount from appellant's distributive share of the proceeds and one-twelfth from the share of the Patrick children. The court also decided that the Patrick children were entitled to one-twelfth of the rents collected by appellant during previous years and paid over to the widow, and entered a decree deducting the amount of the rents from appellant's distributive share in the proceeds of the sale. That was done over objections of appellant. An appeal has been prosecuted to this court, and the only controversy now relates to the one between appellant and the Patrick children concerning the distribution of the funds.

Mary Z. Patrick owned an undivided seven-twelfths of the land, incumbered by the unassigned dower interest of her mother, which when assigned would have been a life estate in an undivided two-twelfths. Mrs. Patrick conveyed an undivided five-twelfths to John R. Harshaw and executed a deed with full covenants of warranty. The dower interest of the widow constituted an incumbrance on the title. *Hewitt* v. *Cox,* 55 Ark. 225; *Seldon* v. *Dudley E. Jones Co.,* 74 Ark. 348; *Vaughan* v. *Butterfield,* 85 Ark. 289. If the dower interest operated as an incumbrance upon the interest conveyed to John R. Harshaw, an eviction thereunder would have constituted a breach of the warranty; but we are of the opinion that it did not constitute an incumbrance upon the part so conveyed for the reason that sufficient interest remained in the grantor to satisfy the dower incumbrance. In other words, the dower is held to be an incumbrance on the remaining interest for the reason that the owner of the title under the conveyance to John R. Harshaw has the right to require the dower interest to be taken out of the interest reserved. This results from the plain principles of equity that "the court will, as between the parties to the equities, treat the subject-matter as if the equity had been worked out and as impressed with the

character which it would then have borne." 11 Am. & Eng. Ency. of Law, 181. To state it in another form, Mrs. Patrick in conveying with covenants of warranty five-twelfths interest, and reserving two-twelfths, is presumed to have intended to convey free from the dower and to leave the dower incumbrance fastened upon the interest which she continued to hold. This is the equitable view which Mrs Patrick and her privies can be required to observe.

The case of *Rice* v. *Rice*, 147 Ia. 1, 34 L. R. A. (N. S.) 917, which is cited on the brief of appellant, is directly in point. There the grantor conveyed certain lands by warranty deed free from all liens and incumbrances. After his death a controversy arose between the grantees under the deeds and the devisees under the will of the grantor as to how the dower should be assigned, whether the grantees under the deed should take their lands free of dower or whether the dower should be assigned in each tract. The court held that the grantees took free of dower and that they had a right to compel the widow to take her dower out of the other lands. In disposing of the matter the court said: "We see no way, however, to avoid giving effect to these conveyances strictly in accord with their terms. They were warranty deeds with full covenants. So far as the estate itself and the beneficiaries of the will are concerned, these deeds carried to the grantees the full and complete title to the tracts therein described. Only the widow can ignore them. And she is in no position to do so if her 'one-third in value' can be set apart without prejudice to her in the remaining real estate owned by the decedent at the time of his death. The devisees of the will can stand in no better position than the testator himself occupied after making such conveyances. If the warranty deeds were complete and binding as to him, they are clearly so as to his devisees. It is argued that the remedy of the grantees would be an action for damages for breach of covenants, and that they could recover therein only nominal damages, because the deeds were executed as a gift of the land. But

the grantees are not bound to resort to an action for damages. We see no ground for holding that they may not maintain their possession and ownership under their deeds and in accordance with the terms thereof, subject only to the contingency that the widow might resort to the conveyed lands if necessary to the protection of her rights."

The only distinction sought to be made between the case just cited and the present one is that in the former the widow's dower right was inchoate at the time of the execution of the conveyance, and in the present case the widow's right was consummated by the death of the husband, lacking only an assignment to perfect her right in particular portions of the lands. The distinction is not, we think, a controlling one, and we are of the opinion that the principle announced in the Iowa case, *supra,* is correct and is applicable here. This disposes of both of the objectionable features of the decree in deducting the widow's dower interest from appellant's share and also decreeing payment by appellant of rent for previous years to appellees. The whole of the dower interest should have been deducted from the two shares of appellees, the Patrick children, and inasmuch as it is shown that appellant had paid the rents over on those two interests to the widow, appellant is not liable to the Patrick children for it.

It is insisted that the only remedy of appellant was an action for the breach of warranty, and that the statute of limitations began to run from the date of the execution of the deed. What we have said disposes of that contention, for, as before stated, there was no breach of the warranty as long as there were other lands on which the dower interest could take effect.

It is also contended that appellant was barred by laches in not asserting at an earlier date its claim for reimbursement for the dower. There is no laches in failing to assert a right which did not exist until the lands were sold. Appellant has been in possession of the lands, paying over to the widow her part of the rents,

and in no view of the case can it be said that appellant has slept upon its rights.

The decree is therefore reversed and the cause remanded with directions to enter a decree distributing the proceeds of sale in accordance with this opinion.

HIMES v. SHARP.

Opinion delivered March 20, 1916.

1. ADMINISTRATION—EXCEPTIONS—DUTY OF COURT TO CONSIDER.—When exceptions to the account of an administrator are filed under Kirby's Digest, § 140, unless withdrawn by the party making them, the duty of the court to consider them is continuing so long as the account current is before the court for confirmation.
2. ADMINISTRATION—ACCOUNT CURRENT—EXCEPTIONS.—A party filing exceptions under the statute, to the account of an administrator, does not have to repeat such exceptions at each term of the court, to which the cause may be continued, and until final confirmation; the same exceptions to the account as a whole, or to any item thereof, do not have to be made more than once.
3. ADMINISTRATION—ACCOUNT CURRENT—EXCEPTIONS — CONTINUANCE.—The order of court continuing the consideration of an account current for restatement necessarily carried over the consideration of the exceptions that had been made to it when such account, at a subsequent term, came up for consideration and confirmation or rejection.
4. ADMINISTRATION—ACCOUNT CURRENT—EXCEPTIONS—FINAL ORDER.—A party filing an exception to the account current of an administrator can not appeal from an order dismissing such exception until the final judgment is rendered confirming or rejecting the account current.

Appeal from Sharp Circuit Court, Southern District; *J. B. Baker,* Judge; reversed.

STATEMENT BY THE COURT.

At the December term, 1912, of the probate court for the Southern District of Sharp County, appellee, as administratrix of the estate of James Norris, deceased, filed for annual settlement her account current number 1, and same was continued until the next term. At the December term, 1913, of the probate court, appellants, heirs of James Norris, deceased, filed exceptions to the

account and the cause was continued to the next term, "with leave granted administratrix to restate said account current."

On September 18, 1914, the court considered the exceptions and entered judgment sustaining certain exceptions, dismissing others, and ordered the administratrix "to restate said account current accordingly, and file same so restated on or before the first day of the next term of this court."

On the 16th day of December, 1914, at the December term of the Sharp County probate court, Thos. I. Herrn, attorney for the heirs presented an affidavit and prayer for appeal from the order and judgment of the probate court "made on the 18th day of September, 1914, in refusing and disallowing their exceptions to account current number 1" in the matter of the estate of James Norris, deceased, Margaret Norris, administratrix.

The record then recites that on the 16th day of December, 1914, appellants "asked and obtained leave of the court to file an affidavit for an appeal which was by the court granted" the appeal allowed, and the clerk directed to make and certify transcript to the circuit court. Then follows account current number 1 for annual settlement restated by order of the probate court made "on the 18th of September, 1914." The account current is set forth showing a balance due the estate according to the account as restated the sum of $1,620.72. Then follows this recital:

In the matter of Account Current No. 1, Restated by Margaret Norris, administratrix estate of James Norris, deceased.

Now on this day is presented to the court the amended account current numbered 1, filed by Margaret Norris, administratrix of the estate of James Norris, deceased, filed before the first day of the present term of this court, in accordance with a former order hereof, and the same being examined by T. I. Herrn, attorney for the heirs of deceased, and no exceptions being filed to said account current, or any item thereof, by any person or

persons, the same is carefully examined by the court and found correct is in all things approved, confirmed and admitted to record, said account current showing a balance due said estate by said administratrix the sum of sixteen hundred and twenty dollars and seventy-two cents, and the attorney for the heirs at the time excepted to the approval of said account current and prayed an appeal to the circuit court of the Southern District of Sharp County, which is granted."

In the circuit court the appellee moved to dismiss the appeal for the following reasons:

1. Because there were no exceptions filed in the probate court to the amended account current, and that no appeal was ever taken or prayed from the order of the probate court approving said account current No. 1, as amended.

2. And because the appellants have filed no bond for costs as required by law.

The court found as follows: That the record shows that there was no exception nor objection to the amended, restated account current No. 1 in the probate court and no affidavit nor prayer for appeal from its confirmation either in term time or in vacation, and further finds that the said plaintiffs have filed no bond for the costs as required by Act No. 327, of the acts of the Legislature of the State of Arkansas, 1909.

The court then rendered judgment dismissing the appeal, and for costs against appellants, which judgment they now seek to reverse.

The Appellants, *pro sese.*

Exceptions were filed to the amended account once; it was unnecessary to refile or renew them. No bond for costs was necessary as appellants asked for no supersedeas. Kirby's Digest, § 1348; Acts 1909, Act 327; Kirby's Digest, § 1348, 1350.

David L. King, for appellee.

No exceptions were filed to the account and no bond for costs was given. The appeal was properly dismissed.

Act 327, Acts 1909, amending Kirby's Digest, § 1348. The statute must be complied with. 9 Ark. 128; 21 *Id.* 94; 26 *Id.* 414; 65 *Id.* 421; 104 *Id.* 285.

WOOD, J., (after stating the facts). The court erred in dismissing the appeal. The statute provides: "Any person interested as heir, legatee or creditor may file exceptions to such account, or any item thereof, on or before the second day of the term of said court to which such account may be continued; and, if exceptions are not filed within the time specified, such account shall be examined and confirmed as hereinbefore provided, and such account when confirmed shall never thereafter be subject to investigation, unless in a court of chancery," etc. Kirby's Digest, section 140.

(1-2) When exceptions are once filed under this statute, unless they have afterwards been withdrawn by the party making them, it is the duty of the court to consider them as continuing so long as the account current is before the court for confirmation. A party filing exceptions under the statute to the account of the administrator does not have to repeat such exceptions at each term of the court, to which the cause may be continued, and until final confirmation the same exceptions to the account as a whole or to any item thereof do not have to be made more than once.

(3) The order of the probate court sustaining certain exceptions and dismissing others at the term of the court previous to the term at which the account was finally passed on and confirmed was not a final judgment, so far as these exceptions were concerned. The order of the court continuing the consideration of the account current for restatement necessarily carried over the consideration of the exceptions that had been made to it when such account, at a subsequent term, came up for consideration and confirmation or rejection.

(4) It is manifest that a party filing an exception could not appeal from the order of the court dismissing such exception until the final judgment was rendered, confirming or rejecting the account current. The court

therefore erred in finding that there were no exceptions to the restated account current in the probate court. The court also erred in finding that there was no affidavit nor prayer for appeal from the judgment of the probate court confirming the account current. It appears that this judgment was rendered on the 16th day of December, 1914, and it is recited in the judgment rendered on that day that "the attorney for the heirs at the time excepted to the approval of said account current and prayed an appeal to the circuit court of the Southern District of Sharp County, which is granted." It also appears that on the same day Thomas I, Herrn, attorney for the heirs, filed a motion and an affidavit praying for an appeal "from the order and judgment of this court made on the 18th of September, 1914, in refusing and disallowing their exceptions to account current No. 1." And the affidavit stated that they "verily believe they are aggrieved by said order and judgment." True this motion and affidavit and the order granting the appeal preceded on the record the entry of the final order and judgment on the account, but that could make no difference. The orders were made on the same day, and it would be highly technical and putting form before substance to say that these record entries, when considered together, were not a sufficient compliance with the law to perfect appellant's appeal, and to entitle them to have the same heard in the circuit court. The appeal being perfected in the circuit court, and the appellant having filed his exceptions in the probate court as required within the time provided by the statute, could renew these exceptions or amend the exceptions already filed in the circuit court.

The court found that no bond for costs was filed as required by Act No. 327 of the acts of the Legislature of the State of Arkansas of 1909. Under section 1348 of Kirby's Digest, as amended by Act No. 327, *supra,* and sections 1349 and 1350 of Kirby's Digest, a bond is not required as a prerequisite to an appeal except in cases where the appellant desires a supersedeas.

The judgment is therefore reversed and the cause remanded with directions to reinstate the appeal.

KIRBY, J., dissents.

YAZOO & MISSISSIPPI VALLEY RAILROAD CO. v. SOLOMON.

Opinion delivered March 20, 1916.

1. CARRIERS—DELAY IN SHIPMENT OF FREIGHT—RIGHT OF CONSIGNOR TO SUE.—Where the consignee of a shipment of freight is given the right of inspection at the point of destination, the sale of the goods is not unconditional, and the consignor may sue the carrier for a delay in the shipment.
2. APPEAL AND ERROR—OBJECTION FIRST MADE ON APPEAL.—An objection made for the first time on appeal will be unavailing.

Appeal from Phillips Circuit Court; *J. M. Jackson,* Judge; affirmed.

Fink & Dinning, for appellant.

1. Plaintiffs are not entitled to maintain this suit. The title was in the consignee. 115 Ark. 221. The case of *Gibson* v. *Inman Packet Co.,* 111 Ark. 521 does not apply in this case.

2. Plaintiffs show no title to the property before shipment.

Andrews & Burke, for appellees.

1. The undisputed evidence shows that the title remained in the plaintiffs until the seed were *delivered* in good condition. The case in 115 Ark. 221 does not apply to this case. The correct rule is laid down in 11 Ark. 521 and governs here. 56 N. J. Law. 617; 32 Md. 344.

2. The testimony does show that Solomon-Moore Land Co. sold and delivered the seed to the consignee. The question of the title to the seed before shipment was not raised below; it is too late to raise it here for the first time.

WOOD, J. The Solomon-Moore Land Company on February 19, 1913, shipped from Helena, Arkansas, to Memphis, Tennessee, over the line of appellant, a car

load of cotton seed. The bill of lading showed that the car was consigned to the Chickasaw Oil Company. The appellees sued appellant alleging that the car was rendered worthless to appellees through the negligence of appellant in delaying the transportation. Appellees recovered judgment, and appellant concedes that the evidence was sufficient to sustain the judgment as to negligence on the part of the appellant, but insists that the judgment is erroneous for two reasons, viz:

1. Because the car was received by appellant f.o.b. Helena, Arkansas, consigned to Chickasaw Oil Mills, Memphis, Tenn., which appellant contends vested the title in the consignee. Appellant relies upon the case of *Warren & Ouachita Valley Ry. Co.* v. *Southern Lbr. Co.*, 115 Ark. 221, 170 S. W. 998, where the undisputed evidence showed that the sale was unconditional. We said: "The delivery to the carrier under those circumstances constituted a delivery to the purchaser and completed the sale, the title to the goods then being in the consignee." Again, "There was no effort to prove in this case an intention not to pass the title by the delivery to the carrier * * *. The contract of sale being complete, the only remedy the vendor has is against his vendee to recover the price, and the latter has a remedy against the carrier for any damage which accrued by reason of the failure to deliver." But in the case at bar there was testimony which at least would warrant a finding that the sale of the car of seed was upon condition that the vendee and consignee had the privilege to refuse the seed if they were not in good condition when they reached Memphis. If such were the fact, the sale was not unconditional and complete when the consignor delivered the goods to appellant for the consignee. The instant case is ruled by *Gibson* v. *Inman Packet Co.*, 111 Ark. 521, where we held that the consignor has a right of action against the carrier when it appears that it was not the intention of the parties to pass title to the property shipped by delivery to the carrier. Hence the court did not err in refusing appellant's prayer for instruction,

telling the jury that the appellees had shown no beneficial interest or ownership in the seed, and hence to find for appellant.

2. Appellant next contends that appellees did not show title to the property before shipment. The appellant makes this objection here for the first time and therefore such objection can not avail. The cause without objection progressed through the lower court as if appellees were the owners of the car before same was offered for shipment, and that is the course it must take here. *Brown* v. *LeMay,* 101 Ark. 95; *St. L., Sw. Ry. Co.* v. *White Sewing Machine Co.,* 78 Ark. 1; *Shinn* v. *Plott,* 82 Ark. 260; *Cook* v. *Bagnell Timber Co.,* 78 Ark. 47; *Allegheny Imp. Co.* v. *Weir,* 96 Ark. 500. See also, *Western Union Tel. Co.* v. *Freeman,* 121 Ark. 124.

The judgment is correct. Affirmed.

CRABTREE *v.* STATE.

Opinion delivered March 20, 1916.

1. STATUTES—CONSTRUCTION—EJUSDEM GENERIS.—The maxim "*ejusdem generis,*" which may be applied to effectuate the legislative intent, will never be allowed to defeat it.
2. GAME AND FISH—SALE OF—CONSTRUCTION OF STATUTE.—The general words, "or any other kind of game, wild fowl, or birds, whatever," as used in Kirby's Digest, § 3618, restricting the sale of game, which words follow the particular kind of game enumerated, include animals, fowls and birds of a wild nature that are fit and commonly hunted for use and food in addition to and different from those specified.
3. GAME AND FISH—"WILD FOWL" DEFINED.—The term "wild fowl" means any large eatable bird of a wild nature.
4. GAME AND FISH—SELLING WILD DUCKS.—A conviction of the crime of selling wild ducks may be had under Kirby's Digest, § 3618.

Appeal from Miller County Court; *Geo. R. Haynie,* Judge; affirmed.

J. M. Carter, for appellant.

The statute does not prohibit the sale of wild ducks. Kirby's Digest § 3618. General words following specific terms *ejusdem generis* should be limited by reference to

the specific words, and should be construed only with all other articles, things, etc., of like nature and quality, etc. 61 Ark. 502; 54 Ark. 611; 102 *Id.* 218; 101 *Id.* 596. The word "game" does not refer to "fowls." The statute makes no exception of fowls. The case in 174 S. W. 527 does not apply here. The only question raised there was the constitutionality of the act. But if it did the ruling is not sound.

Wallace Davis, Attorney General, and *Hamilton Moses,* Assistant, for appellee.

1. It is unlawful to sell wild ducks. "Game" means beasts and birds of a wild nature obtained by fowling and hunting and includes quail and other wild fowls fit for food. Coke on Littleton, 233a, § 378; 8 Words and Phrases, 1023; 71 Mich. 325; Cyclopedic Dict. 404; 198 Ill. 258; 19 Cyc. 1450. "Fowl" comprehends all birds and poultry, but "wild fowl" applies to ducks, geese, etc. 3 Words and Phrases 2929; 11 East 574.

The statute reads "or any other kind of game," etc. The word "other" means different from that specified; not the same. 29 Cyc. 1532; 78 Pac. 565; 35 Atl. 658; 140 Ind. 397; 6 Words and Phrases 5070.

The maxim *ejusdem generis* is applied only to effectuate the legislatve intent; not to defeat it. 48 Minn. 140; 18 Ala. 687; 116 Pa. St.; 3 Words and Phrases 2328. But our court has settled the matter. 174 S. W. 527; 103 *Id.* 288.

WOOD, J. Section 3618 of Kirby's Digest provides: "It shall be unlawful for any person, corporation, or company, to purchase, or have in possession for barter, exchange or sale, or to expose for barter, exchange or sale, or to sell any buck, doe, fawn, or any part thereof, or any wild turkey, pinnated grouse, commonly called prairie chicken, or any quail, sometimes called Virginia partridge, or any other kind of game, wild fowls, or birds whatsoever, within this State, except bear, rabbits, squirrels."

(1) Appellant was convicted of selling wild ducks under the above section, and he contended that the statute

does not prohibit the sale of wild ducks, invoking the maxim of *ejusdem generis.* But that maxim, while applied to effectuate the legislative intent is never allowed to defeat it. *Foster* v. *Blount,* 18 Ala. 687; *State* v. *Broderick,* 7 Mo. Ap. 19, 20.

"It has never been supposed," says the Supreme Court of Illinois, "that the rule required the rejection of the general terms entirely, but only that they should be restricted to cases of the same kind as those expressly enumerated. On the contrary, it must yield to another equally salutary rule of construction, viz: that every part of a statute should, if possible, be upheld and given its appropriate force." *Misch* v. *Russell,* 136 Ill. 22, 25.

(2-3) The general words, "or any other kind of game, wild fowl, or birds, whatsoever" following the particular kinds enumerated, were manifestly intended by the Legislature to include animals, fowls and birds of a wild nature that are fit and commonly hunted for use and food in addition to and different from those specified. Law Dictionary; English Stand. Dict.; Worcester's Dict., verbum, "game." The term "wild fowl" means any large eatable bird of a wild nature.

(4) In *Jonesboro. L. C. & E. Rd. Co.* v. *Adams,* 117 Ark. 54, 174 S. W. 527-530, we said: "The law-makers contributed to the preservation of wild ducks," by enacting a general statute, citing section 3618, Kirby's Digest.

While the exact question here presented was not before us in that case, the language above used was a correct interpretation of the statute.

The judgment is therefore affirmed.

WALLACE *v.* DAVIS, BANK COMMISSIONER.

Opinion delivered March 20, 1916.

PUBLIC FUNDS—DEPOSIT IN BANK—RIGHTS OF DEPOSITOR AGAINST BANK.—Where public funds are legally placed in a bank as a general deposit, the relation of debtor and creditor exists, and the deposit does not become a trust fund, and if the bank fails, a claim for

public money has no preference over the claims of general creditors of the bank, but stands on the same footing with them.

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

J. M. Brice, for appellant.

1. This was a trust fund and the claim of the county was entitled to a preference. Plaintiff having settled with the county was subrogated to its rights as a preferred creditor. 41 Ark. Law Rep. 351; 97 Ark. 374; 116 *Id.* 410, 472; 114 *Id.* 344; 55 Pac. 858; 59 *Id.* 929; 80 Miss. 755; 8 A. & M. E. Ann. Cas. 114; Kirby's Digest, § § 1990, 1, 2, 3.

The funds were deposited for "safe keeping" and was a special deposit or trust fund. Cases *supra.* 16. L. R. A. 918; 95 Pac. 771; 9 Am. St. 481; 55 Pac. 858.

W. L. Thompson, for appellee.

The deposit was made in the name of J. R. Wallace and not as collector. There is no statute prohibiting a collector from making a deposit in any bank he chooses, nor any statute giving him a preference over other depositors, even if it be money collected as taxes. 121 Ark. 4; 97 Ark. 374, 382. It was general deposit although made for safe keeping. He was entitled to no preference over other credittors. 83 Ark. 486.

HART, J. Appellant instituted this action in the chancery court against appellee. The complaint alleges substantially the following facts:

The plaintiff, J. R. Wallace was duly elected sheriff and ex-officio collector of Cleburne County, Arkansas. During his term of office he collected taxes to the amount of $1,387.65 and deposited the same in the bank of Higden, an incorporated bank with its place of business in Cleburne County. The officials of the bank at the time they received the deposit knew that the moneys were public funds arising from the collection of taxes and that they were deposited by the collector as such.

The bank became insolvent and was placed in the hands of the bank commissioner pursuant to our statutes.

The bank commissioner refused to pay over to the plaintiff said public funds.

The county court called on the plaintiff for a settlement and the plaintiff paid into the treasury out of his own funds said sum of $1,387.65. He asked for judgment against the defendants and that his claim and judgment be declared a preferred claim over the general creditors of the insolvent bank and that he should be subrogated to the rights of the county. The court found that the claim of plaintiff for the sum of $1,387.65 was correct but that he was not entitled to preference over general creditors out of the assets of the insolvent bank. Judgment was accordingly rendered in favor of the plaintiff for the amount of his claim. It was allowed as a general claim and the bank commissioner was directed and ordered to pay the claim pro rata out of the assets of the bank in his hands. The plaintiff has appealed.

Section 1990 of Kirby's Digest among other things provides that collectors of taxes may deposit the public funds in their custody in incorporated banks for safe keeping; and that the said officials and the sureties on their official bonds, the bank and the stockholders of the bank shall be liable for the funds that such bank, on demand, shall fail to pay to the person entitled to receive the same.

It is conceded that the plaintiff as collector of Cleburne County deposited the public funds in an incorporated bank of that county; that the bank became insolvent and failed to pay the same over to him on demand.

It is contended by counsel for the plaintiff that the circumstances under which the deposit was made in the bank by plaintiff were such as to create the relation of trustee and *cestui que trust* rather than that of debtor and creditor. Cases are cited by counsel in support of their contention but we do not deem it necessary to cite them; for we have already decided adversely to their contention in cases which we shall presently cite. The theory upon which the decisions referred to by counsel are based, is that the public funds are held by the insolvent bank

charged with a trust and on that account the county is entitled to a preference over the claims of general creditors unless the identity of the deposit has been destroyed and its proceeds can no longer be traced.

From the reasoning of these cases it follows that where public funds are legally placed in a bank as a general deposit, the relation of debtor and creditor exists and the deposit does not become a trust fund, and in case of the failure of the bank a claim for public money has no preference over the claims of the general creditors of the bank, but stands on the same footing with them. In the case of *Warren* v. *Nix,* 97 Ark. 374, we held that under section 1990 of Kirby's Digest, that tax collectors are authorized to make a general deposit of the public funds in their hands in an incorporated bank. The writer concurred in the judgment in that case because he believed that public funds deposited under section 1990 did not become a debt of the bank but that they were a trust fund and on the bank's becoming insolvent became no part of the bank's estate. From the opinion of the court, however, the deposit of the money by the tax collector created the relation of debtor and creditor and the deposit became a general one and did not become a trust fund.

The tax collector in the instant case, under the statute was authorized to make a general deposit of the public funds in his hands in the bank and the funds then became a part of the estate of the bank to be distributed to its creditors according to law. In the case of *Talley* v. *State,* 121 Ark. 4, it was held that a county has no preferential right to the assets of a county depository bank by reason of the fact that its funds had been deposited there. The reason given is that no preference was created by the statute authorizing the deposit and that there was no general statute giving the county a preference over general creditors. It is true the court in that decision was construing a depository statute but the reasoning of the court applies with equal force to the

construction of section 1990 of Kirby's Digest now under consideration.

It follows that the decision of the chancellor refusing to allow the claim of the plaintiff as a preferred claim was correct and the decree will be affirmed.

JOHNSON v. WALLACE.

Opinion delivered March 20, 1916.

1. PUBLIC FUNDS—DEPOSIT BY COLLECTOR IN BANK—LIABILITY OF STOCK HOLDERS.—Kirby's Digest, § 1990, which gives a collector authority to deposit funds collected by him in a bank, the stockholders of which shall be liable for all funds that the bank, on demand, shall fail to pay the person entitled to receive them, was not repealed by Act 116 of the Acts of 1913, page 504 which created a county depository for a certain county.
2. PUBLIC FUNDS—DEPOSIT IN BANK BY COLLECTOR—SUBROGATION.—Where a collector deposited public funds in a bank, and upon the failure of the same, settled with the county out of his own funds, he will be subrogated to the rights of the county.

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

Brundidge & Neelly, for appellant.

1. The demurrer to the complaint should have been sustained. This suit was based upon Kirby's Digest, § 1990. There was no liability to the county and hence no subrogation. 82 Ark. 407.

2. No demand was made for payment. 97 Ark. 374; 59 *Id.* 356.

3. Kirby's Digest, § 1990 was repealed by Act No. 116, Acts 1913. The whole subject was taken up and the entire ground of the subject matter covered. 105 Ark. 79; 88 *Id.* 324.

J. M. Brice, for appellee.

1. The stockholders were liable under Kirby's Digest, and it was not repealed by Act No. 116, Acts 1913. There is no conflict and no repugnancy. The depository

act does not affect or repeal section 1990. The word sheriff or collector does not appear in the act at all. Appellant's contention was not tenable. That was the sole duty of the defense. Questions conceded, waived or abandoned at the trial will not be decided here. 78 Ark. 1; 82 *Id.* 260; 98 *Id.* 500.

2. Appellee was entitled to subrogation. 114 Ark. 344; 120 Ark. 583.

3. No demand was necessary; the bank was insolvent. 121 Ark. 4.

HART, J. J. R. Wallace as collector of taxes for Cleburne County, instituted this action against E. F. Johnson and others to recover the sum of $1,387.65, the amount of taxes collected by him and deposited in a bank of which Johnson was a stockholder.

This is a companion case to that of *J. R. Wallace, Collector, against John M. Davis, Bank Commissioner* this day decided, 123 Ark. 70. At the trial of the case it was admitted by the defendant that the plaintiff was collector of taxes for Cleburne County; that he, as such collector had deposited taxes collected by him to the amount $1,387.65 in a bank in which the defendant was a stockholder; that the officers of the bank accepted the deposit of the funds with full knowledge that they were public funds; that the bank subsequently became insolvent and was placed in the hands of the bank commissioner to be wound up as an insolvent bank.

The action was based on section 1990 of Kirby's Digest, which gave the collector authority to deposit the funds in the bank, and which made the stockholders liable for all funds that the bank on demand failed to pay to the person entitled to receive the same.

The defense of Johnson was that section 1990 of Kirby's Digest was repealed by Act 116 of the Acts of 1913 creating a county depository of Cleburne County, Arkansas. The court found against the contention of the defendant and rendered a decree in favor of the plaintiff. The opinion of the chancellor was correct. The act creating a county depository for Cleburne County was approv-

ed March 3, 1913. See Acts 1913, page 504. Under the terms of that act the collector of taxes had no authority whatever to deposit public funds in a bank. By the terms of that act the county treasurer alone was authorized to deposit public funds in a bank. The tax collector alone was authorized to deposit public funds in an incorporated bank by section 1990 of Kirby's Digest.

The Special Act creating a depository for Cleburne County does not by express terms repeal section 1990 of Kirby's Digest. There is no repugnancy between the two statutes. There are no provisions in the special depository act relating to the authority of the collector of the taxes to deposit the public funds in a bank. It confers such authority solely on the county treasurer. The depository act was not intended to cover the subject of section 1990 of Kirby's Digest. As we have already stated there is no repugnancy between the two statutes and we hold that the former is not repealed by the latter. Under section 1990, the stockholders of the bank are liable for public funds deposited in the bank that such bank on demand shall fail to pay to the person entitled to receive the same. See *Roberts* v. *State use of Logan Co.,* 116 Ark. 410. The bank was admittedly insolvent and on that account a demand upon it would have served no useful purpose. In such cases a demand for payment of public funds which had been deposited in a bank under statutes authorizing such deposits is unnecessary. *Talley* v. *State,* 121 Ark. 4. The collector was required to settle with the county court and paid the amount sued for into the county treasury out of his own funds. Therefore he was entitled to be subrogated to the rights of the county. *Bank of Midland* v. *Harris,* 114 Ark. 344; *Steed* v. *Henry, County Treasurer,* 120 Ark. 583.

The decree will be affirmed.

THORSEN *v.* POE.

Opinion delivered March 20, 1916.

1. CONTRIBUTION—RIGHT OF—PAYMENT OF OBLIGATION.—Where several parties are equally liable for the same debt, or bound to the discharge of an obligation, and one is compelled to pay or satisfy the whole of it, he may have contribution against the others, to obtain payment from their respective shares.
2. JUDGMENTS—ASSIGNMENT—LIMITATIONS UPON.—The assignee of a judgment takes subject to all the equities and defenses existing between the parties thereto.
3. CONTRIBUTION—ASSIGNMENT OF JUDGMENT.—P. and C. were jointly liable for certain debts of an insurance company, and P. having paid certain of these debts was entitled to contribution from C. C. meanwhile paid a judgment against himself and P. and assigned the same to G., the judgment being in the same matter. *Held*, the judgment in the hands of the assignee was subject to a set off of the amount due by C. to P. by way of contribution.

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

STATEMENT BY THE COURT.

This appeal comes from a judgment of the chancery court, enjoining appellants, assignees of a certain judgment of the American Insurance Company against McGehee Liquor Company, and their attorneys from the collection thereof from A. B. Poe, one of the parties against whom the judgment was rendered.

A. B. Poe, W. B. Calhoun, et al. became sureties upon the bond of said insurance company, required by the statute, authorizing it to do business in the State. The McGehee Liquor Company sustained a loss under a policy issued it by said company, which was adjusted and a draft on the home office in another State endorsed by A. B. Poe and Jno. B. Driver was given for payment of the loss. The insurance company became insolvent and went into the hands of a receiver before the draft was paid. The said liquor company brought suit against the insurance company, the sureties on its bond and the endorsers on the draft for the amount of its loss and recovered judgment against all of them, from which an appeal was taken and a supersedeas bond executed with

A. B. Poe and A. J. Graham as sureties. Upon the hearing in the Supreme Court the judgment against the sureties on the bond of the insurance company was reversed and the cause dismissed as to them and the judgment against the insurance company and Poe and Driver as endorsers on the draft given in payment by the adjuster was affirmed and judgment entered, also against A. B. Poe and Graham as sureties on the supersedeas bond. *American Ins. Co.* v. *McGehee Liquor Co.*, 93 Ark. 62.

The matter next appeared in this court upon a motion or petition of said Poe and Graham, asking this court to quash an execution issued by it's clerk on the ground that the judgment had been satisfied.

It was alleged that after the affirmance of the judgment an execution was issued thereon and same was satisfied and the judgment paid either by the insurance company or one of the sureties on the bond, later alleged to be W. B. Calhoun. That the judgment was assigned to him by the plaintiff and in turn to the German Investment Company.

It was further alleged that one of the attorney's for the judgment creditor caused the execution notwithstanding it had been paid, to be returned unsatisfied and then procured an assignment of the judgment from the Liquor Company for the purpose of defrauding the petitioner and preventing him from enforcing his right of contribution against the sureties for amounts that he had paid out for the insurance company on other judgments.

The response denied that the judgment had been satisfied and the other allegations of the petition except as to the assignment of the judgment and contained the statement that after the case had been appealed to the Supreme Court and before the reversal of the judgment as to the sureties on the bond, an execution had been issued from the Pulaski circuit court to the sheriff of Mississippi County against W. B. Calhoun, one of the sureties on the insurance company's bond and against whom judgment had been rendered and that he to pre-

vent the sale of his property satisfied said execution and the judgment was assigned to him as appears from the record of same upon the margin thereof.

This court held that it would not be proper to strike out the assignment of the judgment unless it was shown that the judgment had been satisfied and that although there was an allegation in the petition that such was the fact, the allegation was denied and the records showed an assignment of the judgment by the plaintiff.

The court recognized having power over its own process and the propriety of quashing an execution erroneously issued thereon, upon proof of payment of the judgment and declined to go further because it would be an exercise of original jurisdiction to attempt to adjust the equities between the sureties on the bond of the defendant insurance company if any existed, saying: "The admission that Calhoun satisfied the execution issued from the Pulaski circuit court and caused the judgment to be assigned to him and later to the German Investment Company, raises a question of fact which relates only to the alleged equities between petitioners and Calhoun and those who claim under him, since the judgment of this court was not rendered against Calhoun. The effect of the admission is merely that Calhoun purchased an assignment of the judgment and the question whether he had a right to do so is one for investigation in a court of original jurisdiction," and denied the motion without prejudice to the rights of the petitioners to proceed in a court of competent jurisdiction for the relief to which they were entitled, *American Ins. Co.* v. *McGehee Liquor Co.*, 113 Ark. 488.

It was shown on that motion that the petitioners had already instituted this action in the Pulaski chancery court, which was since determined in their favor, the court rendering a judgment against W. B. Calhoun, one of the sureties on the original bond of the insurance company in favor of A. B. Poe for $1,500 as contribution for amounts expended by said Poe as co-surety on said bond more than his share and enjoining the collection of said

original judgment by the assignees thereof and their attorneys, and this appeal comes from said judgment.

J. P. Kerby and *R. L. Floyd,* for appellants.

1. W. B. Calhoun is not in the chain of the title; he is a stranger to the judgment. An assignee of a judgment takes subject to all equities between the parties. 2 Freeman Judgm. 427; 113 Ark. 488. There is no equity growing out of this judgment in favor of plaintiff against Calhoun. Their claims grow out of other and independent transactions. 17 Iowa, 503; 85 Am. Dec. 575; 23 Cyc. 1422, 3, 4; 78 Am. St. 52, 53. An innocent assignee of a judgment without notice is entitled to protection. 24 S. C. 387. An assignee has right to purchase as cheaply as he can. 87 N. Y. 10; 23 Cyc. 1421.

2. An assignment carries all rights, remedies, liens or securities of the assignor. 102 Ga. 696; 13 Ind. 75; 49 N. Y. 183; 36 Minn. 198; 110 Ill. 453; 52 Mo. 43; 3 Del. Ch. 183; 100 Iowa 266; 62 Am. St. 571; 23 Cyc. 1472-3 74 Tex. 31.

3. The judgment was never satisfied. 94 Ill. App. 112; 65 S. E. 64.

4. Petitioner cannot question assignee's title. 74 Tex. 31; 25 S. C. 597; 35 La. Ann. 384. Plaintiff was guilty of laches and was barred. 9 Cyc. 802; 32 *Id.* 286; 34 *Id.* 636, 641.

Mehaffy, Reid & Mehaffy and *Lawrence B. Burrow,* for appellee.

1. Payment of a judgment by one of two joint defendants operates as an extinguishment as to all and thereafter the judgment is a nullity. 69 N. Y. Supp. 612; 36 S. E. 174; 45 N. E. 69; 11 *Id.* 38; 40 Pac. 1071; 44 N. W. 25; 72 S. W. 413; 102 N. W. 354.

2. Calhoun was not a surety for Poe, but if he was, the rule would not be changed. 16 Ark. 216; 26 Miss. 63. A judgment once paid off and satisfied can not be assigned. 25 Miss. 63; 6 Rob. (N. Y.) 552; 5 Rawle, (Pa.) 131; 23 Cyc. 1414.

3. An assignee can take no other nor superior rights than those vested in his assignor. 75 N. W. 185; 65 N. Y. Supp. 795; 84 N. W. 581.

4. Payment of a judgment by a stranger does not entitle him to subrogation or substitution. 68 Me. 155; 52 Pa. 522; 110 N. Y. 43 etc. But it extinguishes the judgment. Calhoun was not a stranger; he was a joint defendant. 124 U. S. 534; 57 Am. Rep. 192. Where it is equity that one who pays a debt should be substituted for the creditor, he will be so substituted. 35 Kans. 495; 11 Am. St. 18; 102 Mass. 313; 131 N. Y. 262, etc.

KIRBY, J. (after stating the facts.) Appellants contend that no equities arose from the judgment of the liquor company as between A. B. Poe and W. B. Calhoun, which can be enforced against the assignees of Calhoun, who were not parties thereto, this court having reversed the judgment of the lower court after the assignment thereof to Calhoun, and dismissed the action as to him. It is not denied however that Poe and Calhoun were sureties on the bond required by law of the insurance company, and as such liable of course to the payment of its obligations. The chancellor found in this action for contribution that surety Poe paid obligations of said principal insurance company, in discharge of the liability as surety on said bond in sufficient amounts to entitle him to recover as contribution from his co-surety Calhoun the sum of $1,500, from which judgment no appeal was taken by said Calhoun.

(1) It is a familiar principle that where several parties are equally liable for the same debt, or bound to the discharge of an obligation, and one is compelled to pay or satisfy the whole of it, he may have contribution against the others to obtain payment for their respective shares. 6 R. C. L. 1036-7; 1 Brandt Suretyship, Sec. 279. Our statute also recognizes this right. Kirby's Digest, § 7926; *Wilks* v. *Vaughan,* 73 Ark. 174; *Salinger* v. *Black,* 68 Ark. 449.

(2) The assignee takes the judgment subject to all the equities and defenses existing between the parties

thereto. 2 Freeman, Judgments, § 427; 23 Cyc. 1424; *Am. Ins. Co.* v. *McGehee Liquor Co.*, 113 Ark. 488.

(3) The first assignee of the judgment, W. B. Calhoun, was a co-surety on the insurance company's bond with A. B. Poe, appellee, and equally liable with him to the discharge of all obligations of the insurance company, for which the sureties were bound under the terms of said bond. He was liable to contribution to his said co-surety Poe on the whole amount paid out by Poe as surety beyond the amount of his share of the indebtedness or obligations of said insurance company, which has been determined herein to be $1,500 with costs, an amount in excess of said assigned judgment attempted to be enforced against said Poe. There is no question but that Poe in a suit or any other proceeding for the collection by Calhoun of said judgment claimed to have been assigned to him could have claimed as a defense the amount due from said surety Calhoun to Poe as contribution for the amount of the debts and obligations of the insurance company discharged by Poe more than his share hereof, himself and Poe being the solvent sureties.

Having the right to contribution of said amount from W. B. Calhoun, who was in fact a party when he paid the consideration and became the first assignee of the judgment, he can enforce the collection of the amount thereof as against the judgment in the hands of the present assignee, the assignment not cutting off any equities nor defenses that existed as between said Calhoun and appellee Poe.

The decree is affirmed.

McCABE v. LEE.

Opinion delivered March 20, 1916.

EXECUTIONS—EXISTENCE OF LIEN—RIGHT OF LEVYING OFFICER—SUBSEQUENT MORTGAGE.—An execution constitutes a lien from the time of its issuance and levy; by the levy the officer acquires a special interest in the property of the judgment debtor, which has been levied

upon, which he may protect by suit and where the execution is renewed in accordance with the statute (Kirby's Digest, § § 4642-44) during its life or before it becomes *functus officio*, the lien is continued, and the officer has the right to seize the property under the execution, and his right is superior to any right acquired by a mortgagee of the property, where the mortgage was not recorded until after the issuance and levy of the execution.

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

STATEMENT BY THE COURT.

Appellee, the constable of Gleghorn Township, Clay County, levied an execution, issued upon the 22nd day of October, 1914, upon a judgment in the justice court obtained by J. P. Pugsly against Charles Harper, upon a cow, the property of Harper, which he took into possession and advertised for sale on the 7th day of November, 1914.

John McCabe brought replevin against appellee on that day, claiming the right to the possession of the cow under a chattel mortgage executed by said Harper to him on the 18th day of March, 1914, which was filed for record on the 3rd day of Nov. 1914. On the 16th of Nov., after the service of the writ of possession in the replevin suit, the appellee, S. O. Lee, by order of the plaintiff in execution, returned the execution with the endorsement "Not satisfied" for renewal, and it was endorsed by the justice in accordance with the statute.

Appellee executed a retaining bond and upon the trial of the replevin suit judgment was rendered in McGehee's favor against him, from which he appealed to the circuit court where upon trial the court found the value of the cow and declared the lien of the constable under the execution superior to the mortgage lien, same having been fixed prior to the filing of the mortgage and rendered judgment against appellant, from which he brings this appeal.

C. T. Bloodworth, for appellant.

1. The mortgage lien was superior to the lien of the execution. The plaintiff in execution directed the officer to return the execution not satisfied and had it renewed for one year. By this action, the lien acquired by the first

levy was lost and waived. 17 Cyc. 1071, 1057, 1058 and note 33; 18 Ark. 309; 23 *Id.* 268; 109 *Id.* 151; 94 *Id.* 296; 58 *Id.* 289. The rights of a third party had intervened and the court erred in its findings of law.

The appellee *pro se.*

Appellee by the levy acquired a special interest in the property. Duffie & Hill's Arkansas Justice par. 505-508. Pugsly had a right to direct that the execution be returned "unsatisfied for the purpose of renewal." *Ib.* p. 515. The renewal continued in force the lien of the the first levy which was prior to the lien of the mortgage. 27 Ark. 20; 8 *Id.* 395; 23 *Id.* 268; 40 *Id.* 146; 51 *Id.* 417; 12 *Id.* 497; 8 Ark. 69, 388, 395; 58 *Id.* 417; 27 *Id.* 25; 12 *Id.* 421.

KIRBY, J. (after stating the facts). The execution constituted a lien upon the property of the judgment debtor, which continued as long as the writ remained in force, and the general rule is "in the absence of express statutory enactment an execution has no legal effect as such, after its return day, and on the return of an execution *nulla bona,* its lien expires, yet the title vested in an officer by virtue of his levy remains until divested by subsequent proceedings, and he may proceed to advertise and sell the property by virtue of his title acquired by levy after the return day of the writ." 17 Cyc. 1072; 2nd. Freeman on Executions, 202.

The property had been levied on and taken into possession of the officer under the authority of the execution before appellant acquired a lien under his mortgage which had not been recorded until afterward, and the officer could have proceeded with the sale of the property even after the return day of the writ, but he returned it before the day, under the direction of the judgment creditor, unsatisfied, and caused it to be renewed by proper endorsement thereon, under the authority of Sections 4642- 4644, Kirby's Digest. By the terms of the statute such endorsement of renewal continues the execution in full force in all respects for 12 months after the endorsement made. The execution constituted a lien from the time of its issuance and levy, and by the levy of it, the officer acquir-

ed a special interest in the property of the judgment debtor levied upon, which he could protect by suit, and the execution being renewed in accordance with the statute, during its life or before it became *functus officio,* continued the lien and the right of the officer to the property seized under it from the time of its levy until the disposition thereof, according to law, and his right was superior to any right that could be acquired by appellant under his mortgage, which was not recorded until after the issuance and levy of the execution.

The judgment is affirmed.

KOONCE v. FORDYCE LUMBER COMPANY.

Opinion delivered March 20, 1916.

1. DEEDS—SECOND CONVEYANCE BY GRANTOR.—One who conveys a tract of land and thereafter executes a second conveyance with the intent to defeat the first, or with knowledge that such conveyance will be used for that purpose, commits an actionable wrong against the first grantee, who holds an unrecorded deed.
2. DEEDS—CONVEYANCE OF TIMBER—SUBSEQUENT CONVEYANCE OF LAND WITHOUT RESERVATION.—Appellant deeded the timber upon certain land to appellee, but appellee did not record the deed. Thereafter appellant deeded the land to a third party without reserving the timber. The property was deeded to innocent parties who had no knowledge of the timber deed to appellee. *Held,* appellant would be responsible to appellee for the loss of the timber.

Appeal from Dallas Circuit Court; *Turner Butler,* Judge; affirmed.

STATEMENT BY THE COURT.

Appellee brought suit to recover the value of timber taken from certain lands in Dallas County.

The lumber company purchased the timber on the lands in question in 1908 from appellants and the same was conveyed to them by a warranty deed granting twenty years in which to remove the timber. On July 11, 1913, appellant Koonce conveyed his one-half undivided interest in the lands to appellant, McKee, by deed without reserv-

ing or excepting the timber therefrom. On February 13, 1914, McKee conveyed to R. S. Treadway and W. J. Key without any exception or reservation of the timber and the deed was recorded on the 28th of February. This deed contained some lands on which the right of the lumber company to cut timber had expired, and a lien was retained therein to secure the unpaid purchase money and subsequently on March 23, 1914, McKee and wife executed a quit claim deed to said grantees releasing the vendor's lien. On March 19, 1914, Treadway and Key conveyed all the standing timber on the lands to Cox and Richardson, who in the suit of the lumber company against them, were held to be innocent purchasers thereof, and entitled to the timber, after which decree appellee company instituted this suit. Its deed to the timber was not recorded until April 13, 1914.

Appellants first demurred to the complaint for misjoinder of parties and upon the demurrer being overruled, answered admitting the making of the conveyances of the timber and lands at the time alleged and stated that the deed from Koonce to McKee of the one-half interest in the land was not intended to and did not convey the timber, which both parties knew belonged to the lumber company and was only intended to convey the lands, that therefore no reservation or exception of the timber was made therein; that upon the making of the deed to Treadway and Key, it was understood between the parties that the timber upon the lands was not conveyed although no exception or reservation was contained in the deed; that said grantees knew that the lumber company was the owner of the timber.

They denied any liability to the lumber company for the loss of the timber and alleged that if any damage or loss was suffered, it was on account of the failure of the company to record its deed to the timber, which they supposed had been recorded. The timber conveyed to the lumber company by appellants' deed and lost to them by their subsequent conveyances of the land without reservation or exception of the timber as set out, was shown

to be worth the sum of $3,500. Koonce and McKee testified denying any intention to wrong the lumber company or deprive it of the timber sold to it by the later conveyances of the land, each testifying that they notified the grantees down to and including Treadway and Key that the timber belonged to the lumber company and did not pass with the conveyance of the land. They also stated that they had no information that the timber deed was not recorded and in fact supposed it had been recorded before making such conveyances.

The court refused to give any of appellants requested instructions and denied the motion to require appellees to elect which defendant it would proceed against, the liability being claimed to be several and not joint. It thereupon directed the jury to return a verdict for the lumber company and from the judgment thereon, this appeal is prosecuted.

Wynne & Harrison and *Daggett & Daggett,* for appellants.

1. It is conceded that one who conveys land and then executes a second conveyance with the intent to defeat the prior title, or even with knowledge that such conveyance will be used for that purpose commits an actionable wrong. But this is a different case. Appellants had a right to sell the land and did so, giving the purchasers notice of the rights of appellee. The case in 26 L. R. A. (N. S.) does not control, but is easily distinguished. 18 Minn. 405; 10 Am. Rep. 201; 22 Minn. 405.

2. Notice of an unrecorded deed is equivalent to a record of it. 14 Ark. 286; 71 *Id.* 31; 77 *Id.* 309; 94 *Id.* 503; 48 *Id.* 277. Appellee should have recorded its deed to the timber and appellants violated no statute and committed no wrong in selling the land. Cooley on Torts (3rd ed.) p. 142; Kirby's Digest, § 763; 16 Ark. 562; approved and followed in many cases; 47 Ark. 540; 54 *Id.* 508; 70 *Id.* 256; 58 Fed. 455.

3. There was a misjoinder of parties. 58 S. W. 536; 58 L. R. A. 666; 105 Iowa 358.

4. It was error to direct a verdict. The case should have gone to a jury.

S. F. Morton and *Gaughan & Sifford,* for appellee.

1. The case of *Hilligas* v. *Kuns,* 26 L. R. A. (N. S.) 284 is conclusive in this. See notes. The appellants were guilty of an actionable wrong when they sold the land *and the timber* without a clause preserving the timber rights of appellee. The court properly directed a verdict. 29 Ark. 650; 43 *Id.* 467; 37 *Id.* 571; 50 *Id.* 327; 81 *Id.* 464; Kirby's Digest, § 1693, 4, 5.

2. There was no misjoinder. 62 Ark. 118; 61 *Id.* 387.

3. The verdict is not excessive.

KIRBY, J., (after stating the facts). Attorneys for appellants concede that one who conveys a tract of land and thereafter executes a second conveyance with intent to defeat the first or with knowledge that such conveyance will be used for that purpose, commits an actionable wrong against the first grantee, holding an unrecorded deed, but insist that the instant case is entirely different from such cases. If appellee had recorded its deed to the timber, the condition existing now could never have arisen, since the last grantees who were held to be innocent purchasers of the timber would have had constructive notice of appellee's title from the record, their timber deed being in the chain of title. *Gaines* v. *Summers,* 50 Ark. 327.

Our statute provides, section 1693-95, Kirby's Digest, that if a person shall be a party to any conveyance or assignment of any real estate or interest therein with intent to defraud any prior or subsequent purchaser, or if any person shall *bona fide* sell any tract or parcel of land and shall make any written deed of conveyance or other instrument of writing, assuring the title of such land to the purchaser thereof and shall afterwards sell and convey such tract of land to any subsequent purchaser, whether the subsequent purchaser have knowledge of the previous

sale or not, such person shall be deemed guilty of a misdemeanor.

Appellants contend that said section 1694 relative to the sale of lands does not apply to the facts of this case, since they had the right to sell the lands and it was not their intention to convey the timber which they did not sell. Their testimony also shows that they had no intention in fact or rather did not make the conveyance of the land to the last grantees for the purpose of defrauding the lumber company of the timber already conveyed to it as they supposed its deed was of record and would protect its interest. However, this may be, it is unquestionably true that the conveyance of the land conveyed the timber standing thereon and that this fact was well known to appellants in making the deeds thereto. They also knew that their conveyances of the land contained no reservation or exception of the timber thereon from the grant, and were chargeable of course with knowledge that the conveyances of the land without such reservation or exception of the timber, carried the timber and would have effect to defeat their prior conveyances of the timber to the lumber company if said timber conveyance was not of record and the lands were afterwards granted to a *bona fide* purchaser without notice of it. Their affirmative action in making such conveyances without proper exceptions and reservations to protect their grantee of the timber whose deed might not have been and was not recorded, had the same effect to defeat its right and defraud the grantee of the timber as though they had intended the result effected, and for which they must be held answerable. They were owners as tenants in common, each of an undivided half of the lands upon which the timber stood, and conveyed the timber thereon to the lumber company by a warranty deed granting twenty years time for its removal, and their warranty was broken, and their grantee appellee, deprived of the timber by a *bona fide* purchaser through their subsequent conveyances of the lands within said time without reservation or exception of the timber,

for the loss of which they became liable. Whether the action be regarded arising out of contract or sounding in tort, the effect is the same, since the damage would not have resulted but for their subsequent conveyances of the land without reservation or exception of the timber, and although it is true that both appellants knew that they had already conveyed the timber to the lumber company, and neither in fact intended to defeat that conveyance, or deprive said company of the timber by his conveyance to the other of his undivided half of the land, still but for his said conveyance as made, the other would not have been able to convey the lands and wrongfully deprive their grantee of the timber. In other words, the act of Koonce in making the conveyance of his undivided half of the land to his co-tenant, McKee, contributed to the result attained by the conveyance of the lands without reservation or exception of the timber, thereby causing the damage to appellee in the loss of its timber. There was therefore no misjoinder of parties as contended by appellants.

The Supreme Court of Nebraska has reached the same conclusion as to liability in a case of like kind, in a well considered opinion. *Hilligas* v. *Kuns,* 26 L. R. A. (N. S.) 284.

The testimony being undisputed as to the value of the timber, the court committed no error in directing the verdict. The judgment is affirmed.

SMITH v. BERKAU.

Opinion delivered March 20, 1916.

VENDOR AND PURCHASER—DEFERRED PAYMENTS—DEFAULT.—Where land was sold to appellee upon a credit, the contract providing for the payment of the deferred installments in monthly amounts, where the time of payment is not of the essence of the contract, the contract of sale will not be declared forfeited upon default in the deferred payments.

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

Manning, Emerson & Morris, for appellant.

1. It was error to refuse to enter a decree for plaintiff for possession of the land. Time was an essential of the contract and payments at the times specified were conditions precedent. Hence a forfeiture should have been declared. 78 Ark. 574-578; 48 *Id.* 413; 87 *Id.* 593; 76 *Id.* 578; 4 *Id.* 413; 50 Am. Dec. 669-677.

2. The court erred in its findings of facts. The burden of showing payments was on the appellee. The three credits should not have been allowed. Appellant was at least entitled to a decree for the full amount unpaid.

Bradshaw, Rhoton & Helm, for appellee.

1. Forfeitures are not favored in the law and never enforced in equity. 77 Ark. 305; 78 *Id.* 202; 98 *Id.* 333. The findings of the chancellor on this question are against appellant on all the evidence and should not be disturbed. 83 Ark. 524; 98 *Id.* 331. The cases cited for appellant are not applicable.

2. The evidence sustains the chancellor in his finding in the matter of the three credits. 112 Ark. 341.

SMITH, J. Appellant is the administrator of the estate of his mother, who in her life time entered into an agreement to sell the property involved in this suit to appellee. A cash payment of $200 was made, and a contract entered into providing that the remainder should be paid at the rate of $30 per month. These payments—100 in number—were each evidenced by a note. The first note was payable August 15, 1910, and one note was to be paid on the 15th of each month thereafter, and all of the notes bore interest at 7 per cent. until paid. The contract for the sale of the land contained the following stipulation:

"But if the purchase money for said lands is not paid at the time and in the manner herein specified, upon the fourth default made in said payments all of said notes remaining unpaid shall at once become due and payable, and the obligation resting on the party of the first part shall become null and void, and the money theretofore paid on said purchase shall remain with and be the

property of the party of the first part, and shall be considered as so much rent paid by said party of the second part for the use of said property from the date of this instrument to the date of such default in payment * * * And the said party of the second part hereby accepts the conditions of this obligation, and in the event of the failure to make payments as herein provided, waives all right and claim to said real estate, and to the money heretofore paid on account thereof."

Suit was brought by appellant to recover possession of the land, it being alleged that appellee had defaulted in the payment of ten consecutive notes and had thereby forfeited all rights under his contract of purchase.

Appellee denied that he had failed or refused to make payments required under contract, and alleged he had made payments amounting to $2,324.00 and that credit had not been given him for these payments.

Appellee assumed the burden of proof and introduced a statement of the account showing various payments. Of all the credits so claimed only ten are in dispute. The court disallowed seven of these items and allowed three of them as follows: July 5, 1910, cash $150; July 1, 1911, cash $192; March 8, 1912, $67.00.

The court found that appellee was six months in arrears in his payments at the time the suit was instituted, but refused to declare the contract forfeited, and the administrator has appealed.

It is first insisted that time is of the essence of this contract and that the court erred in refusing to hold that appellees rights thereunder had been forfeited.

It is also insisted that the contract makes the payment of the notes a condition precedent before any rights can be acquired under the contract.

It is settled that equity will not relieve against a vendee who has made default where time has been made of the essence of the contract and the forfeiture has not been waived. Nor will it relieve against the performance of some act which the contract has made a condition precedent. Neither principle, however, con-

trols here. This is a contract for the sale of land on a credit of one hundred months with the proviso set out above. The contract gives appellee a present right as a purchaser and upon payment of the purchase money he becomes entitled to a deed just as any other purchaser would be who had bought land on credit.

Appellant relies on the case of *Thomas* v. *Johnson,* 78 Ark. 578. But that was a contract which created the relation of landlord and tenant and which was not to be changed into the relation of vedor and vendee until certain payments were made. Here the relation was never anything but that of vendor and vendee, and we think the priviso set out above does not so make time of the essence of the contract that appellee's rights thereunder became forfeited. The payments were made at irregular times and without reference to the maturity of the notes or the amount due at the time of the payments, and as the contract does not plainly and unambiguously provide for the forfeiture we will not hold that it should be so construed. *Chapman & Dewey Land Co.* v. *Wilson,* 91 Ark. 30; *Atkins* v. *Rison,* 25 Ark. 138; *Butler* v. *Colson.* 99 Ark. 340; *Kampman* v. *Kampman,* 98 Ark. 328; *Singer Mfg. Co.* v. *Brewer,* 78 Ark. 202.

The evidence in regard to the three payments allowed is conflicting and unsatisfactory, but the evidence in appellee's behalf concerning these three items is very similar to his proof on the other seven. According to appellee he is as much entitled to the seven which were disallowed as he is to the three which were allowed, except that purported receipts for each of these three items were offered in evidence. Appellee testified that he made all ten of the payments, yet the court allowed him only three. The signature to the three receipts were submitted to experts, who, by consent, were allowed to express their opinion, but who were not cross-examined. Two of these experts pronounced the signatures of S. J. Smith, who was his mother's agent in the collection of this money, and who was shown to have collected other moneys, to be genuine, while the third expert pro-

nounced the signature a forgery. In addition to this expert who pronounced the signature a forgery was the evidence of the wife of S. J. Smith and of his brother with whom he had been associated in business for a great many years and who likewise pronounced the signature a forgery. There is also evidence touching the time and place and circumstances under which certain alleged payments were made which tends to discredit appellee's evidence. In regard to the alleged cash payment of July 5th, 1910, and which is one of the items covered by the disputed receipts, the wife of Smith testifies that appellee made a cash payment of only $50.00 and the balance was paid in two installments of $75.00 each. Checks given by appellee corroborate Mrs. Smith's evidence concerning these payments. One was made on July 16th, one day after the papers were drawn up, and the second check was drawn on the 6th of August, nine days before the first note became due. The evidence is equally as uncertain in regard to the other credits claimed, and when we consider that the burden of proof of showing these payments rests upon appellee, and that this controversy did not arise until after both Mrs. Smith and her son, S. J. Smith, were dead, we have concluded that the proof does not sustain the finding that the payments were in fact made, and the decree of the chancellor will be modified by disallowing these credits.

The decree will therefore be reversed and the cause remanded with directions to modify the decree to conform to this opinion.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO. v. SCOTT.

Opinion delivered March 20, 1916.

RAILROADS—INJURY TO EMPLOYEE—DUTY TO MAINTAIN LOOKOUT—COLLISION.—Deceased was a brakeman on a train of the F. Rd. Company, and received fatal injuries when the engine upon which he was riding collided with a moving engine of the appellant railway company. Deceased's administratrix sued both companies but

elected to proceed against the appellant alone. *Held*, the case was covered by the lookout statute (Acts 1911, page 275), and that the appellant company would be liable, it appearing that the operatives of its engine failed to maintain the lookout for danger required by the statute, and that the accident could have been averted if a proper lookout had been kept.

Appeal from Crittenden Circuit Court, First Division; *J. F. Gautney,* Judge; affirmed.

Thos. S. Buzbee and *H. T. Harrison,* for appellant.

1. The proof was not sufficient to show negligence on part of defendant.

2. Defendant's negligence was not the proximate cause. 66 Ark. 68; 87 *Id.* 576; 51 L. R. A. (N. S.) 892; 95 U. S. 439; 40 Ark. 322; 45 S. E. 886; 62 Ark. 170; 76 *Id.* 13.

3. It was error to give instruction No. 3. It entirely ignores the question of deceased's negligence. Also in giving No. 5. It is abstract. 111 Ark. 135.

It was error to refuse to give defendant's request No. "D." 98 Ark. 17; 96 *Id.* 206. Also in refusing "A" and No. 2. 36 Ark. 377; 46 *Id.* 522; 7 L. R. A. (N. S.) 132; 63 Ark. 489.

Covington & Grant, for appellee.

1. The evidence is sufficient and defendants' negligence was the proximate cause. Plaintiff made out her case. 107 Ark. 431; 119 Ark. 36; 110 Ark. 169; 108 *Id.* 331; 107 *Id.* 170; 94 U. S. 474; 13 Cyc. 25, 6, 7. Failure to keep a proper lookout and exercise ordinary care was the proximate cause. 108 Ark. 331.

2. There was no negligence of deceased. The lookout statute makes the failure to keep the lookout or to exercise the ordinary care required the proximate cause. 108 Ark. 331; 109 *Id.* 241; 40 Fed. 632.

3. There is no error in the court's charge. 112 Ark. 405; 111 *Id.* 133; 93 Ark. 19; 111 *Id.* 133; 88 *Id.* 209; 111 *Id.* 281. The statute and 108 Ark. 331 settles this case.

SMITH, J. Appellee recovered judgment as administratrix of the estate of her husband to compensate the loss occasioned by his death, while engaged in the pursuit of his duties as a brakeman. The suit was brought against both the appellant railway company and the Frisco Railroad Company. It was alleged in the complaint that both of said railroads were operating trains through the town of Mansfield, Arkansas, where there were numerous sidetracks and switches used by them for switching cars and for other railroad purposes. That appellee's intestate, Ira M. Scott, was, on the 5th of May, 1914, employed by the Frisco Railroad Company, at which time the employees in charge of the train on which he was engaged as a brakeman and the trainmen operating one of the trains of the appellant company carelessly and negligently ran said trains together, and as a result of this collision the deceased received the injuries from which he died after suffering great pain.

Appellant filed a separate answer in which it denied specifically all the material allegations of the complaint, and plead affirmatively that the death of appellee's intestate was due to his own negligence.

At the conclusion of appellee's testimony the court, upon motion of the Frisco Railroad Company, ordered appellee to elect which of the defendants she would proceed against, whereupon she dismissed her suit against the Frisco and elected to proceed against the appellant company.

The evidence in support of the allegations of the complaint tended to establish the following facts: Appellant's railroad runs in a southwesterly direction through the town of Mansfield, while the Frisco tracks run almost due east and west, curving to the north in going from Mansfield to Jensen. The tracks of the two roads come together about twelve or fourteen hundred feet east of the Rock Island depot. Frisco trains from Jensen to Mansfield, after reaching Mansfield, leaves the main line Frisco track at a point near where the two roads come together, and back up to the depot, traveling over what is called the

run-around track. On the day in question the Frisco train had gone into the depot in the usual way, and the switch leading from the Frisco track to the run-around track had been left open with the red target or danger signal exposed, which fact gave notice that the track leading from the switch to the depot was being used at the time by a Frisco train. The Frisco train was composed of an engine, with a caboose attached to the rear, and a large refrigerator car coupled to the front, and after unloading some freight at the depot it started on its return to its own main track, where the car which was being pushed in front of the engine was to be placed upon the track for which it was intended by a flying switch. As this train was returning to its own track it encountered the Rock Island engine, which had "run over" the red target and come in upon the same track the Frisco train was on, and the trains collided with such force that Scott, who was riding on the pilot of the engine on the engineer's side, was killed, as was also another brakeman who was riding on the pilot on the opposite side of the engine. It was Scott's duty to have been on top of the car which was being pushed in front of the engine, or to have been on the ladder on the side of the car in a position to signal the engineer. As it was, there was no one on the Frisco train who could keep a lookout, and this train went blindly towards the switch where it would leave appellant's tracks for its own. The only possible excuse that could be offered for this negligence was the fact that the red target at the switch would apprise the trainmen in charge of appellant's engine of the presence of the Frisco train.

It was shown, however, on the part of appellant that it was not negligent in having come in upon the run-around track on which the collision occurred and that its train had a right to go upon this track notwithstanding the presence of the other train, provided the engine was kept under control, and the same duty rested upon the operatives of both trains to keep the engines under control. It was shown that by operating under control was

meant having that control of the engine which would enable the engineer to bring his engine or train to a stop within the range of his vision, that is, within the distance he could discern the presence of danger upon the track ahead of him, or in case his vision, for any cause, was obstructed, to have his engine under such control that he could stop it within the range of vision of the man whose duty it was to pass signals to him.

There are not many controverted questions of fact in the case, but among such questions are the relative speed of the trains, and the distance from each other when appellant's engineer saw, or could have seen, the other train, and the distance traveled by the Frisco train after the whistle on the Rock Island engine was blown as a warning of danger. While the witnesses do not agree as to the speed of the two trains it appears to be reasonably certain that the Frisco train was traveling faster than the Rock Island train. Without setting out this evidence in detail it may be said that it is sufficient to support a finding that, if the employees of either company whose duty it was to keep the lookout had performed that duty, the unfortunate collision would not have occurred. The evidence on appellant's behalf is to the effect that its engineer was keeping a lookout, that he blew a shrill blast of the whistle, and that he did this as soon as he realized the impending danger, and that he had applied his air-brake and had just reversed the engine when the impact came.

It is urged that appellant's engineer could not have prevented the collision because of the blind and heedless manner in which the Frisco train was backing up the track and that there was no time during the events leading up to the collision and until the occurence of the collision itself when the deceased could not by the exercise of care, have averted the fatal consequence to himself either by giving appropriate signals to his engineer or by jumping off his engine. Appellant argues from this assumption that the case should have been submitted on the question only of whose negligence was the proximate

cause of the collision. This idea was embraced in an instruction which reads as follows:

"2. If you find from the evidence in this case that the collision in question was the result of the joint concurring negligence of the operatives in charge of the Rock Island engine and of plaintiff's intestate, Ira M. Scott, it is your duty to return a verdict for the defendant."

Learned counsel for appellant review a number of cases which announce a rule that would require the giving of the instruction set out above and which would call for the reversal and dismissal of the case except for the lookout statute, enacted by the General Assembly of this State, May 26, 1911, (Acts 1911, p. 275).

The theory of the court below was that this statute was applicable and controlled the rule of liability under the facts of this case, and the correctness of that view presents the real question in the case.

We have considered this statute in a number of recent cases, and that the trial court correctly interpreted these decisions is shown by instruction numbered 3 which was given over appellant's objection, and which reads as follows:

"3. If you find from a preponderance of the evidence that plaintiff's intestate was upon a train which was being operated upon the railway, and that the agents and servants of defendant company in charge of its train, whose duty it was to keep a constant lookout for persons and property upon the track, saw the train upon which plaintiff's intestate then was, and the perilous position thereof in time to have avoided colliding therewith by the exercise of ordinary care, or that said agents and servants of defendant, by keeping a constant lookout, could have seen the train upon which the plaintiff was, and discovered the the perilous position thereof in time to have avoided colliding therewith by the exercise of ordinary care, and failed to exercise such ordinary care to protect plaintiff's intestate from danger and injury, then you will find for plaintiff."

When we have approved this instruction as applied to the facts of this case we have practically decided the case, and we do approve it. Prior to this lookout statute the law was that, notwithstanding a railroad company was guilty of negligence in the operation of its trains which caused the injury, there could be no recovery if the person injured was guilty of negligence contributing to his injury, unless the peril of this negligent person was discovered in time to avoid injuring him by thereafter exercising ordinary care for that purpose. But this lookout statute worked a radical change in the law. Indeed, it was enacted for the purpose of making railroad companies liable where, notwithstanding the contributory negligence of the person injured, the injury could have been averted had a lookout been kept, and it is made immaterial whether the operatives of the train know of the person's presence and danger or not, provided the circumstances are shown to be such that the injury could have been avoided by the exercise of ordinary care had a lookout been kept. A lookout here would have revealed that the Frisco crew was guilty of the negligence of which appellant complains and also the peril and danger impending. It is true deceased could have gotten off the engine if he had known of his danger, and it may be true he would not have been endangered had he been at his post of duty to communicate appropriate signals to the engineer; but the keeping of a lookout on appellant's part would have revealed to the Rock Island train crew the impending collision which the negligence of the Frisco crew made probable, and we think the jury was warranted in finding that this collision would have been avoided had the Rock Island trainmen performed their duty by keeping a proper lookout.

Finding no prejudicial error the judgment is affirmed.

BREYSACHER *v.* STATE.

Opinion delivered March 20, 1916.

1. CRIMINAL LAW—SPECIAL GRAND JURY—ENTERING ORDER.—The entering of the order calling a special grand jury, upon the record of the court, instead of on the judge's docket is a substantial compliance with the statute.
2. CRIMINAL LAW—ORDER SUMMONING SPECIAL GRAND JURY—CLERICAL MISPRISION.—The order of court summoning a special grand jury, when designated as a "*scire facias*," instead of a "*venire facias*," is merely a clerical misprision, and does not affect its validity.
3. CRIMINAL LAW—HOMICIDE—EVIDENCE OF INTENT—STATE OF MIND OF THE ACCUSED.—In a prosecution for homicide, evidence of a proposition by certain employees of a lumber mill, to pay the fine of one of their number if he gave accused a whipping, which was brought to accused's attention, is incompetent, when there was no connection between the affair and the deceased, the evidence being calculated to show that defendant was in a quarrelsome frame of mind a short time before the killing.
4. EVIDENCE—DEPOSITIONS—FORM—CRIMINAL CASE.—Depositions in a criminal case are inadmissible, where they had no caption showing the style of the case in which they were to be used, and when the certificate of the officer, before whom they were taken, did not comply with the statute.
5. CRIMINAL LAW—ADMISSIONS OF INCOMPETENT TESTIMONY—REVERSAL.——SENTENCE FOR LOWER CRIME.—Defendant was sentenced to twenty-one years in the penitentiary for the crime of homicide. Incompetent evidence on the issue of intent was admitted by the court. The cause was reversed with leave to the Attorney General to have defendant sentenced for voluntary manslaughter, the evidence warranting the same, and the error going only to the question of malice.

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

STATEMENT BY THE COURT.

At a regular term of the circuit court of Mississippi County, the prosecuting attorney petitioned the court for an order impaneling a special grand jury to inquire into the killing of one Johnny Bryeans which occurred after the regular grand jury had adjourned. The court granted the petition and issued an order, which is designated as a *scire facias,* to the sheriff of Mississippi County, commanding him forthwith to summons from the body of the

electors "sixteen good and lawful men to serve as members of the grand jury." The clerk entered the order upon the circuit court record and issued an order directed to the sheriff, commanding him to summons "from the body of the Chickasawba District of Mississippi County sixteen good and lawful men," etc., to act as special grand jurors. The jury was duly impaneled and returned an indictment against the appellant, charging him, in correct form, with the crime of murder in the first degree in the killing of one Johnny Bryeans. The appellant was convicted of murder in the second degree and his punishment fixed by the sentence and judgment of the court at twenty-one years in the State penitentiary, from which he duly prosecutes this appeal. Other facts will be stated in the opinion.

C. A. Cunningham and *Gravette & Rodgers,* for appellant.

1. The court erred in overruling the motion to quash the indictment. Kirby's Digest, § 2219. Power to order special terms of court and special grand juries is purely statutory and the law must be strictly complied with and must appear of record. 176 S. W. 165; Kirby's Digest, § 2219; 100 Ark. 375; Kirby's Digest, § § 1532-3, 2219.

2. The court erred in permitting witnesses to testify as to the conversations and transactions between them and defendant prior to the killing and in permitting counsel to examine defendant as to what took place between him and the witnesses. The only object was that of placing a neighborhood squabble before the jury in an attempt to affect the jury by extrinsic facts upon which to base a motive for the killing, and to show the condition of defendant's mind at the time he fired the shot. It was incompetent. 82 Ark. 58. The threats were too remote and indefinite to become a part of the *res gestae.* 73 Ark. 152; *Ib.* 407; 70 *Id.* 610; 52 *Id.* 303; 180 U. S. 356; 82 *Id.* 58; 21 A. & E. Enc. Law, (2 ed.) 219-20.

3. The depositions as to good character and reputation of Schatz should have been admitted. 40 Cyc. 2563, 2463; 104 Tenn. 74; 78 Am. St. 913; 74 *Id.* 145. The

general rule governing the admissibility of testimony to sustain the general character of a witness for truth and veracity is accurately stated in 20 Vt. 554; Underhill on Ev. § 352; 2 Elliott on Ev. § 995; Wigmore on Ev. § 1104; 24 S. W. 1078; 10 So. 621; 29 Ind. 555; 26 Am. St. 350; 38 Md. 15; 18 So. 912; 49 Ala. 650; 42 S. E. 853; etc.

Wallace Davis, Attorney General and *Hamilton Moses,* Assistant, for appellee. *J. T. Coston,* of Counsel.

1. There is no error in the order impaneling the special grand jury. The order was properly made and entered of record. Kirby's Digest, § § 606, 4475. The calling it a *scire facias* instead of a *venire* is immaterial; it contained all that was necessary. The clerk is merely the secretary who does the work of a judicial officer. 9 Humph. 626; 15 Cal. 328; 14 Ga. 43; 73 Ind. 537.

2. The testimony of Potts, Owens and Burns was competent. 50 Atl. 1078; 1 Wigmore Ev. § 364; 82 S. W. 201; 4 Ark. 62; 13 *Id.* 236; 92 S. W. 1123; 2 Ark. 244, etc.

3. The depositions were rightfully excluded. They have no caption, nor style of case and they are not properly certified. Kirby's Digest, § 3185.

4. The crime was atrocious. Defendant had a fair trial under proper instructions. He was fortunate in escaping a verdict of murder in the first degree.

WOOD, J. (after stating the facts). Appellant contends that the court erred in overruling his motion to quash the indictment because the order calling for a special grand jury was not entered on the minutes of the court and was directed to the clerk instead of the sheriff, and because it was designated a *scire facias* instead of a *venire facias.* There is nothing in any of these objections.

(1) The statute* provides: "If any offense be committed or discovered during the sitting of any court after the grand jury attending such court shall have been discharged, such court may, in its discretion, by an order to be entered in the minutes, direct the sheriff to summons a special grand jury." The

*Kirby's Digest, § 2219 (Reporter).

entering of the order upon the record of the court instead of on the judge's docket was a substantial compliance with the statute. It was the purpose of the lawmakers simply to have the order entered upon the official record of the court. That is the meaning of the word "minutes," as used in the statute.

(2) Designating the order as a "*scire facias*" instead of a "*venire facias*" was a mere clerical misprision. The order itself was directed to the sheriff, and commanded him to "forthwith summons from the body of electors of this district sixteen good and lawful men to serve as members of this special grand jury," which showed that it was a *venire facias*. It was wholly immaterial what the order was called since the purpose of the order was clearly stated therein, and was understood by the officer and complied with. The clerk was directed to issue the order, but the order itself was by him issued to the sheriff. The proceedings were in all things regular, and the court did not err in overruling the motion to quash the indictment. See *Dawson* v. *State,* 121 Ark. 211.

The appellant was one of the bosses in the employ of the Chicago Mill & Lumber Company. Bryeans was permitted to haul wood from the mill and supply the mill employees and its officers and such other persons as he cared to. When there was a surplus of wood at the mill it was sold to anybody who wanted it. It was a rule of the company not to allow anyone to bother the men who were employed at the mill or to talk to them while they were at work. Bryeans, it appears from the testimony, had been violating this rule and appellant had remonstrated with him about it, and on the day of the killing appellant approached him again, as he stated, to protest against his further interference with the employees at the mill and that it was during this conversation that the killing occurred.

Appellant relates the occurrence as follows:

"As I came out I met Mr. Schatz at the door and asked him to go to the boiler room with me. On the way over I saw Johnny Bryeans and told Mr. Schatz I wanted

to speak to him. It was the first opportunity I had had. I walked up to him as he was pulling the back off of his wagon under the kindling shed, and said, "Johnny, I want you not to bother that negro any more about bringing wood out. Come to Mr. Davidson or me and we will see that you get it.' He replied, 'I have not been bothering any of the men.' I said, 'You will have to keep your driver out of here, and the other evening you were bothering the men and it is against the rule. I do not want it done.' He said he had not been bothering the men. Mr. Schatz stepped between us and said there was no need for trouble. I thought at the time that Bryeans was going after his knife, but did not think that there would be any trouble. I told him every time he came into the shop he stopped and talked to Skinny Morgan and he called me a God-damned-liar, and I called him another one, and he put his hand in his pocket, got his knife and ran at me from a distance of about five or six feet. I backed away but got my foot tangled in some trash and kindling, saw that I could not get away from him, pulled my pistol and shot him. I could tell by the look in his eye that he was going to cut me. I had no intention of killing him. If I could bring him back by serving a term in the penitentiary I would gladly do so."

This testimony of appellant as to what took place at the time of the fatal rencounter was substantially corroborated by witness Schatz, who was in company with appellant at the time he approached Bryeans, and also witness Stinnett, who was nearby and observing them.

On behalf of the State a witness testified as follows: "I was something like forty-five or fifty feet away. Mr. Bryeans was facing Mr. Breysacher and Breysacher's back was to me; Mr. Schatz was leaning against the back of a wagon. I saw Mr. Breysacher step back about one step and fire. Mr. Bryeans did not fall for about a minute, and I thought he had missed him. At the time the shot was fired Mr. Bryeans was standing facing towards Mr. Breysacher with his hands at his sides. He stood in that position until he weakened down." Witness

went to where Bryeans was lying and saw no weapon. They were five or six feet apart when the shot was fired. Witness was in a position to see Bryeans and could have seen same if he had had a knife in his hand. However, he was not expecting any trouble and did not remember having seen any knife. Witness stated that he himself was very much excited, and did not know whether he saw any movements or not. Did not pretend to say Mr. Bryeans did not have a knife, he might have had one but witness did not see it.

One other witness testified that he was about sixteen feet from Bryeans when the dispute between him and appellant arose. He could not hear what was said. Immediately after they stepped back from the wagon Bryeans started towards Breysacher. As he started Breysacher reached back, but witness did not see him put his hand in his pocket and bring it out. He had a gun. Bryeans turned around, sank to his knees and fell over. Witness could see his hands and he did not have any knife. Witness never saw Breysacher's pistol; just saw the motion of his arm. Witness had his eyes on Bryeans at the time, and was looking at him at the time to see if he put a knife in his pocket and he didn't do it. His hands were down at his sides, and he never moved them.

Another witness testified that he saw Bryeans advance towards Breysacher a couple of steps; could not say that he was doing anything at the time he was shot. He stepped back and dropped his hands to his sides; never put his hands to his pockets. Witness did not see any knife.

Other witnesses on behalf of the State whose attention was called to the occurrence by the pistol shot testified substantially to the effect that the participants seemed to be standing perfectly still; that Bryeans' hands were hanging by his sides. They did not see him put his hands in his pocket from the time he was shot until he sank down. They could have seen the knife if he had had one in his hands. One witness testified, "At the crack of the pistol I looked up and saw Mr. Gus (Brey-

sacher) standing with it (the pistol) in his hand. Mr. Bryeans was standing ten feet away, with both of his hands by his side. I could see his hands distinctly; he did not have anything in them. Another witness testified substantially to the same effect.

The above testimony presents the circumstances of the fatal rencounter from the view point of the appellant and the State.

A witness by the name of Potts testified that prior to the 3rd of April he had been employed by Bryeans and before that day Bryeans had discharged him, and told witness at the time that he did so because Gus Breysacher said witness was bossing the negroes too much. The evening before the killing witness was with several boys in the barber shop and they agreed among themselves that if the witness would whip Breysacher they would pay witness' fine. Some of the boys were employees at the mill. Over the objection of appellant, witness was permitted to testify that he stopped Breysacher while he was on his way to dinner and asked him why he told the damn lie on witness; that Breysacher replied "If you think I told a damn lie on you get Johnny Bryeans and bring him up and I will convince you that I did not."

Another witness testified that about 12:30 o'clock on the day of the killing he had a conversation with Breysacher, and, over the objection of appellant, witness was permitted to state that Breysacher said to witness "When you get money to donate on anybody else's fine donate some on mine." Witness told Breysacher that he had agreed to pay a dollar on Potts' fine, and Breysacher said that he had not done anything to the boys. Witness jokingly said that he would pay a dollar towards paying Potts' fine if he would whip Breysacher. Breysacher replied that he was glad witness did not have any more than that to do with it, and left witness laughing and in a good humor. That was 30 or 40 minutes before the killing.

Another witness was permitted, over the objection of appellant, to state that about five minutes before the killing he had a conversation with Breysacher in which Breysacher had reproached him for offering a dollar on Potts' fine if Potts' would give Breysacher a whipping; that Breysacher said to witness that it was none of witness' business who told him (Breysacher) about it; that Breysacher struck witness and said something to witness that he did not remember. Witness found that he was mad and tried to get loose from him. He got loose and went in the mill and Breysacher caught him again. Witness only regarded what the Potts boy said as a joke, and did not apologize because Breysacher did not give him time. Breysacher said to witness that there were seven more that he was going to see.

Now it was not shown that Bryeans was one of those in the barber shop who offered to pay Potts' fine if he should whip Breysacher, and there is no testimony whatever to connect Bryeans with that conversation; nothing to show that the appellant harbored any ill will towards Bryeans growing out of the occurrence in the barber shop. There was nothing to show that Breysacher had reference to Bryeans when he stated to Albert Burns that there were seven more he was going to see in regard to the proposition to pay Potts' fine. There was nothing to show that there was any ill feeling on the part of Breysacher towards Bryeans before the fatal rencounter.

Breysacher testified that he and Bryeans were good friends; that they had had no difficulty whatever; that there was no ill feeling existing between them and that he had not connected John Bryeans with the conversation in the barber shop and had no intention of mentioning the barber shop occurrence to him at the time he approached him about disturbing the men in the box factory. So the occurrence in the barber shop, which so aroused the temper of the appellant as to cause him to violently attack one of the parties and to declare that he was going to see the others for the same purpose, had no connection

whatever with the matter between Bryeans and appellant out of which the difficulty grew and which resulted in the death of Bryeans.

(3) Now the effect of the testimony of witnesses Potts, Burns and Owens was to show that Breysacher was in an ill humor, and was harboring ill will towards those who had participated in the occurrence at the barber shop when Potts proposed to whip Breysacher, and the others present agreed to pay his fine if he would do so; that he was so embittered against them that he was, on the day of the killing and just a short time before, engaged in looking them up and calling them to account for what they had said and the part they had taken in the proposal by Potts to give him (appellant) a whipping; that he had gone to the extent of making a violent attack upon one of them, and had declared that there were seven more that he expected to see. The testimony was calculated to cause the jury to believe that the appellant, upon apparently a very slight provocation, or no provocation whatever, was undertaking to run down and rebuke or chastise those who he fancied had done him a wrong, and that in so doing he was manifesting a wicked and abandoned disposition, and that it was this malice and bad temper which caused him to assault and slay Bryeans.

In *Deal* v. *State,* 82 Ark. 58, a witness was permitted to testify that a few hours before the killing the defendant had threatened to shoot his gun until it melted if they didn't quit running over him. His threat was not directed to any particular individual, and the deceased was not mentioned. In commenting upon this testimony we said: "It tended to show a malevolent spirit, a wicked and abandoned disposition; that appellant was in a frame of mind fatally bent on mischief which culminated in the killing of Bronson. But the testimony was clearly incompetent, because the threat 'to shoot his gun till it melted,' made several hours before the tragedy, was not directed against Bronson, the man who was killed, 'but against another fellow.' The proof showed that there was no ill will between appellant and Bronson before the

killing. On the contrary, they were shown to be on friendly terms." We held in that case that the admission of such testimony was error, citing cases. The principle announced in that case rules this.

(4) The court excluded offered depositions of certain witnesses taken at Cairo, Illinois, to establish the reputation of appellant's witness Schatz for truth and morality. The certificate of the officer taking the offered depositions was as follows: "State of Illinois, County of Alexander. John T. Brown, Cairo, Ill., being first duly sworn, deposes and says that he is the commissioner before whom W. H. Wood was taken in the case of The State of Arkansas, plaintiff vs. J. A. Breysacher, defendant. He also further states that he had no connection, either directly or indirectly, with the said Breysacher." (Signed) John T. Brown, Commissioner."

Our statute provides: "The certificate of the officer shall state the time and place of taking the deposition; that the witness was duly sworn before he gave his testimony, and that his testimony was written, read to and subscribed by him in the presence of the officer; and also state by whom it was written, and which of the parties, in person or by agent or attorney, was present at the examination of the witness." Kirby's Digest, § 3185.

The depositions had no caption showing the style of the case in which they were to be used. The certificate of the officer did not comply with our statute, and therefore the court did not err in excluding the depositions in the form in which they were offered.

(5) The court erred in admitting the incompetent testimony above indicated, and the judgment will be reversed. But it does not follow that the appellant is entitled to a new trial. The only effect of the incompetent testimony was to show malice on the part of the appellant, and the prejudicial effect of this testimony therefore will be eliminated if the verdict is reduced from murder in the second degree to manslaughter. For the jury did not accept the testimony on behalf of the appellant tending to show that he was justified in taking

the life of his fellow man. On the contrary, their verdict shows that they believed the testimony of the witnesses for the State on this issue, and with the incompetent testimony tending to show malice eliminated, it is manifest the jury would not have returned a verdict for a lower offense than that of voluntary manslaughter.

The judgment will therefore be reversed and the cause remanded for a new trial, unless the Attorney General, within fifteen days, shall elect to have appellant sentenced to imprisonment in the penitentiary for voluntary manslaughter.

KIRBY, J. dissents.

WOODS v. STATE.

Opinion delivered March 20, 1916.

1. HOMICIDE—FIRST DEGREE MURDER—SUFFICIENCY OF EVIDENCE.—Evidence held sufficient to warrant a verdict of first degree murder.
2. CRIMINAL LAW—IDEM SONANS.—The doctrine of *idem sonans* does not apply, where an indictment charged Henry Wood with the crime of killing Vina Wood, and the proof showed that their names were Henry Woods and Vina Woods.
3. CRIMINAL LAW—NAMES IN INDICTMENT—VARIANCE.—Defendant was indicted as Henry Wood for the killing of Vina Wood; defendant testified that his name was Woods and that deceased was Woods also; certain witnesses who had known the parties testified that the defendant and deceased were known in the community as both Wood and Woods. *Held*, a conviction would be upheld, when the court instructed the jury that they might convict, if they found beyond a reasonable doubt, that Henry Wood and Vina Wood, named in the indictment, were the same persons as the defendant and deceased, mentioned in the proof.

Appeal from Craighead Circuit Court, Lake City District; *W. J. Driver*, Judge; affirmed.

The appellant, *pro se*.

1. There is a fatal variance between the indictment and proof. Wood and Woods are not *idem sonans*. 5 Ark. 72; 21 Am. & Eng. Enc. Law, 313; 21 Tex. App. 320; Defendant was entitled to have the indictment drawn

definite enough to notify him of the crime. 7 Ark. 70; *Ib.* 394; 24 *Id.* 574; 68 *Id.* 244.

Wallace Davis, Attorney General and *Hamilton Moses,* Assistant, for appellee.

1. The variance was not fatal. The names are *idem sonans.* The proper party was convicted. The jury found there was no variance. 1 Ark 503; 21 *Id.* 462; 7 *Id.* 70; 50 *Id.* 97; 60 *Id.* 517; 100 *Id.* 149; Kirby's Digest, § 2332; 35 Ark. 385; 105 *Id.* 84; 101 *Id.* 59.

HART, J. The defendant was indicted for the crime of murder in the first degree. He was tried before a jury which found him guilty and assessed his punishment at death by electrocution. From the judgment rendered, the defendant has duly prosecuted an appeal to this court.

The facts proved by the State are substantially as follows:

On July 19, 1915, the defendant killed deceased at a boarding house run by Rosa Tucker and her husband, Ferrell Tucker in the Lake City District of Craighead County, Arkansas. The defendant Henry Woods and the deceased Vina Woods had formerly been husband and wife. They had lived a part of the time in the State of Oklahoma and a part of their married life was spent in the State of Arkansas. While they were living in Craighead County, Arkansas, the defendant got into trouble about selling whiskey and went to the State of Oklahoma and remained away about eighteen months. During the time he was gone he corresponded with his wife but she obtained a divorce from him. At the time she was killed she lived with the Tuckers and slept in the same room with them. She had been keeping company with Monroe Heister and was reputed to be engaged to him. He also boarded with the Tuckers.

The defendant came back from Oklahoma for the purpose of trying to persuade his wife to marry him again. On the night of the eighteenth of July, 1915, he came to the home of Walter Gunn who lived about a quarter

of a mile from the Tuckers and asked him the way to their boarding house.

When the defendant arrived at the Gunn's house that night, he tapped on the door step with his pistol to wake Gunn up and then shot off his pistol four or five times. Gunn showed the defendant the way to the Tuckers and defendant arrived there soon after midnight. He went into the house occupied by the Tuckers and found his wife in their room. He got into bed with her and after they had talked a while, deceased got up and went into another room and motioned for Rosa Tucker to follow her. She told Rosa that her husband had a pistol which she had put in her trunk and asked Rosa to lock the trunk. Rose told her husband to lock the trunk and while he was trying to find the key, he found the pistol and put it in his bosom and gave his wife the key. Vina then got back on the bed with the defendant and they continued to talk the rest of the night. Rose Tucker said: "We had breakfast before daylight. After breakfast, the defendant asked me for the key to Vina's trunk. I gave the key to my husband. Vina said, "Well just as well give him the key. Just as well now as any time, it is going to be some time—that he is going to kill her."

The defendant was given the pistol and went out of the house and in a short time came back and asked Vina to go walking with him. She refused saying she didn't want to go out there because he was going to kill her. The defendant told her that he was not going to kill her and insisted on her going walking with him. They went down the road a little piece and talked a while. The deceased then came back to the house and the defendant went over to Walter Gunn's. In a short time the defendant came in at the front door and asked where his lantern was. It was then daylight. Vina stepped inside the middle door and showed him where his lantern was. He picked up the lantern and jerked back his coat to pull his pistol, I ran. Vina cried out for him not to shoot and commenced screaming.

The husband of Rosa Tucker corroborated her testimony and stated that he was at the mill at the time the shooting occurred and went to the house at once and that Vina was drawing her last breath when he got there. He stated that the pistol used by the defendant was a thirty-two Colt's revolver; that he shot deceased near the center of the breast and in the head just below the right ear.

Walter Gunn told the jury about the defendant coming to his house and inquiring the way to the Tucker boarding house as stated above. He then said, that the defendant came back to his house the next morning between six and six-thirty o'clock; that the defendant came up to him and said he wanted to shake hands with him for the last time; that he said to the defendant, "What is the matter Henry? and the defendant said, "I am going to kill that damn bitch this morning." Gunn then asked him who he was talking about and he said, "That woman down there." The defendant also said he was going to kill Chas. Craig and Monroe Heister. Gunn finally got the defendant to promise that he would not kill deceased and that he would go back to the boarding house and get his lantern and then come back and stay with him. He said that defendant went down towards the boarding house and after he had gone a little ways turned around and asked him if he had any thirty-two cartridges and that he replied that he did not and that defendant then said, well what I have got will do, and went in a trot from there to the boarding house; that some four or five minutes after that he heard the pistol fire.

Another witness who was standing near and heard most of the conversation between Gunn and the defendant corroborated the testimony of Walter Gunn.

Another witness for the State testified that he saw the defendant walk into the house, draw his gun and commence shooting at deceased; that she threw up her hands and asked him not to do it; that he shot twice; that Vina fell over on the bed and defendant went over towards her

and shot again, and that she screamed until the last shot was fired. Vina died soon after she was shot by the defendant. The defendant ran off and escaped into Canada. Later he was arrested there and brought back for trial.

The defendant testified in his own behalf as follows: "My name is Henry Woods not Henry Wood. My wife's name is Vina Woods. My wife promised to remarry me and we agreed to meet at Poplar Bluff for that purpose. I went there but she did not come. I then went to Oklahoma and wrote her a letter stating that I was willing to carry out my promise to her. I received a letter from her in which she stated she was still willing to marry me. When I came back to Arkansas, I went up to the boarding house where my wife was staying and hollered. I then went into the room where she was and walked up to the bed and kissed her. She seemed cold to me and when I asked her what was the matter, she replied that she was not going to live with me any more. I tried to persuade her to stick to her promise. I had taken my pistol off when I first got there and put it under the pillow. I threatened to blow out my brains. She asked me for the gun and I gave it to her and she put it in the trunk. The next morning I asked my wife to go walking with me and she did say she was afraid I would kill her. I told her that I would not hurt her. We walked off about thirty yards from the house and had a talk. She agreed to give up our little daughter. I did not want a stepfather over her. I went over to Walter Gunn's on the morning of the killing but he is mistaken in what he said. I did not say anything about killing my wife and did not holler back and ask him if he had any thirty-two cartridges. I had no ill will towards my wife and did not realize what I was doing when I shot her. After the killing I went through the bottom and escaped to Canada.

(1) The evidence on the part of the State was sufficient to warrant a verdict of murder in the first degree. According to it there was a specific intent to kill deceased

formed in the mind of the defendant at or before the time he was at the home of Charley Gunn on the morning of the killing. He told Chas. Gunn in the hearing of another witness, that he intended to kill her, at the same time referring to her by a vile name. He walked on back towards the boarding house and killed deceased as soon as he entered it. There was no provocation whatever for the killing and according to the testimony of the State, it was the result of deliberation and premeditation. The defendant himself admits the killing and the only excuse he gave for it was that he did not realize what he was doing.

His insanity at the time of the killing was submitted to the jury under proper instructions. The court also gave the usual instructions on the question of homicide, of reasonable doubt and the credibility of the witnesses. The guilt or innocence of the defendant was submitted to the jury upon competent evidence and under instructions which fully covered every phase of the case. The verdict of the jury was fully warranted by the evidence.

(2) The defendant was indicted as Henry Wood and he was charged in the indictment with killing Vina Wood. He testified that his name was Henry Woods and that deceased's name was Vina Woods. Therefore his counsel insisted that there was variance between the indictment and the proof.

Charley Craig was a witness for the State and testified that he was the uncle of the deceased and had known her and the defendant all their lives. We quote from his testimony as follows:

"Q. Did you know Henry Woods?

A. Yes, sir.

Q. Do you know what is the name of the defendant, whether it is Henry Wood or Henry Woods?

A. No, sir; I don't know which it is. I have heard it both ways. Used both ways. I never knew for sure whether it was Wood or Woods.

Q. Did you know Vina Woods?

A. Yes.

Q. What was her correct name, Vina Wood or Vina Woods?

A. They have called it both ways.

Q. Was she the wife of Henry Woods?

A. Yes, sir.

Q. Do you know of your own personal knowledge whether the Vina Wood mentioned in this indictment was one and the same person that was killed over there?

A. Yes, sir.

Q. Whatever her name might have been, whether it was Vina Wood or Vina Woods, she was one and the same person?

A. Yes, sir.

Q. And whatever Henry Woods name may be, whether Henry Wood or Henry Woods, he is the one and the same person that is charged with the offense?

A. Yes, sir."

Counsel for the State insists there is no variance because the names come within the doctrine of *idem sonans* but this court has decided adversely to that contention. In the case of *Semon* v. *Hill,* 7 Ark. 70, it was there said that the letter "S" terminating the letters of a name in our language is seldom silent, and that if it appears as the last letter of a name, the pronunciation thereof conveys to the ear an entirely different sound than that conveyed when the consonant is omitted. In the case note to 52 L. R. A. (N. S.) page 939, the author states that the great majority of the decisions seem to establish the general rule that the addition or omission of the final "S" to a name creates such a change in the sound of the name that the variant name can not be said to be *idem sonans.* The decisions from quite a number of States to that effect are cited. The reason given is that the final "S" to a name is not silent.

(3) We are of the opinion, however, that the testimony of the State was sufficient to warrant the court in submitting to the jury the question of whether the defendant and deceased were as well known and called by the name of Henry Wood and Vina Wood respectively

as Henry Woods and Vina Woods. This results from the doctrine of interchangeability of names.

Charles Craig was the uncle of the deceased and had known both her and the defendant all their lives; and under his testimony the question of variance was one of fact for the jury. *Bennett* v. *State,* 84 Ark. 97. In that case the court said: "The question of identity of the person described in the indictment with the one mentioned in the evidence is one of fact, to be established, like any other fact, to the satisfaction of the jury." See also *Commonwealth* v. *Gormley,* 133 Mass. 580.

Under the testimony of Charles Craig, as above stated the jury might have found that defendant and deceased were as well known and called by the name of Henry Wood and Vina Wood respectively as by the name of Henry Woods and Vina Woods. This question of fact was submitted to the jury under the following instruction: "You are instructed that if you find from the evidence, beyond a reasonable doubt, that Henry Wood and Vina Wood, named in the indictment, are one and the same person, respectively, as the defendant and the deceased, mentioned in the evidence in this case, then there would be no variance between the allegations of the indictment, and the evidence, and it would be your duty to convict the defendant, provided you find him guilty under the instructions hereinbefore given you."

Another reason for not reversing the judgment on account of the alleged error in spelling the defendant's name is given in *Bridger* v. *State,* 122 Ark. 391. This case was so recently decided that it is not necessary again to state the reasons there given.

We have carefully examined the record and find no prejudicial errors in it. Therefore, the judgment must be affirmed.

WISCONSIN & ARKANSAS LUMBER COMPANY v. IRONS.

Opinion delivered March 20, 1916.

1. MASTER AND SERVANT—SAFE PLACE TO WORK—DUTY TO INSPECT.—It is the master's duty to exercise ordinary care to provide his servants with a reasonably safe place in which to work, and to make reasonable inspection to see that the place of work and appliances are safe.
2. MASTER AND SERVANT—INJURY TO SERVANT—ASSUMED RISK.—When plaintiff, an employee of defendant, was injured by a defect in the floor of the sawmill, *held*, under the evidence that it was not shown that plaintiff assumed the risk.
3. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE.—In an action for damages for personal injuries received by plaintiff because of defective flooring in a sawmill, the evidence held sufficient to show the defendant employer guilty of negligence, and to warrant a recovery.
4. DAMAGES—PERSONAL INJURIES—AMOUNT.—Where plaintiff, an able-bodied young man, was injured through defendant's negligence, sustaining a hernia, which grew steadily worse, and which prevented him from working steadily, he being fitted to do only manual labor, a judgment for $1,500 damages is not excessive.
5. MASTER AND SERVANT—INJURY TO SERVANT—ASSUMED RISK—DUTY OF SERVANT.—Where an injury to a servant was due to the master's negligence, it is erroneous to charge the jury that the servant assumed the risk, if by the exercise of ordinary care he could have discovered and avoided the danger.
6. MASTER AND SERVANT—INJURY TO SERVANT—INSTRUCTIONS—ASSUMED RISK.—In an action for damages for personal injuries, an instruction on defendant's liability for negligence, is not erroneous because it omitted the issue of assumed risk, unless the appellant made a specific objection to the instruction, at the trial, on that ground.

Appeal from Hot Spring Circuit Court; *W. H. Evans*, Judge; affirmed.

T. D. Wynne and *H. T. Harrison*, for appellant.

1. The defect in the floor was open and obvious. A servant assumes the ordinary risks and hazards incident to the service, including all risks known to him and those which are open and obvious. 82 Ark. 16; 90 *Id.* 387; 68 *Id.* 316; 57 *Id.* 505; 172 S. W. 822; 61 *Id.* 53; 103 Ark. 103; 87 N. E. 571; 120 Am. St. 562; 107 Ark. 528; 53 N. E. 137; 65 *Id.* 810; 105 Ark. 434; 174 S. W. 150; 108 Ark. 377; 93 *Id.* 208; 100 *Id.* 465; 95 *Id.* 560; 57 *Id.* 76.

2. Plaintiff was bound to take notice of the hole in the floor. 82 Ark. 16; 161 Ill. App. 422; 211 U. S. 459; 45 L. R. A. (N. S.) 387; 115 C. C. A. 515; 195 Fed. 725; 166 *Id.* 407, 410; 92 C. C. A. 159.

3. The facts disclose no actionable negligence. 55 Ark. 483; 57 *Id.* 506; 80 Pac. 311; 182 Ill. App. 236.

4. The instructions given for plaintiff ignore a material issue in evidence and hence are prejudicial. 105 Ark. 205; 99 *Id.* 385; 93 *Id.* 573; 89 *Id.* 522.

5. It is prejudicial error to submit to the jury issues upon which there is no legal evidence to support the finding. 106 Ark. 186; 101 *Id.* 537, 543; 63 Ark. 177; 56 *Id.* 387.

6. The verdict was excessive and not supported by the evidence.

D. D. Glover and *J. C. Ross,* for appellee.

1. The cases cited by appellant do not apply. The defect was not open and obvious. 87 Ark. 217; 91 Ark. 343; 97 *Id.* 553; 87 *Id.* 321; 93 *Id.* 34; 95 *Id.* 477; 87 *Id.* 396; 90 *Id.* 223; 95 *Id.* 291; 98 *Id.* 327; 78 *Id.* 374. There was no assumed risk. The master must provide suitable appliances and a safe place to work. 90 Ark. 223; 95 *Id.* 291; 98 *Id.* 327; 78 *Id.* 374; 93 *Id.* 564; 103 *Id.* 506; 105 *Id.* 434; 79 *Id.* 20; 90 *Id.* 555; 97 *Id.* 553; 95 *Id.* 291; 88 *Id.* 548. Whether the risk was obvious or not was for the jury. 95 Ark. 291; 110 *Id.* 463.

2. There was no error in the instructions to the jury. 105 Ark. 205; 99 *Id.* 385; 74 *Id.* 377. As a whole, considered jointly, they correctly declare the law. 77 Ark. 458; 87 *Id.* 396; 88 *Id.* 433; 100 *Id.* 119; 83 *Id.* 61; 88 *Id.* 524; 86 *Id.* 104.

3. The verdict is not excessive. There is no reversible error.

HART, J. Appellee sued appellant to recover damages for injuries received by him while working for appellant at its sawmill. There was a trial before a jury which resulted in a verdict for appellee and from the judgment rendered, appellant prosecutes this appeal.

Roy Irons, the appellee, in his own behalf testified substantially as follows:

I am twenty-one years old. At the time I was injured my regular work was running the cut-off saw at appellant's mill. On the morning I was injured the foreman directed me to help the man operating the rip-saw. Lumber buggies were used to bring in the lumber to the rip-saw. The buggies were loaded with lumber and pulled in to the mill by mules. Then the man who operated the rip-saw would take hold of the lumber buggy and pull it by hand. I would get by the side of the wheel and push the lumber buggy towards the rip-saw. While I was engaged in pulling the buggy wheel, all of a sudden the opposite wheel went through the tram and threw me right over on top of the wheel. There was a sudden stop when the wheel went through the floor and this threw me against the wheel. The injury ruptured me.

S. V. Grissom for the plaintiff testified: I was running the rip-saw and plaintiff was off-bearing for me on the day he was injured. We were pulling a loaded lumber buggy up to position by the rip-saw, at the time appellee was injured. I was guiding the buggy and pulling it, and appellee was pushing at the wheel. There was a place sluffed off of the floor in the tram and one of the wheels went through the floor when it reached the defective place. When the wheel fell through the floor appellee was jerked over on the wheel. I observed the plank after the buggy was taken out. The plank was rotten and the rotten place was about eight or ten feet from the machine I was operating. Two or three days before that time, I noticed a crack in the floor at the place and notified the foreman that it was dangerous and should be repaired. He promised to do so. The floor was not completely out at the place where the wheel went through it, but sloped off and the plank showed itself to be defective if any one should observe it closely. The crack was something like fourteen inches long. It was also shown that the joists on the floor were about

eighteen inches apart and running east and west. The planks were laid across the joists running north and south and were laid in the same direction, with regard to the place of the injury as the rip-saw.

Will Carmichael, the mill foreman testified as follows: Appellee was my brother-in-law and worked under me. I remember him telling me that he fell on the wheel and ruptured himself, about the time he was injured. He did not stop work. He did not turn in any report that he was hurt but worked on under me for something like a year. I don't remember whether Grissom came to me about the hole in the floor or not. It was my duty to look out for holes in the floor and repair them. Appellee regularly worked at the cut-off saw which was situated near the rip-saw.

(1) It is well settled that it is the master's duty to exercise ordinary care to provide his servant with a reasonably safe place in which to work and to make reasonable inspection to see that the place of work and appliances are safe. This is conceded to be the law by counsel for appellant and it is also conceded by them that there is sufficient testimony to warrant the jury in finding that the floor was defective but they contend that the defective condition of the floor which appellee claims caused his injury was perfectly obvious and that the court should have told the jury as a matter of law that appellee had assumed the risk as one of the ordinary incidents to the employment in which he was engaged at the time of his injury. In short they contended that the defect in the floor which caused the injury to appellee, was plainly to be seen and was one of the obvious risks of the business carried on by the appellant.

On the other hand it is insisted by counsel for the appellee that the court was right in submitting the question to the jury. Many illustrative cases are cited by counsel on both sides to sustain their respective positions.

(2) We do not consider it necessary to review these cases, for the reason that they all contain well settled

principles of law and we do not think the facts of any of the cases cited are sufficiently like the facts in the instant case to make them controlling. The law on the question is well settled and the only difficulty is in the application of it to a given state of facts.

When the testimony adduced by appellee is considered in the light most favorable to him, we do not think it can be said as a matter of law that he assumed the risk. It is true Grissom stated that there was a crack in the floor some fourteen inches long and that he had seen it two or three days before the injury occurred, but he also stated that the defective plank sloped off and that only a crack was shown. He was asked if anybody could see the defect and replied that he did not know whether anybody could see it or not; that it was not entirely through the plank.

It is true the regular job of appellee was at a cut-off saw which was situated near there, but his duties did not cause him to walk over that portion of the tramway, so far as the record discloses. He had hauled several loads over the tramway on the day he was injured and on that day and on other days, had noticed that other portions of the tramway were defective but said that he had not noticed any defect in the tram at the place where he was injured.

We do not think it can be said as a matter of law, under the circumstances, that the defect was an obvious one. The joists on the floor were laid east and west and were about eighteen inches apart. The planks were laid across the joists running north and south. According to Grissom's testimony, while the crack was something like fourteen inches long, it was only a crack and the defective condition of the plank did not show all the way through.

It is a matter of common knowledge that more or less saw dust would fly around and would be lighting on the floor near the rip-saw. Anyone walking along there and seeing the crack might have thought it was caused by the plank shrinking or not being laid close

enough together, instead of being caused by the rotten condition of the plank. At least these matters were legitimate inferences which might have been drawn by the jury.

(3) Again it is insisted that the evidence did not warrant the jury in finding that the falling of the wheel through the floor caused appellee to be ruptured, but we believe the facts fully warrant the jury in so finding.

It is true appellee continued to work but it may be fairly inferred from his testimony that he did this because he did not realize the gravity of his injury. Two physicians testified for appellant and stated that they did not believe from the testimony detailed by appellee, that the rupture was caused by him falling on the wheel when it fell through the floor. On the other hand a physician for appellee testified that the rupture could have been caused in that way; and from appellee's statement was likely caused that way.

Immediately after the accident happened appellee complained of pain and exhibited his person to Grissom, who testified that it showed indications of injury. Appellee went to a physician after working hours on the day he was injured and stated that the physician told him he had been ruptured. As above stated the testimony of appellee and his witnesses we think, warrant a verdict in his favor.

It is insisted by counsel for appellant that the verdict is excessive. Appellee recovered a verdict of $1,500.

Two witnesses for appellant testified that hernia can be cured by a simple operation and that there was but little danger in undergoing the operation; that most operations for hernia are successful. On the other hand a physician who had examined appellee testified that he found a complete indirect inguinal hernia. He further testified that there is always an element of uncertainty in operations and that there is some danger attached to an operation for hernia; that appellee was permanently injured and would have to wear a truss for the balance of his life.

(4) Appellee was an able bodied young man at the time he received his injury and could only earn his living by manual labor. It is true he continued to work around appellant's mill after he was injured but he says that he could only do light work and was not capable of lifting, and finally got so that he could not work steadily. According to his testimony he has grown worse since he was injured, and can not now work steadily. Therefore we do not think the verdict was excessive.

The court instructed the jury in effect, that it was the duty of appellant to exercise ordinary care in providing appellee with a safe place in which to work and that while appellee assumed the risks ordinarily incident to his employment, he did not assume any arising from any negligence of appellant in failing to discharge its duty towards him.

(5) Counsel for appellant asked that the instruction should be modified by adding thereto: unless the jury should find that appellee knew or by the exercise of ordinary care could have known of said negligence. It was the duty of the counsel for appellant to ask for a correct modification of the instruction. The first part of the modification was correct but the latter part was not the law. In other words appellee would assume the risk of the defective condition in the floor if he knew of the defect, but it was wrong to add "or by the exercise or ordinary care on his part could have known of said negligence." The practical effect of such qualifications would have been to tell the jury that appellee should have examined the floor for defects in it before he went to work. In *Chicago, Rock Island & Pacific Ry.* v. *Smith,* 107 Ark. 512, the court in regard to a precisely similar request said that the court did not err in refusing to modify the instruction. Again in the case of *Mosley* v. *Mohawk Lumber Co.,* 122 Ark. 227, the court gave an instruction containing the modification now under consideration and on appeal we held the instruction to be erroneous, saying that the fact that the servant could by the exercise of ordinary care have dis-

covered the defect and avoided the danger does not constitute an assumption of the risk where it arose by reason of the negligence of the master, even though such servant may have been guilty of contributory negligence, which would bar his recovery.

(6) At the appellee's request the court gave the following instruction: "You are instructed that the duty that devolved upon the defendant to exercise ordinary care to provide the plaintiff a reasonably safe place to work, was an absolute duty, and that the defendant could not delegate that duty to any of its employees so as to escape the responsibility of performing this duty, and if you find from the evidence that the defendant failed to perform this duty of exercising ordinary care to furnish and provide the plaintiff a reasonably safe place to work, and that this failure resulted in the injuries complained of herein, then the plaintiff is entitled to recover, and you will find for the plaintiff."

Counsel for appellant insists that the judgment should be reversed because this instruction ignored appellant's defense of assumption of risk. No specific objection was made to the instruction on the ground that it failed to include the claim of assumed risk. At the request of both appellant and appellee, the court gave other instructions on the question of assumed risk. It is conceded that the instruction deals correctly with the phase of the case therein presented. If appellant desires that this instruction should contain qualifications of the claim of assumed risk, it should have made specific objection in the trial court. *A. L. Clark Lumber Co. v. Johns,* 98 Ark. 211; *St. L., I. M. & S. Ry. Co.* v. *Carter,* 93 Ark. 589; *Arkansas Midland Rd. Co.* v. *Rambo,* 90 Ark. 108; *St. L., S. W. Ry. Co.* v. *Graham,* 83 Ark. 61.

Counsel for appellant to sustain their contention rely on the case of *Helena Hardwood Lumber Co.* v. *Maynard,* 99 Ark. 379. The court told the jury that the master was negligent in furnishing a defective log loader; and directed it to find for the plaintiff if the

injury was due to the fact that it was defective unless the decedent was guilty of contributory negligence. The court in that case said the instruction as drawn not only excluded the defense of assumed risk but was in conflict with the instruction given on defendant's part relative to assumed risk and on that account was erroneous and prejudicial.

It follows that the judgment will be affirmed.

BUNCH v. PITTMAN.

Opinion delivered March 13, 1916.

1. TIMBER DEED—FAILURE TO RECORD—SALE OF LAND.—An unrecorded timber deed, although executed before a second sale of the land by the grantor, is not good as against an innocent purchaser of the land, for value and without notice.
2. TIMBER DEED—OCCUPANCY OF LAND—NOTICE.—A. sold the timber to B. on certain land, but B. did not record the deed. A. then sold the land to C., who had no actual knowledge of the sale of the timber. *Held*, although B. at once after his purchase put a man to work on the land, that under the evidence, C. would not be charged with constructive notice of B.'s claim.
3. DAMAGES—CUTTING TIMBER—GOOD FAITH.—B. cut timber, in good faith under a deed from A., but in the meantime A. had deeded the land to C. without mention of the deed to B., which B. had failed to record. *Held*, the measure of C.'s claim for damages against B. was the stumpage value of the timber cut, and not the enhanced value in the manufactured state.

Appeal from Monroe Circuit Court; *Thos. C. Trimble*, Judge; reversed.

G. O. Bogle and *Manning, Emerson & Morris*, for appellant.

1. The sale of the timber by Morgan's agent was valid. 92 Ark. 213; 90 *Id.* 301; 83 *Id.* 202.

2. Defendant was in actual possession of the land when plaintiff purchased and this was notice of his rights; she was not an innocent purchaser. 76 Ark. 27; 82 *Id.* 455; 101 *Id.* 163-9; 95 *Id.* 512-19. It was error to direct a verdict, as the evidence was sufficient to raise an issue for the jury.

3. The court erred in directing the jury to find for the value of the timber after it was manufactured; only stumpage value should have been allowed as defendant acted in good faith and was not a mere trespasser. 93 Ark. 353, 360; 94 *Id.* 511; 44 Ark. Law Rep. 129.

C. F. Greenlee, for appellee.

1. There is no issue of fact to be determined in this case and the law is settled. Edmonds had no power of attorney from Morgan to convey timber. Kirby's Digest, § § 753, 763. Bunch had constructive notice that appellee was the owner of the land after March 4, 1913, when her deed was recorded. 86 Ark. 202; 71 *Id.* 31; 38 *Id.* 181, 190; *Ib.* 278; 70 *Id.* 256, 269.

2. The possession by appellant was not of such character as to give notice. Appellee was an innocent purchaser. The cases cited by appellant do not apply.

3. Plaintiff was entitled to recover the value of the timber in its manufactured state. 69 Ark. 424; 109 *Id.* 223. Bunch was a trespasser and did not haul a stick of timber from the land for more than three months after appellee's deed was recorded.

McCULLOCH, C. J. J. M. Morgan owned a tract of timber land consisting of 205.74 acres, situated in Monroe County, Arkansas, a few miles from Brinkley, and on March 1, 1913, he sold and conveyed the merchantable timber on the land to the defendant, T. W. Bunch, and on March 4, 1913, he sold and conveyed the land to the plaintiff, Mrs. Pittman. The sale of the timber to defendant was made through Edmonds, who was acting for Morgan, either as agent or broker. Morgan and Mrs. Pittman both lived in Oklahoma, where the sale of land to Mrs. Pittman was negotiated, and when she purchased the lands she had no knowledge of the sale of the timber to defendant and did not receive any information that the timber had been sold until her husband went to Monroe County in December, 1913, and ascertained that the defendant was cutting the timber on the land and claimed to be the owner.

Defendant commenced cutting the timber soon after his purchase and continued to do so after he was notified, according to the testimony of the plaintiff, that Morgan had sold the land to plaintiff and that she was the owner of the timber as well as the land. Plaintiff instituted three actions against the defendant—two for the recovery of the value of the timber cut from the land, and the other a replevin suit for ties made from timber cut on the land. The three cases were consolidated and tried before a jury, and after the testimony was introduced the court gave to the jury a peremptory instruction to find for the plaintiff in each of the cases, and in the amount which the undisputed testimony showed was the enhanced value of the timber in its manufactured state. The defendant asked for instructions submitting the issue to the jury whether the plaintiff or the defendant had title to the timber, and also as to the measure of damages in case there should be a verdict on that issue in favor of the plaintiff.

(1) The conveyance of the timber to the defendant was prior in point of time to the conveyance executed by Morgan to the plaintiff, but it was never recorded and was therefore not good as against an innocent purchaser for value without notice. *Cooksey* v. *Hartzell,* 120 Ark. 313, 179 S. W. 506. The proof is undisputed that plaintiff, Mrs. Pittman, paid a valuable consideration and that she had no actual notice of the sale of the timber to defendant. She never received any notice until December, 1913, when, as before stated, her husband went to Monroe County to look after the land. The only effort made by defendant to show constructive notice to the plaintiff was to prove that he entered upon the land and commenced cutting timber as soon as he made the purchase. Defendant testified that he took a man out to the land on March 2d, the day after he purchased the timber, and started the man cutting on the land and preparing roads over which to haul the timber, and that the man continued to work there until some time

in June, when he sent a force of men there on the land to work.

(2) It is claimed that the fact that one man entered upon the land for the purpose of cutting timber was sufficient to put strangers upon notice of occupancy so as to charge the purchaser with notice of the rights asserted under such occupancy. Ordinarily it is a question for the determination of the jury whether or not the character of occupancy is sufficient to amount to such hostile acts as will be sufficient to give notice to the world of a claim of ownership, but we are of the opinion that the asserted acts of ownership shown in the present case were not sufficient to warrant a submission of that issue to the jury. This is true when we consider the size of the tract of land, its remoteness, and the fact that only one man entered upon the land for the purpose of cutting timber, and that his entry was too short a time before the purchase made by plaintiff to be sufficient to give notice to the world that there was an occupant. When all those circumstances are considered, it is plain that the occupancy was not sufficient to give notice to the world of a claim of ownership.

In *Earle Improvement Co.* v. *Chatfield,* 81 Ark. 296, (quoting from the syllabus) we said: "In order to acquire title to wood land by adverse possession, there must be actual use and occupancy of it of such unequivocal character as will reasonably indicate to the owner visiting the premises during the statutory period, not a mere occasional trespass, but exclusive appropriation and ownership."

In that case there was involved the question of adverse possession for the statutory period of limitation, but the same principle applies in testing the sufficiency of the acts of possession as notice to the world of a claim of ownership so as to prevent acquisition by an innocent purchaser. It would be unreasonable to hold that occupancy of a 200-acre tract of wild land by one man, manifesting no other act of ownership except cutting timber for a short period of two or three days, would be sufficient

to put strangers upon notice that there was an assertion of title by such occupant. We are of the opinion, therefore, that the court was correct in refusing to submit to the jury the question of the right of the plaintiff to recover, for under the undisputed evidence she was an innocent purchaser of the land without any notice of defendant's prior purchase of the timber, and was entitled to recover the value of the timber.

(3) We think, though, that the court erred in instructing the jury to fix the damages at the enhanced value of the timber, for it is undisputed that defendant cut the timber, at least the greater portion of it, if not all, under the honest belief that he was the owner and without any actual knowledge that Morgan had sold the land to the plaintiff or to any other person. Under those circumstances he was liable only for the value of the timber as it stood on the land, in other words what is called the stumpage value, and not the enhanced value in the manufactured state.

In *Eaton* v. *Langley,* 65 Ark. 448, the following rule was laid down as the measure of damages: "In replevin for standing timber cut by an innocent trespasser and converted into cross-ties, the owner is entitled to judgment for delivery of the timber so converted, notwithstanding its value has been increased six times; but, if delivery can not be made, the measure of the damage recoverable is the value of the cross-ties less the labor expended on them, provided such expense does not exceed the increase in value."

One of these suits was replevin for the possession of the cross-ties. Therefore the rule stated above is applicable. The same rule is applicable to the other two suits for the value of the timber which had been cut from the land and sold in its manufactured state. There are numerous decisions of this court on that subject, the last being the recent case of *Foreman* v. *Holloway,* 122 Ark. 341, and according to the rule announced there the instruction of the court fixing the measure of damages was erroneous. For that reason the judgment will be reversed and the cause remanded for a new trial.

PIERCE v. WHIPPLE.

Opinion delivered March 27, 1916.

1. SALES—CONDITIONAL DELIVERY—RETENTION OF TITLE—RESALE.—Where property is delivered to the purchaser, on condition that the title should not pass until the purchase price was paid in full, a subsequent purchaser from the original vendee can acquire no title to the property.
2. ADMINISTRATION—SALE BY ADMINISTRATOR—RESERVATION OF TITLE.—An administrator who sells chattels on credit, under a reservation of title, does so at his peril, and if a loss occurs to the estate by reason of his failure to comply with the terms of the statute, he is responsible for the loss.
3. SALES—SALE BY ADMINISTRATOR—UNAUTHORIZED SALE—RIGHTS OF PURCHASERS.—Where an administrator sold chattels belonging to the estate, on credit, with a reservation of title, the fact that such sale was unauthorized will not permit the purchaser or his vendee to repudiate the conditions upon which the sale was made.

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

Smith & Gibson, for appellant.

1. Administrators are not allowed to sell personal property and take as surety the mere retention of the title to the property. Kirby's Digest, § 85; 12 Ark. 378.

2. John Keith should have been made a party. He was the original purchaser.

Baker & Sloan, for appellee.

1. The retention of title by the adminsitrator was not wholly void. Credit sales are allowed. Kirby's Digest, § 85. The retention of title was good and sufficient security. 23 Ala. 377, 389.

2. John Keith was not a proper, nor necessary party. 31 Ark. 345, 361-4.

McCULLOCH, C. J. The plaintiff sold the personal property of the estate of his intestate, pursuant to an order of the probate court which directed that he take notes with good security for the purchase price, as provided by statute. Kirby's Digest, § 85. Among the property thus sold was two mules, which were purchased by John Keith, a son of the decedent, who executed to plaintiff,

as such administrator, his note for the purchase price of the mules, said note containing a stipulation that the title and ownership of said property should remain in the plaintiff until the note should be paid in full. Keith subsequently sold one of the mules to defendant Pierce, and this is an action to recover possession from Pierce, it appearing that said purchase note executed by Keith has not been paid. The circuit court rendered judgment in favor of the plaintiff and the defendant has appealed.

(1) It is insisted that as the statute authorizes an administrator to take "notes with good security from the purchaser," this sale was void because the form of the security taken was in derogation of the terms of the statute. The property was delivered, however, on condition that the title should not pass until the purchase price be paid in full, and under those circumstances a subsequent purchaser acquired no title from his vendor, who had none to convey, as against the original vendor. *Andrews* v. *Cox,* 42 Ark. 473; *McIntosh* v. *Hill,* 47 Ark. 363; *McRea* v. *Merrifield,* 48 Ark. 160; *Simpson* v. *Shackelford,* 49 Ark. 63.

(2-3) There is no statutory authority for an administrator to sell chattels of the estate and reserve the title as security, and when an administrator does that it is at his own peril. If loss occurs to the estate by reason of his failure to comply with the terms of the statute, he is responsible for the loss. But the purchaser who accepts delivery of possession of the property on those terms is estopped to repudiate the conditions upon which the delivery was made. The fact that only security of another kind was authorized by statute does not help the purchaser or his vendee, for no title passed until the condition was complied with.

That is the only question involved in this appeal, and as the case was correctly decided by the circuit court the judgment is affirmed.

BOYD v. BOYD.

Opinion delivered March 27, 1916.

1. MENTAL CAPACITY—TRANSFER OF PROPERTY.—The finding of the chancellor that deceased, who was suffering from cancer, had mental capacity, a short time before his death, to transfer all his property to defendants, upheld.
2. EVIDENCE—CONFLICTING STATEMENTS—WEIGHT.—Where a witness, in answer to interrogations, made conflicting answers, the statements made without the prompting of a leading question, and without suggestion, should have the greater weight.
3. EVIDENCE—STATEMENTS OF DECEASED—DISPOSITION OF PROPERTY.—Deceased, upon his death bed, deeded all his property to his son, who in turn deeded the same to the widow; in an action by a grandson, to set aside the conveyances, *held*, testimony in regard to the previous declarations of the deceased as to the manner in which he expected to dispose of his property at his death, and of his intention that his wife should have a life estate therein, and that after her death it should be divided equally between his grandson and his son, was competent.
4. DEEDS—VALIDITY—INTENTION OF GRANTOR.—Certain deeds, executed by deceased upon his death bed, *held*, under the evidence not to be deeds drawn in the form which deceased wished to execute.
5. DEEDS—INTENTION OF GRANTOR—SUBSEQUENT ACTS OF GRANTEE.—Where a deed, executed upon his death bed by deceased was not drawn according to deceased's intention, and named his son as grantee, when deceased wished his wife as grantee, subject to certain restrictions, nothing that the son could do after the death of his father, would validate the transfer, and make it the act and deed of the deceased.
6. DEEDS—MENTAL CAPACITY—PHYSICAL AND MENTAL WEAKNESS OF GRANTOR.—Where a grantor, so weakened by disease, that he was unable to lift his hand, executed a deed, the same, when challenged after his death, which occurred immediately, will be carefully scrutinized, and the burden of proving its validity is upon the party claiming a benefit thereunder.
7. DEEDS—PHYSICAL AND MENTAL WEAKNESS OF THE GRANTOR—VALIDITY.—If a person, although not positively *non compos* or insane, is yet of such great weakness of mind as to be unable to guard himself against imposition or to resist importunity or undue influence, a contract made by him under such circumstances will be set aside.
8. DEEDS—MENTAL INCAPACITY—RELIEF.—Where deceased, due to mental incapacity, executed a deed which was not in conformity to his intention, the same is void, and the chancellor should declare it so, and should not attempt, under a prayer for general relief, to reform the same.

Appeal from Searcy Chancery Court; *T. H. Humphreys,* Chancellor; reversed.

STATEMENT BY THE COURT.

W. F. Boyd died on the 2d day of April, 1912, leaving surviving him his widow, S. J. Boyd, and his son, C. A. Boyd, and his grandson, Haco Boyd a youth about ten years of age.

This suit was instituted by S. G. Daniel, as administrator of the estate of W. F. Boyd, and by Haco Boyd, through his mother as next friend. The complaint alleged that W. F. Boyd died siezed of certain lots and parcels of land in Searcy County, which are described, and also that he owned certain personal property consisting of stock in the First National Bank of Leslie, worth $2,500, and money on deposit in that bank in the sum of $800; that John Norman was indebted to him in the sum of $2,000; P. P. Boyd in the sum of $1,500, and Marion Dickens in the sum of $1,600, and various other parties in varying amounts, which were assets of the estate and should be turned over to the administrator thereof. They alleged that "on the night before the death of W. F. Boyd, and when he was greatly weakened from fever and the ravages of his disease, and while he was unconscious and in the very shadow of death, the defendants, C. A. Boyd and S. J. Boyd, by fraud, misrepresentations, concealment, overreaching and undue influence, procured the signature, by mark, of the said W. F. Boyd to an instrument of writing which purports to be a warranty deed conveying from W. F. Boyd and S. J. Boyd to C. A. Boyd all the above described property; that W. F. Boyd at the time did not have the mental capacity to execute a deed or to transact any business of any kind whatever or to understand the effect of the transaction."

The plaintiff, Haco Boyd, alleged that the pretended deed was an attempt to defeat him of his right to said property as heir, and was a cloud upon his title; that he was the owner of an undivided one-half of all the lands left by his grandfather, subject to the rights of the widow under the law, in said property.

And they further alleged that C. A. Boyd and S. J. Boyd wrongfully and fraudulently took possession of the money and bank stock and appropriated the same to their own use. Plaintiff, Haco Boyd, prayed that the deed be cancelled, and plaintiffs both prayed that the shares of stock, the money and all other personal assets in the hands of the defendants be surrendered and turned over to the administrator for proper distribution.

Appellants, C. A. Boyd and S. J. Boyd, denied the allegations of the complaint, and set up that W. F. Boyd "at the last practical time prior to his death sold and delivered to S. J. Boyd all his personal property, including moneys, bank deposits, bonds and notes," and that when he executed the deed described in the complaint he acted upon his own free will and accord, and that he had full mental capacity to execute the same, having "full understanding of the effect of said deed; that at the time of the execution of said deed and the assignment of his personal property it was agreed and understood by and between the said W. F. Boyd, deceased, C. A. Boyd and S. J. Boyd; that the deed above referred to was to be executed to said C. A. Boyd to hold the same in trust for the said S. J. Boyd, and that the said C. A. Boyd was to execute a deed to all the property conveyed to him by the said W. F. Boyd to the said S. J. Boyd, which deed had been duly executed in accordance with said agreement, thereby investing the said S. J. Boyd with all the real and personal property which said W. F. Boyd possessed in his lifetime, and that W. F. Boyd died intestate and without any estate whatever."

The court below found that "at the time the transfer of all of said property by the deceased it was done at impending death, and that he was so weak mentally and physically that the court has grave doubts of his mental capacity to make said transfer, but finds that there is not sufficient evidence to warrant the cancellation thereof; but the evidence warrants a finding that the deed and transfer should be reformed so as to pass a life estate only to S. J. Boyd;" and further found that the personal

property amounted in value to $6,427.68; that S. J. Boyd had turned all of said personal property over to C. A. Boyd, who had taken the same out of the jurisdiction of the court and had invested it in the State of Utah recklessly and in speculative securities which was more likely to result in waste. Upon this finding the court rendered a decree as follows: "That all conveyances and transfers be and are reformed so as to convey to S. J. Boyd a life estate only in said real estate and personal property; and that said defendants, C. A. Boyd and S. J. Boyd, are ordered to return one-half of all of said personal property either in kind or in money to this jurisdiction and invest same in safe and sound securities for the benefit of S. J. Boyd during her natural life, and after her death to Haco Boyd, her grandson." And dismissed the cause as to all other defendants. Both parties have appealed.

A. Y. Barr, for appellants.

1. The evidence is overwhelming and conclusive that William Boyd was sane—knew what he was doing—and that no fraud was practiced on him. He was weak physically, but his mind was not impaired. Sanity and business capacity are presumed until the contrary are shown by evidence clear, satisfactory and convincing. This is elementary law.

2. No reformation of the deed should have been allowed. It was good or void. The law is well settled. 15 Ark. 555; 141 S. W. 1168; 101 Ark. 611.

3. Boyd did what he intended to do; left his property to his widow with the boys to receive whatever she left to them. The case has been fully made out and the case should be remanded with directions to dismiss the bill.

Bratton & Bratton, David Cotton and *Garner Frazer,* for appellees.

1. The pleadings warranted a cancellation or reformation. 96 Ark. 163; 91 *Id.* 400. The prayer was for general relief. 31 Cyc. 111. The court did not exceed its authority.

2. A life estate was intended without limitation. The finding is not clearly against the evidence. 101 Ark. 529; 85 *Id.* 105.

3. On the cross-appeal, the entire transaction should be cancelled. 14 Mich. 541; 133 Iowa 681; 100 Wis. 24; 63 Neb. 349; 2 Pom. Eq. Jur. (3 ed.) 951; Thornton on Gifts, 447 § 450; 33 Md. 188; 63 Tenn. 947. C. A. Boyd received the benefit of this death-bed conveyance; the burden is on him to show its fairness and the capacity of the grantor. He has failed. 15 Ark. 603; 26 *Id.* 110.

4. The whole business smacks of fraud and smells of suspicion; the deed and assignments should be cancelled. 15 Ark. 603; 26 *Id.* 110; 99 Mass. 88. The decree should be reversed with directions to cancel the entire transaction.

WOOD, J. (after stating the facts). (1) The first question is whether or not William Boyd, at the time of the execution of the deed, and of the alleged transfer of personal property, had sufficient mental capacity to understand the nature and effect of these transactions. This is purely an issue of fact which must be determined by the preponderance of the evidence.

William Boyd, for over a year before his death, had been afflicted with cancer. This disease gradually preyed upon his vitals until he finally died from exhaustion. The testimony is conflicting, but the finding of the chancellor that Wm. Boyd had sufficient mental capacity to execute the instrument is not clearly against the preponderance of the evidence.

The next question is whether or not Boyd executed the deed conveying the land and transferring the personal property in controversy with the intention of vesting absolute title therein to S. J. Boyd, his wife. This is also peculiarly a question of fact, depending upon a preponderance of the evidence.

C. A. Boyd was the only son and the only living child of William Boyd. He had been living away from his father some fifteen years, in Idaho and Utah. He stated that during these years he had seen his father

only for brief periods some five or six times; that his personal association with his father had not been close for some fifteen years. Appellee Haco Boyd, whose father was dead, was the grandson of William Boyd. C. A. Boyd was a lawyer, and testified that he had prepared the papers to carry out his father's wishes; that his father signed all instruments by mark because of his weak physical condition, and requested two or three of those present to sign as witnesses; that his mind was good and he appeared to understand his business and his own condition and the condition in which his mother would be left at his death as well as at any time in former and healthier years. He stated that he never suggested to his father at any time what to do or urged him to make the disposition of the property that he did make; that his father asked him to arrange his property so that if he should die that his mother would have it all. He then suggested a will, but his father stated that he would rather turn it right over to her and that he would know that it was done. Witness then prepared all the papers and made the transfers that were made. He suggested to his father that the better way to convey the real estate would be for him and his mother to join in a deed to some third person, with the understanding that such person then make a deed direct to his mother, and that accordingly the instrument was prepared and executed.

Mrs. S. J. Boyd, the wife of William Boyd, testified on this branch of the case, in part, as follows: "We talked the matter over several times. I don't know how many times. During his last illness he seemed to be interested in my condition, and wanted me to have a living out of what he had worked and made." She was asked this question: "Q. You say he wanted you to have a living during your life and after your death, he wanted Berry and Haco to have the property equally divided between them?" "A. It is." "Q. You were present and saw and heard what took place; isn't it a fact that what he wanted to do, and attempted to do, was to fix his property so you could have the use of

it during your life and at your death Berry and Haco could have the property in equal parts?" "A. Yes, sir."

On redirect examination she was asked this question: "Q. Is it, or is it not a fact, that the understanding was that the property was to be deeded to Berry and by Berry to you without any limitations or restrictions, and that you have the property now, both real and personal, in your own name, and in your own right to dispose of it as you see fit?" "A. Yes, sir." "Q. Then when you say that it was your husband's intention that the property should be divided at your death, you mean to say that your husband trusted you with the property under Berry's management to do right both between Haco and Berry when you die?" "A. Yes, sir."

C. A. Boyd testified, and it was undisputed, that in carrying out the intention of his father the deed was executed to him (C. A. Boyd), and that he had since executed a warranty deed to his mother. Now it will be seen that Mrs. S. J. Boyd, the beneficiary of these transfers, when testifying as to what the intention of her husband was as to the disposition of his property, stated that he wanted her to have a living out of what he had worked and made. It is true, in answer to a leading question, she stated that the understanding was that the property was to be deeded to Berry and by Berry to her, and that she was to have the property, both real and personal, without limitation or restriction, and that her husband trusted her with the property, under Berry's management, to do right both between Haco and Berry when she died.

(2) Now as between her apparently conflicting statements, the statement that she made without the prompting of a leading question and without suggestion should have the greater weight, and that was to the effect that it was her husband's wish that she was to have a living out of the property; that is, as she afterwards explained, to have the use of it during her life, and that

after her death Berry and Haco should have the property in equal parts.

No one corroborates the testimony of C. A. Boyd to the effect that it was the intention of his father to transfer the property to S. J. Boyd without restriction. But, on the other hand, there is much testimony tending to show that it was the intention of William Boyd that his wife, S. J. Boyd, should have a life estate in all of his property, which, at her death, should descend to the son, C. A. Boyd, and the grandson, Haco Boyd. Mrs. Boyd herself stated that her husband's feelings were in no way estranged towards Haco's father or Haco himself, and C. A. Boyd testified that his father was very proud of and very fond of Haco. Haco testified that his grandfather told him the last Thursday before his death that he wanted him (Haco) to share equally with his grandmother and uncle Berry; that the summer before he died he was with him every time he could get a chance, and that his grandfather had great affection for him. The mother of Haco testified that Haco was a favorite with his grandfather Boyd; that she heard the grandfather frequently say that he was going to educate Haco just as he had his own sons, Berry and Roy (Haco's father), and that he wanted Haco to have the same share in his property as Berry and his grandmother. She stated that she heard the conversation between Haco and his grandfather on Wednesday before he died, and that grandfather Boyd ended the conversation by saying, "When grandpa dies he wanted him (Haco) to share equally with his grandmother and uncle Berry."

Several other witnesses who were not relatives and who were disinterested, stated that the grandfather Boyd manifested great affection for his grandson Haco. Several of these stated that he seemed to think as much of Haco as his own child, and they heard him so express himself time and again. Several of these stated that they heard William Boyd say that after his death and his wife's death that he wanted his son and grandson to share equally.

J. M. Boyd, a brother of William Boyd testified, "I was present Sunday and Sunday night when William Boyd disposed of his property. Well, I heard the conversation, and, as I understood, the property was to be made over to Berry and from him made over to his mother during her lifetime, and then be divided between Berry and Haco, his grandson." True, in answer to a leading question, witness stated that he (witness) understood that William was giving to his wife an absolute right and trusting to her to do what was right between Berry and Haco.

(3) The testimony in regard to the previous declarations of William Boyd as to the manner in which he expected to dispose of his property at his death and of his intention that his wife should have a life estate therein, and that after her death it should be divided equally between his grandson and Haco and his son Berry, was competent.

In *Howe* v. *Howe, et al,* 99 Mass. 88, it was held: "To impeach the validity of a deed, evidence of declarations of the grantor, while of sound mind, prior to the execution of it, as to his intentions concerning the disposal of the granted premises, is admissible when offered 'among other circumstances tending to prove unsoundness of mind, undue influence and fraud;' especially if it is a deed of gift disposing of the grantor's estate among his children and omitting any provision for the issue of a deceased child."

(4) Now a clear preponderance of the evidence shows that in making final disposition of his property it was the intention of William Boyd to convey to his wife a life estate with remainder over to his son and grandson. While the deed itself is not set forth in the abstract, the complaint alleges that it was an instrument of writing which purported to be a warranty deed, conveying from William F. Boyd and S. J. Boyd to C. A. Boyd the real estate described in the complaint. Such a deed was not the instrument, according to the pre-

ponderance of the evidence, that Wm. F. Boyd intended to execute.

The justice of the peace who took the acknowledgment testified, among other things, that the deed which C. A. Boyd had first prepared, and which had been read, and the deed which he supposed was being acknowledged by William Boyd, was not complete; that it described only one of the lots and "all other real estate." None of the witnesses who were present at the time it is alleged that the deed was executed testified that the same was read over to Wm. Boyd and that he stated in their presence that he understood the instrument. The justice of the peace himself, while stating that he took the acknowledgment, does not state that the deed was read over to Boyd and that Boyd stated that he understood it. On the contrary, as before stated, the testimony of the justice tends to show that the deed which he thought was being acknowledged, was incomplete in that it failed to describe the real estate.

As we view the record, there is no testimony, except the testimony of C. A. Boyd, which tends to prove that William F. Boyd knew and undertook at the time he executed the deed and made the transfers, that he was making an absolute conveyance of the real estate and transfer of the personal property to C. A. Boyd. The preponderance of the evidence shows that it was not his intention to make such a disposition of his property. and therefore it must be held that these deeds and transfers were not the acts of Wm. F. Boyd.

(5) It is shown that the mother and father both reposed great confidence in C. A. Boyd, but there is nothing in the record, or even in the testimony of C. A. Boyd, himself, to justify the conclusion that William Boyd intended to have the instruments evidencing the transfers drawn in such a way as to entrust C. A. Boyd with the duty of disposing of his property after his death in such a manner as to effectuate his declared purposes during life. While there is some testimony to show that William Boyd intended to transfer the absolute title

to his wife, S. J. Boyd in trust to carry out these purposes, there is no testimony whatever to show that he intended to put the absolute title in C. A. Boyd. Yet that was the effect of the transfers in controversy, and, as such, the intention of William Boyd was not carried out. The deed and the transfers that were made did not even vest the title in trust in Mrs. S. J. Boyd. But absolute title, by the purported transfers of Wm. F. Boyd, was vested in C. A. Boyd. Nothing that C. A. Boyd could do after the death of his father would validate these transfers and make them the acts and deeds of his father.

Now the testimony shows that Mrs. Boyd and C. A. Boyd were dealing with the property as if the absolute title was vested in Mrs. S. J. Boyd. C. A. Boyd, it appears from her testimony, "has the absolute management and control" of her money, property and financial affairs. She stated, "He is taking care of it for me and handling it for me." The chancellor found, and the testimony shows, that C. A. Boyd had taken the personal property, amounting to nearly $8,000, outside of the State and invested the same. It thus appears that Mrs. S. J. Boyd, through C. A. Boyd, was exercising absolute dominion over the property.

(6) Even though a preponderance of the evidence may not show that William F. Boyd was positively *non compos* or insane at the time the purported instruments were alleged to have been executed by him, yet he was so weakened by the ravages of disease that, as one of the witnesses said, "he could turn his head only; he could not raise his hands. He was not able to trace the signature; they had to hold his hand and do that for him."

The doctor testified that he had been kept alive for several days on strychnine and caffeine; that his mind was weak in proportion as his body was weak.

A deed executed under such conditions, when challenged, should be scrutinized with the greatest care. Mr. Pomeroy says: "Finally, in a case of real mental weakness, a presumption arises against the validity of the

transaction, and the burden of proof rests upon the party claiming the benefit of the conveyance or contract to show its perfect fairness and the capacity of the other party." 2 Pomeroy Eq. Jur. sec. 947. See *Graves* v. *White,* 63 Tenn. 38.

(7) After appellees had shown the extreme weakness of body and mind under which the transfers in controversy were alleged to have been executed it then devolved upon C. A. Boyd, who was named as the beneficiary and grantee in those instruments, to prove their validity. This he has not done by testimony which preponderates over the testimony on behalf of appellees tending to prove that C. A. Boyd drafted the instrument not in a way to effectuate the declared purpose of William Boyd in the disposition of his property. The case comes well within the doctrine announced in *Kelly's Heirs, et al,* v. *McGuire,* 15 Ark. 555-603, as follows: "If a person, although not positively *non compos,* or insane, is yet of such great weakness of mind, as to be unable to guard himself against imposition, or to resist importunity or undue influence, a contract, made by him under such circumstances, will be set aside."

(8) Since the preponderance of the evidence shows that there was no intention upon the part of William Boyd to execute a deed to the real estate and the transfers of the personal property to his son C. A. Boyd, these instruments are not the acts of Wm. F. Boyd at all and are not susceptible of reformation. Moreover, the pleadings did not warrant the court in decreeing a reformation of the instruments, and the proof was not sufficient to warrant such relief under the prayer for general relief. The court should have found the instruments void and entered a decree to that effect.

The judgment will therefore be reversed and remanded, with directions to enter a decree cancelling the deed and transfers of personal property, and for such other and further proceedings as may be necessary according to law and not inconsistent with this opinion.

ROE RICE & LAND CO. v. STROBHART.

Opinion delivered March 27, 1916.

TRIAL—ISSUE OF FACT—EXPRESSIONS OF OPINION BY TRIAL JUDGE.—Where the question is in issue whether a writing constituted the contract of the parties, it is reversible error for the trial judge, during the progress of the trial, to express his opinion, in the presence of the jury, on that issue.

Appeal from Monroe Circuit Court; *Thos. C. Trimble,* Judge; reversed.

STATEMENT BY THE COURT.

Appellant brought this suit against the appellee to recover the possession of certain livestock, machinery, etc., described in the complaint, alleging that it was the owner of the same, and that the appellee wrongfully detained it under a false claim of ownership, with all the necessary allegations for a complaint in replevin. The value of the property was alleged to be $1,652.25.

Appellee denied the allegations of the complaint, and set up that he owned the property under a written contract and bill of sale, which was made an exhibit and introduced in evidence, and which is as follows:

"January 16th, 1914.

"I hereby agree to sell to Mr. R. S. Strobhart the stock, machinery and tools on our farm, located two miles south of Roe, Arkansas, for the sum of $2,230.00, including everything on the place, except tools belonging to the plant and the threshing machine and engine. The engine and threshing machine belong to the Roe Rice & Land Co. We reserve the right to use the center aisle of the machine shed for our threshing machine and engine. Mr. Strobhart agrees hereby to release Dr. C. A. Meredith of contract to deliver to him one team of mules which were contracted for in the sale of our farm, same sale was made in December, 1913; Mr. R. S. Strobhart agrees to accept this deal at the above named figures, $2,-230 and pay at the close of this contract one-third of this amount which is $743.33, and the balance in two payments of $743.33 each; the first deferred payment to be made on

January 1, 1915, the second deferred payment to be made on January 1, 1916, the two deferred payments to bear interest from date at the rate of 6 per cent. per annum, the deferred payments to be secured by his share of the rice crop each year. Mr. R. S. Strobhart agrees to lease our rice farm of 160 acres for the purpose of raising rice for the term of five years. He agrees to furnish one-half of the seed rice, one-half of the rice bags, and one-half of the machine bill at threshing the crop, at the rate of .04 per bushel and deliver our half of the crop on board the cars at Roe, Arkansas, when the proper time comes to sell the crop at any time after threshing is done.

"We, the Roe Rice & Land Co., agree to lease to Mr. R. S. Strobhart the 160 acres of land for the term of five years for the purpose of growing rice. We agree to furnish the pumping plant in running order and keep it so, and furnish the water for the rice crop.

"We, the Roe Rice & Land Co., reserve the right to enter upon our land at any time we see fit to inspect same. We, the Roe Rice & Land Co., also reserve the right to sell this land at any time during the life of this lease and to sell this lease with the land. We also give R. S. Strobhart an option to buy this land at any time he wishes, but this option shall not stop us from offering this land for sale should we get an offer on this land at any time during the life of this lease. We agree to submit the offer to Mr. R. S. Strobhart for him to buy at the price offered or to give us the right to sell at the price offered; this sale to be made subject to the lease of R. S. Strobhart during the five years. We ask the right to use the fan mill to clean our rice and to the use of the teams to haul balance of our rice (now in small house) to the cars when we make a sale of same; all machine canvass on the place belonging to the threshing machine.

"I give this bill of sale to Mr. R. S. Strobhart for the stock and machinery on the place and Mr. R. S. Strobhart is to release all claim on the team of mules which was

contracted for at the sale of our one-half of the farm, which sale was made in December, 1913.

"I do this in full authority in writing from Dr. C. A. Meredith as president of the Roe Rice & Land Co. The full amount of $2,230; first payment to be made at the close of this contract, which is one-third, being $743.33, balance two deferred payments to be made as aforementioned in our contract, earnest money, cash $5.00, receipt of which is hereby acknowledged.

(Signed) Henry W. Halwe,
Treasurer of the Roe Rice & Land Co.

Witness: Herman Wilke.

"I accept this five year lease from the Roe Rice and Land Co. of Missouri of their 160 acres of rice farm land in Monroe County, Arkansas, as described in the above contract; also bill of sale of their stock and machinery.

(Signed) R. S. Strobhart."

Appellant asked judgment for $1,652.25, for the value of the property, and damages in the sum of $3,500.00 for for the detention of his property.

The facts are substantially as follows: Appellant was a foreign corporation, having its office in St. Louis, Missouri. It owned 320 acres of land in Monroe County on which, for several years, it had been engaged in raising rice, and also owned the personal property in controversy in this suit. The stock of the appellant was owned by Dr. C. A. Meredith and H. W. Halwe, except one share which was owned by one Mueller. Meredith, the president, and Mueller, the secretary, resided in St. Louis, and Halwe, who was treasurer and manager of appellant, resided on the farm.

In December, 1913, appellee Strobhart bought 160 acres of the land of appellant, on which was situated the improvements. The negotiations were conducted on the part of the appellant through its president, Meredith. Meredith then made an effort to lease the other 160 acres to Strobhart, and also to sell him the livestock and farm-

ing implements on the place, with the exception of the threshing machine, and to this end wrote Strobhart a letter, in which, among other things, he says: "So it would be impossible to rent you the farm unless some agreement could be made to take over the machinery and stock. * * * I am sure if any such arrangement is to be made as we are contemplating, it must be done at once. Therefore I would suggest you go down tomorrow night if Mrs. Strobhart is well enough for you to leave. I am willing to accept any arrangement you and Mr. Halwe may agree to. * * * I will write Halwe this evening that you may be down leaving tomorrow night."

Strobhart, who lived in St. Louis, went to Roe, in Monroe County, and he and Halwe entered into the agreement under which the appellee claims title to the property. Strobhart paid the $5.00 mentioned in the contract as earnest money.

Halwe testified, on behalf of the appellant, that he told the appellee at the time the agreement of January 16th was presented to the appellee that the statement covered what he (Halwe) was willing to do, but that he (Strobhart) would have to close the deal with the officers of the company at St. Louis; that as treasurer of the company his duties were confined to keeping the accounts and records of the company, receiving the earnings of the company and paying claims against the company when they had been approved by the board of directors; and that there had been no meeting of the company with reference to the sale of the personal property and lease of the land prior to Strobhart's visit to Roe. He also testified that he was general manager for the company in Arkansas, bought and sold personal property for the company, but never made a sale without first taking it up with the company.

The witness was then asked this question: "Didn't you make a deal for the stuff?" and answered, "I did not." He was then asked: "You were helping them in buying it, were you not?" Whereupon the appellant objected, and the court remarked: "I don't see that any

corporation can form a corporation and put a man down there and buy and sell and take charge of it and then get out of it by claiming that the agent did it." The appellant excepted to the remarks of the court.

Halwe further testified that he first signed the contract as an individual, and then, at Strobhart's request, added the word "Treasurer." And, also under Strobhart's dictation, he wrote the words, "I do this in full authority in writing from Dr. C. A. Meredith as president of the Roe Rice & Land Co." The witness then stated that he regarded the contract as a statement. The court at this juncture, said: "'I will instruct the jury that it is a regular contract," and the appellant duly excepted to the remarks of the court.

The appellant asked the witness if he had any authority from the board of directors of the Roe Rice & Land Co. to execute that paper. But the court, over the objection of appellant, refused to permit the witness to answer the question.

It was shown on the part of the appellant that at a meeting of the directors of appellant on January 29, 1914, the offer made by Strobhart as contained in the instrument set out was rejected. The witness stated that the understanding between him and Strobhart was that he should take the agreement of January 16, 1914, to the appellant, and that upon the approval of Meredith and Mueller the papers would be made out; that Strobhart dictated all that portion in regard to the leasing, saying that that was the way Meredith wanted it; that Strobhart did not present to him the letter he had from Meredith, but stated to witness that Meredith was willing to accept any arrangement that Strobhart and Halwe might come to; that he never sold or attempted to sell, at any time any of the personal property of the plaintiff company and did not sell the products of the farm except upon authority from the directors; that the property involved included all of the personal property owned by plaintiff except the threshing machine.

The appellee in his own behalf, testified that after the contract was signed he took possession of the stock and machinery and began the cultivation of the rice; that Halwe was representing the appellant and was running the place for it down at Roe; that after the contract was signed, witness went back to St. Louis, and everything was turned over to witness and Dr. Meredith knew it; that he had the use of the stock, machinery, etc., until this suit was brought, since which time appellant had had possession of the stock. He stated that Meredith told him to come to Arkansas and make a contract with Halwe and that it would be all right with the company. Halwe and witness made the arrangements, and then witness went back to St. Louis and notified Dr. Meredith that he and Halwe had made the contract, and showed the same to Meredith, and Meredith stated that he would not sign that contract in five years. Witness made a tender of the money called for in the contract to Dr. Meredith and he refused to accept it. Witness went down to Roe to look over the machinery and see whether he would accept it. He went down there to see whether the property was like they said and to agree with Mr. Halwe on terms, if possible, and he did accept the stock and the price. It was understood that if Halwe fixed a price that was satisfactory to witness that it was a trade.

The appellant offered prayers for instructions, which it is unnecessary to set out at length, in which they asked to have the issues submitted to the jury as to whether or not the instrument under which appellee claims was the contract of the appellant and binding upon it as such, or whether or not it was understood by both parties as simply an offer made by Halwe individually which had to be submitted to and approved or ratified by the appellant before it would be binding upon it, and as to whether or not such was the understanding between Halwe and the appellee. The court refused these requests for instructions.

The above sufficiently sets forth the rulings of the court for the purposes of the opinion. The jury returned

a verdict in favor of the appellee awarding him $1,652.25 for the value of the stock and $500 damages for loss of the use of the property while in appellant's possession. Appellant seeks by this appeal to reverse this judgment.

Manning, Emerson & Morris, for appellant.

1. The remarks of the court were improper, highly prejudicial and constitute reversible error. Const. Art. 7, § 23; 51 Ark. 147-158; 73 *Id.* 568, 573.

G. Otis Bogle and *C. F. Greenlee,* for appellee.

1. Neither the remarks of the court nor counsel were prejudicial. 103 Ark. 359; 89 *Id.* 87; 90 *Id.* 398; 100 *Id.* 437; 74 *Id.* 256; etc.

WOOD, J., (after stating the facts). During the progress of the trial the court made remaks (in addition to those set out in the statement) while evidence was being adduced concerning the instrument under which appellee claims, as follows: "the instrument was a regular contract;" "We will accept the contract in preference to an imaginary theory;" "Did he come down there to do what he did, to make that agreement to buy that property;" "He (Strobhart) says he accepted that, the written instrument, and it was the terms."

These remarks were contrary to section 23, article 7 of the Constitution, and invaded the province of the jury. *Sharp* v. *State,* 51 Ark. 147-58; *Bishop* v. *State,* 73 Ark. 568-73.

The controlling issue in the case was, whether or not the written instrument under which appellee claimed to be the owner of the property in controversy was the contract of appellant. Under all the evidence in the case this was an issue for the jury, which the court should have submitted without such comments. Necessarily the jury must have concluded that in the opinion of the court the instrument under which the appellee claimed was a contract binding on the appellant.

All these remarks were improper, highly prejudicial to appellant and constitute reversible error. They indicated the opinion of the trial judge on the issue of fact

which should have been submitted under appropriate instructions. The court by its ruling in the exclusion of certain evidence, and the remarks made when ruling thereon, and in the giving and refusing of prayers for instructions, proceeded with the trial under a misapprehension of the effect of the written instrument. There was evidence from which the jury might have found, on correct instructions, that Halwe the agent of appellant had no authority, express or implied, to bind appellant by the instrument which he executed and which is the basis of appellee's claim, and also there was testimony from which the jury might have found that the making of such a contract was not within the apparent scope of Halwe's authority.

It is unnecessary to set out and discuss specifically the rulings upon the prayers for instructions. The principles of law applicable to the facts of this record are familiar and have been repeatedly announced by this court.

The judgment, for the errors indicated, is reversed and the cause is remanded for new trial.

BROOKFIELD v. BLOCK.

Opinion delivered March 27, 1916.

1. DEDICATION—STREETS AND ALLEYS.—Where owners of land lay out a town or an addition to a city or town, platting it into blocks and lots, intersected by streets and alleys, and sell lots by reference to the plat, they thereby dedicate the streets and alleys to the public use, and such dedication is irrevocable.
2. DEDICATION—STREETS AND ALLEYS—ACCEPTANCE.—Where lots have been sold with reference to a plat, no formal acceptance by the city or town is necessary, as by that act the dedication becomes irrevocable.
3. DEDICATION — STREETS AND ALLEYS — SUBSEQUENT DEED — RESERVATIONS.—Where the owner of property has filed a plat of the same as an addition to a city, he can not by a subsequent deed to a purchaser reserve to himself any interest in the alleys, which had been already dedicated to the public.

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

J. C. Brookfield, for appellant.

1. The property reverted to plaintiff under the provisions of her dedication deed when the alley ceased to be used by the public. 24 Ark. 105; 91 Ark. 407; 99 *Id.* 404; 35 *Id.* 70; 34 *Id.* 534; 103 *Id.* 425; 28 *Id.* 282; 98 *Id.* 570; 13 Cyc. 611.

Block & Kirsch, for appellee.

1. Where it affirmatively appears that certain evidence was used at the trial is not in the record, it is conclusively presumed that it warranted the judgment. The plat nowhere appears in the record. 8 Ark. 439; 77 *Id* 195; 72 *Id.* 182; 45 *Id.* 240.

2. All the interest of appellant passed to Merriman under her deed. Appellant failed to show title.

HART, J. Nannie E. Brookfield instituted this action in the circuit court against R. Block to recover possession of a strip of land twenty-four feet wide by ninety-six feet long in the west half of block five in the town of Wynne in Cross County, Ark.

On the 24th day of May, 1883, Joshua Brookfield and Nannie E. Brookfield, his wife, conveyed by warranty deed to R. B. Merriman, "the west half of block number five in accordance with the plat of the town of Wynne in said county now on file in the office of the recorder of said County of Cross." On the 28th day of March, 1890, plaintiff filed for record a dedication deed as follows: "Know all men by these presents that I, Elizabeth Brookfield, for and in consideration of the sum of one dollar to me in hand paid, the receipt of which is hereby acknowledged, do hereby grant, sell and quit claim unto the inhabitants of the town of Wynne in the County of Cross and State of Arkansas, all the streets and alleys as designated and platted on this map for the use of the public as highways, and when said streets and alleys cease to be so used, then the same to revert and belong to me." The property in question was formerly an alley in the west half of block number five in Brookfield's Addition to the town of Wynne. It has

since been enclosed and occupied by various persons. The alley is not now used by the public but it is claimed by the defendant Block. The court directed a verdict in favor of the defendant and from a judgment dismissing her complaint the plaintiff has appealed.

The plaintiff formerly owned the acreage property of which the piece of property in question was a part. It is the contention of counsel for the plaintiff that the property in controversy reverted to her under the provisions of her dedication deed when the alley ceased to be used by the public. It may be stated here that none of the maps or plats of the town of Wynne referred to in the briefs are copied in the transcript.

(1) It is well settled by the decisions of this court that where owners of land lay out a town or an addition to a city or town, platting it into blocks and lots, intersected by streets and alleys, and sell lots by reference to the plat, they thereby dedicate the streets and alleys to the public use, and that such dedication is irrevocable. *Stuttgart* v. *John,* 85 Ark. 520, and cases cited; *Simon* v. *Pemberton,* 112 Ark. 202, and cases cited.

(2) It will be noted that the deed from Mrs. Brookfield and husband to B. B. Merriman conveys "The west one-half of block number five in accordance with the plat of the town of Wynne now on file in the office of the recorder of said county of Cross." The plat referred to in the deed is not in the transcript. So we can not know whether or not there were any alleys laid off on the plat. If there was no alley laid off on the plat, then the property in controversy being a part of the west one-half of block five passed by the deed from Mrs. Brookfield to Merriman. If by the plat referred to in the deed from Mrs Brookfield to Merriman, the alleys were laid off, they were dedicated to the public by the sale of the lots in the block and the dedication became irrevocable. Under the authorities referred to above where lots have been sold with reference to a plat, no formal acceptance by the city or town is necessary, as by that act the dedication becomes irrevocable.

(3) The dedication deed upon which Mrs. Brookfield relies for title was not executed until 1890, several years after the deed from her to Merriman was executed. She could not by that deed reserve to herself any interest in the alleys which had been already dedicated to the public. As we have seen the plat referred to in the deed from Mrs. Brookfield to Merriman is not in the record and the title to the lot in question either passed to Merriman by that deed or it was laid off as an alley on the plat referred to in that deed, and was irrevocably dedicated to the use of the public when the lots in the block were sold. In either event the title to the property in question was divested out of Mrs. Brookfield when she executed the deed to Merriman and it is well settled in this State that a plaintiff in ejectment must recover on the strength of his own title.

It follows that the court was correct in directing a verdict in favor of the defendant and the judgment will be affirmed.

WILLIAMS v. PRIOLEAU.

Opinion delivered March 27, 1916.

1. RES ADJUDICATA—UNLAWFUL DETAINER—ACTION TO TRY TITLE.—A judgment in an action of unlawful detainer will not be *res adjudicata* in an action to try the title.
2. EQUITY—PRAYER FOR RELIEF—DUTY OF PLAINTIFF TO DO EQUITY.—Where plaintiffs seek to have an instrument declared a mortgage instead of an absolute deed, they can not then claim that the mortgage does not constitute a lien upon the land because of limitations.
3. EVIDENCE—STATEMENTS OF DECEASED.—In an action not against an executor or administrator, evidence as to transactions with the deceased may be admitted.
4. COSTS AND ATTORNEY'S FEES—ASCERTAINMENT OF AMOUNT OF LIENS—EQUITY JURISDICTION.—Where it is to appellant's interest to ascertain the correct amounts of the liens upon certain lands, and to have the same reduced as much as possible, the lands will be subject to a lien for the payment of the cost of ascertaining said sums.

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

STATEMENT BY THE COURT.

Appellee brought suit in ejectment against appellants, the widow and children of Gabe Williams, deceased, alleging that she was the owner of the lands described, which had been conveyed to her by a warranty deed executed by Gabe Williams and Lincy Ann Williams on the 14th day of March, 1908.

Appellants moved to dismiss the complaint upon a plea of *res adjudicata,* setting out the record in the unlawful detainer suit in *Prioleau* v. *Williams*, 104 Ark. 322. This motion being overruled, they answered denying the allegations of the complaint, alleged that they had been in the open, notorious and adverse possession of the lands for thirty years, paying taxes thereon; that the alleged deed of conveyance from Gabe Williams and Lincy Ann Williams was a forgery, never having been signed by either of them; that if such a deed was made, it was fraudulently procured, neither of the alleged grantors being able to read or write and pleaded as *res adjudicata* the decision in the above styled case. They then filed a motion to transfer to equity stating that the alleged deed upon which plaintiff relied was not executed as a deed, but was intended as a mortgage to secure certain indebtedness and never intended to operate as a deed; that the consideration for said deed was so grossly inadequate as to show fraud on its face and that it constituted a cloud on the title of defendants, which should be removed. That it should be cancelled as a deed and considered only as a mortgage to secure the amount of $600, a debt to the American Freehold Mortgage Company. The case was transferred to the chancery court.

It appears from the testimony that the lands were conveyed by a warranty deed of the date alleged for a recited consideration of $200 "and the assumption of a mortgage held by the Freehold Land & Mortgage Company of London for $700, and the assumption of any valid mortgages now on record."

The deed purports to be signed by Gabe Williams and Lincy Ann Williams, by their mark, witnessed by

Miss Jennie Pickett, and duly acknowledged before Milton B. Rose, a notary public.

Appellee's husband, who was her agent in the entire transaction, stated that Gabe Williams approached him to borrow some money on the lands, telling him of the indebtedness to the mortgage company and of various mortgages having been executed to one Baum, and of the deed of trust from Baum to his trustee in bankruptcy and that he thought there was more against the land than it was worth and declined to lend the money; that they kept insisting upon it and he finally agreed to buy it for the consideration recited, which he stated was paid by a small amount of cash and a mare of the value of $125 and an old account due him from Williams. He said that the grantors in the deed came in together and made no objection about signing the deed whatever and that the acknowledgment of it was taken before the notary, who read it to them. The notary also testified that the deed was written and the parties came into his office with it and acknowledged the same; that no complaint or objection to it was made when it was read to them.

A great many other things were testified to by R. R. Prioleau as to all the transactions he had had with the deceased, Gabe Williams, and the litigation with Baum and Comer, trustee, in clearing up the title to the land and having an adjudication of the amount due upon the different mortgages and also the amounts paid for attorney's fees and costs of the litigation, amounting to something over $600.

Lincy Ann Williams denied ever having executed a deed to the lands at all to appellee and stated that she never signed but one paper and understood it was a mortgage for supplies. She said also that she had paid the taxes for certain years and exhibited the receipts, some of which were after the transfer of the lands to appellee and receipts from the agent of the Freehold Mortgage Company for interest, which she claimed to have paid. There were some contradictory statements in the testimony for appellee, and her husband explained that the

money with which the interest had been paid to the Freehold Mortgage Company was furnished Lincy Ann Williams by himself and that the taxes were paid by appellant while they were occupying the premises, rent free as agreed between himself and Gabe Williams, during the pendency of the suit against Baum, Comer, Storthz and others to ascertain the amount due under the different mortgages executed to Baum.

The chancellor found the deed was intended as a security for certain indebtedness and moneys and held it to be a mortgage and continued the case until the next term of court for further proof of the indebtedness secured by it. He then found that the amount finally adjudged to be due under the Baum and Comer mortgages, with the expense of the litigation and attorney's fees in the determination of the amount, together with the amount paid by appellee to discharge the mortgage of the American Freehold Mortgage Company and interest, with the $200 furnished at the time of the execution of the instrument was secured by the mortgage and that the amount advanced for supplies for cultivating the land did not constitute a lien against it under the mortgage and decreed that appellants were indebted in the sum of $2,812.30, for which the land was security under the mortgage and that same constituted a lien thereon for said amount, for which the land was ordered sold and from this decree the appeal is prosecuted.

Jas. B. Reed and *Chas. A. Walls,* for appellant.

1. The whole transaction has been so contaminated with fraud and imposition by plaintiff through her agent, that it should be declared null and void *ab initio.* 8 Ark. 146; 84 N. C. 515; 2 Vesey, Sr. 125, cited 1 Lead. Cas. Eq. (4 Am. Ed.) 773.

2. Plaintiff has not come into court with clean hands.

3. The testimony of Prioleau deals with transactions with the deceased; it was incompetent.

4. The purchase was champertous and void. Black's Law Dict., 188; 6 Cyc. 878.

5. The plea of *res adjudicata* should have been sustained.

6. The transaction whereby Prioleau attempts to charge the widow and heirs with the amounts paid on the Baum-Storthz-Williams litigation comes within the statute of frauds. Kirby's Dig., § § 3666, 3668. There are no innocent purchasers involved. All the items of the open account for $714.98 for years 1908, 1909 and 1910 are barred.

7. The plea of limitation should have been sustained.

Trimble & Williams and *Blackwood & Newman*, for appellees.

1 There was no fraud nor imposition. The deed was duly signed and acknowledged. Its purpose was understood. 96 Ark. 564-6.

2. There was no champerty. 91 Ark. 407; 17 *Id.* 674; 6 Cyc. 880.

3. In this case the land was not adversely held and even the old common law would not forbid the purchase. As to the suit for an accounting between Gabe Williams and Baum *et al.* to determine the extent of the liens against the land and costs, expenses, etc., there was nothing champertous. The assumption of the mortgages by Mrs. Prioleau was not binding on Baum, or Comer. She had not agreed to pay the mortgage debt so there was no privity between her and Baum or Comer. 42 Ark. 199; 90 *Id.* 426. She had the right to redeem but was not a necessary party. 77 Ark. 379; 30 Cyc. 50.

4. The defense of *res adjudicata is* untenable. The former suit was *unlawful detainer*. Kirby's Dig., § 3650; 104 Ark. 322; 38 L. R. A. (N. S.) 1024.

5. Prioleau's evidence was competent. This suit was against the widow and heirs. Kirby's Digest, § 3093; 37 Ark. 200; 46 *Id.* 378, 383; 79 *Id.* 414, 418.

6. Appellants must do equity under their prayer for relief. 83 Ark. 278. They can not plead limitation. 83 Ark. 278; 11 L. R. A. (N. S.) 825; 61 *Id.* 123; 60 *Id.* 458.

KIRBY, J., (after stating the facts). The undisputed testimony shows that the instrument as executed by Gabe

Williams and Lincy Ann Williams is in form a warranty deed, conveying the lands in controversy, but after a consideration of the whole testimony, which we do not regard altogether clear and convincing, we are unable to say that the chancellor's finding that the instrument executed was only intended as a mortgage and security, is clearly against the preponderance of the testimony.

(1) No error was committed in denying the plea of *res adjudicata,* since the former suit was an action of unlawful detainer in which the title to the premises could not be adjudicated. *Prioleau* v. *Williams,* 104 Ark. 322; Kirby's Digest, section 3648.

(2) The statute of limitations could not avail against the indebtedness held to be secured by the mortgage, in form a deed, even if the testimony had shown that sufficient time had expired to bar the claim. Appellants were asking equitable relief and that an instrument in form a deed be declared to be a mortgage only for the security of certain indebtedness, instead of the conveyance of the title to the lands, and were bound to do equity, and the court would not intervene to declare such instrument a mortgage and then hold that it did not constitute a lien on the land for the debt it was given to secure, on account of the statute of limitations. In other words, as said in *Sturdivant* v. *McCorley,* 83 Ark. 278, 11 L. R. A. (N. S.) 825, "The statute of limitations as to mortgages does not apply to equitable mortgages of this kind evidenced by absolute deeds without any written defeasance."

(3) The objection that the testimony of Prioleau is incompetent as relating to transactions with deceased Gabe Williams is without merit, the suit not being against the executor or administrator of his estate. Section 3093, Kirby's Digest; *Bird* v. *Jones,* 37 Ark. 200; *Mosley* v. *Mohawk Lbr. Co.,* 122 Ark. 227.

(4) It is strenuously urged that the court erred in holding the lands security under the mortgage for the amount of the attorney's fees and costs of the suit brought for an accounting and ascertainment of the

amounts due under the mortgages from Williams to Baum, etc., none of which were satisfied of record, in view of the "assumption of any valid mortgages now on record," as part of the consideration for the execution of the instrument. The different mortgages from Williams to Baum aggregated an amount of more than $3,000 and there was in addition a deed of trust to secure notes amounting to $800 to the American Freehold Mortgage Co. and the record also showed a deed of trust from Baum and wife to Storthz, to secure a thousand dollars. Appellee was only bound to pay the amount secured by valid mortgages existing against the lands in addition to the debt in the said mortgage, but the instrument held to be a mortgage charged the lands with a lien for such payment, and it was to the interest of appellants to reduce the lien of all of said mortgages to the amount that was justly due thereunder and the chancellor correctly held the lands subject to a lien for the payment of the cost of ascertaining said sum, as well as the amount thereof.

Appellee had not assumed the payment of the mortgages to Baum or his trustee and having agreed with Williams to assume the payment of valid mortgages against the land we see no merit in the objection that the suits to determine the amount due under such mortgages were brought in the name of Williams, the grantor in the instrument or conveyance to appellee. 30 Cyc. 50.

After a careful consideration of the whole record, we find no prejudicial error therein and the decree is affirmed.

HARPER v. YOUNG.

Opinion delivered March 27, 1916.

LEASES—RESTRICTED USE OF PREMISES—CHANGES OF USE.—Y. leased a building to H., the lease providing that the premises be used as a saloon and dramshop, that all liquors sold by H. should be purchased from Y., and provided also that the premises could be used for any lawful purpose, upon the lessor's written consent. The sale of liquor became illegal in the city in which the premises were situated, and H. refused to pay further rent. *Held*, it was

H.'s duty to apply to Y. for permission to use the premises for purposes other than as a saloon and dram shop; that if Y. had refused this permission that the lease would have terminated, otherwise it remained in force, and H. was liable for the stipulated rent.

Appeal from Sebastian Circuit Court; *Paul Little,* Judge; affirmed.

STATEMENT BY THE COURT.

In this case appellee, as administratrix of the estate of D. J. Young, sued appellant for the sum of $1,000 for rent of a certain building in the city of Ft. Smith under a lease executed by the said Young to appellant on November 15, 1910. The lease provides:

"That said premises shall be used for the purpose of a saloon and dramshop, provided that they may be used for any other legal purpose with the written consent of the said lessor."

Written in the body of this lease was the further agreement:

"Lessee further agrees that during the term of this lease he will purchase all of the beer that he uses in said saloon or sells therefrom both bottled and keg beer from the said lessor and from no one else, and failure or refusal to so purchase said beer from said lessor as aforesaid shall forfeit all of lessee's rights under this lease, and same shall at once become void at option of said lessor and be of no further force and effect, and lessor may without process of law or notice enter into said premises and eject lessee."

It was conceded that the rent for the four months beginning September 1, 1914, and ending January 1, 1915, was not paid by appellant, and it was also conceded that the operation of saloons in Fort Smith was prohibited by order of the court under the provisions of the Going Act, and that said order became effective August 1, 1914. Appellant paid the rent for the month of August, but shortly after the first of the month vacated the premises, and so notified the lessor, and mailed him the keys to the premises, but the letter containing the keys was returned unopened.

Young was not engaged in the real estate business and was not the owner of the building, but had rented it from the owner and had sub-rented it to appellant, who had used it only for the purpose of running a saloon. Young was the local agent of a brewery and was interested in having a tenant who would buy the beer sold by him. A conversation occurred between appellant and deceased, after the city had gone dry, in which appellant asked about the lease, and Young said that so far as he was concerned the lease would be all right, whereupon appellant said, "What about Mr. Wyatt (the owner of the building)?" and there was some evidence about a statement by Young that he would not charge rent unless Wyatt charged him; but no attempt was made to show that anything was said about using the building for any other purpose.

At the conclusion of the evidence the court directed the jury to return a verdict for appellee for the sum sued for, and this appeal has been duly prosecuted from that judgment.

Thos. B. Pryor, for appellant.

1. It was the intention of the parties that the premises should be used for a saloon and no other purpose. It was error to direct a verdict. 45 Ark. Law Rep. 245; 113 S. W. 67; 90 Ark. 461; 15 *Id.* 286.

Ben Cravens and *John H. Vaughan,* for appellee.

1. The lease expressly provided that the building may be used for any other lawful purpose, etc. 118 Ark. 239, does not apply here. Appellant could have used the building and did so use it for other lawful purposes. The court properly directed a verdict.

SMITH, J., (after stating the facts). It is insisted on the part of the appellant that we have here a contract similar to the one which we construed in the case of *Kahn* v. *Wilhelm,* 118 Ark. 239, 177 S. W. 403, and that this case is controlled by the rule there announced. But we do not agree with counsel in this contention. The contracts are not similar. In the case of *Kahn* v. *Wil-*

helm, we said of the lease there construed that the parties to it had agreed and covenanted that the property should be used as a hotel and saloon, and for no other purpose whatever, and that in construing the lease we had no right to strike out one of the terms there employed. It was there argued that the building could be used for a hotel, even though no saloon was kept there, and that the property had other usable value. But in answer to this argument, it was said that the lease was not a general one, but a special one for the purpose of operating a hotel and saloon, and we construed that instrument as leasing the building for a single purpose, that purpose being the operation of a hotel and saloon.

The lease now under consideration does not provide as did the lease in the *Kahn* v. *Wilhelm* case, that the building should be used for certain purposes only. In fact, it appears to have been contemplated that some other use of the building might be desired, in which event such permision could be obtained by the written consent of the lessor, the lessee paying any increased rate of insurance caused by the change of business. It is true the parties to the lease in the *Kahn* v. *Wilhelm* case might have agreed to some other use of the premises, but the contract contemplated no such agreement, and the agreement, if made, would have been a new one outside of the original contract. Here the contract contemplates the possibility of a change in the use of the premises, and provides a manner in which that change may be accomplished. The provision in the lease requiring appellant to purchase beer from his lessor was inserted for the purpose of requiring appellant to buy beer from his lessor, so long as he operated a saloon in the building, and it has no other effect.

Appellant proceeded on the theory that his lease was for one purpose only, and acted upon that theory in returning the keys without attempting to use the building for other purposes or asking if that could be done. His liability depends upon the correctness of his interpretation of the contract, for he stood upon that interpreta-

tion in returning the keys without attempting to use the building for some other purpose, or inquiring if he could do so. We think he should have made some other use of the building, or should have asked if this might be done, and if this permission had been refused he would, of course, have been absolved from any obligation to pay the rent. But not having done so we must hold that the court properly directed a verdict against him for the rent due under his contract.

It is true this contract required appellant to obtain the written consent of the lessor before engaging in any other business except the operation of a saloon, but the insertion of this provision shows that the parties contemplated that such a request might be made and the terms, upon which it would be granted. While this permission might not have been granted, it can not be assumed that it would certainly have been refused, and we conclude, from the insertion of the provision, that the parties contemplated the probability of this request being made, and had not contracted for a single use of the building as was done in the case of *Kahn* v. *Wilhelm, supra.*

The judgment is, therefore, affirmed.

BEATY *v.* SWIFT.

Opinion delivered March 27, 1916.

INSANITY—DEFECTIVE CONVEYANCE—MENTAL CAPACITY—IGNORANT AND ILLITERATE PERSON.—An ignorant and illiterate person may acquire property and may convey it, provided he knows what he is doing and appreciates and understands the transaction in which he is engaging, and although a grantor is very ignorant, and there is evidence tending to show mental incapacity to make a deed, such deed will be held valid, where the evidence shows that he knew what he was doing and the purpose thereof.

Appeal from Washington Chancery Court; *T. H. Humphreys,* Chancellor; reversed.

R. J. Wilson and *McDonald & Grabiel,* for appellant.

1. The court erred in finding that Ann Swift was incompetent and not capable of knowing the nature of the

transaction at the time she signed the deed. The court should have dismissed the bill because Ann had reasonable capacity; she received a valuable consideration and there was no allegation nor proof of fraud, and she had never been adjudicated *non compos.* All the testimony tends to show sufficient capacity. The examination of the experts was wholly improper and illegal. Mere weakness or want of education is not sufficient. She had mental capacity enough to transact ordinary business. 97 Ark. 450; 106 *Id.* 362-8-9; 103 *Id.* 199; 100 *Id.* 618; 87 *Id.* 243; 27; *Id.* 166; 22 Cyc. 1112, 1113; 70 Ark. 166; 17 *Id.* 292; 97 *Id.* 456, 459; 22 Cyc. 1204; 21 Am. Rep. 24, and note, p. 29; 16 Am. & E. Enc. Law. 625.

J. W. Walker, for appellees.

The rule as to the admissibility of non expert testimony is stated in 61 Ark. 245; 103 *Id.* 200. The finding of the chancellor is fully sustained by the evidence. 115 Ark. 436; 42 *Id.* 118; 47 *Id.* 455. See also, 55 Ark. 396; 47 *Id.* 455. The overwhelming preponderance of the evidence sustains the finding of the chancellor as to Ann Swift's mental capacity. The decree should be affirmed.

SMITH, J. The court below found that appellee Ann Swift was given a life estate under the will of her father in the land in controversy, and that at the time she executed a deed to the land to one A. S. King, under whom appellant Beaty claims title by deed, the said Ann Swift was not possessed of sufficient mental capacity to know and appreciate her act, or to make a binding deed, and that her attempted conveyance of the land was void. The deed so declared void was dated September 14, 1891. As a result of this finding various collateral questions are presented in the briefs, but the correctness of the above finding presents what we regard as the controlling question in the case.

After Beaty's purchase of the land he improved it, and as a result of these improvements, and the building of a railroad near the land, and the general enhancement of values, the land became much more valuable than it was at the time appellee sold it. Appellant was in pos-

session of the land by a tenant, who commenced moving from the place, but, before all of his effects had been removed, appellee and her husband moved in and took possession of the premises and retained possession until appellant brought an action of unlawful detainer to dispossess them. The cause was transferred to equity, where a guardian was appointed to defend for appellee, and a decree was rendered cancelling appellee's conveyance of the land for the reason stated.

A large number of witnesses—forty-two in fact—testified in appellee's behalf. Much of this evidence is clearly incompetent. For instance, the postmaster at Fayetteville testified that he taught school in the '80's near the home of William Rinehart, who was appellee's father, and that he always understood that Rinehart had a child who was mentally unbalanced, but that all he knew of her mental condition was what he had heard. Other witnesses who are non-experts appear to have stated their opinion without detailing the evidence upon which such opinions were based. Only three persons testified who attempted to qualify as experts, and the usual difference of opinion was found among them. Two of the three testified that appellee did not have sufficient mental capacity to convey land, while the third was of the contrary opinion.

A number of non-experts, however, testified, both pro and con, and gave such detailed statements of the facts and circumstances arising out of their observation of, and association with, appellee as gave them the right to express an opinion, based upon such observation and association concerning appellee's sanity. It appears from the evidence of some of the witnesses that appellee and her husband possessed about the same degree of intelligence. Of course, the husband's sanity was not directly involved in this inquiry, yet the witnesses discussed it more or less, and it is certain that both appellee and her husband possessed very little intelligence and were wholly uneducated. Evidence offered in appellee's behalf unquestionably tends to show that she did not pos-

sess sufficient mentality to execute a valid deed, and this evidence, considered alone, would, no doubt, sustain the finding of the chancellor. But the question is, and we concede it is a close one, whether the chancellor's finding is contrary to the preponderance of the evidence.

It was shown that at the time the deed was made appellee's husband shot a man and, rather than stand trial upon this charge, ran away. He went first to Texas, and later to Tennessee, where he lived for two years, and, learning of the death of the man whom he had shot, he returned to his former home. Appellee left this State about two months after her husband ran away, and joined him in Texas and has lived with him continuously since.

Appellee's brother testified that after Swift shot the man, the land in question was sold to raise money to pay the expenses of Swift's flight. That his sister knew her husband was in trouble, but he could not say how much she knew about it, but he supposed, if it was explained to her, she would have understood. That his sister received $250 in money, and gave him $150 of it to take to her husband, and she retained the other $100. Other heirs who had an interest in the land joined in the conveyance, and the total consideration was $1,000.

Appellee had a life estate under the will of her father in a fourth interest, and she received the same price for this life estate as did the heirs who owned the fee. This brother was asked, "Do you think she has sufficient mental capacity to intelligently dispose of any estate and protect her rights?" and he answered, "I do not think she ever had any ability. In some things she has judgment and in other things she is a blank." A neighbor of many years standing testified, "I think she is pretty weak minded; always thought that. It is my judgment she never was bright. She might know good from evil." Another testified, "I do not think Ann would be very competent. Some things she might know, some she might not." Another brother of appellee testified that his sister knew no more of right or wrong than a child four or five years old, and that she had never de-

veloped mentally. He admitted, however, that in the settlement of his father's estate it became necessary for his sister to execute a deed to him, and this she did, and he thought she knew what she was doing when that deed was executed. Another sister testified that appellee never went to school and could not learn at home, but that she had read in the first reader. That her sister wanted the money to enable her husband to get out of the country, and that she sold her interest in the land for the same price which her sister received. Indeed, the proof appears to greatly preponderate that a fair price was received for the land. Another neighbor testified that appellee did not know right from wrong and could not deal at arm's length in business transactions with men and women; and several other witnesses employed similar language in expressing their opinion of appellee's mentality. It was shown that she possessed a great fondness for pets, particularly cats and dogs, and that she kept a good many of these about her, and talked to them in a childish way, and some of these witnesses who so testified stated that her mentality appeared to be that of a child anywhere from four to twelve years old. She was shown also to have had a fondness for dolls and to have had dolls to play with until she was thirty years old. She was about sixty years old at the time of the trial. Notwithstanding a good many witnesses testified appellee did not know right from wrong, these same witnesses admitted that she did right rather than wrong. That her conduct was decorous and her life simple and blameless, and no scandal had attached to her name. One witness did answer affirmatively the question, "Is she morally depraved?" but he did no after having stated that he did not understand the question and without having had it explained to him. This witness admitted that he could not himself read or write, and it is very probable that he did not understand the significance of his answer. At any rate, no other witness so testified. Upon the contrary, it was shown that she attended church regularly, and witnesses stated they had heard her testify in church

coherently and that she appeared to enjoy the consolations of religion. Unquestionably she and her husband were very poor and were ignorant, and it is shown that they had none of the luxuries, and not many of the comforts, of life in their home. Witnesses described the home as one of squalor, filth and misery. Yet, for a number of years appellee and her husband kept house, during all of which time she performed all the usual and necessary domestic duties. She raised chickens and eggs and geese, and other fowls, and carried them to market, and sold them and exchanged them for things needed about her home. Witnesses in appellant's behalf testified that appellee would talk and understand the affairs of the neighborhood; that she would borrow things and bring them back, and that she raised fine hogs for the market. One witness asked her how she raised such fine hogs, and she answered, "Us takes care of 'em." This appears to be characteristic language in which she expressed herself. Other witnesses testified that she talked intelligently and coherently, and while these witnesses conceded that she was of a low order of mentality, they thought she had intelligence enough to know what she was doing and what she wanted to do. Appellee's family physician who had practiced his profession in the vicinity in which she lived for thirty-four years testified that he had numerous conversations with her, and that while she presented a case of arrested mental development she was not an imbecile, nor an idiot, but had sufficient intelligence to understand things ordinarily, to look after her own interests, and to sell her interest in land or deed it away and understand the nature of the transaction, and that he thought she was mentally competent to sign a deed and know the nature of a transaction of that kind. He expressed the opinion that if she had had the assistance in her youth which science now affords such persons, that she might have made an intelligent woman.

Two doctors testified as experts in appellee's behalf, and the testimony of these physicians is practically identical. Neither had ever seen appellee until they were call-

ed upon to examine her, which they did together and in the presence of her husband. They expressed the opinion that neither appellee nor her husband appeared rational or to comprehend the simple transactions of life. They tested her reflexes, her ability to discriminate dates, the denomination of currency and her visual capacity. They found that she could not count money, and after making various tests, which were regarded as appropriate to enable them to form the opinion which they expressed, they stated their opinion to be that they did not regard her as capable of transacting any kind of business. This examination covered a period of from thirty to forty minutes, or possibly an hour, as one of the doctors said, and they also expressed the opinion that neither appellee nor her husband was simulating a lack of intelligence. They expressed the opinion that appellee would be unable to remember incidents that had happened several years back, and that they did not think she had mentality to recollect or recount incidents that had occurred fifteen or sixteen years previously. Upon their cross-examination, however, the questions asked and answers given by appellee when her deposition was taken were read to these doctors, and they stated that those answers were more connected and coherent than anything which they had been able to obtain, and they also expressed the opinion that the answers given indicated intelligence and continuity of thought, and that the answers indicated an understanding of the matters testified about and were fairly intelligent, except the phraseology employed in expressing them, but that this, however, was common in the case of illiterate persons like appellee and could not be regarded as a special mark of weakness of mind. And after the remainder of the questions and answers had been read the doctors testified that the answers indicated a fair degree of intelligence and that if they had been without any personal knowledge of the party interrogated, they would be of the opinion that the answers showed something near an average degree of intelligence, and that those answers lead them to believe that the wit-

ness had more capacity and intelligence and understanding of the subjects about which she was questioned than their examination of her would have led them to believe.

But possibly the more important of this evidence is that of appellee herself. She was examined and cross-examined at length, and was recalled for further examination and cross-examination. Notwithstanding the great length of time which had elapsed since the execution of her deed she appeared to remember the circumstances under which it was executed, although other witnesses to the transaction contradicted her statement that the deed which she signed was destroyed and another deed was prepared but was not signed by her. She had never up to then traveled on a train, but yet she followed her husband to Texas, and although she got lost there, this appears to have resulted from the failure of the brakeman to advise her of the proper place to change cars. She named the various places in Texas where she stopped and through which she passed and the length of time she remained in each and where and when she finally joined her husband. She went with him to Tennessee and detailed with fair intelligence their principal business transactions in that State. She described a piece of land which he purchased there and the terms of his contract for its purchase and the source from which he derived the funds to pay for the place. She remembered accurately and stated correctly the principal provisions of her father's will and knew the property which had been given to her and the conditions which had been imposed, and seemed to understand the nature and extent of her interests in that estate. She appears to have discussed frequently with her neighbors the sale of this land and to have advised with some, and to have been advised by others about her chances of recovering it long before this suit was brought. She told one person that she did bring this suit because she was afraid she might not recover the land, but she and her husband appeared to have bided their time and seized the first opportunity of taking possession of the land, thereby mak-

ing themselves defendants in a suit to determine its title. Upon her cross-examination, appellee showed her ability to count money, to spell her given name, and to give a rational answer to all questions that were asked about herself, her family, and her property.

In the case of *McEvoy* v. *Tucker,* 115 Ark. 430, we had occasion to consider the sufficiency of proof to establish the lack of mental capacity to invalidate a conveyance of real estate. In that case we quoted the rule applicable to such questions as stated by Mr. Justice Riddick in the case of *Seawel* v. *Dirst,* 70 Ark. 166, as follows:

"It follows, therefore, that the proof which is designed to invalidate a man's deed or contract on the ground of insanity must show inability to exercise a reasonable judgment in regard to the matter involved in the conveyance. * * * To have that effect, (*i. e.,* to invalidate the deed), the insanity must be such as to disqualify him from intelligently comprehending and acting upon the business affairs out of which the conveyance grew, and to prevent him from understanding the nature and consequences of his act."

In applying that test to the facts in this case, as we understand them to be, we have reached a conclusion contrary to the one announced in the case of *McEvoy* v. *Tucker.* We think that appellee was not a person of average intelligence, but this is not required. The ignorant and illiterate person may acquire property and may convey it, provided he knows what he is doing and understands and appreciates the transaction in which he is engaging, and we think appellee had this knowledge, and we are constrained to believe that she realized that her husband's trouble put her to a choice between her land and her husband, and she chose to sell her land to save him. And having made this election with intelligence enough to know that she had done so, she can not now recover her land, and the decree of the chancellor will be reversed and the cause remanded with directions to enter a decree in accordance with this opinion.

BALMAT *v.* CITY OF ARGENTA.

Opinion delivered March 27, 1916.

1. DEDICATION—ALLEYS—INTENT.—Where an addition is platted, and the plat filed showing streets and alleys, the alleys will not be held to have been dedicated to the public, where there was an express declaration by the donor that the alleys are for the use of the owners or residents, but may be closed by the joint action of the owners.

2. DEDICATION—STREETS AND ALLEYS—PROOF.—A dedication of streets and alleys across a tract of land is not established merely by proof of making and recording the plat, where the lands remained enclosed by the original owner.

3. STREETS AND ALLEYS—RIGHT OF CITY.—Where a certain alley was never dedicated to the public, either expressly or by implication, and the public has acquired no prescriptive right over the same, where the same has been enclosed by the adjacent owner, the city has no right to open the alley and to forcibly break and enter the plaintiff's enclosure, and an injunction will lie to restrain the officers from so doing.

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

Bratton & Bratton, for appellant.

1. There was never a dedication of the alley to the public; but there was a reservation that the alleys might be closed. Dillon on Mun. Corp., § § 631-6; 9 How. 10; 77 Ark. 570; 91 *Id.* 350; 84 *Id.* 520; 111 Ark. 548; 112 *Id.* 202. There was nothing more than a mere license to pass. 59 Ark. 35. The alley had been fenced for twenty-five years. The dedication must be to the public. 69 Md. 346. Use by permission is not sufficient. 110 Ind. 509; 67 Ill. 368; 2 Met. (Ky.) 98; 35 Barb. 395; 103 Ind. 349.

2. The intent to dedicate was wanting. 60 Ill. 324. Mere permission will not create a public easement. 67 Ill. 368. No length of time of use will make a public highway, unless adverse. 36 Ia. 485. There never was a dedication, and the city was entirely without authority.

Fred McDonald, for appellee.

1. There was a dedication to the public and an acceptance. 85 Ark. 525; 58 *Id.* 142; 77 *Id.* 177, 221; 68 *Id.*

40, 68; *Ib.* 40, 69; 85 *Id.* 524. The dedication is irrevocable. 85 Ark. 524; 77 *Id.* 221.

2. A reservation of closing alleys after dedication is void. 13 Cyc. 461; 48 Mass. 309; 2 L. R. A. 87; 57 Mo. 297.

3. There was no limitation; there was a dedication to public use, and the city and the public were the beneficiaries. 68 Ark. 39, 54.

4. A deed of streets to the "present and future owners" is a dedication to the public (50 Cal. 175), and so is a deed to the inhabitants. 71 Me. 144; 57 Mo. 297; 49 Atl. 822. The clause that the alleys, etc., shall be open highways is sufficient. 50 Ark. 466; 84 Wis. 205. "Highways" includes alleys. 12 Okla. 82. All the acts, conduct and writings clearly show an intention to dedicate.

McCULLOCH, C. J. This is an action instituted by appellant in the chancery court of Pulaski County to restrain the officers of the city of Argenta from breaking appellant's inclosure and tearing down his fences for the purpose of opening an alley. The officers of the city attempt to justify their invasion of the premises under a claim of dedication to the public by appellant's grantor. James H. Barton (who was appellant's immediate grantor) and James L. Davis, formerly owned the property, and, in the year 1887, platted it into city lots with intersecting streets and alleys indicated on the plat. The plat was duly acknowledged and filed for record, and attached thereto were field notes and the following statement, signed by the dedicators:

"Know all men by these presents:

"That whereas, we, James H. Barton and James L. Davis, are the owners of the land described in the foregoing notes; and, whereas, we have caused the said land to be laid off into lots and blocks, streets and alleys as shown on the plat preceding said notes. Now, therefore, we hereby declare that the said land so laid off shall hereafter be known as Davis' addition to the town of Argenta, and the streets shall remain open highways forever and the alleys shall remain open highways for the use of the

owners of or residents upon the blocks through which they run, but the alley in any block may be closed at any time, by all owners of lots in any such block duly executing, acknowledging and placing on record in the recorder's office of Pulaski County, a valid instrument of writing setting forth such closure."

Appellant subsequently purchased two lots from Barton and the same were enclosed by a fence which included the portion indicated on the map as an alley running through the block, and that fence has been maintained by plaintiff to the present time, or at least until it was broken and the premises entered by the officers of the city.

The question in the case is whether or not there has ever been a dedication of the land in controversy to public use. The language of the writing is peculiar. It contains an express dedication of the streets indicated on the plat, but as to the alleys it provides that they "shall remain open highways for the use of the owners of or residents upon the blocks through which they run, but the alley in any block may be closed at any time, by all owners of lots in any such block duly executing, acknowledging and placing on record in the recorder's office of Pulaski County, a valid instrument of writing setting forth such closure." At the time of the alleged dedication, we had in this State no statutory method of voluntary dedication of lands to public use as streets, alleys and other public places, but the General Assembly of 1901 enacted a statute requiring persons and corporations to file plats of land situated in any city or town with the recorder of deeds. Kirby's Digest, § § 5523-4.

There are two classes of common law dedications, "express dedications and implied dedications," says Mr. Elliott in his work on Roads and Streets, volume I, section 133. "In both express and implied common law dedications," continues the author, "it is necessary that there should be an appropriation of land by the owner to public use, in the one case by some express manifestation of his purpose to devote the land to the public use, in the

other by some act or course of conduct from which the law will imply such an intent." The same author in another section of his work, (section 138), says: "It is essential that the donor should intend to set the land apart for the benefit of the public, for it is held, without contrariety of opinion, that there can be no dedication unless there is present the intent to appropriate the land to the public use. If the intent to dedicate is absent, then there is no valid dedication. The intent which the law means, however, is not a secret one, but is that which is expressed in the visible conduct and open acts of the owner. The public, as well as individuals, have a right to rely on the conduct of the owner as indicative of his intent."

There have been many decisions of this court on the subject, and the rule expressed by Mr. Elliott is the one that we have steadily adhered to. Among other things we have decided that "An owner of land, by laying out a town upon it, platting it into blocks and lots intersected by streets and alleys, and selling lots by reference to the plat, dedicates the streets and alleys to the public use, and such dedication is irrevocable" (*Davies* v. *Epstein,* 77 Ark. 221); but that "merely laying out grounds, or merely platting and surveying them without actually throwing them open to use or actually selling lots with reference to the plat, will not as a general rule show a dedication." *Holly Grove* v. *Smith,* 63 Ark. 5.

(1) Now, it can not be said that there was any express dedication in this instance, for there is nowhere found in the instrument executed by Barton and Davis a dedication of alleys to the public; so if there has been one at all, it must arise by implication, either from what was declared in that instrument or by the conduct of the parties. It will be seen that while there was an express dedication of the street for public use, the use of the alleys indicated on the plat was reserved to the owners of or residents upon the block through which the alleys run, and there was an express reservation to such owners of

the right to close the alleys at any time. In the face of the express declaration that the alleys are to remain open for the use of the owners or residents, and may at any time be closed by the joint action of such owners, it can not be said that there was an implied intention to irrevocably dedicate the alleys to public use.

(2) Notwithstanding that reservation, the public might acquire the right of use by prescription, but such is not the case in the present instance, for it appears that the alley now sought to be opened has never been opened, but on the contrary has been occupied by appellant and included within his inclosure. The case falls, we think, within the principle announced by this court in the case of *Holly Grove* v. *Smith, supra,* where it was held that a dedication of streets and alleys across a tract of land is not established merely by proof of making and recording the plat, where the lands remained inclosed by the original owner.

(3) The question whether the appellant is wrongfully withholding the strip of ground from the other owners of land in the block, for use as an alley, is not involved in this controversy inasmuch as none of those owners are complaining. When they do complain, the question will arise whether or not they are barred by the statute of limitation, there being only private rights involved. At any rate, the public has no concern in the rights of private owners, as there has never been any prescriptive right acquired by the public, and as we have already seen there has been no dedication. We conclude, therefore, that the city had no right to open the alley and to forcibly break and enter appellant's inclosure, and that he was entitled to an injunction restraining the officers from so doing.

The decree is there reversed and the cause remanded with directions to enter a decree in favor of the appellant.

HICKEY v. STATE.

Opinion delivered March 27, 1916.

LIQUOR—SOLICITING SALES—INJUNCTION.—Defendant, under Act 109, page 408, Acts 1915, may be restrained from maintaining a public nuisance in violation of Kirby's Digest, § 5133, where, in a city in Arkansas, after the passage of Act 30, page 98, Acts of 1915, he engaged in said city in soliciting orders for the sale of whiskey by a firm in Missouri, of which he was a member, to persons in Arkansas.

Appeal from Sebastian Circuit Court; *Paul Little,* Judge; affirmed.

Holland & Holland, for appellant.

1. Kirby's Digest, § 5133 has no application to sales made out of the State. If it did the act is void. Soliciting orders for a dealer out of the State is not a violation of the statute. 24 L. R. A. 270; 78 S. W. 951; 82 Ark. 405; 99 *Id.* 563.

Wallace Davis, Attorney General, and *Hamilton Moses,* Assistant, for appellee.

1. The liquor laws are cumulative. Defendant was tried under section 5133, Kirby's Digest and Acts 1907, Act 135 which changes the common law rule as to agency. The solicitation of orders for liquor makes out an offense. 114 Ark. 149. His acceptance of the order and the delivery in this State is a sale in this State. 88 Ark. 273; 42 *Id.* 275; 41 *Id.* 355; 105 *Id.* 462; 88 Ark. 240.

2. Since the passage of the Webb-Kenyon Liquor Law, intoxicating liquors have lost their interstate character. 145 N. W. 451; 69 So. 652; 238 U. S. 190; 210 Fed. 378; 219 *Id.* 579. See also, 87 Miss. 171. Appellant was clearly guilty under the Woods Nuisance Act.

HART, J. This action was instituted by the prosecuting attorney of the twelfth judicial circuit against J. E. Hickey to enjoin him from using a certain building in the city of Fort Smith for the purpose of soliciting orders for the sale of whiskey.

The prosecuting attorney proceeded under an act entitled an act to define certain public nuisances and to provide for the abatement thereof. See Acts of 1915, p. 408.

The facts are as follows: Prior to our act prohibiting the issuance of liquor licenses in the State of Arkansas approved February 6, 1915,* the defendant Hickey was engaged in operating a saloon in Fort Smith, Arkansas. After his saloon in Fort Smith was closed, he formed a partnership for the sale of liquors at Monette, Mo., under the firm name of Monette Liquor Company. He opened an office in Ft. Smith, Ark., and stayed there for a part of the time for the purpose of sending orders to his liquor firm in Monette, Mo. The officers found an order blank in his office of the Monette Liquor Company at Monette, Mo., envelopes addressed to that firm and also a circular letter with the letter head of that firm. The letter was signed Monette Liquor Company, Monette, Mo., by J. E. Hickey, and it informed his friends and customers that he had shipped his stock of liquors from Ft. Smith, Ark., to Monette, Mo., and had opened a liquor house with orders as a specialty. The letter after soliciting the patronage of his former customers said, "I will be in Fort Smith a portion of my time and any information you may desire I can tell you if you ring our former Fort Smith phone number 1168. Again thanking you and assuring you that any favors shown us will be certainly appreciated we remain," etc.

One of the police officers of the city of Fort Smith testified that Hickey told him that he was soliciting orders in the city of Fort Smith to send to the Monette Liquor Company; that he was accepting orders in Fort Smith but was not taking any money.

Another officer stated that he told him that the circular letter found in his place of business was sent out to prospective customers together with a price list which was also found in the Fort Smith office occupied by Hickey. He was then asked this question: "Did he

*Act 30, page 98, Acts 1915.—(Rep.).

(referring to Hickey) say that was a part of his business?" The witness answered, "yes."

The circuit judge rendered a judgment restraining Hickey from soliciting and transmitting orders for intoxicating liquors at his place of business in Fort Smith, Ark. The defendant has appealed.

In the case of *Dalamater* v. *South Dakota,* 205 U. S. 93, 10 A. & E. Ann. Cas. 733, the court held that since the enactment of the Wilson Law which expressly provided that intoxicating liquors coming into a State should be as completely under control of the State as though manufactured therein, the owner of intoxicating liquors in one State can not, under the commerce clause of the Constitution, go himself or send his agent into another State and, in defiance of its laws carry on the business of soliciting proposals for the purchase of such liquors. In that case it was contended that because under the Wilson Act, a resident of one State had the right to contract for liquors in another State and receive the liquors in the State of his residence for his own use, he had the right to go into a State and there carry on the business of soliciting from residents of that State orders for liquor to be consummated by acceptance of the proposals by the nonresident dealer. The court said that this contention ignores the broad distinction between the want of power of a State to prevent a resident from ordering from another State liquor for his own use and the plenary authority of a State to forbid the carrying on within its borders of of the business of soliciting orders for intoxicating liquors situated in another State, even though such orders may only contemplate a contract to result from final acceptance in the State where the liquor is situated. See also, *State of Alabama, ex rel.* v. *Delaye,* 68 So. 993, 57 L. R. A. (N. S.) 640. Therefore being unable to prohibit the shipment of intoxicating liquors into the State, the Legislature of several states have enacted laws prohibiting the soliciting of orders for liquors by agents of liquor dealers of other states and of the same State out of the limits of the prohibited territory. Our Legislature provided that it shall be unlawful for any person,

firm, partnership or corporation engaged in the sale of alcohol or any spirituous, ardent, vinous, malt, or fermented liquors, where the same may be lawful, to solicit orders, either by agent, or otherwise, for the sale of alcohol or any spirituous, ardent, vinous, malt, or fermented liquors in any place or places in this State where same is prohibited by law. Kirby's Digest, section 5133.

The gist of the offense is the soliciting of orders in prohibited territory and the penalties of the statutes are denounced against the licensed dealer whether in or out of the State.

The testimony in this case shows that Hickey had a place of business in the city of Fort Smith from which he solicited orders for a liquor house at Monette, Mo., in which he was interested as a partner. In the circular letter of his firm, which was signed by him, he told his former customers that he would be in Fort Smith a part of the time and to call on him for information in regard to the purchase of liquor, at the same time giving his phone number.

An officer of the city of Fort Smith testified that Hickey had told him that he was soliciting orders to send to the Monette Liquor Company and the circular letters stated that company was doing business at Monette, Mo.

Another officer testified that he told him that his firm was sending out a circular letter and he was asked by the court if that was a part of his business and replied, yes. The court might have inferred from this that Hickey himself was sending out circular letters from his office at Fort Smith, Ark.

The testimony was sufficient to have established the fact that he was soliciting orders for the sale of whiskey by his firm at Monette, Mo. This was contrary to section 5133 of Kirby's Digest. Therefore he was maintaining a public nuisance under Act 109 of the Acts of 1915, and under that act the circuit court was given the power to abate the nuisance by injunction. See Acts of 1915, p. 408.

The judgment will be affirmed.

MARTELS v. WYSS.

Opinion delivered March 27, 1916.

1. STATUTES—REPUGNANCY—REPEAL BY IMPLICATION.—Repeals by implication are not favored, and when two statutes covering the whole or any part of the same subject matter are not absolutely irreconcilable, effect should be given, if possible, to both; it is only where two statutes relating to the same subject are so repugnant to each other that both can not be enforced, that the last one enacted will supersede the former, and repeal it by implication.
2. STATUTES—CONFLICT—CONSTRUCTION.—Where there is a seeming conflict between two acts, all rules for judicial construction are to be applied, to the end that they may be reconciled before reaching the conclusion that the one repeals the other.
3. TAXATION—DELINQUENT TAXES—PENALTY—REPEAL OF STATUTE.—Act 415, page 361, Public Acts 1911, fixing a uniform date for paying taxes without penalty, and providing for such penalty, does not repeal Kirby's Digest, § § 7083 and 7084.
4. TAXATION—DELINQUENT TAXES—COLLECTION.—Act 415, page 361, Public Acts of 1911, *held* to provide that where the owner pays his taxes after the 10th day of April, and before the 25 per cent. penalty is added by the clerk under Kirby's Digest, § 7084, the collector is required to extend the penalty of 10 per cent. against such delinquent taxpayer, and collect the same, and this provision of the law does not change the duty of the clerk as defined in Kirby's Digest, § § 7083 and 7084.

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

STATEMENT BY THE COURT.

L. R. Martels instituted this action in the chancery court against Jeff McKinnon to foreclose a vendor's lien on a quarter section of land in Polk County, Arkansas.

Caesar Wyss filed an intervention claiming the land under a tax deed executed to one R. P. Harris. Harris deeded the land to Wyss. The land was sold at a tax sale on the second Monday in June 1911: that being the 13th day of the month.

Plaintiff Martels filed a reply to the intervention of Wyss in which he alleged that the land was sold for a penalty of 25 per cent. when only a 10 per cent. penalty should have been added; that the overcharge in penalty amounted to seventy-three cents and avoided the sale.

The court found that the tax sale was valid and that Caesar Wyss was the owner of the land. The lien of the plaintiff Martels was therefore denied and the recital thereof in the deed was canceled as a cloud upon the title of Caesar Wyss.

From the decree entered of record the plaintiff Martels duly prosecuted an appeal to this court.

W. Prickett and *J. I. Alley,* for appellant.

1. The Act of 1911, p. 361, repeals § § 7069 and 7084 of Kirby's Digest. The penalty should only have been 10 per cent. and the sale for 25 per cent. is void. Kirby's Dig., § 7083-4, 7069; 66 Ark. 428; 100 *Id.* 507; 40 *Id.* 448; 61 *Id.* 36; *Ib.* 414; 63 *Id.* 475; 77 *Id.* 570; 86 *Id.* 578; 72 *Id.* 254.

Minor Pipkin, for appellee.

The act does not change, amend or repeal sections 7069, 7083-4, Kirby's Digest. The land was properly sold for the 25 per cent. penalty. 6 Ark. 484; 70 *Id.* 83; 63 *Id.* 573; Cooley, Const. Lim. 455. The tax sale was valid.

HART, J., (after stating the facts). It is contended by counsel for appellant that the act* approved May 31, 1911, fixing a uniform date for paying taxes without penalty, and providing for such penalty repeals sections 7083 and 7084 of Kirby's Digest. Sections one and two of the Act of 1911 read as follows:

"Section 1. All taxes levied on real estate and personal property by the several county courts of the State, when assembled for the purpose of levying taxes, shall be deemed to be due and payable at any time from the first Monday in January to and including the 10th day of April in each year, and all such taxes remaining unpaid after the 10th day of April shall be considered as delinquent, and it is hereby made the duty of the collector to extend a penalty of 10 per cent. against all such delinquent tax payers that have not paid their taxes within the time limit above specified, and the collector shall col-

* Act 415, page 361, Public Acts of 1911.—(Rep.).

lect said penalty in the same manner and at the same time he collects other delinquent taxes."

"Section 2. The clerk of the county court, at the time of making settlement with the collector, shall carefully examine the record of tax receipts as kept by the collector and shall charge said collector with a sum equal to 10 per cent. of all tax receipts recorded subsequent to the 10th day of April. Provided, all errors or omissions of the collector in recording any tax receipt shall be exempt from the penalties herein prescribed." General Acts of 1911, page 361.

Section 7083 and 7084 of Kirby's Digest reads as follows: "Section 7083. The collector shall, by the second Monday in May in each year, file with the clerk of the county court a list or lists of all such taxes levied on real estate as such collector has been unable to collect, therein describing the land or city or town lots on which said delinquent taxes are charged as the same described on the tax books, and the collector shall attach thereto his affidavit to the correctness of such list. The clerk of the county court shall carefully scrutinize said list and compare the same with the tax-book and record of tax receipts, and shall strike from said list any tract of land, city or town lot upon which the taxes shall have been paid, or which does not appear to have been entered upon the tax-book, or that shall appear from the tax-book to be exempt from taxation."

"Section 7084. No taxes returned delinquent as aforesaid shall be paid into the State treasury, except by the collector. It shall be the duty of the clerk of the county court to add a penalty of 25 per centum upon all taxes so returned delinquent, which penalty shall be collected in the manner provided for the collection of delinquent taxes."

Prior to the passage of the Act of 1911 in question, tax payers were allowed to the 10th day of April to pay taxes on all classes of property without a penalty. After that time, under section 7069, the collector might distrain to pay taxes on personal property, which had not been

collected, and a penalty of 25 per cent. thereon. Under section 7083, he was required to make a list of real property, on which taxes had not been paid, to the 10th of April, and was required to file such list with the county clerk by the second Monday in May of each year. Owners of land might pay taxes thereon at any time before the list was filed without a penalty but there was no duty upon the collector to keep the tax books open for that purpose after the 10th of April. In other words under the old act, the tax collector might close the books after the 10th day of April and refuse to receive payment of taxes by the owners but if he chose to keep open the tax books until he filed the list with the clerk, the owner might pay his taxes without paying a penalty. *Boles* v. *M'Neil,* 66 Ark. 422.

There is no express repeal of sections 7083 and 7084 by the Act of 1911; but it is insisted that they are repealed by implication. The Legislature of 1911 did not take up the whole subject-matter. If they had intended to do so it is probable that some reference would have been made to the prior acts on the subject. Counsel do not point specifically to any invincible repugnancy between the old and the new statutes.

(1-2) Repeals by implication are not favored, and when two statutes covering the whole or any part of the same subject-matter are not absolutely irreconcilable, effect should be given, if possible to both. It is only where two statutes relating to the same subject are so repugnant to each other that both can not be enforced, that the last one enacted will supersede the former and repeal it by implication. *Carpenter* v. *Little Rock,* 101 Ark. 238; *Benton* v. *Willis,* 76 Ark. 443; *Coats* v. *Hill,* 41 Ark. 149; *Blackwell* v. *State,* 45 Ark. 90. Tested by this cardinal rule of construction we can not say that the repugnancy between the new statute and the old one is plain and unavoidable. The conflict is more seeming than real; and in case of a seeming conflict between two acts, all rules for judicial construction are to be applied, to the end that

they may be reconciled before reaching a conclusion, that the one repeals the other.

(3-4) The Act of 1911 does not cover the whole subject-matter of the prior statutes on the subject. No reference is made in it to the prior statutes. It we should hold that the later act repeals the former, there would be a radical change in the method of extending delinquent taxes on real estate and collecting the same and this too without any language being used in the later act that would indicate that the Legislature contemplated such a sweeping change. As the old act was construed by this court, the collector was not required to keep the tax books open after the 10th of April of each year but if he did keep them open, the owner of real property might pay his taxes at any time before the collector was required to file his delinquent list with the county clerk without being subject to a penalty.

Under the provisions of the new act the collector is required to extend a penalty of 10 per cent. against all tax payers who have not paid their taxes to and including the 10th day of April in each year. (We think the obvious meaning of the statute is that where the owner pays his taxes after the 10th day of April, and before the 25 per cent. penalty is added by the clerk under section 7084 of Kirby's Digest, that the collector is required to extend the penalty of 10 per cent. against such delinquent tax payers, and collect the same). The old law remains as it was; that is to say it is still the duty of the collector to file with the county clerk a delinquent list of real estate on or before the second Monday in May and it is still the duty of the county clerk to carefully scrutinize said list and compare it with the tax books and record of tax receipts, etc., as required by section 7083 of Kirby's Digest. It is still his duty under section 7084 to add a penalty of 25 per cent. upon all taxes so returned delinquent. When so construed the two acts are harmonious and present a complete system for collecting taxes from delinquent tax payers. This construction is borne out by section 2 of the Act of 1911. Under it the

county clerk at the time of making settlement with the collector is required to carefully examine the record of tax receipts as kept by the collector and is required to charge the collector with a sum equal to 10 per cent. of all tax receipts recorded subsequent to the 10th day of April. Before the passage of the act, the collector at his option might keep the tax books open after the 10th day of April but he was not required to do so and could not collect any penalty from the delinquent tax payer. No penalty could be added until the clerk added it pursuant to section 7084 of Kirby's Digest. We think it is evident that the Legislature only intended to require the sheriff to extend and collect a penalty of 10 per cent. on all taxes collected by him subsequent to the 10th day of April and before the time the 25 per cent. penalty was added by the county clerk, under section 7084 of Kirby's Digest.

It is conceded by counsel for Martels that the tax sale was in all respects valid except as to the amount of the penalty. They contended that the penalty charged should have been 10 per cent. and not 25 per cent. They admitted that if the penalty is 25 per cent. then the judgment is correct. In other words, they conceded that the judgment is correct unless the Act of 1911, under consideration repeals sections 7083 and 7084 of Kirby's Digest. Having held that the later act does not repeal the prior one, the judgment must be affirmed.

OLIVER v. ROUTH.

Opinion delivered March 27, 1916.

1. SERVICE OF SUMMONS—ABSENCE OF SEAL.—A writ of summons is not void for want of the official seal of the clerk, and it may be amended upon application to the court.
2. JUDGMENTS—COLLATERAL ATTACK—FORECLOSURE DECREE.—The decree of the chancery court foreclosing a vendor's lien, and ordering a sale of the property, may be set aside on appeal, if erroneous, but its validity can not be collaterally attacked, except upon the ground that it was procured by fraud.

3. JURISDICTION OF PROBATE COURT—USUAL POWERS.—In cases falling within the usual powers of the probate court, where the record is silent with respect to any fact necessary to give the court jurisdiction, it will be presumed that the court acted within its jurisdiction.

4. JURISDICTION—PROBATE COURT—SPECIAL POWERS.—The facts essential to the exercise of special jurisdiction, by the probate court, must appear upon the record.

5. HOMESTEAD—SPECIFIC PERFORMANCE—EXECUTORY CONTRACT TO CONVEY.—The probate court is without jurisdiction to render a judgment of specific performance of an executory contract, made by deceased, to convey the homestead.

6. HOMESTEAD—CONVEYANCE BY HUSBAND.—A deed purporting to convey the homestead by a married man is void unless his wife joins in the execution of the deed.

7. SPECIFIC PERFORMANCE—EXECUTORY CONTRACT TO CONVEY—DEATH OF OBLIGOR.—There must be a valid executory contract to convey land, made by the decedent before the probate court can order it to be specifically performed.

Appeal from Madison Chancery Court; *T. H. Humphreys,* Chancellor; reversed.

STATEMENT BY THE COURT.

Appellant instituted this action in the chancery court against appellees and set up two causes of action.

1. Appellant seeks to set aside a decree of foreclosure of a vendor's lien on real estate made in the Madison chancery court several years ago in a suit wherein the Madison County Bank was plaintiff and Percie and Geo. Thos. Oliver were defendants on the grounds that it is void. The First National Bank was the successor of the Madison County Bank.

2. Appellant seeks to set aside as void an order of the Madison probate court for the specific performance of an undivided interest in the same land.

The material facts are as follows: On October 6, 1904, Geo. B. Oliver died, owning the land in controversy, situated in Madison County, Arkansas, which was his homestead. He left surviving him his widow, Princie Oliver, now Princie Arrington, and Geo. Thos. Oliver, his minor child and sole heir at law. Prior

to his death G. B. Oliver and T. G. Gamble owned the land in controversy, each owning an undivided one-half interest therein. On the 20th day of May, 1903, Gamble by warranty deed, conveyed his interest in the land to G. B. Oliver. The deed recites that a vendor's lien is retained for $500 of the purchase money, evidenced by a promissory note of even date. The note was transferred by Gamble to the Madison County Bank and in December, 1904, after the death of Oliver, the Madison County Bank instituted proceedings in the chancery court against the widow of G. B. Oliver who was named as Percie Oliver and Geo. Thos. Oliver the minor child, to foreclose a vendor's lien on the lands in controversy. Service was had upon the widow and minor child of Geo. B. Oliver, deceased, in the manner required by statute but the clerk failed to put the seal of the court on the summons. The court found there was a balance due of the purchase money on the said land in the sum of $537 and a decree of foreclosure of the vendor's lien of plaintiff was entered of record. The land was duly sold under the decree and the purchaser at the commissioner's sale conveyed the land by deed to E. A. Routh.

In the present action appellant introduced evidence tending to show that some of the installments of the purchase price sued on in that case were not due at the time the decree of foreclosure was entered of record. Testimony was also introduced by appellant tending to show that certain payments had been made which were not taken into account by the court in rendering the decree of foreclosure. Evidence was introduced by appellees tending to show that no such payments had been made. The views we shall hereinafter express, however, render it unnecessary to set out this testimony in detail.

It is undisputed that the land in controversy was the homestead of Geo. B. Oliver at the time of his death and that Geo. Thos. Oliver was still a minor at the time of the institution of this suit. The suit was brought by his mother as next friend.

After the death of Geo. B. Oliver, administration was had upon his estate. A petition was filed in the probate court setting up that Thos. J. Oliver, the twin brother of Geo. B. Oliver had purchased one-half interest in the land in controversy from his brother prior to his death. No written contract of purchase was had between the brothers. It was shown however, to the probate court, that Thos. J. Oliver had made a verbal contract with his brother for the purchase of an undivided one-half interest in the land and had paid him therefor the sum of $400 as part of the purchase money. The balance of the purchase money was paid to the administrator and an order was made pursuant to sections 209-214 of Kirby's Digest for the specific performance of the contract.

The chancellor entered a decree dismissing appellant's complaint for want of equity as to the decree of foreclosure in the Madison chancery court. It was also decreed that his cause of action seeking to set aside the judgment in the Madison probate court should be dismissed without prejudice to any proceeding appellant might hereafter institute in the probate court in relation thereto. The case is here on appeal.

S. H. Sornborger, of Oklahoma, for appellant.

1. There was no service on the minor so as to give the court jurisdiction. The summons did not bear the official seal. Nor did the return of service even as amended show such service as to give jurisdiction. The summons was void. 6 Wall. 556, 18 Law. Ed. 948; 2 Ark. 131; 3 *Id.* 450; 6 *Id.* 452; 13 *Id.* 413. The writ was never amended and there was no appearance. 44 Ark. 404; 50 *Id.* 113; 22 *Id.* 362; 6 *Id.* 380.

2. The decree was entered before default in the installments; they were not due and there was no breach. 27 Cyc. 1451; 3 Litt. (Ky.) 404.

3. As to the second cause of action the court had no jurisdiction and the orders of the probate court should be set aside. Sand. & Hill's Dig., § § 205, 209, etc.; 33 Ark. 727; Const. 1874., Art. 7, § 34.

W. N. Ivie, for appellee.

1. The absence of the official seal from the summons did not render it void. 22 Ark. 363. Only part of the evidence and part of the record is before this court and it will not disturb the decree. 81 Ark. 589. The presumption is that the decree was warranted by the evidence. 80 Ark. 74; 84 *Id.* 100; 86 *Id.* 368; 95 *Id.* 302.

2. The decree was not premature; besides no defense was made or alleged.

3. The probate court had jurisdiction of the second cause of action. Const. 1874, Art. 7, § 34; 33 Ark. 727; Sand. & Hill's Dig., § 205 to 209. No valid defense is shown and this is a collateral attack upon a decree rendered years ago. Kirby's Dig., § 4434; 90 Ark. 44; 49 *Id.* 397; 85 *Id.* 272. A judgment against an infant will not be vacated unless there was a valid defense even on a direct attack. This was a collateral attack and no fraud is alleged or shown. The court had jurisdiction and its judgment is conclusive. *Massey* v. *Doke, infra* 111.

S. H. Sornborger, in reply.

The probate court was absolutely without jurisdiction to enforce specific performance of an oral contract for the sale of a homestead, or contract for such sale in which the wife did not join. Probate courts have no chancery jurisdiction. If it is claimed *special* jurisdiction was conferred to enforce specific performance the jurisdiction must appear upon the face of the record. 54 Ark. 627.

HART, J., (after stating the facts). (1) It is claimed by counsel for appellant that the decree of foreclosure in the case of the Madison County Bank against the widow and minor child of Geo. B. Oliver, deceased, was void because the writ of summons was without the official seal of the clerk; but this court has decided adversely to him in regard to this contention. In the case of *Rudd* v. *Thompson and Barnes,* 22 Ark. 363, the court held that a writ of summons is not void for want of the official seal of the clerk and that it may be amended on application to the

court. The court further held that if no application to amend has been made, the defect is ground of reversal of a judgment rendered by default but that the writ can not be treated as void.

(2) Again it is contended that the judgment of the Madison chancery court foreclosing the vendor's lien on the property in controversy should be set aside because certain installments of the purchase money for which the decree of foreclosure was had were not then due and for the further reason that certain credits were not allowed which should have been allowed in that case. It must be remembered however, that this is a collateral attack on the decree. In the case of *Whitford* v. *Whitford,* 100 Ark. 63, the court held: "In determining the validity of a judgment upon collateral attack, a distinction must be observed between those facts which involve the jurisdiction of the court over the parties and subject-matter, and those quasi-jurisdictional facts, without allegation of which the court can not properly proceed and without proof of which a decree should not be made; absence of the former renders the judgment void upon collateral attack, but not so as to the latter." To the same effect see *Citizens Bank* v. *Commercial National Bank,* 107 Ark. 142; *McDonald* v. *Ft. Smith & Western Rd. Co.,* 105 Ark. 5; *Crittenden Lumber Co.* v. *McDougal,* 101 Ark. 390. So the decree in the chancery case referred to might have been erroneous but this would depend upon the facts before the court. If it was erroneous it could have been set aside on appeal; but the validity of it can not be attacked collaterally except on the ground that it was procured by fraud. There is no allegation or proof in the present action that the decree in the chancery case was procured by fraud. It follows that the decree of the chancellor on this branch of the case was correct and must be affirmed.

We now come to the question of the judgment of the Madison probate court ordering the administrator of the estate of Geo. B. Oliver, deceased, to execute to Thos. J.

Oliver a deed to an undivided one-half interest in the homestead of decedent.

(3-4) The property in controversy was the homestead of Geo. B. Oliver. An order of the probate court directed the administrator of his estate to specifically execute a contract which the decedent had made with his brother before he died. The authority to grant specific performance of an executory contract to convey land against the executor or administrator of a decedent is a special power conferred upon the probate court by sections 209-214 of Kirby's Digest. It is to be exercised in a special manner and not according to the course of the common law. In cases falling within the usual powers of the probate court, the rule is that where the record is silent with respect to any fact necessary to give the court jurisdiction it will be presumed that the court acted within its jurisdiction. *Massey* v. *Doke,* 123 Ark. 211. But where special powers conferred or exercised in special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases from the record. *Beakley* v. *Ford,* 123 Ark. 383. See also, *Hindman* v. *O'Connor,* 54 Ark. 627. This distinction was pointed out in *Massey* v. *Doke.*

(5-6) As we have already seen, the land in controversy was the homestead of Geo. B. Oliver at the time of his death and the probate court had no power to render a judgment of specific performance of an executory contract to convey the homestead. Under the act of March 18, 1887,* a deed purporting to convey the homestead by a married man is void unless his wife joins in the execution of the deed. *Davis* v. *Hale* 114 Ark. 426, and cases cited; *Stephens* v. *Stephens,* 108 Ark. 53; *Newman*

*Act 64, page 90, Acts of 1887 (Rep.)

v. *Jacobson,* 108 Ark. 297. In the case of *Waters* v. *Hanley,* 120 Ark. 465, 179 S. W. 817, in discussing this statute, we said that it is clear that if a husband can not make a conveyance of the homestead without the concurrence of his wife, he can not make a contract to convey the homestead which will be obligatory upon his wife. The reason given was, that if he could do so, the statute could be easily evaded and would be of no force. See also *Jarrett* v. *Jarrett,* 113 Ark. 134. Therefore, we are of the opinion that the probate court had no power to make an order for specific performance of the contract made by the decedent in his life time to convey his homestead to another.

(7) We think the order was void for an additional reason. Sections 209 *et seq.* Kirby's Digest contemplate that there should be a valid executory contract to convey land made by the decedent before the probate court can order it to be specifically performed. The contract in question was an oral one and no possession was taken under the contract prior to the death of the vendor. The contract then could not have been specifically enforced had Geo. B. Oliver lived and the purchaser had brought suit against him. Under the rule before announced the judgment of the Madison probate court could only be supported by a record which shows jurisdiction and no presumption as to its jurisdiction will be indulged.

From the views we have expressed it follows that the court erred in not setting aside the order of the Madison probate court, and for that error the decree will be reversed and the cause remanded with directions to enter a decree in accordance with this opinion.

SOUTHWESTERN TELEGRAPH & TELEPHONE CO. *v.* FENDLEY.

Opinion delivered March 27, 1916.

TELEPHONE COMPANIES—SERVICE TO PATRONS—NEGLIGENCE—DISCRIMINATION.—Mere negligence in failing to properly repair the telephone connections to plaintiff's house, after the wires had been destroyed by a fire, will not support an action against the telephone company for failing to supply plaintiff with telephone connection and facilities, without discrimination or partialty.

Appeal from Searcy Circuit Court; *Jno I. Worthington,* Judge; reversed.

STATEMENT BY THE COURT.

This appeal is from a judgment in favor of appellee for the penalty under the law, requiring telephone companies to supply applicants for telephone connection and facilities without discrimination or partiality.

It appears that E. G. Fendley, appellee, a physician, was a subscriber for telephone service in his residence at Leslie and had paid his rent in advance for the last quarter to the first of January, 1914. On November 20th, a fire occurred in the town which burned in two the cables carrying fifty pairs of wires, including the wires to the residence of Doctor Fendley. The telephone company immediately set about the repairs of the nineteen telephones put out of use thereby. The telephone company got another messenger cable from Little Rock, cut the wires and put them in the new cable and on Monday evening, the 23d inst., had all the wires repaired. When the repairs were finished, the lines were tested from the cable to the residence and the doctor's phone appeared to be in condition. It was not, however, and he complained two or three times and demanded that his 'phone be fixed and the service supplied, finally giving a notice in writing. Each time he complained, the manager agreed to fix the 'phone and thought it had been fixed the first time after the test from the cable to the dwelling, until after the next complaint when he tried to call from the central station to the residence.

On the 1st of December, it was worked on again, the memorandum from the office showing "Clearing line fixed on P. B. Thomas and Doctor Fendley's telephones." It was fixed that day so it would work and was repaired finally so there was no further trouble about it on December 8. The lineman had difficulty in locating the trouble after the connection was made of the wires in the cable and finally discovered that the 'phone was placed on a bad pair of wires and remedied the defect.

The manager did all the repair work in Leslie and on the toll line from Heber Springs to other towns and stated he made the repairs on appellee's telephone as soon as it could be done; that there was one time when complaint was made that he could not get to it immediately, being called off on trouble on the toll line.

Appellee testified that the manager of the telephone company was his friend and agreed every time he complained about the telephone to fix it right away, but that it was not fixed until eighteen days after the fire, while the 'phones of the other subscribers that had been disconnected by the burning of the cable, were repaired and the service resumed within three days after the fire.

The operator at the central station when any calls came for the physician, tried to get him over other telephones near his residence and to notify him of all calls that came for him. Especially was this true of the night operator.

The court instructed the jury and refused to direct a verdict for the telephone company.

A. P. Wozencraft, Walter J. Terry and *Edward B. Downie,* for appellant.

1. A verdict should have been directed for defendant. 100 Ark. 546, 549; 107 *Id.* 611. The statute only inflicts the penalty for discrimination, not for negligence or inattention in failing to repair or supply service.

D. T. Cotton, for appellee.

1. The jury under proper instructions found that there was a wilful and intentional neglect to repair. This

was sufficient. 100 Ark. 546; 107 *Id.* 611; 81 *Id.* 493; *Ib.* 61; 89 *Id.* 574; 98 *Id.* 227; 102 *Id.* 460.

2. The finding of the jury should not be disturbed. 75 Ark. 111; 76 *Id.* 326; 67 *Id.* 399.

KIRBY, J., (after stating the facts). In *Southwestern Telegraph & Telephone Company* v. *Murphy,* 100 Ark. 546, the court in construing the statute prescribing the penalty, section 7948, Kirby's Digest, said:

"The manifest purpose of the statute is to inflict a penalty on a telephone company, not for negligence or inattention in failing to repair its instrumentalities for supplying service, but for wilful refusal to furnish telephone connections and facilities without discrimination or partiality to all applicants who comply or offer to comply with the rules. The statute forbids discrimination, and mere neglect or inattention in repairing instruments does not constitute that. The most that the evidence tends to establish is negligence in failing to repair plaintiff's telephone. There is nothing to show that this was prompted by any intention to deprive plaintiff of the use of his telephone, and for that reason we are of the opinion that the question of discrimination during that period should not have been submitted to the jury."

The undisputed testimony shows that all the telephones upon the wires carried by the cable that was burned were disconnected and put out of service thereby, that the telephone company began work immediately to renew the cable and restore the service, working on the cable on the first three days after the fire; that the test from the cable to appellee's residence on the 24th of November showed the 'phone connected, that it was again fixed on December 1, but the service was not good until it was repaired finally on December 8. The trouble resulted from bad connection of the wires in the cable or from defective wires and was remedied as soon as it could be located. The appellee stated that the manager of the telephone company was his friend and agreed every time when complaint was made to fix the 'phone immediately.

The delay in restoring the service was due to the failure sooner to locate the trouble and the testimony shows no intention upon the part of the telegraph company to discriminate against or refuse to furnish telephone connection and facilities to the appellee. The testimony at most shows no more than negligence on the part of the company in failing to repair the line, causing the delay in furnishing the service and does not tend to show there was any intention to deprive appellee of the use of his 'phone and is not sufficient to show a refusal to furnish telephone connection without discrimination or partiality and entitle appellee to recovery of a penalty therefor.

The court erred in not directing a verdict in appellant's favor and the judgment is reversed and the cause dismissed.

RUSSELL v. SUDDOTH.

Opinion delivered March 27, 1916.

1. HOMESTEAD—CLAIM OF—BURDEN OF PROOF.—The burden of proving that certain land was their father's homestead is upon the children asserting that fact.
2. HOMESTEAD—PETITION OF WIDOW AND CHILDREN—ADMISSIBILITY.—In an action to have certain lands declared the homestead of petitioner's father, a petition of the widow and said children in the probate court claiming other land as homestead and asking for the rents on the land in controversy is admissible.
3. EVIDENCE—PETITION OF ADULT CHILD—HOMESTEAD—ADMISSION AGAINST INTEREST.—The petition in the probate court, above set out, is admissible, as an admission against interest, as to one of the heirs who was of age when the petition was presented.
4. HOMESTEAD—ACTS OF WIDOW—RIGHTS OF CHILDREN.—A widow can not impress the lands of her deceased husband, after his death, with the homestead character, nor can she abandon the homestead and thereby in any wise affect the homestead rights of the minor children.
5. HOMESTEAD—RIGHT OF WIFE DURING LIFE OF HUSBAND.—The wife has the right in the lifetime of the husband to claim the homestead exempt from execution sale if he fails or refuses to do so.
6. HOMESTEAD—CHILDREN'S RIGHT—RIGHT OF WIDOW TO ASSERT CLAIM.—After the death of the husband and father, the widow can not

select for the minors a homestead from deceased's land, but she may, acting for them, set up a claim of homestead in land, upon which the homestead character had been impressed, and if the matter is in doubt, to have determined what was, in fact, the homestead.

Appeal from Phillips Circuit Court; *J. M. Jackson*, Judge; affirmed.

STATEMENT BY THE COURT.

Appellants, children of P. T. Baugh, brought this suit to recover possession of 2 2-20 acres of ground in the village of Turner, alleged to have been the homestead of the deceased, their father, and occupied by them as such at the time of his death.

The answer denied that the land in controversy was the homestead of the father of appellants at his death and alleged that appellees were the owners of the north half thereof, through different mesne conveyances from J. C. Terry, who purchased the same at the administrator's sale thereof, by order of the probate court, for the payment of the debts of the estate of their said father. They disclaimed any interest in the south half of the block and pleaded the five and seven year statute of limitations and also set up a claim for betterments.

It appears from the testimony that P. T. Baugh, the father of appellants, owned a farm about five or six miles from the village of Turner and resided thereon with his wife and family as his homestead; that he purchased the block of ground in controversy in the little village of Turner for $250 and moved his family to the small house on the south end thereof in order to obtain better school facilities for his minor children. He also while living in said village had a contract for carrying the mail. The family lived there from 1894 to the death of said Baugh in 1897 and they thereafter moved back to the farm.

Testimony was introduced tending to show that the residence in Turner was only temporary and in order that better educational advantages might be enjoyed by his children and that it was not the intention of the deceased to change his homestead from the farm to the block

of ground in the village of Turner. The testimony on this point was in conflict however, there being some from which it could have been inferred that such was the case.

The court permitted the introduction in evidence over appellant's objection of a certain petition of the widow and children of said Baugh in the probate court, stating that the farm was the homestead of the deceased and claiming the rents upon the adjoining lands thereto, her dower not having been assigned and also the statement of two witnesses, the administrator and his attorney, of the action of the court in sustaining the petition.

The court in instructing the jury gave over appellant's objection instruction numbered 5 as follows:

"The jury are instructed that upon the death of the father owning a homestead, the mother, acting for the children, has the right to set up for them a claim of homestead where the homestead might be either of several tracts of land depending upon the intention of the father as to the location of the family home at the time of his death; and where such claim is in good faith made and a homestead located, the children are bound thereby."

From the judgment on the verdict in appellee's favor, this appeal is prosecuted.

Fink & Dinning, for appellant.

1. The court erred in permitting the petition of M. J. Baugh to be introduced in evidence. The sole question at issue was whether the lands sought to be recovered were the homestead or not, and the *ex parte* petition of the widow was not evidence. 115 Ark. 359.

2. The court erred in permitting witnesses Horner and Burke to testify as to an order of court assigning certain farm lands as a homestead. Even if the record of the judgment had been properly kept and introduced in evidence, it would not have been competent, for the reason that plaintiffs were not parties. 66 Ark. 306; 87 *Id.* 418. A judgment can not be established by parol testimony. 87 Ark. 108; 90 *Id.* 5; 15 Wend. 397; 1 Black on Judgments, 107.

3. The court erred in giving instruction No. 5 for defendants. The widow has no right to select any one of several tracts of land as her homestead after the death of the husband. The question of homestead is one of fact to be determined by the jury. There can not be two homesteads and the widow has no right of selection. 71 Ark. 597; Thompson on Homesteads, § 2251. The act of the widow does not bind the children. 115 Ark. 359.

Bevens & Mundt, for appellee.

1. The petition of the widow for homestead was not *ex parte.* All the children signed it and were parties. The administrator, representing the creditors, was also a party and opposed it in court. Every one in interest was a party. It was admissible as part of the *res gestae,* showing the intent of P. T. Baugh. The intention of the head of the family is the principal test. 55 Ark. 55; 103 *Id.* 557; 101 *Id.* 101, 105; 21 Cyc. 620; 14 Fed. Cas. No. 7733; 43 S. W. 290; 47 *Id.* 52; 110 *Id.* 181.

2. No record entry of the judgment being found the testimony of Hornor and Burke was admissible. Jones on Ev., § 203; 32 Ark. 386; 54 Ind. 339; 132 *Id.* 312.

3. There is no error in instruction No. 5. There can be only one homestead, and this is a question of fact depending on the intention of the father as to location at the time of his death. *Martin* v. *Conner,* 115 Ark. 365; Kirby's Dig., § 3884.

4. The defendants were certainly entitled to judgment for improvements and taxes, etc., under the Betterment Act. Kirby's Digest, § 2754 to 2758; 53 Ark. 400; 47 *Id.* 456; 70 *Id.* 488. The betterment statute applies to infants. 48 Ark. 183; 72 *Id.* 539; 85 *Id.* 556; 86 *Id.* 404.

KIRBY, J., (after stating the facts). (1) It is contended that the court erred in allowing the introduction of said testimony and in the giving of said instruction numbered 5. The question at issue in the case was whether or not the probate sale of the lands in controversy to appellee's grantor was void on account of same being the homestead of their father, the deceased, at his death and

the burden of proof was upon appellants to show that fact.

(2-3) The petition introduced in evidence purported to be by the widow and all the children of the deceased, naming them, and the statements of the witnesses, the administrator and his attorney who resisted the claim made in the petition of the court's action thereon, were competent, as tending to show the location of the homestead of the deceased. It was also admissible as against the heir, whose name appeared in it as a petitioner, who was of age at the time it was filed, as an admission against interest, and as a statement contradictory of her testimony herein, and there was no attempt to show an adjudication by the probate court that the farm was the homestead of the deceased, claimed to be conclusive of the question herein. These facts were only introduced to throw such light as they might shed upon the question at issue and the testimony was competent.

(4-5) The widow can not of course impress the lands of the deceased after his death with the homestead character, nor can she abandon the homestead and thereby in any wise affect the homestead rights of the minor children. *Martin* v. *Conner,* 115 Ark. 365. The wife has the right in the life time of the husband, to claim the homestead exempt from execution sale, if he fails or refuses to do so, and select the homestead where the debtor has more land subject to the claim than the law allows to be exempt as a homestead. Kirby's Digest, section 3902.

(6) The court did not mean to tell the jury by the instruction complained of, as contended by appellant, that the widow had the right to select for the minors a homestead out of the lands of the deceased, but only that she had the right acting for them, to set up a claim of homestead of land, upon which the homestead character had been impressed and have determined what was in fact the homestead, the matter being in doubt.

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

LAMBERSON v. COLLINS.

Opinion delivered March 6, 1916.

1. ROAD DISTRICTS—FORMATION—ACTS TO BE DONE—SURVEYS, PLANS AND ESTIMATES OF COST.—A compliance with both subdivisions of section 1 of Act No. 338 of the Acts of 1915 is necessary, in order that the formation of a road district under said act be held valid.
2. ROAD DISTRICTS—FORMATION—REQUISITES.—In the formation of a road district under Act 338 of the Acts of 1915, it is necessary that the provisions of subdivision B of § 1, of the act, be followed, providing for the furnishing of a survey, plans and estimates of cost by the State Highway Department, as well as the provisions of subdivision A, of § 1, the lawmakers having intended to provide for a source of information as to the magnitude and cost of the improvement, before the property owners are called upon to exercise their choice, either favoring or opposing it.

Appeal from Craighead Circuit Court, Jonesboro District; *W. J. Driver,* Judge; reversed.

H. M. Mayes, for appellants.

The act is void. 92 Ark. 93, 621; 118 Ark. 119; 115 *Id.* 88; 115 *Id.* 594; 116 *Id.* 167. Other questions are argued but as they are not decided by the court they are not abstracted.

N. F. Lamb, for appellees.

1. The act is not unconstitutional and void. Acts containing the same provisions have been upheld. 91 Ark. 30; 91 Ark. 79.

2. The provisions of the act were fully complied with. The discretion of the court below will not be disturbed on appeal. 102 Ark. 553. It is not necessary to set out the kind or particular character of the improvements to be made. 17 S. W. 678; 113 Ark. 193; 97 Ark. 534.

MCCULLOCH, C. J. This is a proceeding which originated in the county court of Craighead County, upon the petition of property owners of that county, for the establishment of a road improvement district, under Act No. 338 of the General Assembly of 1915, entitled "An Act providing for the creation and establishment of Road Improvement Districts for the purpose of building, constructing and maintaining the highways of the State of

Arkansas." The petition included a description of the land to be included in the district, and also contained a description of the route of the highways proposed to be improved, and referred to a plat filed with the petition which showed the route of the road drawn to a scale. But there was nothing either in the petition or on the plat showing the plans and specifications or estimates of the cost of the road or the character of the material to be used. Plans and specifications and estimates of the cost were, however, procured from the State Highway Department during the pendency of the proceedings in the county court after the petitions had been filed and notice given by advertisements pursuant to the statute. Appellants appeared as remonstrants against granting the prayer of the petition, and on the hearing of the matter the county court found that the petition contained a majority in value and acreage of the land owners and made an order establishing the district. On appeal to the circuit court, there was a trial which resulted in a like order being made by the circuit court, and an appeal has been duly prosecuted to this court.

The first section of the statute under consideration reads as follows: "Section 1. (A) That whenever a majority in land value, acreage or number of land owners within a proposed road improvement district in any county shall petition the county court to establish a road improvement district to embrace a certain region which it is intended shall be embraced within the boundaries of the proposed district and shall file a plat with said petition upon which the boundaries of the proposed district shall be plainly indicated showing the roads which it is intended to construct and improve as nearly as practicable, and shall also file a good bond conditioned that the petitioners will pay all court costs and legal advertising that may accrue in the event said district is not established, it shall then be the duty of the county court to give public notice by publication in some weekly newspaper having a *bona fide* circulation in said county by three consecutive insertions therein that said petition has

been filed, and giving a description of the territory embraced in said petition in as large subdivisions or calls as practicable, and calling upon all persons, firms or corporations owning land or other real property within the proposed district to appear before the county court on some date to be fixed by the court not less than five days after the last insertion of said notice to show cause for or against the establishment of said district. The original petition may be circulated among the land owners, or such number of exact copies of same as may be deemed necessary may be circulated, and when all of said petitions are filed at or before the time of the hearing above mentioned the said petitions shall be consolidated and treated as one petition, if same are filed before or at the date of said hearing.

"(B) *Provided, however,* upon application of the county judge, or of ten or more land owners within a proposed road improvement district to the State Highway Commission it shall be the duty of the State Highway Commission to instruct and direct the State Highway Engineer, or his assistant, to prepare preliminary surveys, plans, specifications and estimates of the roads which it is proposed to construct and improve within said district in the same manner as set out in section 7 of this act, and file them in the county court of said county for the purpose of determining the feasibility of any road improvement and the cost thereof before said petitions are circulated, and when said preliminary plans, specifications and estimates are so made and filed the State Highway Commission, upon the application of either the county judge or ten or more land owners, shall cause to be prepared the petitions to be circulated among the land owners in the proposed district for the purpose of obtaining a majority in land value, acreage or number of land owners, as set out in the preceding section, and when such majority is obtained said petition shall be filed in the county court and a date set for a hearing and due notice thereof given to the owners of real property in said district of said hearing as provided by the preceding sec-

tion, and when said hearing is so had, the organization of said district shall then proceed in the manner hereinafter prescribed."

There was no attempt to comply with the terms of subdivision (B) in the matter of procuring a preliminary survey and plans, specifications and estimates from the State Highway Commission before the circulation of the petition. The contention of counsel for the petitioners is that the two subdivisions of section 1 provide alternative methods of forming a road district, and that having complied fully with the terms of subdivision (A) the district was legally organized merely upon the petition of a majority of the land owners showing the territory to be embraced and the route of the road, and that after the formation of the district there is provision for a preliminary survey and plans, specifications and estimates of costs in section 7 of the same statute. We have reached the conclusion, after a careful consideration of the statute, that the construction of counsel for petitioners is not the correct one, and that subdivision (B) is merely a proviso setting forth conditions upon which the district may be formed. The language of the subdivision itself leads to that conclusion, because it follows in the form of a proviso and it requires that upon an application of the county judge or ten or more land owners in the proposed district, the State Highway Engineer or his assistant shall "prepare preliminary surveys, plans, specifications and estimates of the roads which it is proposed to construct and improve, * * * and file them in the county court of said county for the purpose of determining the feasibility of any road improvement and the cost thereof before said petitions are circulated." It will be observed that the word "petition" is used for the first time in this subdivision in the above quotation, and the word is used in a way which indicates that it refers to the petition mentioned in subdivision (A). We think the law makers intended the two subdivisions to be read together so as to provide an appropriate scheme for advising the land owners of the character of the improve-

ment to be undertaken, and the cost thereof, so that they could act upon the petitions intelligently.

Without stopping to determine whether the Legislature may not, if it sees fit to do so, authorize the county court to create a road improvement district without first having a preliminary survey and estimate of the cost and specifications of the character of material to be used, we think it has not done so in this instance, for there is little reason to believe that the Legislature would have deemed it necessary to so carefully provide for a scheme of preliminary work under one method of forming road districts and not do so under the other. When the whole of section 1 is read together, it is obvious that the lawmakers intended to provide for a source of information as to the magnitude and cost of the improvement before the property owners are called on to express their choice, either favoring or opposing it.

It is true that there is a further provision in section 7 in regard to surveys, plans, etc., which tends to obscure the real meaning of the law makers, but the language in section number 1 leads so definitely to the conclusion we have here expressed that the cloud cast upon its meaning by section number 7 is not sufficient to change that view. Section 7 provides for the preliminary survey, and the plans, specifications and estimates of the cost to be made by the State Highway Engineer, but provides further that if such survey, plans, etc., have already been made under subdivision (B) of section 1, then the commissioner may adopt it without having another one made. The more reasonable view is, however, that the Legislature intended, as before stated, to provide a method for giving the land owners the necessary information before they are called on to sign the petition, and we can not indulge the presumption to the contrary in the face of the language used in subdivision (B) of the first section of the statute. It is very clearly expressed there that the preliminary survey, plans, specifications and estimates of cost, etc., shall be procured and filed in the county court "before said petitions are circulated,"

and it is a strained construction to put upon it to say that the words "said petition" referred to alternative methods of procedure and not to that mentioned in subdivision (A).

There is no pretense that the terms of the statute in that respect were complied with, and as the omission is jurisdictional the county court has no authority to establish the district upon petitions procured and filed in the county court before the preliminary survey, estimates, etc., were filed. There are other questions raised in the case, which the conclusion we have reached on this point renders it unnecessary for us to decide.

The judgment of the circuit court establishing the district is therefore reversed, and the cause is remanded with directions to the circuit court to enter a judgment dismissing the petition for establishment of the road district, and to certify the same down to the county court.

OPINION ON REHEARING.

McCULLOCH, C. J. A petition for rehearing has been filed by the appellees and we have before us, in addition to the briefs filed by counsel for the respective parties to this proceeding, numerous briefs filed by other attorneys who appear here as *amici curiae,* but who in fact represent other road districts which are said to have been organized under the terms of the statute we now have under consideration, and which are invalid if we adhere to the conclusions originally announced as to the proper construction of the statute.

It is very earnestly contended that our interpretation of the statute is erroneous and that the effect of the decision is disastrous because it invalidates a large number of road districts already organized, in some of which, it is said, bonds have been issued and the money thus procured has been spent. Considerations of mere expediency should not appeal to us, for the law can not be changed by judicial interpretation simply to suit our notion of expediency. Changes in the law fall within the sole province of the legislative branch of government. Judges

can only interpret the law as enacted by the Legislature. We have carefully read and considered the arguments of counsel and a majority of the judges of this court are still of the opinion that the construction of the statute announced in the original opinion is correct.

Counsel have introduced here a stipulation amending the record so as to show that the State Highway Engineer made a certificate adopting, as his own, the surveys, maps, plans, estimates, etc., of the Berthe Engineering Company, a private concern which was employed by the petitioners to make surveys and prepare maps, plans and estimates of the proposed improvement. It appears from the stipulation now filed that said certificate of the State Highway Engineer was brought into the record of the proceedings of the county court by stipulation of counsel long after the petition had been filed and presented to the court. It was done, in fact, after the hearing on the petition had been adjourned over to give time for procuring the plans, etc., of the State Highway Engineer. The statute requires that the "preliminary surveys, plans, specifications and estimates of the road which it is proposed to construct and improve," must be filed in the county court "before said petitions are circulated." It is too late to procure the surveys, etc., after the petitions have been filed and presented to the court.

Rehearing denied.

WOOD and KIRBY, JJ., dissent.

MASSEY v. DOKE.

Opinion delivered February 28, 1916.

1. RES ADJUDICATA—FORMER APPEAL—DIFFERENT PARTIES.—The decision on an appeal, in which the controversy is between the heirs and certain lien claimants against property of deceased, will not be *res adjudicata* in an action between the heirs and the administrator.
2. ADMINISTRATION—LANDS OF DECEASED—DEBTS.—Lands are assets in the hands of an administrator, and are decreed in his possession and subject to his control for the payment of the debts of his intestate.

3. ADMINISTRATION—COMPLETION OF BUILDING—JURISDICTION OF PROBATE COURT.—Deceased was engaged in the erection of a building at the time of his death. *Held*, where it was necessary that the building be completed in order to prevent loss to the estate, it is within the power of the administrator to apply to the probate court for authority to complete the building, and the probate court acts within the limits of its constitutional jurisdiction, in rendering a judgment granting the prayer, and directing the administrator to complete the building in order to preserve the same, and to prevent its loss to the estate.

4. ADMINISTRATION—WASTE—COMPLETION OF BUILDING.—The order of the probate court, authorizing the completion of the building, was one to prevent waste of the property, and to preserve it to the estate for the payment of the debts of the deceased.

5. COURTS—JURISDICTION—PRESUMPTION.—Where the record is silent with respect to any fact necessary to give the court jurisdiction, it will be presumed that the court acted within its jurisdiction.

6. ADMINISTRATION—COMPLETION OF BUILDING—JURISDICTION OF PROBATE COURT.—Where the probate court ordered the administrator to complete a building begun by the deceased, in order to prevent waste, the court having constitutional jurisdiction to issue such an order, in the absence of a showing to the contrary, it will be presumed that the administrator made the proper allegations in his petition to give the court jurisdiction.

7. COURTS—JURISDICTION—HOW SHOWN.—Where a court acquires jurisdiction by virtue of a special statute, no presumption will be indulged in favor of the court's jurisdiction, but every fact essential to give the court jurisdiction, and to substantially meet the requirements of the statute under which the court is proceeding must appear of record.

8. ADMINISTRATION—COMPLETION OF BUILDING—PAYMENTS BY ADMINISTRATOR.—The order of the probate court, directing an administrator to complete a building and to "expend the funds in his hands for that purpose," is tantamount to an order in advance, for him to pay for the labor and materials necessary to complete the building, as expenses of administration; and it is unnecessary to have the claims presented to the probate court to procure an order to the administrator for their payment.

Appeal from Benton Circuit Court; *Jos. S. Maples*, Judge; affirmed.

STATEMENT BY THE COURT.

R. D. Massey, a gentleman of considerable wealth, residing in the city of Bentonville, entered into a contract with a number of the citizens of that city by which

he agreed to erect a hotel building upon plans of modern and up-to-date architecture, the general description of which was set out in the agreement; and the citizens agreed that, in consideration of the building of such hotel, they would donate to him the lands upon which the same was to be erected, and for that purpose they subscribed the various amounts set opposite their respective names for the purpose of procuring title to the lots, and which they agreed with Massey to pay when he should complete the hotel according to his proposal as set forth in the agreement.

Massey purchased the lots designated in the agreement and entered upon the performance of his contract to construct the hotel, secured plans and specifications, and employed L. A. Pace by the day to superintend the work of constructing the hotel.

Massey was accidentally killed November 7, 1909, and a few days later he was buried at Springfield, Mo. His brother, Frank R. Massey, of Springfield, was appointed administrator of his estate in Missouri. About the 17th of November, 1909, Frank R. Massey and his attorney came to Bentonville, and at the request of Frank R. Massey appellee Doke was appointed administrator of the estate of R. D. Massey in Arkansas and duly qualified as such administrator. W. A. Dickson, an attorney of Bentonville, was selected by Frank R. Massey as attorney for the heirs of the estate in Arkansas.

The administrator immediately presented to the probate court his application in due form, properly verified, asking for an order of the probate court granting him authority to complete the hotel building begun by his intestate. Upon consideration of the application the court entered an order which reads, in part, as follows: "Now on this day comes W. J. Doke, administrator of the estate of R. D. Massey, deceased, and presents his application in due form, properly verified, asking for order and authority to complete a certain building begun by the intestate in his lifetime.

"The court finds from the evidence adduced that R. D. Massey in his lifetime began the construction of a hotel building in Bentonville, Arkansas, and let contracts to various parties for different portions of the construction, and said contracts when fulfilled by contractors will complete the construction of said building. That the greater portion of the work and construction of said building was completed before the death of said Massey. That the building in the condition it was at the time of the death of intestate was incomplete and could not have been sold in that condition without great loss, and that it is necessary and to the best interest of said estate to carry out and perform the contracts for work and materials entered into by intestate in his lifetime and complete the construction of said building. The court finds that said intestate is solvent, but that there are a number of notes, accounts and evidences of indebtedness payable to said estate that have not matured, and if the work on said building is suspended until said notes mature said building is likely to depreciate greatly in value and that it would be to the best interest of said estate to borrow funds to complete the same, and pledge the assets of said estate for the payment thereof, if there is not sufficient cash on hand to pay the same.

"It is therefore considered, ordered and adjudged by the court 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 that 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 repayment thereof."

Pace resumed the work of completing the hotel. He employed laborers by the day, paying at the end of each week for their services at so much per day. Such claims for labor, and also claims for material furnished were

presented to the administrator, and were by him allowed, and he, in turn, presented these, and other claims for insurance taken out by him as administrator, to the probate court for classification and allowance, as shown by various orders of the probate court, made at various times, beginning February 21, 1910, and from time to time as claims were presented until June 19, 1911. These claims were examined and approved, as shown by the orders of the probate court made from time to time as the claims were presented by the administrator, beginning February 21, 1910, and continuing to June 19, 1911. The claims were approved as fourth class claims, and ordered paid in due course of administration.

The administrator filed his first annual settlement with the probate court February 24, 1910. In this settlement the administrator sets forth that after he was appointed, he qualified as such, and filed an inventory and appraisement of the personal property of the estate of R. D. Massey, deceased, and in which he shows that the net amount of the personal property of the estate that came into his hands was $35,750.02 with which he charged himself. And he credits himself with vouchers representing the accounts that he had paid out to various persons on the accounts which he had allowed and which had been approved and ordered paid by the probate court. The aggregate amount of these credits deducted from the amount charged against him left in his hands the sum of $2,884. He reported that he had expended for the estate in cash the sum of $32,862. In that settlement he recites as follows: "That he has by the orders of this court completed the construction of the hotel building begun by his intestate in his lifetime, and has leased the same as directed by this court. This administrator shows that all of the assets of said estate have not yet been reduced to cash, and that all of the debts of said estate have not yet been paid."

The order of the court approving this settlement is, in part, as follows: "It appearing to the court that said settlement was filed at the January term of this court,

and that notice of the filing thereof has been given and published in the manner and for the full length of time and in all respects as required by law, and that no exceptions have been filed thereto, the same is by the court examined." And, after finding that the administrator had charged himself with the sum of $36,237.02, and that he had paid out on behalf of the estate the sum of $33,-352.07, leaving a balance in the administrator's hands of $2,884.95, the court found that the administrator had fully administered in cash on behalf of the estate the sum of $32,862, and, after allowing him a commission as administrator, the court found that "said settlement is in due form and ought to be approved and confirmed," and entered an order to that effect. This order was entered April 22, 1911.

At the October term of the probate court in 1911, the appellants, the heirs and distributees of Massey, filed their affidavits and prayed for an appeal "from a judgment and order of the probate court approving and confirming the first annual account current of W. J. Doke, administrator of the estate of R. D. Massey, deceased, made and entered herein on the 22d day of April, 1911." The probate court, on October 16, 1911, granted the appeal.

On April 17, 1912, the appellee filed his second annual settlement. In this settlement he reports, "that there are suits pending against the estate of R. D. Massey, deceased, in the chancery court of this county, and some of the debts due said estate are not collected, and some of the debts of the estate are not paid. Said administrator therefore presents this his second annual settlement, and asks the court to extend the time for final settlement until the debts due to and from said estate are collected and paid." He then charges himself with the balance on hand from the last settlement, and with the amounts collected by him, amounting, in the aggregate to $3,799.23, and credits himself with various vouchers for sums which he had paid, amounting in the aggregate to $3,208.73, leaving a balance in his hands of $590.50.

This account was continued for publication until the next term of the court. On July 16, 1912, exceptions were field to every item of the settlement except the first item of $1.80, the amount paid the clerk for filing the settlement.

The appellants alleged in their exceptions that the amounts specified were expended without warrant or authority of law; that the time allowed for the closing of the administration had long since passed; that the debts of the estate of Massey had all been paid, and that they were now entitled to a distribution of the assets in the hands of the administrator. They prayed that the credits which he asked should be disapproved, and that an order be issued directing him to make final settlement. The court overruled the exceptions, and entered an order approving the second annual account, from which order the appellants prayed and were granted an appeal to the circuit court.

In the circuit court appellants, on the 18th of March, 1912, filed exceptions to every voucher for which the appellee claimed credit in his first annual settlement, and alleged generally that the amounts represented by these vouchers "were wrongfully expended by said administrator herein without warrant or authority of law; that same are no just and legal charges against said estate." And they prayed that the order of the probate court approving and confirming this settlement be set aside.

The appeals from the orders and judgments of the probate court approving and confirming the first and second annual settlements of the appellee with that court were consolidated in the circuit court, and that court found from the evidence, (which consisted of records, documents and oral testimony) that "Massey, in person or through his authorized agent, L. A. Pace, contracted with the Benton County Lumber Company, the Builders Supply Company, the Benton County Hardware Company, Mitchell, and others for the material to be used in the construction of a hotel, and in like manner with the Armstrong Furniture Company for the furniture to be

used in said hotel, and that Massey also contracted with Pace for the latter to superintend the construction of the hotel; that at the time of the death of Massey the hotel was not completed; that a portion of the material contracted for had been delivered and the remainder ordered and held ready for delivery when needed; that after the death of Massey, Doke, as administrator of his estate, carried out the plans and contracts of Massey as nearly as practicable by completing and equipping the hotel, paying therefor out of the personal estate of Massey; that it was for the best interest of the estate to complete the hotel; that it was done under the orders of the probate court, with the express consent and direction of Frank Massey, one of the heirs of R. D. Massey, who was the administrator of his estate in Missouri, and who claimed to represent the other heirs of R. D. Massey; that neither Frank Massey nor any of the other heirs made any objection to the completion of the hotel until after the work was all done and the hotel equipped and furnished, and until after said Doke had paid all the items claimed as credits in his two accounts; that all the items required to be probated were presented to and allowed by the probate court and no appeal was taken from any of said allowances, and that all were just claims against the estate of R. D. Massey; that the title to the lots on which the hotel was built could not be obtained without the payment of about $3,500 therefor by the heirs of R. D. Massey, or by completing the hotel, and that the heirs received the value of the lots, or a large part of it, by the completion of the hotel."

The court, after making these findings, entered a judgment affirming the judgment of the probate court, approving the settlements with that court of W. J. Doke, as administrator of the estate of R. D. Massey, and appellants duly prosecute this appeal. Such other facts as may be necessary will be stated in the opinion.

Ira D. Oglesby, for appellants.

1. All the exceptions contended for, except that the claims were not properly verified and probated, relate to labor and material after Massey's death, and these exceptions are sustained by 169 S. W. 327. That is the law of this case and the question is *res adjudicata.* The only difference between that case and this is, that there was an attempt to enforce a mechanic's lien. But the liability of the estate, validity of the acts of the administrator under the order of the probate court and the principles of law governing payments made and credits claimed are all settled. Kirby's Digest, § 186; 73 S. W. (Mo.) 151; Woerner on Administration, 518; 81 S. W. (Mo.) 904; 4 N. H. 208.

2. The orders of the probate court are no protection to the administrator. The payments were not for any indebtedness contracted by deceased in his lifetime, but for labor employed and material purchased after his death. The court had no jurisdiction. 34 S. W. (Mo.) 838; 17 Ark. 567.

3. An administrator has no authority to improve the real estate and complete a hotel. 114 Ark. 1; 27 Ark. 235; 46 *Id.* 373; 56 *Id.* 320; 54 *Id.* 61; 49 *Id.* 91.

4. These claims were never properly verified, nor "allowed" by the administrator, nor by the court. Kirby's Dig., § 114 *et seq.* The unfinished hotel and furniture purchased should have been sold, if necessary to pay debts or prevent waste.

McGill & Lindsey, for appellee.

1. This case is not governed by the case 114 Ark. 1; 169 S. W. 327. All that was decided there was that under the evidence the complainants had no lien against the real estate because the materials were not furnished under contract with the owner. Doke was not a party to that suit.

2. Doke as administrator was liable on all the contracts made by R. D. Massey in his life time. He had the right to carry out the contracts, even without the order of the probate court. 68 Am. Dec. 755; 72 *Id.* 600; 78

Am. St. Rep. 200; Ann. Cas. 1912, A 417; 42 Pac. 971; 82 N. E. 194; 34 Ark. 204; 51 *Id.* 415; 56 *Id.* 159; 39 *Id.* 256.

3. All the claims were duly allowed by the probate court and none of the orders of allowance were appealed from. The judgment of the probate court was final and no appeal was taken. 12 Ark. 95; 14 *Id.* 244; 5 *Id.* 705; 35 *Id.* 205; 70 *Id.* 88; 73 *Id.* 440; 90 *Id.* 261; 86 *Id.* 368; 92 *Id.* 611; 102 *Id.* 114; 34 *Id.* 63; 40 *Id.* 393, etc. Final judgments of the probate court can not be collaterally attacked; the only remedy is by appeal. 70 Ark. 88; 92 *Id.* 611; 86 *Id.* 368. The heirs had the right to appeal. 89 Ark. 554; 99 *Id.* 56; Acts 1909, amending section 1348, Kirby's Digest.

4. The administrator properly took credit for all sums lawfully expended. Kirby's Digest, § § 133, 140. In the absence of fraud, judgments of allowance are binding and conclusive upon all parties. 18 Cyc. 534; 58 A. S. R. 604; 35 Ark. 180; 36 *Id.* 383, 396; 108 *Id.* 80.

5. Courts of probate have equity powers to prevent waste, preserve property and even the right of subrogation. If the payments made were not strictly legal, they were made for the benefit of the heirs and with their knowledge and consent and Doke should be subrogated to the rights of the parties receiving payment. 108 Ark. 80; 92 *Id.* 611; 36 *Id.* 405-6; 53 *Id.* 545; 42 Pac. 974; 172 S. W. 347. The heirs accepted all the benefits of the hotel completed and should not be heard to complain.

WOOD, J., (after stating the facts). First. The principal ground of appellants' contention is, that the circuit court erred in affirming the judgment of the probate court, approving the first and second annual settlements of W. J. Doke, the administrator of the estate of R. D. Massey, in which he took credit for amounts paid by him for labor done and materials furnished and used in the construction of the hotel building after Massey's death.

Counsel for appellants urge that these credits can not be allowed the administrator under the decision of this court in *Doke* v. *Benton County Lumber Co. et al.,* 169

S. W. 327, 114 Ark. 1. In that case certain parties brought a suit in equity against Doke, to which the heirs of Massey were afterwards made parties, in which the complainants sought to have liens declared on the hotel building, for materials they had furnished which went into the construction of the building. The claim for liens filed showed that the materials were furnished to the administrator upon contracts made with him after the intestate's death, on an order of the probate court, authorizing and directing him to complete the hotel building which R. D. Massey had begun in his lifetime and which had not been completed at the time of his death.

In holding that that the complainants were not entitled to liens, we said: "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 improvements;" and further, "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."

(1) The real controversy in the above suit was between the heirs of R. D. Massey and certain lien claimants. The administrator, Doke, was not a necessary party to that suit. His rights were not involved and under the issues there framed could not be determined, and hence the language above used must be considered in connection with the real parties in interest and the issues that were to be determined between them.

While the witnesses in that case and much of the testimony was substantially the same, yet, what was said by us in that case has no application to the issues raised in the present suit, for the issues here are entirely different and different principles must control in the decision of the case.

This disposes of the contention of counsel for appellants that the decision of the court in *Doke* v. *Benton County Lumber Co., supra,* "is the law of this case," and that it is *res adjudicata.*

Second. The claims for labor done and for materials furnished in the hotel building accrued under the final order and judgment of the probate court directing the administrator of the estate of Massey to complete the construction of the hotel building which R. D. Massey had begun in his lifetime. The exceptions to those items in the accounts of the administrator in which he claimed credit for the sums paid out for labor and materials necessary for the completion of the building under the order and judgment of the probate court are but a collateral attack upon the order and judgment of the court directing these expenditures. There was no appeal from this order and judgment of the probate court directing the completion of the hotel building and no direct attack upon it in any manner, and at the end of the term at which it was rendered such judgment became final. The question therefore here is, does this record show that the probate court had no jurisdiction to render such judgment?

(2) Lands are assets in the hands of an administrator and are deemed in his possession and subject to his control for the payment of the debts of his intestate. Kirby's Digest, section 79. The probate court has exclusive jurisdiction over the estates of deceased persons and their administrators. Constitution of Arkansas, art. 7, section 34.

(3) If the hotel property belonging to the estate of Massey was in the possession and under the control of the administrator, Doke, for the payment of debts against the estate, he was acting within his power and within the scope of his duty as such in applying to the probate court for an order to complete the building, if this was necessary to prevent a loss of the property and to preserve it to the estate for the payment of the debts thereof. And the probate court was acting within the limits of its constitutional jurisdiction in rendering a judgment granting

the prayer of the administrator and directing him to complete the building in order to preserve the same, and to prevent its loss to the estate.

The judgment of the probate court directing the administrator to complete the building, it will be observed, among other things, recites, "that the greater portion of the work and construction of said building was completed before the death of said Massey; that the building in the condition it was at the time of the death of the intestate, was incomplete, and could not have been sold in that condition without great loss, and that it is necessary and to the best interests of said estate to carry out and perform the contracts for work and materials entered into by intestate in his lifetime and complete the construction of said building, and, further, if the work on said building is suspended until said notes mature, said building is likely to depreciate greatly in value," etc. The recital that the building, "at the time of the death of the intestate was incomplete and could not have been sold in that condition without great loss," indicates that the hotel building was to have been sold, and in order to put it in a condition where it could be sold "without great loss," it was necessary to complete it.

(4-5) This order and judgment of the probate court, as we construe it, was nothing more nor less than one to prevent waste of the hotel property and to preserve it to the estate for the payment of the debts of the intestate. This is the only fair and reasonable inference to be indulged from the language in which the judgment is couched. In rendering such judgment, the court was but pursuing, as above observed, its constitutional authority. It certainly can not be said that the judgment on its face shows that the court was acting beyond its constitutional jurisdiction. "The probate court is a court of superior jurisdiction, and, within its jurisdictional limits, its judgments import absolute verity, the same as other superior courts." *Collins* v. *Paepcke-Leicht Lumber Company*, 74 Ark. 81-86. We, therefore, must apply here the rule "that where the record is silent with respect to any fact neces-

sary to give the court jurisdiction, it will be presumed that the court acted within its jurisdiction." *Clay* v. *Bilby,* 72 Ark. 101; *Flowers* v. *Reece,* 92 Ark. 611-616.

(6-7) The judgment recites that W. J. Doke, administrator of the estate of R. D. Massey, deceased, "presents his application in due form, properly verified, for order and authority to complete a certain building begun by the intestate in his lifetime." The application of the administrator is not set forth in the record, and we must presume in favor of the court's jurisdiction, that it set forth that Doke had possession and control of the hotel building, and that it would be necessary to sell the same to pay the debts of the estate, and that in order to prevent its loss, and to preserve it to the estate for the purpose of paying the debts, it was necessary that the same be completed. In other words, we must presume that the petition which formed the basis of the court's order, and the evidence which was adduced in support of the petition, showed every fact that was essential to give the court jurisdiction to render the judgment directing the administrator to complete the hotel building. The rule, of course, is different where the judgment of the probate court is rendered in a proceeding not in accord with its constitutional jurisdiction, or according to the course of the common law, but concerning a subject-matter the jurisdiction of which is conferred upon it by special statute. In such cases no presumptions can be indulged in favor of the court's jurisdiction, but every fact essential to give the court jurisdiction and to substantially meet the requirements of the statute under which the court is proceeding must appear of record. *Beakley* v. *Ford,* 123 Ark. 383; *Reeves* v. *Conger,* 103 Ark. 446-450. See, *Landreth* v. *Henson,* 173 S. W. 427, 116 Ark. 361.

(8) The order of the court directing the administrator to complete the building and "to expend the funds in his hands for that purpose" was tantamount to an order in advance for him to pay for the labor and materials necessary to complete the building, as expenses of administration. Therefore, it was unnecessary to have the

claims presented to the probate court to procure an order to the administrator for their payment. And since claims under contracts made, not with the intestate, but with the administrator, for the completion of the building could not be allowed and classified as claims against the estate, but could only be ordered paid as necessary expenses of administration, the course pursued of having these claims presented to the probate court for allowance and classification as claims against the estate was irregular. *Yarborough* v. *Ward,* 34 Ark. 204; *Turner* v. *Tapscott,* 30 Ark. 312; *Bomford* v. *Grimes, Admr.,* 17 Ark. 567. But this irregular course pursued by the administrator, and the fact that he did more than was necessary, or than he was required to do, did not affect his right to have the amounts he had expended for labor and materials approved and allowed by the court, as necessary expenses of administration, and to have his settlements credited with these amounts. Such was the effect of the judgments of the probate court, and the circuit court in overruling the exceptions to the annual settlements of the administrator, and these judgments were correct.

Third. Counsel for appellants concede that Doke, as the administrator, was liable on all contracts which Massey entered into, and which were undischarged at his death except such as depended upon the personal skill of the deceased, and that Doke was entitled to credit for such amounts as were properly allowed by the probate court, and paid by the administrator on these claims. Appellants contest here only what their counsel designate as "labor accounts, materials accounts," and "miscellaneous accounts." Counsel say that the miscellaneous accounts "are simply for material after the death of Massey," except certain vouchers "which are for insurance taken out by the administrator." What we have said disposes of the "miscellaneous accounts" that are for material furnished after the death of Massey. So far as the credits for insurance are concerned, counsel for appellant only abstracts one voucher, towit, No. 100, which counsel states "is for insurance upon the hotel, which insurance

was taken out prior to the death of Massey." Therefore, so far as this record discovers, appellee was entitled to the credit for amount paid for insurance. At least, there is nothing in this record to show that the court erred in allowing appellee credit for the amounts paid for insurance.

There are no reversible errors in the record, and the judgment is therefore affirmed.

HART and KIRBY, JJ., dissenting.

McDONALD v. MUELLER.

Opinion delivered February 14, 1916.

1. CORPORATIONS—STATEMENT—FAILURE TO FILE—REMEDIAL AND PENAL STATUTE.—Kirby's Digest, § 859, providing for the personal liability of the president and secretary of a corporation failing to file its annual report, is a remedial statute, and the amending statute, Act 222, page 643, Acts of 1909, does not change its remedial character, but adds only a penal feature to it.
2. LIMITATIONS OF ACTIONS—REMEDIAL STATUTE—FAILURE OF CORPORATION OFFICERS TO FILE ANNUAL REPORT.—Kirby's Digest, § 5068, requiring all actions upon penal statutes to be brought within two years, can not be pleaded in bar of the remedial portion of Kirby's Digest, § 859, as amended by Act 222, page 643, Acts of 1909, placing a personal liability upon the officers of a corporation when they fail to file the annual statement required by the statutes.
3. PRINCIPAL AND SURETY—LIABILITY OF PRINCIPAL TO SURETY—LIMITATIONS.—In the relation between principal and surety, there is an implied contract of indemnity, which is not broken until the surety has been called upon to make good the default of his principal, and the period of limitation against that action is three years.
4. LIMITATIONS—FAILURE OF OFFICER OF CORPORATION TO FILE REPORT.—The statute of limitations runs against the president and secretary of a corporation, who have failed to file the annual statement required by law, as against the claim of a particular creditor, from the time when a complete cause of action exists in favor of that creditor.
5. CORPORATIONS—LIABILITY OF OFFICERS FOR DEBTS.—The defaulting officer is absolutely liable for the debts of the corporation, when he has failed to comply with Kirby's Digest, § 859, contracted during the period of the default.
6. CORPORATIONS—LIABILITY OF OFFICERS—NOTE OF CORPORATION—RIGHT OF HOLDER.—The holder of a corporation note may proceed against the corporation or its officers in default under Kirby's Digest, § 259, or both, but he can have but one satisfaction of his debt.

7. LIMITATIONS—ACTION BY SURETY.—Limitations do not run against a surety's action against his principal until the surety has paid the debt.

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

M. P. Huddleston, Robt. E. Fuhr and *J. M. Futrell,* for appellant.

1. Under section 859 of Kirby's Digest, Mueller became liable for this indebtedness. This is a primary liability and the liability is to all creditors of the corporation. 90 Ark. 51; 68 *Id.* 433; 78 *Id.* 517. A surety is a creditor and the relation of debtor and creditor arises at the time of becoming surety. 96 Ark. 268; 98 *Id.* 200; 103 *Id.* 473; 24 *Id.* 511; 34 *Id.* 524; 40 *Id.* 547.

2. The statute does not run until there is some one to sue. The contract of suretyship is not breached until the surety pays the debt. Wood on Lim. to Actions, § 145; Brandt on Sur., § 199; Stearns on Sur. & Guar., § 297; 25 Cyc. 1113; 28 *Id.* 364; Jones on Mortgages, § 176. The statute of limitation applicable to this case is three years from the time the surety paid the debt. 34 Ark. 113; 76 *Id.* 245; 96 *Id.* 594.

3. The statute as amended is remedial and the three-year limit applies instead of the two-year penal statute. 68 Ark. 338; 146 U. S. 657; 36 Cyc. 1181-2-3; 134 Mass. 471: 85 N. E. 36; 93 Ark. 42; 146 U. S. 657; 75 Ark. 107.

4. The statute does not commence to run until a complete cause of action has accrued. 3 Ark. 409; 25 *Id.* 465; 10 *Id.* 228; 32 *Id.* 131; 25 Cyc. 1066.

5. A statute may be both penal and remedial. 36 Cyc. 1181-2-3; 134 Mass. 471; 93 Ark. 42.

6. Taking any view the suit is not barred. 2 Dougl. 699; 2 W. Bl. 1226; 2 T. R. 148; 16 Pick. 128, etc. The statute began to run on the maturity of the debt. 75 Ark. 107; 21 *Id.* 186; 40 *Id.* 545. But it is not material in this case whether the statute commenced to run from the creation or maturity of the debt, as McDonald was an accom-

modation endorser and hence a surety, and the statute began to run from the time he paid the debt. Authorities *supra;* 16 Ark. 81; 21 *Id.* 99.

R. P. Taylor and *Block & Kirsch,* for appellee.

1. It is conceded that appellant was a creditor, and that the liability is primary. 96 Ark. 268; 90 *Id.* 51. The creditor, so long as he is unpaid, has two remedies, one contractual against the corporation, the other statutory created by law against the officers for official neglect, either or both of which he may pursue. 90 Ark. 51; 53 C. C. A. 14. Against the corporation the suit is not barred until three years from the time he paid the debt. But as against the officers the statute began to run from the time of the creation of the debt. Kirby's Dig., § 848; 68 Ark. 433; 53 C. C. A. 14; 107 Fed. 188; 75 Ark. 107; 45 Pac. 662; 47 Vt. 313; 9 Abb. N. C. 275.

2. Whether the statute is penal or remedial or both, this suit is barred. 101 U. S. 188; 68 Ark. 433; 113 U. S. 452, 146 U. S. 657; 158 *Id.* 337; 35 N. Y. 412; 96 *Id.* 323; 33 Md. 487, and many others.

SMITH, J. The Mueller Mercantile Company, a corporation, executed a note for $5,000, dated March 29, 1910, and due six months after date. This note was endorsed by appellant and appellee, and two other persons. On April 29, 1910, the same corporation executed another note for the sum of $10,000, due four months after date, which note was likewise endorsed by both appellant and appellee, together with three other sureties. Neither of said notes was paid and suits were commenced upon them at the October, 1911, term of the Greene Circuit Court. Before the final hearing of said causes, appellant McDonald filed a cross-complaint against appellee Mueller, in which he alleged that Mueller had entered into a contract with him by which he (Mueller) was to indemnify him against the payment of said notes. Mueller answered, denying any such contract, and upon the hearing of the issue, the jury returned a verdict in his favor. Judgment upon both of the foregoing notes was taken against both Mc-

Donald and Mueller and the other endorsers and against the Mueller Mercantile Company as principal. Subsequently Mueller and McDonald each paid one-third of said judgments and costs.

On October 8, 1914, appellant sued appellee for the amount which he had been compelled to pay, on the ground that, when the foregoing notes were executed and delivered, Mueller was the president of the mercantile company, and as such president, had failed to make and file the annual statement of said corporation with the county clerk as required by law. Appellee answered, admitting such failure as president, but pleaded former adjudication and the statute of limitations. Appellant demurred to this answer and stood upon his demurrer, when the same was overruled, whereupon his cause of action was dismissed, and this appeal has been prosecuted to reverse that action.

Appellee insists that the decree should be affirmed for a number of reasons. Among other reasons, he interposes the plea of *res adjudicta,* and has made a most plausible argument on that question. Under our view of the statute upon which this action is predicated, it is unnecessary to pass upon that question. This action is founded upon section 859 of Kirby's Digest, which reads as follows:

"If the president or secretary of any such corporation shall neglect or refuse to comply with the provisions of section 848, and to perform the duties required of them respectively, the persons so neglecting or refusing shall jointly and severally be liable to an action founded on this statute, for all debts of such corporation contracted during the period of any such neglect or refusal."

This statute was amended by the General Assembly of 1909 (Act 222, p. 643, Acts of 1909), by the addition of the following provision: "And shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not to exceed five hundred dollars, and each and every day such person or persons shall so neglect to comply with the provisions of said section 848 or fail or re-

fuse to perform said duties, shall constitute a separate offense."

Prior to this amendment a case arose in which it became necessary to decide whether this statute was remedial or penal, and in the case of *Nebraska National Bank* v. *Walsh,* 68 Ark. 433, it was held that this was a mere statutory liability and was not a penalty, and that an action might, therefore, be brought under it within three years under the three-year statute applicable to "all actions founded upon any contract or liability, express or implied, not in writing."

(1-2) It is now strongly urged that the nature of the action has been changed by the amendment set out above, and that even though the original statute was properly held to be remedial, the statute as amended must now be held to be penal, inasmuch as the amendment makes the official dereliction there provided against a misdemeanor. This amendment, however, does not change in any respect the statute which was held to be remedial, but adds only a penal feature, and it, therefore, becomes both remedial and penal. We conclude, therefore, that section 5068 of Kirby's Digest, which requires all actions upon penal statutes to be brought within two years, can not be pleaded in bar of the remedial portion of the statute.

(3-7) The notes which formed the basis of this action matured, respectively, on September 29, 1910, and August 28, 1910, and this action was commenced October 8, 1914, which is more than three years from either the date or the maturity of the notes. While it does not appear when appellant was called upon to pay the third part of said notes, which he did pay, it is conceded that this payment was within three years of the date of the institution of this suit.

As the statute of limitations applicable to this action is three years, it becomes necessary, therefore, to decide the point of time from which the statute should be computed. A very earnest argument is made by appellee that the statute commenced to run from the date of these notes, and not from their maturity. But it is unnecessary to

choose between these dates, because more than three years had elapsed after the maturity, before the institution of this suit. Appellant, on the other hand, very earnestly insists that no cause of action arose in his favor until he had actually paid the money in satisfaction of the judgments rendered against him, and that this action is, therefore, not barred.

We think the case of *Griffin* v. *Long,* 96 Ark. 268, decides when the statute begins to run against the surety who pays his principal's debt insofar, at least, as that question is involved in a suit under sections 848 and 859 of Kirby's Digest. It was there said:

"This was a suit to recover a debt of the principal due to his surety for what he had paid for such principal. The principal in this case was a corporation, and the action was brought to recover the debt from certain officers of said corporation. The action is founded upon the statutes of this State, which provide that said officers of a corporation shall at stated times file reports of the financial condition of the corporation, and upon a failure or refusal to do so, said officers shall jointly and severally be liable 'for all debts of such corporation contracted during the period of such neglect or refusal.' Kirby's Digest, § § 848, 859. The material question involved in this case is: When, under the allegations of the complaint, was the debt due by the corporation to appellant, its surety, contracted? When one becomes surety for a principal, a liability arises upon the part of the principal to indemnify his surety for any payment which he may be compelled to make for the principal. *Hill* v. *Wright,* 23 Ark. 530; *Rice* v. *Dorrian,* 57 Ark. 541. The principal thus becomes indebted to the surety for the payments he is compelled to make for the former, and the question which arises is, does such indebtedness have its inception from the time the party became surety or from the time payment is made by the surety? The true rule seems to be that the surety becomes a creditor of the principal at the time he signs the note as surety, and not at the time he pays the same. In the case of *Wiggin* v. *Flower,* 5 Rob. (La.) 406,

it is said: 'Though the obligation of a surety can not be enforced till after the event on which it becomes absolute, it exists from the time it was contracted, so the rights of the surety against his principal exist before the obligation of the former becomes absolute.' "

The case of *Griffin* v. *Long, supra,* as well as the case of *Jones* v. *Harris,* 90 Ark. 51, states the character of liability of the defaulting officers as primary, and not secondary. In the last cited case it was said:

"We have held that it creates a primary and not a secondary liability, and that the defaulting officers of the corporation become, by reason thereof, absolutely liable for the debts of the corporation incurred during the period of the default. This being true, they have no right to postpone the enforcement of the statute against them, and no equities can arise in their favor as against creditors of the corporation. *Nebraska National Bank* v. *Walsh,* 68 Ark. 433; *Ark. Stables* v. *Samstag,* 78 Ark. 517."

The unpaid creditor has a choice of remedies. He may proceed against the maker of the note and the endorsers thereon, or he may proceed against the corporate officers for their official neglect, and he can pursue these remedies simultaneously, provided, of course, he can have only one satisfaction of his demand.

The question involved here is not merely the time when a surety may sue his principal, for in such case the statute of limitations does not run as against the surety until he has paid the debt, but the question here is, when does the cause of action created by section 859 of Kirby's Digest arise? In a discussion of the general purpose of legislation of this character, it was said in *Griffin* v. *Long, supra,* in a quotation from Thompson on Carriers:

"The reason of the statute is to require corporations to make such a public showing of their affairs as will enable those dealing with them to determine whether they can safely give them credit, and the mischief at which it

is aimed is not done unless the credit was actually given during the period of default."

In the ordinary relation between principal and surety, there is an implied contract of indemnity, which is not broken until the surety has been called upon to make good the default of his principal, and this was the action which appellant set up in his cross-complaint in the original suit by the payee of the notes against him and appellee, and the period of limitation against that action is three years. But in answer to appellee's plea of *res adjudicata,* appellant insists that this is not the action which he now seeks to maintain, but that the suit is based upon the statutory liability of the defaulting corporate officer. But as has been shown in the cases quoted from, the liability of the corporate officers is an independent and primary one, arising out of the fact that the debt was contracted during the period of official delinquency, and we think, of necessity, the statute must be said to be in motion when a complete cause of action exists in favor of any creditor as against that cause of action.

This statute was under review in the case of *Continental National Bank* v. *Buford,* 53 C. C. A. 14, and in the opinion by Judge Caldwell, it was there said:

"It is settled by the decision of the Supreme Court of Arkansas in the case of *Bank* v. *Walsh,* 68 Ark. 433, 59 S. W. 952, that the statute on which this action is founded is a remedial statute, and imposes 'a statutory liability, and not a penalty,' and that the three years' statute of limitations applies to actions founded thereon. The single question left for our consideration is, when did the plaintiff's cause of action against the defendant accrue? The contention of the plaintiff in error is that it did not accrue until the maturity of the last renewal notes; the contention of the defendant is that it accrued when the debts sued for were contracted, or, at the furthest, on the maturity of the notes given at the time the indebtedness was created. The complaint does not disclose when the debts sued for were contracted, but they must have been contracted on or before May 3, 1894, and September 6,

1894, the respective dates at which the first notes mentioned in the complaint were executed. As the action is barred whether the statute of limitations commenced to run from the creation of the debt or from the maturity of the notes given at its creation, it is not essential to the decision of the case to determine whether, when the plaintiff made a loan to the Bank of Mammoth Spring or otherwise, became its creditor for a present consideration on an agreed term of credit and took a note accordingly, the plaintiff could the next day have brought suit for the amount of the debt against the defendant on his statutory liability to pay it as a debt of the bank 'contracted during the period' of his neglect and refusal to file the required certificate. Under the statute the defendant did not sustain to the debtor bank the relation of a joint principal, surety, or guarantor. His liability was primary, and not secondary. It was created by statute, and was not contingent upon the failure or inability of the bank to pay, but was absolute and unconditional. It resulted from his dereliction of official duty, and, if he had been compelled to pay the debt, he would have had no right of reclamation or indemnity from the bank. The statute imposed upon him the obligation of a principal debtor for his refusal and neglect to perform a duty enjoined upon him by law for the protection of the public. His legal liability for the debt was fixed and perfect the moment it was contracted, without regard to the solvency or insolvency of the bank, or to any proceedings against it to enforce payment. At the time when the first renewal notes were taken, the debt and the original notes given therefor had then become due and payable. The renewal of the notes operated as an extension of time for the payment of the debts by the bank, but did not release the defendant, either from his statutory liability to pay the debts or from immediate action therefor. As soon as the original notes became due and payable, if not before, the defendant was liable. The defendant was unquestionably then liable to an action, and so was the bank. These two rights of action in the plaintiff were not dependent. They were con-

current and independent. The plaintiff could assert either or both. The assertion of one would not preclude the assertion of the other. Suspending the assertion of the one would not preclude the assertion of the other. Nothing but satisfaction of the plaintiff's debt by the pursuit of one would take away its right to follow the other. If, therefore, the right of action against the defendant on his statutory liability did not accrue on the creation of the debt, it unquestionably did on its maturity, and the statute, having once commenced to run, could not thereafter be suspended so far forth as concerned the defendant, by an action of the plaintiff and the bank which might have that effect as between them. Without pursuing the object further, we may say that we concur in the opinion of Judge Folger in *Jones* v. *Barlow,* 62 N. Y. 202, 213, and have, in substance, adopted its reasoning."

While, of course, we are not bound by the interpretation of the statute, we think the correct conclusion was reached, and, as the conclusion was expressed with the clearness characteristic of the learned judge who wrote that opinion, we have adopted that opinion as expressing our own view.

It follows, therefore, that appellant's cause of action is barred, and the judgment of the court below is therefore affirmed.

CLINTON v. NOTHERN.

Opinion delivered November, 8, 1915.

1. EVIDENCE—SHIPMENT OF FREIGHT—WEIGHT.—A contract for the sale of cotton seed meal provided that the weight was guaranteed at the destination. *Held,* evidence of the weight of the shipment, at a point along the route, and at the destination was admissible, the shipment turning up short at destination.

2. EVIDENCE—FREIGHT—WEIGHTS.—Where it was the duty of the weigher of a railway company to weigh shipments of freight, and record the same in a scale book, the agent of the railway company may testify to the same, although the record was not made by him.

3. EVIDENCE—CONTEMPORANEOUS ENTRIES—SPECIFIC OBJECTION.—When a specific objection was not made at the trial to the introduction of certain record entries, on the ground that they were not contemporaneously made, an objection thereto can not be urged on appeal.

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

STATEMENT BY THE COURT.

W. C. Nothern brought this suit in the justice court to recover for a shortage in weight of five tons, in a shipment of cotton seed meal purchased from appellants, and recovered in that court, and an appeal was taken to the circuit court.

The testimony shows that Nothern bought on Oct. 20, 1911, from appellants, doing business as the Twin City Investment Company at Dardanelle, Arkansas, for shipment, 100 tons of cotton seed meal in 100 pound sacks at $23.25 per ton, and the written contract therefor contains the stipulation "weights and quality guaranteed at destination."

Under the contract he directed appellants to ship 600 sacks, 30 tons, on Oct. 28th and to see that the bill of lading read exactly as follows: "Received of W. C. Nothern, Open to W. C. Nothern. Destination, Battle Creek, Mich.; hold at Galesburg, Mich.; Route via. D. O. & S. R. I., Clover Leaf and M. C.; insert rate, 23½c cwt. Prepay freight? Yes. Marks, Bartlett's tags."

The car was loaded by appellant with the 600 sacks of 30 tons weight, according to their testimony and billed according to the directions.

The bill of lading contained the statement: "Consigned to W. C. Nothern. Destination, Battle Creek, Mich.; hold at Galesburg, Mich.; 600 sacks C. S. meal, weight subject to correction." At the bottom, "Twin City Investment Company, Shipper."

The car was sealed and shipped and was weighed at Little Rock, the first track scales of the railway company over which it passed and the recorded weight showed it 10,000 lbs., or five tons short. Upon arrival at Galesburg, with the seals upon the car doors intact,

twenty tons were taken out and the car sent on to Battle Creek, where it was discovered that only five tons remained for unloading.

The appellant paid the draft for the thirty tons of meal upon it being sent to the bank in accordance with his directions, and collected for the thirty tons from the consignee and afterwards refunded to the consignee the price for the five tons shortage, not contained in the car. The railway company refunded to the appellants after weighing the car at Little Rock, the difference in freight or the amount of freight paid on five tons shown by its weight not to be contained in the car.

The freight agent of the railway company at Little Rock testified relative to the weight of the car from the scale book made by the weigher, at the time of weighing the car, whose duty required him to make the entries and records and deliver them to the agent, the same weigher not being then in its employ. This testimony was objected to because the agent did not weigh the car himself, nor make the entries of the weight in the record book and all the testimony relative to the weight of the car after it was loaded at Dardanelle was objected to, appellants contending that the weight of the shipment at that point was conclusive.

The court instructed the jury to find for the defendants if it believed they delivered to the railroad company at Dardanelle 600 sacks of cotton seed meal of 100 pounds each, and the bill of lading therefor was made out to the plaintiff and shipped subject to his order, but if they found that defendants did not deliver to the plaintiff at Dardanelle such quantity of cotton seed meal, to find for him and assess the damages, basing the verdict upon the price per ton paid upon the difference between the quantity contracted for and the amount actually delivered at that point.

The jury returned a verdict for the plaintiff and from the judgment thereon this appeal is prosecuted.

June P. Wooten, for appellants.

1. The jury were correctly instructed that if the meal was delivered to the railroad company at Dardanelle, bill of lading issued to appellee, and it was shipped subject to appellee's order, this was a delivery to appellee. 105 Ark. 53; 91 Ark. 422; 90 Ark. 161; 78 Ark. 123; 44 Ark. 556; 79 Ark. 456; 83 Ark. 426; 92 Ark. 111.

After the shipment was delivered to appellee and was accepted and paid for by him, appellants had no further connection with the shipment, and if there was a loss or shortage after the shipment left Dardanelle, such loss was one for which the railroad company was liable, and not the appellants. *Supra*; 35 Cyc. 343; 118 Ga. 424; 45 S. E. 379; 11 Ky. Law Rep. 138.

2. Any testimony relating to the weights of the shipments after the car left Dardanelle was incompetent, and ought to have been excluded. 20 Col. App. 257; 78 Pac. 308.

Thos. T. Dickinson, for appellee.

There is no merit in the contention that there was a delivery of the shipment to the appellee at Dardanelle so as to make the railroad company liable for any loss or shortage in weight. Not only did the railroad company receive the consigment "weight subject to correction," as appears by the bill of lading, but the contract specifically stipulates "*Weights and quality guaranteed at destination.*" By this contract appellants obligated themselves to deliver a certain amount of meal of a stated quality *at the point of destination.* 53 N. J. L. 617; 79 Ark. 351; 90 Ark. 163; 105 Ark. 57; 19 Ore. 571; 24 Pac. 989; 111 Ark. 521.

KIRBY, J., (after stating the facts). (1) It is contended that the court erred in permitting the introduction of testimony showing the weight of the shipment of meal at any other place than Dardanelle, where it was delivered to the railroad company. This contention is without merit however, for the written contract of sale of the cotton seed meal expressly provides that the weights

and quality are guaranteed at destination, and it certainly could not be held that the point of origin of the shipment, Dardanelle, Ark., was the destination thereof, when the bill of lading expressly stated "Destination Battle Creek, Mich.; hold at Galesburg, Mich."; because the bill of lading recited the shipment was received from W. C. Nothern and consigned to his order and it showed also at the bottom that the Twin City Investment Company was the shipper.

The contract shows that the cotton seed meal was to be shipped from Dardanelle, and the price was made f. o. b. the cars there. The testimony shows that the weight of the car at Little Rock disclosed a shortage of five tons, that it arrived at Galesburg with the seals intact, where twenty tons were removed, and that it contained but five tons more upon reaching Battle Creek, with no indication of displacement or removal of contents since the unloading at Galesburg.

The appellee had the right to show the weight of the shipment at the point of destination where the contract guaranteed the weight and quality and this was done to the satisfaction of the jury by the testimony introduced, notwithstanding the court's instructions to the jury were more favorable to appellants than they were entitled to.

(2) The contract of carriage recites "weight subject to correction" and we do not think the court erred in allowing the weight of the car at Little Rock to be shown as it was. Of course if the weighing disclosed a shortage there, it would conduce to prove that the amount charged for was not shipped to the destination, and neither do we think there was error in permitting the agent of the railway company to testify about the weight of the car from the records made by the weigher in the scale book, because the entries had not been made by himself. It was shown that it was the duty of the weigher to weigh the cars and to record the weights thereof in the record book, which was required to be delivered to the agent and that the freights were charged and adjusted

according to the records so made. *Berry* v. *State,* 103 Ark. 153.

(3) There was no objection below to the introduction of such record, because the entries were not shown to have been contemporaneously made with the weighing of the car and such specific objection not having been made there, it will not avail here. *Railway* v. *Murphy,* 60 Ark. 342.

The jury found in appellees favor as already said, upon the question of fact, and under instructions more favorable to appellants than they were entitled to, under the law.

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

STATE v. BINKLEY.

Opinion delivered April 3, 1916.

1. EVIDENCE—CRIMINAL TRIAL—CONTRADICTORY STATEMENTS OF ACCUSED MADE AT ANOTHER TRIAL.—Accused was indicted for perjury in that at the trial of one L. for gaming he had testified that upon a certain occasion L. was not present. *Held,* evidence of accused's testimony at the trial of one Z. for gaming that L. was present was admissible, the same being competent to be considered by the jury in passing upon the issue as to the truth or falsity of the testimony which was alleged in the indictment to have been false.
2. APPEAL AND ERROR—CRIMINAL CASE — ACQUITTAL — DECLARATION OF ERROR COMMITTED.—Where defendant, in a criminal trial, was acquitted, upon appeal by the State, the cause can not be remanded for a new trial; but as the State may appeal in order to obtain the decision of this court, the court will declare any error committed by the trial court in the proceedings below.

Appeal from Clay Circuit Court, Eastern District; *J. F. Gautney,* Judge; error declared.

Wallace Davis, Attorney General and *Hamilton Moses,* Assistant, for appellant. *M. P. Huddleston,* of counsel.

The court erred in excluding the testimony of Squire H. T. Hill. 88 Ark. 115; 53 *Id.* 395; 54 *Id.* 604; 2 Bishop New Crim. Law, § § 931, 1044; 21 Am. Rep. 365.

McCULLOCH, C. J. The defendant, Barney Binkley, was indicted on the charge of perjury, alleged to have been committed by giving false testimony in the trial, before a justice of the peace, of one Langford, who was accused of gaming. On trial of this case the defendant was acquitted, but the State obtained an appeal for the purpose of testing the correctness of a ruling of the court in refusing to admit certain evidence offered by the State.

It is undisputed that the defendant gave the testimony set forth in the indictment, but there is a conflict as to whether it was true or false. The defendant testified that he was present at the time and place when the parties mentioned in the original charge were gaming, and that Langford was not in the game. He testified that one Zolliman, among others, was present and was engaged at gaming with the other parties. It seems that Zolliman had been tried before another justice of the peace and acquitted, and that at that trial the defendant Binkley testified that Zolliman was not present but that Langford was present and participated in the game. In the trial of the present case the State offered to prove the contradictory testimony of the defendant given at the trial of Zolliman, but the court refused to admit it.

(1) The testimony was competent and should have been admitted, for it constituted a contradictory statement of the defendant and an admission by him that his testimony given at the Langford trial was false. The falsity of the testimony could not be established by contradictory statements alone, or by admissions of the defendant, but his statement was competent testimony to be considered by the jury in passing upon the issue as to the truth or falsity of the testimony which was alleged in the indictment to have been false. *Grissom* v. *State*, 88 Ark. 115; 2 Bishop New Criminal Law, § 1044.

(2) The defendant having been acquitted of the charge, which was a felony, the case cannot be remanded for a new trial; but as the State was entitled to an appeal in order to obtain the decision of this court,

the law is declared to be that said testimony was competent and that the court erred in excluding it.

O'KANE v. LYLE.

Opinion delivered April 3, 1916.

1. DIVORCE—ALIMONY—SUPPORT OF CHILD—CHANGE IN DECREE.—Plaintiff procured a divorce from defendant, her husband, obtaining the custody of their only child. At the time the decree was rendered the court awarded to plaintiff a one-third interest in a certain farm belonging to defendant, which was his only property, the rental value of which one-third interest being about $3,200 per annum. Thereafter, upon plaintiff's petition, the court awarded plaintiff $25 per month for tre support of the child. *Held*, the chancery court should not have made the order, there being no evidence of any change in the circumstances of the parties.
2. DIVORCE—MONEY AWARD—JURISDICTION TO CHANGE.—The original decree in divorce proceedings awarding certain money as alimony, will bar a further award of money, until there has been a change in the circumstances of the parties.

Appeal from Franklin Chancery Court, Ozark District; *W. A. Falconer*, Chancellor; reversed.

J. D. Benson, Davis Partain, J. V. Bourland and *J. D. Arbuckle*, for appellant.

1. No change of circumstances was shown and the matter is *res adjudicata*. 55 Ark. 286; 66 *Id.* 336; 96 *Id.* 540; 19 *Id.* 420; 55 *Id.* 536; 70 *Id.* 200.

2. The evidence does not support the decree. 53 S. W. 717.

Robert J. White, for appellee.

There was no abuse of judicial discretion. The former decree makes no provision for the support of the child and the decree is amply supported by the testimony. 140 S. W. (Tenn.) 745; 111 *Id.* (Mo.) 579; 42 Ark. 495; 86 *Id.* 473.

McCULLOCH, C. J. The plaintiff and defendant were formerly husband and wife and were divorced by a decree rendered in July, 1912, by the chancery court of Franklin County, Arkansas, where they resided. There was one child, the issue of said inter-marriage, a girl, and

the custody of the child was awarded to the plaintiff, Lizzie O'Kane, who has since inter-married with one Lyle. The defendant, Walter O'Kane, owned a large and valuable farm in Franklin County, one-third of which was awarded to the plaintiff as alimony by the same decree which granted the divorce. The decree did not specifically award anything to the plaintiff for the support of the child, but the plaintiff subsequently instituted this action in the chancery Court of Franklin County against her former husband to obtain a decree compelling him to pay a certain sum of money monthly for the support of the child. The defendant pleaded the former adjudication in bar of the right to recover anything now in addition to what was awarded in the former decree. The plaintiff alleged in her complaint that the failure of the court to specify in the former decree a sum to be paid to the plaintiff for support of the child was an inadvertence, and she prays that that be corrected by a decree granting that relief. The cause was heard by the chancellor on oral testimony, which has been preserved in a bill of exceptions, and the court rendered a decree directing the defendant to pay to the plaintiff the sum of $25.00 per month, beginning from the date of the original decree. The defendant has appealed to this court.

It appears from the testimony that the only property owned by either of the parties is that which they owned at the time of the original decree, and that the defendant's portion of the farm, which was not taken away from him by the decree, has a rental value of about $7,000.00 per annum, and that that part of the farm which was awarded to the plaintiff has an annual rental value of about $3,200.00. There is a presumption that the court, in awarding to the plaintiff the custody of the child and a certain portion of defendant's property as her alimony, took into consideration the matter of the support of the child and awarded such sum as the court thought proper for the plaintiff's own maintenance and that of her child. The court has a continuing power over the matter of the

custody and support of the child, but the original decree bars any further inquiry of the right to a further award of money until there has been a change in the circumstances of the parties. The evidence in this case fails to show anything whatever in the condition of the parties except the mere fact that the plaintiff has intermarried with another man since she was divorced from defendant. She still has the same property which was awarded to her, and which yields apparently sufficient income for the support of herself and her child, and it was error for the court to allow any additional sum except upon a showing of a change in the conditions.

The decree is therefore reversed, with directions to dismiss the complaint for want of equity.

HILL v. TREZEVANT & COCHRAN.

Opinion delivered April 3, 1916.

PRINCIPAL AND SURETY—NEW BOND—RELEASE OF SURETY.—H. and P. were sureties on the bond of one B., who was acting as agent for the appellee. B. became in default, and was suspended by the appellee. The shortage was made good, B. was reinstated and a new bond with new sureties was executed to appellee. Upon a second default by B., appellant sued upon both bonds. *Held*, the settlement of the first shortage and the suspension of B. operated to release the sureties upon the first bond.

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

W. E. Beloate and *H. L. Ponder*, for appellant.

Appellant, Hill, was released when the *new* bond was given. The judgment is erroneous; clearly against all the evidence.

McCULLOCH, C. J. The plaintiffs, Trezevant and Cochran, are general agents for insurance companies and in the year 1901 appointed J. N. Beakley local agent at Walnut Ridge, Arkansas. They exacted a bond from Beakley and the latter executed a bond in the sum of

$500.00 with P. B. Hill and H. L. Ponder as sureties, the condition of the obligation being that said Beakley would "faithfully and punctually pay over, at Dallas, Texas, to said Trezevant & Cochran, all sums due or that may become due to them, as general agents aforesaid, from time to time, for moneys collected or received by said agent for premiums on policies of insurance or for any other account whatever * * * and perform all the duties of such agent of said company and comply with all instructions contained in his commission of authority, and that may be from time to time communicated to said agent by said Trezevant & Cochran, general agents," etc. There was no time specified in the bond, but Beakley continued to operate under his appointment as local agent from the time of the execution of the bond until the year 1912, when it was found that he was short in his accounts to the extent of the sum of $359.04, and the plaintiffs gave notice in writing to each of said sureties of said shortage, and made demand for payment of the amount. This was done on May 13, 1912, and a few days thereafter Ponder, one of the sureties, wrote to Trezevant & Cochran, stating that he would see Beakley and get him to pay up the amount of the shortage, but that he (Ponder) wanted to be released from the bond and would not be responsible for any further acts of Beakley as such agent. Trezevant & Cochran suspended Beakley as agent and wrote a letter to Ponder stating in substance that Beakley had been suspended, and that "in the event the agency is ever reinstated we will secure a new bond with other sureties." There was no further correspondence between Trezevant & Cochran and the other surety, Hill, but the latter was in communication with Ponder and was informed as to the result of the correspondence between Ponder and Trezevant & Cochran.

Beakley paid up the shortage and was reinstated as agent and gave a new bond with other parties as sureties. Beakley subsequently became short in his accounts in the sum of $729.05, and the plaintiffs, Trezevant & Cochran, instituted this action against the sureties on both

bonds for the amount of said shortage, claiming that the original bond signed by Hill and Ponder as sureties was still in force, and that the liability of the second sureties was cumulative. On the trial of the case the circuit court decided that Ponder had been discharged and rendered a judgment in his favor, but rendered a judgment in favor of the plaintiffs, Trezevant & Cochran, against the defendant P. B. Hill for the amount of the shortage up to the amount of the penalty on the bond, to-wit: $500.00. Hill has prosecuted an appeal to this court.

There is no dispute as to the facts of the case, and it is clear from all the testimony introduced that the new bond was executed as a substitute for the old bond. The old bond contained no specification as to its duration and the sureties had the right to demand a discharge from further liability by paying up the amount of the old shortage. That course was pursued by Ponder and the proceedings which followed inured to the benefit of Hill because of the fact that Beakley was in fact suspended as agent and that terminated the suretyship. When Beakley was reinstated it began a new term of service and the new bond, according to the undisputed evidence, was given to cover the new agency. We are of the opinion, therefore, that the court erred in holding Hill liable and in not rendering a judgment in his favor.

Other grounds are urged why there is no liability on the part of Hill for the last shortage, but in view of what we have said it is unnecessary to discuss the case any further.

The judgment is reversed and the cause dismissed.

AYERS v. CRITTENDEN COUNTY.

Opinion delivered April 3, 1916.

DRAINAGE DISTRICTS—DUTIES OF ENGINEER—FORMATION—COMPENSATION.—Under Act 221, page 193, Public Acts of 1911, providing for the formation of drainage districts, the engineer is required to make only preliminary plans and surveys and estimates, and the said

engineer can not recover for the value of his services, when he furnishes complete plans and estimates, the same being in excess of the provisions of the statute.

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

A. B. Shafer and *B. J. Semmes,* for appellant.

The circuit court erred in its findings of fact and in rendering judgment, because the evidence does not support them. Ayers made the surveys and estimates according to the Act of 1909, p. 829, § 1, etc. He did no unnecessary work and his charges are not excessive. 40 Cyc. 2853; 33 Ark. 651-4; 35 Am. Dec. 141; 22 Tex. 70; 9 Dana (Ky.) 358. The judgment should be reversed and a judgment rendered here for Ayers. 2 McGlorin, (La.) 61.

L. P. Berry and *S. V. Neely,* for District No. 2.

1. Ayers made a complete survey, he did much unnecessary work. There is ample evidence to support the finding and judgment. Acts 1909, p. 829, 109 Ark. 548; 45 *Id.* 41; 82 *Id.*. 372.

Brown & Anderson, for District No. 3.

The appellant's claim is excessive. The judgment was for more than appellant was legally entitled to. 51 Ark. 524; 50 *Id.* 431; 47 *Id.* 442. The evidencefully sustains the judgment.

McCULLOCH, C. J. Proceedings were instituted in the county court of Crittenden County for the organization of two separate drainage districts, one to be designated as Drainage District No. 2 of Crittenden County, and the other as Drainage District No. 3 of Crittenden County. Appellant, W. E. Ayers, was appointed by the county court of Crittenden County to make the preliminary survey as provided by statute. The survey was made by appellant and his report was filed, accompanied by maps, plats, etc., according to the terms of the statute, and subsequently appellant filed in the county court his separate claims against the county for his compensation for said work.

District No. 3 was declared by this court not to have been legally organized. The organization of District No. 2 was completed and it appears that in said district the work of constructing the ditch according to the purpose of the organization is progressing. Appellant's claim against the county for District No. 2, as filed in the county court, was for $9,694.46, of which $2,000.00 had already been paid. His claim against the county for District No. 3 was for the sum of $4,902.22, of which amount $1,500.00 had been previously paid. The county court allowed all of appellant's claim against District No. 2 except $1,958.23, and all of the claim for District No. 3 except $1,135.00. There was an appeal to the circuit court taken on behalf of the county and each of the drainage districts, and also on behalf of appellant Ayers, and on trial of the two causes in the circuit court, which were consolidated, the circuit judge, sitting as a jury, reduced appellant's claim against the county for District No. 2 to the sum of $3,000.00, and his claim against the county for District No. 3 to $1,500.00, and entered a judgment accordingly. No appeal has been prosecuted to this court on behalf of Crittenden County or either of the two drainage districts.

The statute (Act of April 28, 1911,* amending Act of May 27, 1909†) provides that upon the filing of the petition in the county court for the organization of the drainage district and the execution of a bond to pay for the expenses of the survey of the proposed district, "it shall be the duty of the county court to enter upon its records an order appointing an engineer," who shall "forthwith proceed to make a survey and ascertain the limits of the region which would be benefited by the proposed system of drainage and such engineer shall file with the county court a report showing the territory which will be benefited by the proposed improvement and giving a general idea of its character and expense and making such suggestions as to the size of the drainage

*Act 221, p. 193, Public acts of 1911.
†Act 279, p. 829, Session Laws of 1909 (Reporter).

ditches and their location as he may deem advisable." The statute further provides that "all expenses incident to the survey and cost of organization shall be paid by the county as the work progresses, upon proper showing, but all expenses paid by the county shall be repaid out of the proceeds of the first assessment levied under this Act."

The testimony adduced by the appellant in the trial below is to the effect that it is necessary in such cases to make the survey, plans, maps and estimates complete so as to constitute an accurate plan and estimate for the construction of the work. He explained in his testimony that it would be unsatisfactory if it should finally develop that the work costs more or less than the preliminary estimates. In other words, the testimony of the appellant tends to show that he made a complete survey and all necessary maps and plats and estimates of the work, and that the amount of his claim was only fair compensation for that work. The circuit judge decided properly, we think, that the statute only contemplates a preliminary survey and estimate, and not completed plans for the construction of the work. The language of the statute sustains the construction put on it by the circuit judge, for it says the engineer is only required to make a survey and ascertain the limits of the region which is to be benefited, and to give "a general idea of its character and expense." According to that construction of the statute, it appears from appellant's testimony that he did more work than was authorized by his employment and that he is not entitled to full compensation according to his claim.

There is a conflict in the testimony, too, as to a proper amount of compensation for a preliminary survey, such as is contemplated by the statute, and we cannot say that there is no testimony supporting the court's finding on that issue of fact. The case is argued here principally on the question of the legal sufficiency of the evidence, and we are of the opinion that there is

enough to support the finding. For that reason the judgment will be affirmed.

The county has not appealed and we do not undertake to decide whether or not the statute authorizing a county court to pay the preliminary expenses of a survey for a drainage district is a valid enactment. We leave the decision of that question to the future when it is properly presented here.

Judgment affirmed.

SMITH, J., not participating.

THE GRASSELLI CHEMICAL COMPANY v. IRELAN.

Opinion delivered April 3, 1916.

FRAUDULENT CONVEYANCES—HUSBAND TO WIFE—RIGHT OF CREDITORS.—Where a wife accepts a deed to her husband's property, giving nothing therefor, she can not hold it against her husband's creditors, who extended credit on the faith of his ownership.

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

The appellant, *pro se.*

The evidence shows that plaintiff was an existing creditor of the husband at the time of the voluntary transfer to his wife. The transfer was fraudulent and void as to creditors. 80 Va. 423; 20 Ala. 732; 29 Pac. 151; 87 Ill. 393; 64 Ala. 403; 119 Ga. 793; 47 S. E. 332; 64 W. Va. 522; 16 Ann. Cases 1031; 20 Cyc. 421; 113 Ark. 100; Kirby's Digest § 6137; *Ib.* 3095; 77 Ark. 433; 97 *Id.* 11; 107 *Id.* 153; 45 *Id.* 520; 14 *Id.* 69; 33 *Id.* 328; 56 *Id.* 69; 108 *Id.* 106; 86 *Id.* 225.

W. N. Ivie, for appellee.

Appellant was not a creditor at the time of the transfer. The court so found and the evidence supports the finding. There was no evidence that the conveyance was made with intent to defraud appellant as a subsequent creditor. 8 Ark. 470; 56 *Id.* 253; 56 *Id.* 73; 38 *Id.* 419;

42 *Id.* 170; 96 *Id.* 531; 66 *Id.* 98; 30 L. R. A. (N. S.) 1; 15 *Id.* 484; 26 Ark. 20.

McCULLOCH, C. J. The Grasselli Chemical Company, a corporation domiciled in the State of Ohio was engaged in the business of manufacturing and selling certain spraying products and on December 16, 1911, entered into a contract with A. M. Irelan of Benton County, Arkansas, for the sale to the latter of a line of said products upon orders to be sent in from time to time. Irelan owned a farm consisting of 80 acres of land in Benton County of about the value of $12,000, which was encumbered to about the sum of $8,000. He also owned an urban homestead. Orders for shipments of the product were sent in by Irelan which were filled by the seller aggregating in price the sum of $1,338.95, none of which was ever paid. The orders were filled from February 17, 1912, to June 5, 1912. In the meantime the seller made inquiry through commercial agencies as to the moral and financial standing and worth of Irelan and received reports to the effect that the latter owned the aforementioned lands and that he was worthy of credit.

On February 13, 1912, Irelan executed a deed of gift to his wife Waitie Irelan conveying said land to her. The deed recited the consideration to be "love and affection" and the payment of $1.00. The deed was filed for record on August 24, 1912, and was then duly recorded. The seller (the Grasselli Chemical Company) sued A. M. Irelan at law for recovery of said sum in September 1912, and obtained judgment against him. This action was subsequently instituted in the chancery court of Benton County against Irelan and his wife to cancel said conveyances and to have said lands (except the homestead) subjected to the payment of plaintiff's judgment debt.

It is stipulated in the agreed statement of facts that "at the time of the conveyance of the land aforesaid, A. M. Irelan, had not sufficient property left subject to execution from which the amount of plaintiff's judgment

could have been made; that at the time suit was commenced defendant was and is wholly insolvent and has no property from which plaintiff's judgment can be made."

The facts herein set forth are not in dispute. Each of the defendants testified that said conveyance was executed in good faith and without any intention to defraud creditors; and that the deed was not withheld from record for any fraudulent purpose. Mrs. Irelan testified that she had no information that her husband had any unsecured debts; and A. M. Irelan testified that at the time he executed said conveyance to his wife he did not owe the plaintiff anything and did not owe any other unsecured debts.

The chancellor dismissed the complaint for want of equity and the plaintiff appealed.

However innocent the defendant may have been of any actual intention to defraud creditors, the necessary effect of the conveyance was to hinder the collection of debts about to be incurred. It constituted a legal fraud. A. M. Irelan had entered into a contract which contemplated immediate purchases from the plaintiff on credit, and those purchases were in fact made and credit was extended on the faith of the purchaser's ownership of the land in controversy. The plaintiff had no notice of the conveyance, actual or constructive, at the time it extended the credit, and the withholding of the deed from record, whether by evil design or inadvertence, operated as a legal fraud on plaintiff's rights.

The effect of withholding the deed from record was to leave the title, apparently, in the original owner, which formed the basis of credit and deceived the plaintiff. The case comes within the rule that where the wife permits the husband to handle her property as his own and obtains credit on the faith of his ownership, she can not assert a claim to it against the rights of such creditors. *Driggs & Co. Bank* v. *Norwood,* 50 Ark. 42. Moreover, Mrs. Irelan was not an innocent purchaser for value. She paid nothing for the property and can not hold it against

creditors of her husband who extended credit on the faith of his ownership. Each of the defendants disclaim any design to defraud creditors but the circumstances of the case lead irresistibly to the conclusion that A. M. Irelan, by the conveyance to his wife, denuded himself of all of his property in contemplation of immediately becoming indebted to the plaintiff. He sent in his first order to plaintiff just four days after he executed the conveyance and the orders continued throughout a period of about three and a half months until he became indebted to plaintiff in the sum of $1,338,95 without paying anything at all.

The decree is reversed and the cause is remanded with directions to enter a decree canceling said conveyance and subjecting said land to the payment of plaintiff's judgment.

SOEKLAND v. STORCH.

Opinion delivered April 3, 1916.

1. BILLS AND NOTES—FICTITIOUS PAYEE.—A fictitious payee means a fictitious person, who, though named as payee in the note, has no right to it, or the proceeds of it, because it was not so intended when the note was executed.
2. BILLS AND NOTES—FICTITIOUS PAYEE—INTENT.—Whether a note is to be considered as having a fictitious payee, depends upon the knowledge or intention of the party against whom it is attempted to assert the rule, and not upon the actual existence or nonexistence of a payee of the same name as that inserted in the instrument.
3. BILLS AND NOTES—FICTITIOUS PAYEE—VALIDITY.—A note is invalid when payable to a fictitious payee.
4. BILLS AND NOTES—NOTE PAYABLE TO PAYEE UNDER ASSUMED NAME.—Plaintiff, whose name was actually Storch, loaned money to defendant, taking a note therefor payable to Krause, a name which plaintiff had, for the time being, assumed. *Held*, it was the intention of the plaintiff, when he took the note, that the same be payable to himself, and he alone had the right to collect it, and that the same was valid.

Appeal from Arkansas Circuit Court, Northern District; *T. C. Trimble*, Judge; affirmed.

John L. Ingram, for appellant.

1. Payment of a note to a fictitious person cannot be enforced, except in the hands of an innocent purchaser. 1 Daniels Neg. Inst. (5 ed.) § 136; 4 Am. & Eng. Enc. Law, (2 ed.) p. 115; Bigelow on Bills, etc., (2 ed.), p. 26; 4 A. & E. Enc. L. (2 ed.) p. 116.

HART, J. John Storch sued A. H. Soekland for $147.00 alleged to be due on a promissory note. The plaintiff introduced in evidence a note dated Stuttgart, Arkansas, October 1st, 1912, for $147.00 payable to the order of M. Krause at the National Bank of Stuttgart, Arkansas.

The plaintiff testified that his real name is John Storch; that at the date of the execution of the note, on account of trouble that he had had with his wife he assumed the name of M. Krause, Krause having been his mother's maiden name; that he loaned to the defendant $147.00 and took the defendant's note therefor payable to the order of Krause, that being the name he had assumed at that time and by which he was known; that the defendant has not paid any part of the note; that his wife died before the institution of this suit and that he has again taken his real name. No evidence was introduced on the part of the defendant. The court directed a verdict for the plaintiff and the defendant has appealed.

Prof. Daniel says: "The law abhors fraud and discountenances the instruments by which it may be committed. For this reason bills and notes payable to fictitious payees are not tolerated, and will never be enforced, save when in the hands of a *bona fide* holder, who received them without knowledge of their true character. The appearance of a name upon the paper as a payee and endorser is naturally calculated, and has been often used as a means to give it fictitious credit, whereby innocent parties are beguiled into purchasing it." Daniel on Negotiable Instruments (6 ed.), vol. 1, § 136. Counsel for defendant invokes this rule to reverse the judgment in this case.

We do not think, however, the note in question had a fictitious payee within the meaning of the rule announced by Prof. Daniel. Whenever the name is inserted as payee without any intention that payment shall be made only in conformity therewith, the payee then becomes a fictitious person. In other words under the rule a fictitious payee means a fictitious person, who though named as payee in the note, has no right to it, or the proceeds of it, because it was not so intended when the note was executed. Therefore whether the paper is to be considered as having a fictitious payee depends upon the knowledge or intention of the party against whom it is attempted to assert the rule, and not upon the actual existence or non-existence of a payee of the same name as that inserted in the instrument; so that on the one hand a real person may be fictitious, and on the other a non-existing person may be real within this rule. 4th Am. & Eng. Ency. of Law (2 ed.), p. 116; Daniel on Negotiable Instruments (6 ed.), vol. 1, § 141.

In the present case the plaintiff adopted and used the name of M. Krause as his own at the time he loaned the money to the defendant and took his note therefor. It was the intention of the plaintiff that the note should be payable to himself and he alone had the right to collect the note.

Judgment will be affirmed.

GROOMS v. BARTLETT.

Opinion delivered April 3, 1916.

1. COUNTY OFFICERS—APPLICATION OF FUNDS—EQUITY—JURISDICTION.—The officers of a county are trustees in the management and application of the funds of the county and equity has jurisdiction to prevent the misapplication of trust property.
2. PUBLIC FUNDS—MISAPPLICATION—RIGHT OF TAXPAYER—RELIEF.—The taxpayers of a county are the proper parties to maintain suits against public officers to prevent or to remedy misapplication of the public funds, and chancery has the power to grant affirmative as well as injunctive relief. Chancery has power to prevent such wrongs as well as to require reparation for what has been done.

3. ACTIONS—WRONG FORUM—DUTY TO TRANSFER.—An action by a taxpayer to recover, on behalf of the county, money, misapplied by the county treasurer, when brought at law, should be transferred by the law court to equity. And when the complaint was demurred to, the demurrer should have been treated as a motion to transfer, and it is error for the law court to sustain the demurrer and dismiss the complaint.

Appeal from Conway Circuit Court; *M. L. Davis,* Judge; reversed.

Edward Gordon, for appellant.

1. The demurrer should have been overruled. Acts 1911, No. 163, p. 421, § 6; Kirby's Dig., § § 7197, 7199, 7200-1; 102 Ark. 287.

2. The court had jurisdiction. 32 Ark. 553; 50 *Id.* 266; 34 N. W. 186; 46 N. E. 77; 3 Ark. 285; 5 *Id.* 536; 13 *Id.* 52; 25 *Id.* 101; 32 *Id.* 140; 75 *Id.* 125; 82 *Id.* 316; 63 *Id.* 576; 111 *Id.* 120.

W. P. Strait and *Sellers & Sellers,* for appellee.

1. No cause of action was stated. Kirby's Digest, § 7197.

2. The act is unconstitutional. Kirby's Digest, § 7197, *et seq.;* 95 Ark. 618. The section is summary and highly penal. It takes away the right of trial by jury. 93 Ark. 42; 56 *Id.* 45; 87 *Id.* 405; 40 *Id.* 97; 59 *Id.* 344; 71 *Id.* 556; 68 *Id.* 443.

HART, J. Charles Grooms, a taxpayer of Conway County, Arkansas, instituted this action in the circuit court against R. E. Bartlett, county clerk of said county, to recover judgment for the use and benefit of Conway County in the sum of $1,015.43, which plaintiff claims defendant drew from the county treasury in excess of two per cent. allowed him by law for his services in filing claims and keeping the accounts and records in connection with the road funds of the county. The defendant interposed a demurrer to the complaint, which was sustained by the court. The plaintiff refused to plead further and elected to stand upon his complaint. The court rendered judgment in favor of the defendant and the plaintiff has appealed.

Counsel for the plaintiff says that he instituted the action under sections 7197, 7199, 7200, 7201, of Kirby's Digest. We do not deem it necessary to set out these sections. They are set out in the opinion in the case of *Gladish* v. *Lovewell,* 95 Ark. 618. In that case we held that the primary object of the statutes was to authorize a taxpayer to bring an action of ouster against the officers named in the statute where it shall appear that the acts of such officers were corrupt and fraudulent and that a decree for the moneys which such officers have unlawfully detained is a mere incident to the main suit. In that case we also held that equity has no inherent power to oust an incumbent whose title to the office has been forfeited by misconduct or other cause. Section 7199 of Kirby's Digest gives the taxpayer having knowledge of any of the officers named in section 7197 being corrupt in office and depriving the county of its just revenues, the right to institute legal proceedings by a petition to the circuit judge sitting in chancery.

(1) By the Constitution of 1874 jurisdiction of equity matters was vested in the circuit court until courts of chancery should be established and the circuit courts had jurisdiction over the same subjects as a court of chancery to be exercised according to the known rules of chancery, as understood at the time of the adoption of the Constitution. At the time of the passage of the statutes just referred to, separate courts of chancery had not been established in this State. The circuit judge, sitting in chancery, in the act means the circuit judge or the circuit court exercising chancery jurisdiction. It does not follow, however, that because an equity court did not have jurisdiction of the present action under the sections of Kirby's Digest above referred to that it does not have jurisdiction in cases like this. The officers of the county are trustees in the management and application of the funds of the county, and it is well settled that equity has jurisdiction to prevent the misapplication of trust property.

(2) The taxpayers of a county are the persons from whom the public revenues are obtained and are directly interested in protecting the same. They are proper persons to maintain suits against public officers to prevent or remedy misapplication of the public funds, and in such cases chancery has the power to grant affirmative as well as injunctive relief. Chancery has not only power to prevent such wrongs, but it has power to require reparation for that which has been done. We think these propositions of law are clearly deducible from the principles laid down in the case of *Russell* v. *Tate,* 52 Ark. 541. See also *Lee County* v. *Robertson,* 66 Ark. 82; *Griffin* v. *Rhoton,* 85 Ark. 89. The Legislature of 1911 passed a special act relative to the better working of the public roads in Conway County. See Special and Private Acts of Arkansas, 1911, p. 417. Section 6, among other things, provides that the county clerk's fees, in full, for his services in connection with the road fund shall not exceed 2 per cent. of said fund. According to the allegations o the complaint, the defendant received the sum of $1,015.43 in excess in the amount allowed him on the road fund under this special act.

(3) It follows from the views we have expressed that the plaintiff has a right to maintain the present action under the allegation of his complaint, but he should have brought his suit in the chancery court. Section 5991 of Kirby's Digest provides that an error of the plaintiff as to the kind of proceedings adopted shall not cause the abatement or dismissal of the action, but merely a change into the proper proceedings by an amendment in the pleadings and a transfer of the action to the proper docket.

The demurrer should not have been sustained and the complaint dismissed for the error of the complaint as to the kind of action, but the court should have treated the demurrer as a motion to transfer to equity and the action should have been transferred to the chancery court. See *Moss* v. *Adams,* 32 Ark. 562; *Newman* v. *Mountain*

Park Land Co., 85 Ark. 208; *Lawler* v. *Lawler,* 107 Ark. 70; *Rowe* v. *Allison,* 87 Ark. 206.

The judgment will be reversed and the cause remanded with directions to the circuit court to transfer the action to the chancery court.

HOTCHKISS *v.* STATE.

Opinion delivered April 3, 1916.

1. EVIDENCE—HOMICIDE—REMARKS OF ACCUSED.—Evidence of statements of accused made after the killing to witness, deceased's sister, may be admissible to show motive for the crime.
2. EVIDENCE—HOMICIDE—PROOF OF ABSENCE OF MOTIVE.—Defendant, in a prosecution for homicide, when it is sought to be shown that sexual intercourse with one E. was the motive for the crime, may prove in rebuttal, absence of such motive, by showing his previous relations with the said E.

Appeal from Phillips Circuit Court; *Edwin Bevens,* Special Judge; reversed.

The appellant, *pro se.*

1. Improper evidence was admitted to appellant's prejudice. 58 Ark. 55; 69 *Id.* 558; 82 *Id.* 58; 99 *Id.* 604; 101 *Id.* 147; 112 *Id.* 589, 592-3.

2. Evidence was improperly excluded. 52 Ark. 309; 82 *Id.* 58.

Wallace Davis, Attorney General, and *Hamilton Moses,* Assistant, for appellee; *W. R. James,* of counsel.

1. The testimony was admissible to how motive. Clarke, Cr. Law, 50; 25 Ark. 380; 97 Mass. 565. Also as *res gestae.* 43 Ark. 99, 103; 1 Wharton on Ev. (3 ed.), § § 259, 262; 64 Ark. 121; 120 Ark. 160; 171 S. W. 867. If error was committed it was not prejudicial. 120 Ark. 236.

2. There was no error in excluding testimony of Classy Hotchkiss and G. L. Washington. 87 Ark. 52; 105 Ark. 254; 89 Ark. 95; 95 *Id.* 438. No prejudice resulted.

SMITH, J. Appellant was convicted of the crime of murder in the first degree, alleged to have been committed by shooting one Roberta Hotchkiss with a pistol. The evidence on the part of the State was to the effect that at about midnight the deceased and her two sisters, accompanied by two men, were returning from a "moonlight picnic," and, as they were walking along a railroad track, appellant came up from behind, and, calling out "Halt!" began firing his pistol as deceased and her companions turned around. Roberta fell at the first shot, whereupon appellant shot and killed her sister, one Maude Trotter. Other members of the party ran away except Will Ella Yandall, who was the other sister. Will Ella testified that immediately after the shooting appellant said to her, "Now, you G— d— b—, get up the track," and that he took her to his sister's house and compelled her to stay with him until 4 o'clock in the morning, at which time he left her with the remark, "I am gone, and, G— d— you, you had better not tell what direction." Will Ella denied that she had ever had sexual intercourse with appellant prior to that night. Evidence of others present at the time of the killing tended to corroborate the story told by Will Ella.

In his own behalf appellant testified that on the day before the killing he had had trouble with one Ed Anderson, who was Will Ella's escort on the night of the killing. That at the time of the first trouble Anderson said, "You are bigger than I am now, but the next time I see you I will be as big as you are." This remark was occasioned by the fact that Anderson was prevented from assaulting appellant by the exhibition of a pistol. That as he came up with a party, of which Anderson was a member, he stumbled and hurt his leg and cursed, whereupon Anderson asked who it was, and Will Ella told him, when Anderson commenced shooting and shot him in the leg. That Roberta came to his assistance and was shot by Anderson. That after the shooting was over he carried Will Ella to his sister's house, at her request, and that he left that night and made his escape and was gone for

several years before he was captured. He further testified that an intimacy had existed between himself and Will Ella for a number of years, and that he stayed with her whenever he pleased. He also offered to prove by one G. L. Washington that he had known both appellant and Will Ella for a number of years, and knew they had lived together as man and wife; but this evidence was excluded by the court.

Appellant objected to the admission of the statements alleged to have been made by him to Will Ella after the shooting and on the following morning; but it is said in reply that this evidence is competent as tending to show the motive which prompted the commission of the crime; and we think it was competent for that purpose. But we think it was equally as competent for the defendant to prove the absence of motive. This he undertook to do by showing that his relations with Will Ella were and had been such that there was no necessity to resort to force to accomplish his purpose. Certain evidence to this effect by appellant's mother was also excluded. Evidence which would have rebutted the State's theory of appellant's lustful purpose was thus excluded, and we think this was erroneous and necessarily prejudicial, and for this error the judgment must be reversed and the cause remanded for a new trial.

SEGRAVES v. BROOKS.

Opinion delivered April 3, 1916.

1. FRAUDULENT CONVEYANCES—NOTE—RIGHT OF DEBTOR TO OBJECT.—A conveyance in fraud of creditors is void only at the instance of the injured creditor, and where one L. so conveyed a note of appellant which he held, to appellee, appellant can not defeat payment, in a suit by appellee, on the ground that L. made the transfer to appellee in order to defraud his, L's., creditors.

2. REPLEVIN—RECOVERY—MORTGAGED CHATTEL.—In replevin, to recover a mortgaged chattel from the mortgagor, the mortgagee should have judgment for the property or the balance due on the mortgage.

3. REPLEVIN—RETAINING BOND—FORM.—Where appellant retained the property in a replevin suit, he can not complain of a judgment against himself, on the ground that the retaining bond did not follow the precise language of the statute.

Appeal from Randolph Circuit Court; *J. B. Baker*, Judge; affirmed.

STATEMENT BY THE COURT.

Appellee instituted this suit against appellant for the possession of certain personal property. The affidavit was made on behalf of the appellee by his agent, Lee Brooks. It described the property, stated the value thereof, with the other allegations necessary for an affidavit in replevin. The appellant executed a retaining bond to the effect that appellant "shall perform the judgment of the court in the action or return the property."

Judgment was rendered against the appellee in the justice court and he appealed to the circuit court. In the circuit court, the appellant entered an oral plea, denying each and every allegation of the complaint. The testimony on behalf of the appellee, tended to prove that the appellant executed the note to Lee Brooks for $249.07, dated March 14, 1913, and due October 1. To secure this note, appellant executed a mortgage on the property in controversy. The note was assigned October 21, 1913, to the appellee. There was rendered to appellant by Lee Brooks, as the agent of the appellee, an itemized and verified statement of the indebtedness, which the mortgage was given to secure. There was shown to be a balance due on the note of $198.50. Lee Brooks testified that he had often talked with appellant in regard to the indebtedness and appellant had never denied owing it, but often admitted that he did owe all of it. Lee Brooks testified that he did not himself, keep the books from which the verified statement of the account was rendered. The appellant thereupon moved the court to exclude the testimony in regard to this verified statement. The witness stated that if the appellant had paid the account to his brother, J. T. Brooks, witness did not know anything

about it. That he did not pay the account to witness. Witness further stated that he had never obtained his discharge in bankruptcy. That he had brought this suit, attended to his brother's business, and that he had been bringing all suits and making the affidavits in his brother's name. The appellee also introduced the mortgage which was assigned by Lee Brooks to J. T. Brooks, October 21, 1913. The appellant introduced a certified copy of the record of the proceedings before the referee in bankruptcy pertaining to the matter of the bankruptcy of Lee Brooks, and a copy of the judgment of the District Court for the Eastern District of Arkansas, in which it was adjudged that Lee Brooks was a bankrupt, and that the transfer of the note and mortgage of Lee Brooks to J. T. Brooks was fraudulent and void, because it was intended to hinder and delay creditors.

The appellant prayed for instructions telling the jury that the transfer of the note and mortgage under which the appellee claimed, was fraudulent and void and that such assignment carried with it no interest in the note and mortgage in question. The court refused to grant this prayer and appellant duly excepted. The court rendered a judgment in favor of the appellee against the appellant and his bondsmen in the sum of $198.50. The judgment recites: "It appearing to the court from the pleadings and files and admissions herein that this is an action brought by the plaintiff to replevin one sorrel mare, four years old of the value of $90 and one horse worth $85, embraced in a mortgage and held by plaintiff against defendant and securing an indebtedness from plaintiff to defendant on which there is a balance due of $198.50. And upon said property being taken from defendant by an order of delivery herein the defendant made a retaining bond in form of law with Joe H. Johnson, J. J. Grimmett and R. H. Segraves, as securities on retaining bond." Appellant duly prosecutes this appeal.

J. W. Meeks, for appellant.

1. The purported transcript of the proceedings in bankruptcy was not admissible. 4 Ark. 129; 186 U. S. 200; 1 Gr. Ev. (15 ed.), § § 485, 507; 10 Enc. Ev., p. 1006; 33 Conn. 419; 3 Blackf. (Ind.) 241; 25 Am. Dec. 102; 136 Ala. 434; 70 Mo. App. 98. The attempted conveyance of the mortgage was void. J. T. Brooks had no interest in the mortgage note and account.

2. The court erred in directing a verdict and in refusing instructions No. 1 and 2 for defendant. The verdict should be set aside. There is nothing in it as to the value of the property *in solido* or separately. 83 Ark. 315; 43 *Id.* 535; 104 Ark. 375; 25 S. W. 11; 53 *Id.* 411; 10 *Id.* 504; 37 *Id.* 547; Kirby's Dig., § 6863; 78 Ark. 239.

3. It was error to exclude the book account. 95 Ark. 403. No foundation was laid. 111 Ark. 596; 103 *Id.* 528; 63 *Id.* 561-2; 94 *Id.* 189 190, etc.

4. It is error to direct a verdict where the plaintiff's case is made out only by his own testimony which is self-contradictory. 93 Ark. 272.

Campbell, Pope & Spikes, for appellee.

1. The orders in the bankruptcy proceedings were properly admitted. 4 Ark. 129.

2. There was no error in admitting the copy of the account secured by the mortgage. Kirby's Digest, § 5415.

3. Appellant can not raise the question that the assignment to J. T. Brooks was void. Only creditors can do this and appellant was a debtor. 52 Ark. 171; 47 *Id.* 301; 34 *Id.* 292; 19 *Id.* 650; Bigelow Fraud Conv., p. 193; 20 Cyc. 625b.

4. It was not necessary to assess the value of the property. The verdict was an instructed one; and for the balance due. Kirby's Digest, § § 6868-9. The verdict was for the property or balance due. 87 Ark. 5.

5. The evidence supports the verdict and there is no error.

WOOD, J., (after stating the facts). Appellant contends that since the assignment or transfer of the note and mortgage in suit, was adjudged by the referee in bankruptcy of the United States District Court to be fraudulent and void, that such assignment did not vest appellee Brooks with any title of the property in controversy and therefore that the appellee could not maintain this suit. This is not a good defense.

(1) "A conveyance to defraud creditors is good, as between parties and their privies but may be avoided by the creditors of the grantor. If they condone the fraud, the conveyance will stand against all comers." *Millington* v. *Hill, Fontaine & Co.,* 47 Ark. 301; *Bell* v. *Wilson,* 52 Ark. 171; *Bank of Little Rock* v. *Frank,* 63 Ark. 24. The creditors are not parties to this suit. They may have condoned the fraud.

The statute 3658 of Kirby's Digest, declaring conveyances and assignments in fraud of creditors void, was enacted for the benefit of creditors and not to enable the debtor to escape his liabilities. *Doster* v. *Manistee National Bank,* 67 Ark. 325; 20 Cyc., p. 625b. See Bigelow on Frauds and Conveyances, p. 192, section 14. The court did not err therefore in refusing appellant's prayer for instructions. The testimony as to verified statement of the account and as to copy of such account being furnished appellant before the institution of the suit, was but in compliance with the provision of section 5415 of Kirby's Digest, which was necessary in order to enable the appellee to maintain the suit. *Lawhorn* v. *Crow,* 92 Ark. 313.

(2) The verdict and judgment were in due form under section 6869, Kirby's Digest. In *Shaffstall* v. *Downey,* 87 Ark. 5, we held: "In replevin to recover a mortgaged chattel from the mortgagor, the mortgagee should have judgment for the property or the balance due on the mortgage." Citing § 6869 *supra.*

The undisputed evidence shows that there was a balance due on the note of $198.50. The affidavit recited

the value of the property and the appellant while denying verbally all the allegations of the affidavit did not testify that the value was not correctly stated therein. There was no issue under the affidavit, which served as the complaint, as to the value of the property; and under the above statute the court correctly rendered a judgment for possession of the property or the balance due under the mortgage.

(3) The appellant urges that the judgment should be reversed, because the bond did not follow the precise language of § 6863 of Kirby's Digest. The bondsmen did not appeal. The appellant was allowed to retain possession of the property under the bond that was executed and he is not in an attitude to complain because the bond in form contained more than is required for a retaining bond.

The contention that there was no testimony to show that the appellee held any account against the appellant, can not be sustained. Appellant did not plead *non est factum*. He admitted the execution of the note; and the undisputed testimony of Lee Brooks shows that he admitted that he owed the amount secured by the mortgage. If appellant had paid the note, the burden was upon him to show it.

There is no reversible error in the record and the judgment is therefore affirmed.

CARTER v. YOUNGER.

Opinion delivered April 3, 1916.

1. SEPARATION AGREEMENT—MOTION TO MAKE REPLY MORE SPECIFIC.—Appellee brought an action praying for dower in her deceased husband's estate. Appellants set up in their answer a separation agreement. Appellee replied, alleging an abrogation of the said agreement, and setting out certain facts, sustaining the reply. *Held*, a motion to require appellee to make her reply more specific, was properly overruled.

2. FORMER APPEAL—LAW OF SECOND APPEAL.—Where no new facts are developed on a second trial, the law as declared on a former appeal, is the law of the case, and is conclusive.
3. SEPARATION AGREEMENT—COMMUNICATION BETWEEN THE PARTIES—ABROGATION.—It is competent on the issue of whether a separation agreement has been abrogated, to prove that the husband, after the separation agreement was made, had requested the wife to go with him to a certain State, and to show what the wife said in response to such request.
4. EVIDENCE—SELF-SERVING DECLARATIONS—ABROGATION OF SEPARATION AGREEMENT.—In an action to have dower set aside to her, the wife can not by her own acts and words, prove her contention that a separation agreement which she had made with her husband, had been abrogated.
5. EVIDENCE—INCOMPETENT TESTIMONY—PREJUDICE.—The admission of incompetent testimony is not prejudicial, when the facts shown, are also established by other evidence which is competent and undisputed.
6. EVIDENCE—SELF-SERVING DECLARATIONS—ABROGATION OF SEPARATION AGREEMENT WITH DECEASED HUSBAND.—In an action by the widow to have dower set aside to her, appellants, the deceased husband's heirs, may prove transactions of the deceased with third parties, that in their nature are not self-serving, and which show that the separation agreement had not been abrogated.
7. EVIDENCE—ABROGATION OF SEPARATION AGREEMENT—STATEMENTS OF DECEASED.—The widow, claiming dower, may show acts and declarations of her deceased husband tending to show that a separation agreement between them had been abrogated.
8. EVIDENCE—DOWER—TRANSACTIONS WITH DECEASED.—In an action against the executors, by deceased's widow, to obtain dower, it was alleged that she was barred by reason of a separation agreement, *held*, testimony by the widow, as to services rendered her husband during his last illness, is incompetent.
9. SEPARATION AGREEMENT—ABROGATION—PROOF.—Whether a separation agreement had been abrogated by the parties, is a question of fact for the jury.

Appeal from Sebastian Circuit Court, Fort Smith District; *Paul Little*, Judge; reversed.

STATEMENT BY THE COURT.

Appellee petitioned the probate court to allot her dower in the personal property of the estate of her deceased husband, Sam Younger. The appellants challenged the jurisdiction of the court. They also set up that the appellee was not entitled to any dower, for the

reason that she had entered into a separation agreement whereby for a certain consideration appellee had agreed to relinquish her dower; that such agreement had been duly performed on the part of Younger during his lifetime.

Appellee admitted the separation agreement, but alleged that such agreement had been abrogated by mutual consent before the death of her husband.

This is the second appeal in the case. The issues, as set forth on the first appeal, are fully stated in *Carter* v. *Younger,* 112 Ark. 483.

On the former appeal we held that the probate court had jurisdiction to allot dower, and as incident to such jurisdiction it was within the province of the court to determine "whether the separation agreement which she admits she executed was afterwards abrogated by the parties who made it." We held that this was as far as the jurisdiction of the probate court extended, and that the only issue that should have been submitted to the jury was whether or not the separation agreement had been abrogated. The cause was reversed and remanded for a new trial.

On the last trial the appellants moved the court to require the appellee to make her reply more definite and certain by stating when and where the agreement of separation was abrogated, and when and where appellee and her husband lived subsequent to the alleged abrogation of the agreement. The court overruled the motion. Appellants then filed a motion to dismiss the cause, alleging "that the circuit court did not have jurisdiction to try all the issues raised by the pleadings in the case," which motion the court overruled.

The court sent the issue as to whether or not the agreement had been abrogated to the jury. The jury returned a verdict finding that the separation agreement had been abrogated. Judgment was entered in favor of the appellee, awarding her dower as prayed, and appellants duly prosecute this appeal. Other facts will be stated in the opinion.

James B. McDonough and *Geo. F. Youmans,* for appellants.

1. The motion to require plaintiff to make her reply more definite and certain by stating when and where the agreement of separation was abrogated should have been sustained. 96 Ark. 163; 71 *Id.* 562.

2. On the former appeal (112 Ark. 483), this court held that the court had jurisdiction to allot dower and determine whether the separation agreement had been abrogated. The court had no jurisdiction to determine all the issues raised. The cause should have been dismissed or transferred to equity. Brown on Jurisdiction, (2 ed.), § 2; 102 Ind. 233; 52 Am. Rep. 662; 33 Ark. 31; 88 *Id.* 1; 70 *Id.* 346; 48 *Id.* 151.

3. A party can not be permitted to corroborate himself by proving what he said or did at another time. *Res inter alioacta alteros nocere non debet* applies. Best, on Ev., § 506. This rule was repeatedly violated.

4. It was error to sustain objections to defendants' offer to prove by Tubb and Gacking conversations with Younger. Also the objections to the evidence of Gilbert and Kuopinsky. These were not self-serving declarations. Certainly the court could not enforce the rule against defendants and waive it in favor of plaintiff. 54 Ark. 25; Elliott on Appel. Proc., § § 626, 630.

5. The court erred in permitting witnesses to testify in regard to conversations with Sam Younger.

6. The ruling on the testimony of P. A. Ball as to payment of a note was error. It was incompetent. Kirby's Dig., § 3093; 67 Ark. 318.

7. Plaintiff's testimony was incompetent. *Ib.;* 115 Ark. 538; 82 Ark. 136; 108 *Id.* 171; 90 *Id.* 485; 83 *Id.* 210; 173 S. W. (Ky.) 1115; 117 Ark. 628; 84 S. E. 878; 93 Atl. 761.

8. The burden was on appellant to show that the separation agreement was abrogated. She has failed.

9. The court erred in its instructions.

Cravens & Cravens and *J. F. O'Melia,* for appellee.

1. Practically all the questions raised were settled on the former appeal. The motion to make the reply more definite and certain was properly overruled. It was not material when or where the agreement was abrogated. Kirby's Dig., § 6091; 102 Ark. 200.

2. The court settled the question of jurisdiction on the former appeal. 112 Ark. 483.

3. Mrs. Younger simply testified as to what she did. If erroneous, it was not prejudicial. 83 Ark. 337; 66 *Id.* 558; 79 *Id.* 346; 88 *Id.* 135; 103 *Id.* 87.

4. There was no error in excluding testimony of Tubbs, Gacking and others as to conversations with Sam Younger. 54 Ark. 25, only decides that one who first introduced incompetent evidence can not complain. The statements of Younger would be self-serving and made in the absence of plaintiff.

5. The testimony of Sweeney was competent. 112 Ark. 489.

6. The court's ruling on Ball's testimony was correct.

7. This is not a suit against the executors alone but also against others. Plaintiff's testimony was competent. Kirby's Dig., § 3093; 26 Ark. 476. Where appellants introduce incompetent evidence they can not complain because appellee was also permitted to introduce evidence of the same character. 88 Ark. 484; 67 *Id.* 47; 75 *Id.* 251.

8. The sole issue was the abrogation of the separation agreement and the burden was on appellee. The evidence is sufficient. 112 Ark. 488; 57 *Id.* 577; 15 *Id.* 540; 73 *Id.* 377; 75 *Id.* 111; 67 *Id.* 531; 76 *Id.* 326.

9. There is no error in the instructions. 112 Ark. 488; 31 *Id.* 576.

WOOD, J., (after stating the facts). (1) I. The court did not err in refusing to require the appellee to make her reply more definite and certain. The reply, after admitting the separation agreement, and setting up that the same had been abrogated and cancelled by mutual agree-

ment, alleged that appellee "again returned to live with her husband, Samuel Younger, deceased, by nursing, washing his night shirts, providing him with food and giving him every attention that it was possible for her to do." This sufficiently advised the appellants of the fact that the separation agreement had been abrogated by appellee's returning to live with her husband, and setting forth the acts which constituted her demeanor towards him showing that the separation agreement had been abrogated. The appellants could not have been surprised by any testimony that was developed by appellee on this issue. See *Hodges* v. *Bayley,* 102 Ark. 200.

As to when and where the abrogation took place and when and where the appellee and her husband lived together after the alleged separation agreement, were matters to be brought out by the evidence.

(2) II. Our decision on the former appeal, that the court had jurisdiction to allot dower, and, as incident thereto, the power to determine whether the separation agreement had been abrogated, was the law of the case and is conclusive, because no new facts were developed on the last trial which would call for the application of a different rule of law on that issue. The former decision is correct, but even if erroneous it would be controlling as the law of the case. See *Morgan Engineering Co.* v. *Cache River Drainage Dist.,* 122 Ark. 491, and cases there cited.

III. Appellee over the objection of appellants, testified that in January, 1911, "Mr. Sweeney came down and said Mr. Younger wanted me to live with him again and he came to see if I was willing to go to southern Texas or Florida with him. I told him yes, I would go with him anywhere, and to tell Mr. Younger."

(3) The court did not err in refusing to exclude this testimony for the appellee afterwards proved by the testimony of witness Sweeney that he was requested by Younger to see appellee and to ascertain if she was willing to go with him to Texas. The statements of appellee to which appellants objected were but responsive to

the inquiries made of her by Sweeney at the request of Younger. It was competent on the issue as to whether the separation agreement had been abrogated to prove that Younger after the separation agreement, had requested the appellee to go with him to Texas, and to show what the appellee said in response to such request.

IV. Appellee over the objection of appellants, was permitted to testify as follows: "I made preparation to get a house or a place to take my husband to. I went to see Joe Limberg about a place, and he told me he had one which would just suit me. I first went to see the place and had practically decided to take the place, but did not take it because the title was not good. I think it was about the first of January, 1911, I went to see Mr. Limberg. I made preparations to leave Fort Smith. I had made all preparations to go to southern Texas with Mr. Younger. The place in southern Texas I made preparations to go to was near Houston. I had made arrangements to leave at the time I was taken sick along in January, when he was in the hospital the last time."

(4) This testimony was self-serving and prejudicial. *Hamburg Bank* v. *George,* 92 Ark. 472, and authorities there cited. See *Fechheimer-Kiefer Company* v. *Kempner,* 116 Ark. 482. The testimony tended to prove by appellee's own acts and words her contention that the separation agreement had been abrogated.

(5) The testimony of appellee as to when and where she and Younger were married, how long they had lived together before the separation, and as to the separation agreement, even though incompetent, was not prejudicial, for the reason that the facts that were material which this testimony tended to prove, were established by other evidence which was competent and undisputed. *Bispham* v. *Turner,* 83 Ark. 331. See also, *Standard Life & Accident Ins. Co.* v. *Schmaltz,* 66 Ark. 588; *Benson* v. *State,* 103 Ark. 87; *LeGrand* v. *State,* 88 Ark. 135.

(6) V. Appellants offered to prove by several witnesses certain declarations of Younger made during, and a short time subsequent to the time, when it was claimed

by appellee that the separation agreement had been abrogated, tending to show that there had been no abrogation of such agreement. These were in the nature of self-serving declarations, and the ruling of the court in excluding them was correct. The appellants' heirs are privies in blood and estate with Samuel Younger, deceased. It was competent however for appellants to prove transactions of the deceased Younger with third parties that in their nature were not self-serving, and which tended to show that the separation agreement had not been abrogated. Such testimony does not contravene section 2 of the schedule of our Constitution.

(7) VI. The court did not err in permitting certain witnesses to testify in regard to conversations with Samuel Younger after the time of the alleged abrogation of the separation agreement, showing acts and declarations by him, tending to prove that such agreement had been abrogated. These were in the nature of declarations against interest, and appellee, the opposite party in the suit, against those claiming under Samuel Younger, was entitled to show the acts and declarations of Samuel Younger that tended to establish that such separation agreement had been abrogated.

VII. Appellants offered to prove by witness P. A. Ball the date of payment of a note for $525 executed by Samuel Younger to Amanda V. Younger. When this testimony was offered, the court remarked: "If you undertake to prove the date, they propose to show why it was paid, and the court will permit them to do so." The appellants thereupon objected to the ruling of the court, and did not introduce the testimony. There was no error prejudicial to appellants in the ruling of the court. If appellants had made the proof, then testimony, not given by the appellee herself, showing why the note was paid, would have been competent, and we must assume that the appellee would have only been permitted by the court to make such proof by competent testimony.

VIII. The court erred in permitting appellee herself to testify as to the services that she rendered for her hus-

band, Younger, while he was in the hospital; that she fed him, gave him his baths, laundered his clothes, and "did just the same for him as if I had had him in the house with me, as much as any wife could have done."

(8) This testimony related to transactions with the deceased husband and this is a suit by the appellee in which the executor, among others, is a party, and in which judgment may be rendered for or against the executor, because it is a controversy in regard to personal property which is in his possession.

Therefore, the admission of the above testimony violated the provision of section 2 of the schedule of the Constitution to the effect that in civil actions against executors, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with the testator unless called to testify by the opposite party.

In *Williams* v. *Walden,* 82 Ark. 136, we said: "The appellee testified in his own behalf as to the services he performed in nursing his father. The testimony of appellee related to transactions had with the intestate by which appellee attempts to recover upon the strength of a contract, express or implied, to pay for such services. * * * The testimony was improper." Citing cases.

The services which appellee testified she rendered her husband in this connection might have been controverted by the deceased, Younger, had he been living. See *Josephs* v. *Briant,* 108 Ark. 171.

(9) IX. Appellants contend that the evidence was insufficient to sustain the verdict. As was said by us on the former appeal, "It could serve no useful purpose to set out in detail the testimony tending to show on the one hand that the contract was abrogated and on the other that it was not. We are of the opinion that there was testimony to warrant a finding that the contract had been abrogated by the appellee and her husband in again assuming the marital relation, and that they sustained this relation to each other at the time of his death."

The testimony in this record is sufficient to sustain the verdict. As to whether or not the separation agreement had been abrogated was, under the evidence, an issue of fact for the jury, and the burden was upon the appellee to show that such agreement had been abrogated.

X. The last contention of appellants is that the court erred in its rulings upon instructions. We find no error in this regard, and no useful purpose could be served in discussing the rulings of the court in detail.

For the errors indicated, in admitting incompetent testimony, the judgment will be reversed and the cause remanded for a new trial.

FORT SMITH LUMBER COMPANY *v.* BAKER.

Opinion delivered April 3, 1916.

1. FRAUD AND DECEIT—SALE OF LAND—DAMAGES.—Where plaintiff purchased land from defendant because of certain representations, the measure of his damages was fixed when he first discovered the fraud on defendant's part.
2. FRAUD—PURCHASE OF LAND—FALSE REPRESENTATIONS.—A party who has been induced to enter into a contract for the purchase of property, by the false representations of the vendor concerning the quantity or quality of the property sold, may either annul the contract, and by returning, or offering to return the property purchased within a reasonable time, entitle himself to recover whatever he had paid upon the contract; or he may elect to retain the property, and sue for the damages which he has sustained.
3. FRAUD—PURCHASE OF LAND—DAMAGES.—Where the purchaser of land was induced to purchase the same by reason of fraudulent representations, and he elected to retain the land and sue the vendor for damages, the measure of damages is the difference between the real value of the property in its true condition, and the price at which he purchased it.

Appeal from Yell Circuit Court, Dardanelle District; *M. L. Davis,* Judge; reversed.

J. E. Chambers, for appellant.

The verdict is contrary to the law and evidence. The court erred in permitting plaintiff to recount his experiences in farming and in permitting the booklet to be

read as evidence. Also in permitting witnesses to testify that the lands were not suitable for general farming purposes and in giving and refusing instructions. There were no such representations. Appellee got what he wrote for—"fruit land." All the statements in the booklet were mere matters of opinion. 47 Ark. 148.

2. The principles of law in this case are well settled. The issues were not fairly presented to the jury. 11 Ark. 58; 47 *Id.* 148; 71 *Id.* 91.

The appellee, *pro se.*

1. There is no error in the instructions. They correctly state the law. 99 Ark. 438; 97 *Id.* 15; *Ib.* 265; 101 *Id.* 95; 104 *Id.* 388. If plaintiff was wilfully and knowingly deceived as to the quality of land and thereby injured he was entitled to recover. 99 Ark. 438; 97 *Id.* 265; 101 *Id.* 95; 104 *Id.* 388; 47 *Id.* 148.

2. The verdict is right and should stand. 87 Ark. 109; 79 *Id.* 608. Only the difference in value of the land and what it would have been worth had it been as represented was considered and allowed by the jury. There is no error.

HART, J. H. D. Baker sued the Fort Smith Lumber Company to recover damages which he alleges he sustained by reason of the defendant's false and fraudulent representations concerning forty acres of land which he purchased from it. The material facts are as follows:

The plaintiff lived in West Chester County in the State of New York. The defendant was a domestic corporation owning about 35,000 acres of cut-over lands in Yell and Perry counties in Arkansas, which it was advertising for sale. They advertised their land by an illustrated booklet entitled "The Up-Lands of Arkansas." It described in a general way all the lands owned by the defendant which they proposed to sell and also described other land situated in Yell County.

The pamphlet was gotten up in an attractive form and consisted of thirty-six pages of printed matter and of photographs. It stated that no exaggeration nor alluring details were included in their advertisement; that

simple, plain, unvarnished statements had been made throughout; that it was not necessary for the purchaser to see the land before entering into a contract for it; that the company had in its office a complete detailed report made by competent engineers and farming experts, giving full details of every forty acre tract, condition of the roads, the amount of timber, amount of waste land, elevations, springs, creeks, etc. The pamphlet also represented that the defendant would enter into a contract with purchasers to clear the land for $3 per acre, leaving firewood and timber for fence posts. It also contained a photograph of a house with a notation under it saying that the defendant would build a house similar to it for $150.

The plaintiff testified that he entered into correspondence with the defendant company and that it represented to him that the land was good farming land, and had a stream of water running through it; that it had a public road running by it; that he paid $480 for the forty acres of land in question and that a deed was executed to him before he ever saw the land; that he examined the land as soon as he came to Yell County and found that about one-half of it was situated on the side of a mountain and was too steep to be cultivated in fruit or anything else; that the balance of the land had no soil on it and was wholly unfit for farming purposes; that he went to the defendant and asked it to enter into a contract to clear his land and that the representatives of defendant declined to enter into a contract with him as advertised, saying that this proposition had been withdrawn before the deed to the land in question had ben executed; that he also asked the defendant company to construct him a house at the price stated in the circular and that it refused to do so.

On the part of the defendant it was shown that the lands were suitable for raising fruit and that the plaintiff had applied to them to purchase that character of land. Evidence was also adduced on the part of the defendant

tending to show that the land was worth the price the plaintiff paid for it.

The jury returned a verdict for the plaintiff in the sum of $400 and the defendant has appealed.

(1) After the plaintiff arrived in Arkansas he went on the land and attempted to cultivate it for two years. In other words he waited two years after he had seen the land before he brought this suit. He had the right to bring his action at any time within the period of time allowed by law but his measure of damages was fixed when he first discovered the fraud which he says had been perpetrated upon him. According to his own testimony, as soon as he went upon the land he ascertained that there was no public road going to it and no stream of water on it. He also saw that about one-half of the land was too steep to ever be cultivated and that the remaining one-half had no soil on it.

(2-3) A party who has been induced to enter into a contract for the purchase of property by the false representations of the vendor concerning the quantity or quality of the property sold, may have either of these remedies which he conceives is most to his interest to adopt. "He may annul the contract, and by returning or offering to return the property purchased within a reasonable time entitle himself to recover whatever he had paid upon the contract, or, he may elect to retain the property and sue for the damages he has sustained by reason of the false and fraudulent representations, and in this event the measure of damages would be the difference between the real value of the property, in its true condition, and the price at which he purchased it; or, to avoid a circuity of action and a multiplicity of suits, he may plead such damages in an action for the purchase money, and is entitled to have the same recouped from the price he agreed to pay." *Matlock* v. *Reppy,* 47 Ark. 148. In the present case the purchaser elected to retain the property and sue for the damages he sustained by reason of the alleged false and fraudulent representations of his vendor. Therefore his measure of damages was

the difference between the real value of the property in its true condition and the price at which he purchased it.

Counsel for the defendant asked the court to instruct the jury on the measure of damages in accordance with the principles just announced but the court refused to do so and the defendant saved his exceptions to the ruling of the court. On the other hand the court instructed the jury that if it found for the plaintiff it should find for him in whatever sum he had proved to the satisfaction of the jury that he had been damaged. This instruction was wrong and the jury should have been instructed on the measure of damages in accordance with the rule laid down in *Matlock* v. *Reppy, supra.*

Counsel for the defendant also asked the court to instruct the jury that the plaintiff was not entitled to recover damages by reason of the alleged failure of the defendant to clear plaintiff's land or for its alleged failure to build a house for plaintiff. The court refused to give this instruction and this was also error. As we have already seen the plaintiff's measure of damages was the difference between the price which he paid for the land and its real value in its true condition at the time of the sale.

For errors indicated in the opinion, the judgment will be reversed and the cause remanded for a new trial.

WARREN COTTON OIL & MANUFACTURING COMPANY *v.* GORMAN.

Opinion delivered April 3, 1916.

1. FERTILIZERS—INGREDIENTS—EVIDENCE OF RESULTS—USE OF.—In an action to recover on notes given for the purchase of fertilizer, it is competent to show results following its use, in order to determine whether the fertilizer contained the guaranteed ingredients, required by the statute, and stated in its formula and on its labels.

2. FERTILIZERS—INGREDIENTS—SALE.—Appellant sold certain fertilizer to the appellee, taking notes therefor; in an action on the said notes the appellant was entitled to a recovery, under Act 398, p. 995, Acts 1907, if the jury found that the fertilizer contained the ingredients named in the per cent. stated on the tags attached to

the sacks, or if there was no greater deficiency than three per cent.

3. FERTILIZERS—INGREDIENTS—VALUE.—In an action for the purchase price of certain fertilizer, if the same did not contain the percentages required by the statute, it is a question of fact whether the commodity sold was a commercial fertilizer, and had any value as such; if it had a value as such, then the recovery would be proportionate to that value, but if it did not contain the guaranteed percentages and had no value, then no recovery could be had.

4. FERTILIZER—INGREDIENTS—CERTIFICATE OF CHEMIST—PRIMA FACIE EVIDENCE.—Under Act 398, p. 995, Acts of 1907, the certificate of the chemist of the Department of Mines, Manufactures and Agriculture is admissible when offered in evidence, and shall be taken as *prima facie* true, on the issue of the chemical composition of the fertilizer, which is under consideration.

Appeal from Bradley Circuit Court; *Turner Butler*, Judge; affirmed.

D. A. Bradham, for appellant.

1. The evidence shows an absolute compliance with Act 398, Acts 1907, p. 995. The samples showed a commercial value in excess of the requirements of law except one and that one only one-eighth per cent, which under the act would not allow for a reduction. Hence a verdict should have been directed for appellant.

2. The court erred in refusing plaintiffs instruction No. 1, in modifying No. 1 asked by defendant and in giving an oral instruction upon its own motion. Acts 1907, 995; Acts 1913, p. 758. There was no warranty that the fertilizer was guaranteed to produce crops. 18 Southeastern, 267; 102 Am. St. 618, (3) note; 114 *Id.* 44; 74 Ark. 148; 26 N. W. 3; 140 S. W. (Tex.) 356; 35 Cyc. 409, (x); 64 S. E. 650; 108 Ark. 260.

3. The testimony of witnesses that the fertilizer had no beneficial results upon their cotton was incompetent and prejudicial. 78 Ark. 182; 75 *Id.* 463. The burden was on appellee to show that the fertilizer was not as guaranteed. The act makes the analysis admissible as evidence in the courts on any trial of an issue as to the merits of the fertilizer.

B. L. Herring, for appellee.

1. A manufacturer impliedly warrants that the goods purchased, are fit for the purposes for which they are sold. 33 L. R. A. (N. S.) 501; 64 Ga. 601; 48 Ark. 325; Acts 1907, 995. The act creates a warranty by statute. The instructions are correct. The evidence is convincing that the fertilizer was without value for the purpose sold—a cotton fertilizer. The act could not make the official analysis *conclusive* evidence, but only *prima facie.* 32 Ark. 131; 33 *Id.* 816.

2. The evidence was competent. 32 Ark. 131; 33 *Id.* 816; 3 Enc. Ev. 291 and notes. Any material evidence may be sustained by circumstantial evidence. 103 Ark. 61; 16 Cyc. 1111; 42 Ark. 542 554; 16 Cyc. 1139c.

SMITH, J. This suit was begun in the court of a justice of the peace to enforce the collection of two notes, of $40 each, given in payment of the purchase price of eighty sacks of fertilizer sold by appellant to appellee in the spring of 1913. The fertilizer was known as "Cotton King," and a certificate had been issued by the Bureau of Mines, Manufactures and Agriculture authorizing appellant to sell this and other brands of fertilizer. The certificate relating to this fertilizer gave the guaranteed chemical composition of the same, showing the guaranteed percentage of phosphoric acid, nitrogen and potash, which constituents made the fertilizer. The department had made commercial analysis of four samples of this fertilizer and each analysis had shown the requisite per cent. of the ingredients named as required by the law.

It is insisted on appellant's behalf that the fertilizer had been mixed at its plant in accordance with its formula, and, therefore, contained the requisite elements to make the fertilizer which it was authorized by the Bureau of Mines, Manufactures and Agriculture, to sell. Appellee offered the evidence of his farm-hand and a number of farmers to the effect that they had used this fertilizer and had obtained no satisfactory results from its use.

The instructions given and refused indicate the respective theories of the parties at the trial. Appellant's

theory was that the only question in the case was whether the fertilizer contained the ingredients named and that it was, therefore, incompetent and prejudicial for appellee to be allowed to show that satisfactory results were not obtained. On the other hand, appellee's position was that the fertilizer should, not only contain these ingredients, but should also have some value as a fertilizer and that no recovery could be had unless it had such value. Appellant asked the following instruction, numbered 1:

"You are instructed that under the law in this case the only defense the defendant may offer is that the fertilizer did not come up to the guaranteed commercial value, and if you find from the evidence that the fertilizer did not fall more than 3 per cent. below the guaranteed commercial value, or come up to the guaranteed commercial value, you will deduct the amount of the deficiency in commercial value from the face of the note and give a verdict for the amount of the face of the note less this amount. In any event, your verdict will be for the plaintiff in some amount."

This instruction was modified by striking out the words, "in any event," and by adding to the instruction the clause, "provided, you find the fertilizer had any value as such." Other instructions given and refused embody the same views of the law.

The instruction set out was not correct in directing the jury to find for appellee in any event in some sum and, was, therefore, properly refused by the court.

Section 2 of Act No. 398, Acts 1907, p. 995, regulating the inspection and sale of commercial fertilizers provides that the guaranteed analysis of the fertilizer giving the valuable constituents of the fertilizer in the minimum percentage only, shall be branded or printed on each package of the fertilizer; and it is not denied that the sacks sold appellee were so branded.

Section 3 of the same act provides that, if any commercial fertilizer offered for sale in this State shall, upon official analysis, prove deficient in any of its ingredients as guaranteed and branded upon the sacks and, if by rea-

son of any such deficiency, the commercial value thereof shall fall 3 per cent. below the guaranteed total commercial value of such fertilizer, or fertilizer material, then any note or obligation given in payment thereof shall be collected by law only for the amount of the actual total commercial value as ascertained by said official analysis.

(1) Our act on the sale of commercial fertilizers appears to be so similar to the law of Georgia on this subject as to suggest that our statute was borrowed from that State. Georgia Laws 1901, p. 65. Section 3 of our act is practically identical with section 3 of the Georgia statute except that the Georgia statute provides for a cause of action on the part of the consumer against the seller for any damages occasioned by reason of such deficiency. The Supreme Court of that State in the case of *Cooper* v. *National Fertilizer Co.,* 64 S. E. 650, had occasion to construe the provision in regard to a variance of less than 3 per cent. between the total commercial value of the fertilizer ingredients as guaranteed and as printed on the sacks, and held that its effect was to render immaterial any variance not exceeding 3 per cent. But the act contemplates of course, that the ingredients stamped on the sack shall have been used in a sufficiently substantial proportion to the per cent. guaranteed for the commodity to be a fertilizer. As to whether this is true or not is, of course, always a question of fact which may be inquired into and any evidence which tends to elucidate that question is competent. So, here, the evidence of the farmers and of the hired hand was competent. As its name would imply the fertilizer was sold to be used by cotton growers, and it was permissible for persons who had used it properly to state the results obtained, and witnesses testified here that they were accustomed to the use of fertilizers and used this fertilizer in a proper manner. The jury was warranted in drawing the inference that, if the fertilizer contained the ingredients advertised and guaranteed, or contained them in some substantial amount, it would help make cotton, and that, if it did not do so, it did not contain the specified ingredients or any

considerable proportion thereof. As tending, therefore, to show that the fertilizer did not contain the guaranteed ingredients it was competent to show results flowing from its use; but the jury was told that this was the only defense that could be made to the notes. The question at issue was, not whether the fertilizer was a valuable one, but whether it contained the guaranteed ingredients in the per cent. stated, or in sufficient quantities to be a fertilizer at all.

(2-3) An instruction should have been given, had one been asked, to find for the appellant for the amount of the notes if the jury found the fertilizer contained the ingredients named in the per cent. stated on the tags attached to the sacks, or to do so if there was no greater deficiency than 3 per cent. But the act has not undertaken to make a greater deficiency than 3 per cent. immaterial and if the fertilizer did not, in fact, contain the per cent. stated, or within 3 per cent. of that amount, it then became and was a question of fact whether the commodity sold was a commercial fertilizer and had a value as such. If it had a value as such then the recovery should be proportionate to that value, but if it did not contain the guaranteed per cent. and had no value, then, of course, a recovery would not have been proper in any sum. The instruction as asked did not present this view of the law and there was, therefore, no error in refusing to give it as asked, and we think the instruction as modified fairly conforms to this view under the issues made and the respective theories of the parties urged at the trial.

(4) It is finally urged that the evidence of the farmers was incompetent under section 12 of this act and that the certificate of the chemist of the Department of Mines, Manufactures and Agriculture is made the only, and the conclusive, evidence of the composition of the fertilizer. In answer to this it may be said, first, that no certificate of this chemist showing the analysis of this fertilizer was offered in evidence. In further answer it may be said that section 5 of this act makes the tag attached to the package

prima facie evidence that the seller has complied with the requirements of this act. The language employed in section 12 making the analysis of the chemist admissible in evidence in any of the courts of this State on the trial of any issue involving the merits of any such fertilizer must be construed as making this certificate *prima facie* evidence of such merits. In providing what shall be evidence the Legislature has no greater authority than this and we interpret the language which the Legislature employed as meaning only that this certificate shall be admissible when offered in evidence and shall be taken as *prima facie* true. *Cairo & F. R. Co.* v. *Parks,* 32 Ark. 131; *State* v. *Newton,* 33 Ark. 284; *L. R. & F. S. Ry. Co.* v. *Payne,* 33 Ark. 820; *Clayton* v. *Johnson,* 36 Ark. 414, *Smith* v. *Leach,* 44 Ark. 292; *Taylor* v. *State,* 65 Ark. 602; *Oliver* v. *C. R. I. & P. Ry. Co.,* 89 Ark. 471; *Winn* v. *Whitehouse,* 96 Ark. 44.

Finding no prejudicial error the judgment will be affirmed.

STUART v. ELK HORN BANK & TRUST COMPANY.

Opinion delivered April 3, 1916.

1. SALES—BULK SALES LAW—CONSTITUTIONALITY.—The Bulk Sales Law, Act No. 88, Acts of 1913, entitled "An Act to prevent fraudulent sales of stocks of merchandise," *held* to be a valid exercise of the State's police power, and intended to protect the rights of creditors from fraudulent sales of property upon which credit has been extended.
2. SALES—BULK SALES LAW—NOTICE TO CREDITORS.—The purchaser of an entire stock of merchandise, is required, under the Bulk Sales Law, to notify his vendor's creditors of his intended purchase, and he is not excused therefrom, by the fact that he assumed, and paid all the debts, of which he had knowledge.
3. SALES—BULK SALES ACT—LIABILITY OF PURCHASER.—The Bulk Sales Act does not make the person who fails to comply with its provisions liable for all the debts of the seller; it treats the sale as being void, and the purchaser as being a receiver, and his possession as being for the benefit of all the creditors. He is responsible

only for the property purchased; if he sells and gets enough to pay all the debts, he must pay them all; if the property is not sufficient for that purpose he must pay the creditors *pro rata* as any other receiver would do.

4. SALES—BULK SALES ACT—LITIGATION—COSTS.—The purchaser of a stock of merchandise, who becomes liable to his vendor's creditors under the Bulk Sales Act, by asserting title to the property purchased, will be liable for the costs of resulting litigation.

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

McMillan & McMillan, for appellant.

1. The Bulk Sale law is unconstitutional. Acts 1913, 326. It conflicts with article 2, section 2 and article 2, section 18, Declaration of Rights; 211 U. S. 295; 235 Ill. 40; 125 Am. St. 184, 189; 236 Ill. 157.

2. Defendant, Stuart complied with the law, if constitutional. Am. Ann. Cas. 1915, C, p. 415; 140 Ga. 10; 78 S. E. 609; 45 L. R. A. (N. S.) 492; 70 Ore. 182; 138 Pac. 847. Stuart knew nothing of the bank's debt. It was not defrauded or in any way defeated in the collection of its debt. When he learned of the debt he offered to turn over to it all he had left of the stock, all of the fixtures, counters, shelving, etc.

3. It was error to render judgment for all the costs against Stuart and the judgment is excessive.

Hardage & Wilson, John H. Crawford and *Dwight H. Crawford,* for appellee.

1. The Bulk Sales Act is constitutional. 217 U. S. 466, 468; 263 Ill. 363; Ann. Cas. 1915 C. 411; 60 L. R. A. 947; 185 Mass. 18; 71 S. W. 50; 76 Conn. 515; 20 L. R. A. (N. S.) 160; 15 Okla. 477; 34 *Id.* 662; 46 L. R. A. (N. S.) 455; 49 *Id.* 600; 146 S. W. 874; 110 Me. 163; 177 Ind. 1; Ann. Cas. 1914 C. 708; 26 Ia. 438; 118 Wisc. 424; 145 Mich. 721; 99 Minn. 22; 93 Md. 431; 211 U. S. 489; 217 *Id.* 461; Ann. Cas. 1915 C. 414; 179 Ind. 509; 180 *Id.* 536; 146 N. W. 356; 49 Mont. 307; 86 N. J. L. 97; 70 Ore. 182; 145 Pac. 246, and many others.

2. Appellant did not comply with the act. He litigated the claim and lost and the costs were properly adjudged against him.

SMITH, J. One J. M. Henderson owned a small retail grocery business in Arkadelphia and on November 17, 1914, made a bulk sale of his stock of goods and fixtures to appellant. The consideration was $200, of which $30 was cash, and the balance consisted of claims due creditors who had furnished goods amounting to $118.09, which appellant assumed, and an item of $25 for rent, and a telephone bill of $2.50, which appellant also assumed.

Appellant testified that the stock of goods invoiced $204 and was worth 60 per cent. of that amount and that the fixtures were worth $40. But there was evidence that this property was worth $300. Upon the consummation of the sale appellee sued appellant for the amount of its debt against Henderson, and recovered judgment for the debt with interest and costs amounting to $223.35, and, in addition, the court gave judgment against appellant for all costs of the receivership and of the suit.

On the date of the sale Henderson delivered to appellant an affidavit purporting to contain a list of his creditors and the amount due each of them. Of these creditors two lived in Arkadelphia, one in Texarkana, and three in Little Rock. Appellee's banking house was across the street and four or five doors east from Henderson's place of business, and appellant knew nothing of the bank's debt until after his purchase. It was shown that Henderson's debt to the appellee bank was due November 6, and when it was not paid Henderson applied for an extension, which was not granted because the terms upon which the extension was promised were never complied with. In these negotiations Henderson told the cashier of the bank that he might sell out his business, but he did not state positively that he would do so. It is insisted that as this conversation occurred more than ten days before the date of the sale that this information supplied the notice required by the Bulk Sales Act of the intention to sell, and it is urged that it should be so held

in view of the fact that appellant assumed and agreed to pay the debts of all the creditors of whom he had notice, and that neither Henderson's books nor his affidavit showed the bank to be a creditor and appellant could not, therefore, have given it notice. It is urged by appellant, not only that he substantially complied with the requirements of Act No. 88 of the Acts of 1913 entitled "An Act to prevent fraudulent sales of stocks of merchandise," and commonly known as the Bulk Sales law, but he also insists that the law is unconstitutional and he earnestly contends that it should be so held if it is to be so construed as to make him liable to appellee under the facts of this case.

(1) We think the law is not unconstitutional. It appears from the briefs of learned counsel in the case that similar legislation has been enacted in nearly all of the states and by the Federal Government in the District of Columbia, and the appellate courts of nearly all these states have been called on to pass upon the constitutionality of the legislation. Many of these cases are cited in the briefs. In the early history of this legislation the courts do not appear to have been unanimous in upholding it. But our attention has not been called to any case holding the legislation unconstitutional since the opinion of the Supreme Court of the United States in the case of *Lemieux* v. *Young,* 211 U. S. 489. The necessity for such legislation is indicated by the fact that the Legislatures of nearly all the states have seen proper to enact it, and it has been pretty generally sustained as a valid exercise of the State's police power. The various acts on this question are not identical in their provisions, but they are all directed against the same evil, viz., the prevention of fraud in the sale and transfer of merchandise in bulk. Appellant attacks our statute upon the ground that it contravenes section 2, article 2, of our Constitution, which guarantees the right of acquiring, possessing, and protecting property; and also that it contravenes section 18 of the same article, which provides that the General Assembly shall not grant to any citizen, or

class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens. Similar provisions are contained in the constitutions of other states which have enacted this legislation, and it has been generally held by the courts of those states that the legislation does not contravene those constitutional provisions. It is pointed out that this legislation does not prevent the retail dealer who owes no debts from lawfully selling his entire stock without giving the required notice, and one may make a valid sale without such notice by paying his debts even after the sale is made, and that it is the insolvent and fraudulent vendors who are chiefly affected, and that the legislation was intended for the protection of creditors against sales by them of their entire stock at a single transaction and not in the regular course of business. It may be true that compliance with this law will defeat some sales which would otherwise be made and which would not be fraudulent if made; but any exercise of the State's police power operates to abridge in some measure the individual's freedom of action. Without reviewing the cases on this subject, or repeating the arguments made in upholding the law, we announce our conclusion to be that this legislation is a valid exercise of the police power, in that it is intended to protect the rights of creditors from fraudulent sales of property upon which credit was extended.

(2) Nor do we agree with appellant that he has substantially complied with the requirements of this act. The act provides that an inventory must be made before the sale, and must be preserved. No inventory here was made before the sale. The act also provides that the seller shall furnish a written list of the names and addresses of his creditors with the amount of the indebtedness due to each not less than ten days prior to the sale and delivery and payment; whereas the affidavit here was made on the day of the sale. It is also provided that ten days before taking possession of the bulk stock, or paying the money therefor, the purchaser shall notify personally, or by registered mail, every creditor whose name and ad-

dress is on said list, or of whom he has any knowledge, of the terms of the sale. Appellant admits that he did not comply with these provisions, but insists that he was not thereby made liable because he has assumed and paid all the debts of which he was advised, and that notice to these creditors, therefore, could have accomplished nothing, and that even though he had sent notice to the creditors of whom he had information, that would have profited appellee nothing, as its claim was not included in the list of creditors furnished appellant by Henderson. As sustaining his position appellant quotes from a note to the case of *Johnson* v. *Beloosky,* 37 Am. & Eng. Ann. Cas., p. 415, as follows:

"The Oregon statute providing that sales in bulk of merchandise shall be conclusively presumed to be fraudulent and void unless certain conditions are first complied with, was upheld in *Coach* v. *Gage,* 70 Ore. 182, 138 Pac. 847. The court, overruling the contention that the unintentional omission of the name of a creditor from the list furnished to the vendee was a failure to comply with the statute, held that such a construction of the statute would render it void as in violation of the due process clause of the Federal Constitution, saying: 'The act in question, in our judgment, imposes upon the purchaser (1) the duty to demand a written statement, under oath, of the vendor of the names and addresses of his creditors, and (2) upon the receipt of such list to notify the persons named therein of the proposed purchase. For an intentional breach of either of these duties, it was entirely competent for the Legislature by way of penalty for such breach, and to secure the faithful performance of such duty, to declare that their nonperformance should constitute conclusive evidence of fraud, and render the sale void as to creditors, but it is not in the power of the Legislature to make a breach of duty by the vendor evidence of fraud in the vendee. To hold the law means that an omission of the name of a creditor by the vendor without the knowledge of the vendee renders the transaction void as to him would be to hold that it was the intent of the Legislature to or-

dain that a fraud committed by the vendor upon the vendee by falsifying the list of creditors should be conclusively presumed to be the fraud of the person so defrauded and deceived. Such a construction would be so contrary to every principle of law and good morals that it is inconceivable that the Legislature intended it and would be such an arbitrary and unreasonable exercise of the police power as to amount to a taking of the vendee's property without due process of law. It is a rule of interpretation that, where a statute is open to two constructions, one of which will render it unreasonable and unconstitutional, while the other will harmonize with reason, justice, and constitutional prescriptions, the latter construction will be adopted.' In *International Silver Co.* v. *Hull,* 140 Ga. 10, 78 S. E. 609, 45 L. R. A. (N. S.) 492, a similar contention arising from the omission of the name of a creditor from the list furnished the vendee was considered, and it was held that such omission did not render the sale void under the Georgia statute.''

We can and do approve the reasoning of the Oregon court in construing the provisions of their statute, which are similar to our own; but what was there said is not applicable to the facts of this case. Here there was no list furnished for the time required by law, nor was the notice given as required by law to those creditors whose names were furnished. This failure is not excused by the fact that appellant assumed, and has paid, all those creditors of whom he had knowledge. The very purpose of the act is to give publicity to those who have the right to know of intended sales by insolvent debtors and to prevent clandestine and quickly made sales. It is highly probable that if notice is given for the time and in the manner required by the act to the creditors whose names are furnished, that persons interested, although not, in fact, notified, may learn, through commercial agencies or otherwise, of the debtor's contemplated action. It is true, of course, that all creditors may not become so advised, but the chances of fraudulent sales being committed will be greatly minimized if the law is complied with. The

law only requires of the purchaser that he comply with its provisions and, when he has done so, he is absolved from liability to any creditor who may not have received notice. Not having complied with the law appellant can not excuse his liability by showing that he knew nothing of appellee's claim.

(3) We do agree with appellant, however, in his contention that judgment was rendered against him for an excessive amount. The Bulk Sales Act does not make the person who fails to comply with its provisions liable for all the debts of the seller. It treats the sale as being void and the purchaser as being a receiver and his possession as being for the benefit of all the creditors. He is like any other receiver so far as his liability is concerned. He is responsible for the property purchased, but for that only. If he gets enough property to pay all the debts, he must pay them all. If the property is not sufficient for that purpose he must pay the creditors *pro rata* as any other receiver would do.

(4) After the loss of considerable time and effort appellant disposed of the property received for $290, and this appears to have been a very fair price for it. Of course, one who wrongfully takes possession of property and disposes of it is liable for its actual value, whether he receives its value or not when he disposes of it; but the property in question appears to have been disposed of advantageously, and it is improper to charge appellant with a greater sum than he received. There appears to have been due by Henderson on his goods the sum of $118.09, and $27.50 for rent of building and telephone. These items, with the debt of $200 due appellee, make a total indebtedness of $345.59. Each creditor, therefore, was entitled to be paid 83 per cent. of his indebtedness only, and appellee should, therefore, have had judgment for only 83 per cent. of its debt, or the sum of $166. The court below rendered judgment against appellant for all the costs and this action is questioned by him; but we think the court was correct in so assessing the costs. Had appellant conceded his liability as receiver and disposed

of the property accordingly, there would have been no litigation; but he did not do so. Upon the contrary, he asserted title as a purchaser, and this litigation resulted, and he must be charged with all costs except those of this appeal. The judgment in appellee's favor will be reduced to the sum of $166, and interest will be calculated thereon from the date of the bulk sale to appellant.

DAVID v. CHAMBERS.

Opinion delivered February 14, 1916.

SUBSCRIPTION CONTRACTS—VOLUNTARY SUBSCRIPTION—LIABILITY OF SUBSCRIBER.—Defendant, with others, signed a subscription to pay a certain sum per month to a voluntary association. *Held*, where all the signers who had paid their subscriptions joined as plaintiffs, together with the association, in an action to compel the defendant to pay the amount of his subscription, the complaint alleging that the subscriptions were made in consideration of each other, and that the association had incurred expenses upon the faith thereof, that a demurrer to the complaint was improperly sustained.

Appeal from Sebastian Circuit Court, Greenwood District; *Paul Little*, Judge; reversed.

STATEMENT BY THE COURT.

Appellants brought suit in the justice court against appellees to collect certain amounts alleged to be due upon their contract of subscription made for the benefit of the Retail Merchants Association of Hartford. The complaint alleges that appellants with others are members of said association; that on or about the 15th day of October, 1914, defendant entered into and signed a certain contract whereby he promised and agreed to pay to the Retail Merchants Association the sum of $2.50 per month for a period of six months for the benefit of such association, and to pay such other dues as might be assessed by said association; that the plaintiffs with others promised and signed the same contract aforesaid, a copy of which was exhibited with the complaint; "the certain sums set opposite their names, that relying upon the

promise in said contract by said defendant, these plaintiffs carried out their contract of payment and incurred expenses in reliance upon said promise of said defendant, and further these plaintiffs with others, incurred liability by paying the indebtedness of said association and other expenses incident to and in furtherance of the said association's interest and benefit."

It is alleged that the defendant W. C. Chambers failed and refused to pay the sums promised in said contract; that the sum of $6.25 is now due thereon and demand has been made upon said defendant and he still refuses to pay same, the time set for the payment of his subscription having passed. The contract of subscription reads: "We, the undersigned members of the Retail Merchants Association of Hartford, Arkansas, agree to pay the amounts set opposite our names, for a period of six months, for the benefit of the association, and such other dues as may be assessed from time to time," then follows signatures.

Upon motion, other subscribers to the contract who had not been made defendants, were made plaintiffs. A demurrer was interposed and sustained to the complaint and an appeal taken to the circuit court, where the demurrer was repropounded and sustained by the circuit court, and the plaintiffs declining to plead further the complaint was dismissed, from which judgment this appeal is prosecuted.

R. A. Rowe, for appellants.

1. The court erred in sustaining the demurrer. It was defective in not pointing out any defect of parties. Bliss on Code Pl. (3 ed.), par. 411; Sutherland on Pleadings, Vol. 1, par. 276.

2. It was not necessary that all the members of the association should be named; a few could sue for all. Kirby's Dig., § § 6002-3; 104 Wisc. 464; 26 Kans. 476; 81 *Id.* 206; 35 Pa. Sup. Ct. 263; 101 Ark. 172.

3. The consideration was sufficient. Liability had been incurred and money spent. 1 Beach on Cont. 214,

par. 178; Anson on Cont. (2 ed.) 94; 27 A. & E. Enc. Law, 277; 38 Pa. Sup. Ct. 350; 17 N. H. 151; 21 *Id.* 247; 64 Ark. 627; 37 Cyc. 485-6.

John W. Goolsby, for appellees.

The complaint stated no cause of action. Plaintiff had no capacity to sue and there is a defect of parties as the suit is not in the names of the real parties. Voluntary associations are regarded as partnerships. 67 Atl. 855; 28 R. I. 430; 142 N. W. 1034; 75 N. E. 877; 66 Neb. 252; 109 N. W. 608; 94 Minn. 351; 22 Enc. Pl. & Pr., § 242.

KIRBY, J., (after stating the facts). It appears that suits were brought separately against several different subscribers and that they were consolidated for a hearing. The demurrer questions the capacity of the plaintiffs to sue and challenges the sufficiency of the complaint, alleging that it does not state facts sufficient to constitute a cause of action.

The complaint alleges that the defendant agreed to pay the Retail Merchants Association the amount subscribed per month for the benefit of the said association, and such other dues as might be assessed by said association; and that the plaintiffs, with others, signed and promised, in the same contract, certain sums set opposite their names, and that relying upon the promises made in the contract by the defendant, the plaintiffs carried out their contract for payment and incurred expenses in reliance upon said promise, and with others incurred liability in paying the expenses of the association and other expenses incident to and in furtherance of said association's interest and benefit.

It appears well established that voluntary subscriptions, when considered alone and unsupported by any other element, are unenforceable, being merely a gratuitous promise to furnish a sum of money for designated purposes. 1 Elliott on Contracts, sections 227, 228. The same writer at section 229, says: Voluntary subscriptions are upheld on the ground that one gratuitous subscription is the consideration for another. "In

many cases, it is stated, that when several agree to contribute to a common object, which they wish to accomplish, the promise of each is a good consideration for the promise of the others." The writer then says, this is too broad a statement of the rule, and concludes "unless the promises are given in consideration of each other they do not constitute a contract." See also 1 Parsons on Contracts, 489-493; *Miller* v. *Ballard,* 46 Ill. 377.

The complaint sufficiently alleges that the subscriptions were voluntarily made at the same time and given in consideration of each other. The allegations are, further, that plaintiffs, who were members of the voluntary association, for the benefit of which the subscriptions were all made, had relied upon the faith thereof and made expenditures for the association and incurred liability by paying its debts in reliance thereupon, and sufficiently stated a cause of action.

Since all the signers who had paid their subscriptions were made parties plaintiff, and also brought the action for the Retail Merchants Association, for the benefit of which the subscriptions were made, the action could be maintained. The defendant could not again be compelled to pay the subscription at the suit of any one else and can not complain that he is required to do so at the suit of the voluntary organization, for whose benefit the subscription was made and of the other subscribers who had paid their subscriptions and incurred liability for the association in reliance upon the subscription and contract of the defendant to pay in consideration of the promises made by them.

The court erred in sustaining the demurrer and its judgment is reversed and the cause remanded with instructions to overrule the demurrer and for further proceedings according to law.

McCULLOCH, C. J., (dissenting). I raise no question as to the correctness of the principles of law announced in the opinion, but I think they are not applicable in this

case. There is no intimation in the complaint, to say nothing of a direct allegation, that the Retail Merchants Association is a body corporate and capable of contracting or of suing and being sued, so the cause of action of appellants is not aided by the allegation that the suit is maintained for the benefit of that association.

There is no allegation at all concerning the identity of said association. It is not shown who compose the association or whether it is a copartnership or a corporation. The only allegations of the complaint bearing on the identity of the association are that the plaintiffs "with others, are members of the Retail Merchants Association of Hartford, Arkansas," and that the defendants "entered into and signed a certain contract whereby they promised to pay to the Retail Merchants Association" a sum mentioned "for the benefit of said association." Those allegations are not sufficient to show authority of appellants to sue for the benefit of the association, whatever its nature may be.

The only allegation in the complaint tending to show interest of appellants in the subject-matter of the contract is that "relying on the promise in said contract by said defendants, these plaintiffs carried out their contract of payment and incurred expenses in reliance upon said promise of said defendants, and further, these plaintiffs with others, incurred liability by paying the indebtedness of said association and other expenses incident to and in furtherance of said association's interest and benefit." What expense, it may well be asked, did appellants incur in reliance on the promises of appellee, and what did they do in performance of said contract? What will they do with the funds they seek to recover from appellee? What sums of money, if any, have they paid out in reliance on the promises of appellee? The complaint is entirely silent as to those important matters.

It seems to me, therefore, that appellants stated no cause of action in their complaint, and that the trial court properly sustained the demurrer.

WOOD, J., concurs.

CHURCHILL v. VAUGHAN.

Opinion delivered April 10, 1916.

1. ROAD DISTRICTS—FORMATION—FILING MAPS, ETC., AND ESTIMATES.—A road district, attempted to be formed under Act 338, Acts of 1915, will be held not to have been properly formed where the terms of the statute were not complied with in respect to procuring and filing with the county court, a survey of the road and maps, plans, specifications and estimates made by the engineer of the State Highway Commission.
2. ROAD DISTRICTS—FORMATION—SIGNATURES OF PROPERTY OWNERS.—The establishment of a road district depends upon a finding by the court that the petition therefor is signed by either a majority in land value, acreage or in number of land owners within the proposed district, and that the establishment of the district is found to be to the best interests of the county and land owners in said district.
3. ROAD DISTRICTS—VALIDITY OF ORGANIZATION—APPEAL—WORK PENDING ADJUDICATION.—Where a road district is sought to be organized under Act 338, Acts of 1915, and is established by the county court, work is not suspended pending an appeal to the circuit court, and unless the appeal be successful in obtaining a final judgment of the appellate court against the establishment of the district, proceedings had, while the appeal was pending, are valid.
4. ROAD DISTRICTS—FORMATION—APPEAL—INVALIDITY.—The establishment of a road district should be declared void, when an appeal taken from the county court to the circuit court is sustained, although the appeal was not taken by all the land owners within the proposed district.

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

Brundidge & Neelly, for appellants.

1. The appeal of Ray and Howel affected their lands and the district remained in full force as to all property owners who did not appeal. Acts 1915, Act 338, § 3, etc. 24 N. E. 131, 175; 2 Words & Phrases, 536.

2. The finding of the county court as to acreage and benefits was final and conclusive, and it appears there was a sufficient number of signers and the district was for the best interest of the county and district. Unless all the owners appealed the court could not determine whether the district was beneficial or not, or whether a majority had signed or not. Page & Jones on Tax. by Assessments, Vol. 2, p. 2011, § 1368.

3. The burden was on appellants to show that it was not for the best interests of the county and that the requisite number of signers had not signed the petition. 113 Ark. 496.

P. R. Andrews and *Eugene Cypert,* for appellees.

1. This case was rightfully appealed to the circuit court and stood for trial *de novo* on the issues made below. Const. 1874, Art. 7, § 33; Kirby's Digest, § 1492.

2. The only issues were, Did the petition contain a majority in acreage or value and was it for the best interests of the district or county. On both these the circuit court found for the remonstrants. The case 24 N. E. 131 is not in point. This court has held that any person can show that a statute has not been complied with. 104 Ark. 145; 119 Ark. 154. The finding below should not be disturbed. 104 Ark. 145; 116 Ark. 30.

3. The petition did not contain a majority and the formation of the district was for the best interest of the land owners. The court so found and it is conclusive. 116 Ark. 30; 106 Ark. 304.

McCULLOCH, C. J. Certain owners of real estate in White County presented a petition to the county court for the creation and establishment of a road improvement district pursuant to the terms of Act No. 338 of the General Assembly of 1915. Descriptions of the road to be constructed, and of the region to be included within the boundaries of the district, were set forth in the petition, and a plat of the proposed district and route of the road was also filed with the petition. A considerable number of owners of real property, which would have been affected by the creation of the district, filed a counter petition protesting against the establishment of the district. The county court heard the matter upon the petition and counter petition and made an order creating and establishing the district in accordance with the prayer of the original petition. Two of the landowners, who were among those who remonstrated against the creation of the district, took an appeal to the circuit court. They

filed the affidavit and bond prescribed by the statute. The matter was heard by the circuit court upon the petition and counter petition and upon oral testimony, and the court found that the original petition did not contain the signatures of a majority of the owners of land in the district, and also found that it was not to the best interest of the county, or the landowners within the proposed district to establish the district, and denied the prayer of the petition. Judgment was rendered by the court that said district "be not established as a road improvement district in and for White County, Arkansas." The case is brought here for review on the appeal of the original petitioners.

(1) The case may be disposed of by following the decision of this court in the recent case of *Lamberson* v. *Collins,* 123 Ark. 205, the record failing to show that the terms of the statute were complied with in respect to procuring and filing with the county court a survey of the road and maps, plans, specifications and estimates made by the engineer of the State Highway Commission.

(2) In addition to that, the judgment must be affirmed for the reason that the evidence was sufficient to support the finding of the circuit court that the petition was not signed by a majority of the owners of land within the proposed district, and that it was not to the best interests of the county and of the landowners to establish the district. The evidence on those subjects is conflicting, and there being sufficient to support the finding of the circuit judge it is our duty not to disturb it. *Jacks Bayou Drainage District* v. *St. L., I. M. & S. Ry. Co.,* 116 Ark. 30. The statute makes the establishment of the district depend upon a finding by the court that "the petition is signed by either a majority in land value, acreage or in number of landowners within the proposed district," and that the establishment of the district be found to be "to the best interests of the county and landowners in said district."

It is insisted, finally, that the court erred in adjudging that the district be not established, and that in-

asmuch as only two of the property owners appealed from the order of the county court creating the district, the judgment of the circuit court should have been limited to granting relief only to those two appellants by excluding their lands from the district. The contention is based upon the peculiar language of the statute regulating appeals from an order of the county court establishing a district. That part of the statute reads as follows:

"Any owner of real property within the district may appeal from said judgment within thirty days by filing an affidavit for appeal, stating in said affidavit the special matter on which said appeal is taken, and any owner of real property may likewise appeal from the order of the county court refusing to establish said district or eliminating any territory therefrom.

"No appeal shall delay the proceedings for carrying out the proposed improvement after the order of the county court establishing same is made, and any party not appealing within the time herein prescribed shall be deemed to have waived any objections he may have to said order, and to have relinquished all rights he may have had to question the same."*

(3-4) The argument is that the order of the county court establishing the district is, to follow the exact language of the statute, "deemed conclusive, final and binding upon all territory embraced in said district," and that notwithstanding an appeal by a portion of the landowners the establishment of the district remains in full force and continues to exist as to all property owners who do not appeal and successfully maintain their objections. The purpose of the statute was, we think, to prevent a temporary suspension of the judgment of the county court establishing the district, pending the appeal to higher courts. It would not do to say that the Legislature meant that the district should continue in full operation notwithstanding the fact that the organization had been declared invalid at the instance of a number of

*Section 3, Act 338, p. 1406, Acts of 1915. (Rep.)

property owners. Such a construction as that would impose the burden of taxation for the construction of the improvement upon only a portion of the lands in the district. In other words, some of the owners of land would be allowed to escape taxation by successfully prosecuting their protest against the organization of the district, while others who were less aggressive might have to sustain the increased burden. Certainly no such impossible situation as that was intended to be created by the Legislature. The appeal does not, under the terms of the statute, suspend the judgment of the county court creating the district, but when it is found at the instance of the protesting property owners that the organization is invalid, it is the duty of the circuit court on appeal to so declare. The appeal itself does not suspend the judgment creating the district, and proceedings may be continued thereunder pending the appeal, but when a final judgment is rendered on appeal declaring the district not to have been duly organized, then that stops the whole proceeding the same as if it had been so adjudged by the county court.

Counsel for appellants rely, as sustaining the contrary view upon a decision of the Supreme Court of Indiana in the case of *Stipp* v. *Claman*, 123 Ind. 532, 24 N. E. 131. But we do not consider that decision in point, for the only question involved was whether or not an appeal from an order creating an improvement district operated as a suspension of the judgment. The contention in that case was that, regardless of the final outcome of the appeal, the proceedings had while it was pending were void because the judgment creating the district had been suspended, and the Supreme Court held against that contention. The effect of our statute undoubtedly is to prevent a temporary suspension of the proceedings pending an appeal, and unless the appeal be successful in obtaining a final judgment of the appellate court against the establishment of the district, proceedings taken while the appeal is pending are valid.

Judgment affirmed.

ROWE v. YOUNG.

Opinion delivered April 10, 1916.

1. CONTRACTS—CONTRACT TO PROCURE DIVORCE—INVALIDITY.—A contract, a portion of the consideration of which is, a stipulation that a divorce will be procured for plaintiff's wife from him, is void as against public policy.
2. CONTRACTS—CONSIDERATION—DIVORCE.—Any contract intended or calculated to facilitate the obtaining of a divorce, or to promote the dissolution of the marriage relation, is void as against public policy.

Appeal from Johnson Chancery Court; *Jordan Sellers,* Chancellor; affirmed.

STATEMENT BY THE COURT.

Appellee brought this suit to cancel a deed of trust of certain property made to appellant and J. D. Hunt, as trustees, for the division thereof between himself and wife.

In his third amended complaint, he alleged that he and Anna Young were married in July, 1909, and lived together for a period of two years when she left him and went to live with a daughter in Greenwood, Arkansas; that she deserted him in July, 1911, and filed a suit for a divorce on September 8, 1911, and had a writ of attachment issued against his property from the Sebastian chancery court. That he employed J. D. Hunt an attorney, to look after his interest, who went to Sebastian County, and upon his return advised him that his wife would probably attach everything he had unless he executed a deed of trust, a copy of which was exhibited to him. That the deed of trust was to convey the piece of land, which was nine acres, upon which he lived and made his home, in trust to J. D. Hunt and Robert A. Rowe, to be sold by them and the proceeds to be equally divided between the plaintiff and his wife.

He alleged further that he was an igorant foreigner and believed the execution of the deed was the only means for preventing his wife Anna Young from taking everything he had, which he later discovered was not necessary

and that she could not have recovered anything from him in court and that his signature was secured by fraud and misrepresentations and further: "That he agreed to execute the instrument if it would guarantee him a divorce from the said Anna Young. That he was worried by the suit and the attachment and considered that the best thing he could do would be to sever all relations between his wife and himself and that he finally agreed to execute the instrument, if there was a clause in it to the effect that the said Anna Young was to be divorced from him without cost to himself; that said clause was inserted and the deed executed. That Anna Young died Feb. 9, 1912, before any decree had been taken in the divorce suit. That he refused to sign said deed of trust unless he was sure that his doing so would guarantee to him that his wife would obtain a divorce at her own cost. This was made a consideration in the said instrument rendering the same illegal and void" and prayed for a cancellation of the deed of trust.

To this complaint a general demurrer was interposed and overruled and the defendant answered admitting the marriage of Allen and Anna Young; alleged that because of his neglect of and failure to provide for her, she was compelled to go to her daughter's because of his abuse and criminal treatment and for medical attention and nursing, being sick and unable to wait on herself. Denied that Anna Young deserted the plaintiff Allen Young; admitted the employment of J. D. Hunt as his attorney. Denied that the deed of trust was agreed to be made to any one except himself as trustee and stated that after it was prepared, it was mailed to appellant's attorney, J. D. Hunt, and that appellant had inserted his said attorney's name as one of the trustees. Denied that he agreed to execute the instrument if it would guarantee him a divorce from said Anna Young and that he was greatly worried by the suit and attachment and that he refused to sign such deed of trust unless he was assured that in doing so would guarantee that his wife would

obtain a divorce from him at her own cost and that was made a part of the instrument rendering it void.

Alleged by way of cross-complaint that the suit for divorce was brought by Anna Young against appellant while she was confined to her bed, destitute of any means to procure medical attention, nursing, clothing and food, all of which the plaintiff had refused her and, "was not brought so much for the purpose of obtaining a divorce, as for the purpose of dividing the property described in the complaint, so she might receive a portion of same, to provide her with medical attention, nursing, food and clothing, to pay the doctor's bills and that she had already incurred an indebtedness for such services and supplies, amounting to more than $300 and to secure pay for her interest in the land, $375 of her separate money having been paid as part of the purchase price thereof. That the doctors bills and bills for nursing, food and clothing and burial expenses of Anna Young amounted to $500." A copy of the complaint in the divorce suit was exhibited with the answer, showing the grounds for the divorce to be such indignities offered to her person as rendered her condition intolerable and the failure of her husband to provide medical and other attention, that she was without means and desperately ill and forced to live with her daughter, who was taking care of her.

A copy of the deed of trust was upon motion required filed as an exhibit to the complaint. It was in form a deed of trust and recites that Allen Young and Anna Young his wife, in consideration of the sum of $1.00 paid by Robert A. Rowe and J. D. Hunt, trustees, have granted, bargained and sold the real estate described in it and the crops of corn and cotton and other personal property belonging to Allen Young, "which is to be sold by trustees * * * and money equally divided between Allen Young and Anna Young and Allen Young to pay all bills in Johnson County and Anna Young to pay all bills in Sebastian County and Robt. A. Rowe agrees to procure a divorce at Anna Young's cost."

A demurrer was interposed and sustained to the answer and cross-bill and appellant declining to plead further, judgment was rendered canceling the trust deed in accordance with the prayer of the petition, from which this appeal is prosecuted.

A statement appears in the brief, that upon the deed being forwarded by appellant to J. D. Hunt, appellee's attorney, for execution, that appellee had erased the words "and Allen Young agrees to pay $25 in addition for doctor bills at Greenwood" and inserted "and Allen Young to pay all bills in Johnson County and Anna Young to pay all bills in Sebastian County and R. A. Rowe agrees to procure a divorce at Anna Young's cost."

Robert A. Rowe, for appellant.

The court erred in canceling the deed. It conveyed a fee simple title to the trustees with power to sell and divide the proceeds. There was no fraud. 24 Miss. 278; 57 Ala. 14; 6 Cush. 403; 22 Me. 257; 109 Ill. 425 and many others. The deed vested the legal title and a fee simple estate in the trustees. Am. & Eng. Enc. Law, 927-8; 1 Macn. & G. 607; 7 Ves. Jr. 201; 100 Ga. 20; 112 *Id.* 758; 108 Ill. 164; 90 Ind. 441; 112 Wisc. 509 and many others. All these cases hold that the power of sale in a deed to a trustee carries a fee simple title. The deed was not void as against public policy.

Paul McKennon, for appellee.

The deed was void as against public policy. 95 Ark. 552; 95 S. W. 552; 67 Ark. 15; 42 Okla. 286; 84 N. E. 382; 74 N. H. 286.

KIRBY, J., (after stating the facts). Appellant contends that the court erred in overruling his demurrer to the complaint and also in sustaining the demurrer to the answer and cross-complaint, appellee's contention being that the deed of trust was contrary to public policy and void, being a contract in effect to divorce man and wife.

Society and the State have a vital interest in marriage and the law favors the marriage relation and does not sanction or uphold contracts intended to promote di-

vorce or an abandonment of such relation, and contracts of the kind are held void as opposed to the public good, and upon principles promotive of the public welfare. 9 Cyc. 519. In an exhaustive note to *Pierce* v. *Cobb,* 44 L. R. A. (N. S.) 379, the editor states: "Hence it is well settled by unanimous decision that any contract intended or calculated to facilitate the obtaining of a divorce or to promote the dissolution of the marriage relation, is void as against public policy." Numerous cases in support of the statement are therein cited and reviewed.

The clause of the trust deed, providing "And Robt. A. Rowe agrees to procure a divorce at Anna Young's cost" with the allegations of the complaint that "plaintiff agreed to execute the instrument if it would guarantee him a divorce from the said Anna Young, and finally if there was a clause inserted in it to the effect that the said Anna Young was to be divorced from him without cost to himself * * * that he refused to sign said deed of trust unless he was assured that in doing so would guarantee to him that his wife would obtain a divorce at her own cost and that this was made a consideration of said instrument," showed that it was executed for the purpose of procuring a divorce between the parties and with that end in view and being a contract or evidence of such an one, contravenes sound public policy and is void.

The parties being already separated and living apart could make a contract for the division of the property and a valid conveyance of it for the purpose, and if such agreement and conveyance had been only to release the appellant from the payment of any cost or attorney's fees in the divorce proceeding, if one was obtained after the separation agreement made and the deed of trust executed, it would not have rendered the instrument void.

Our law holds the husband liable to the payment of certain costs and attorneys fees in suits for divorce by the wife, but this agreement stipulates that appellant, one of the trustees in the instrument, agrees to procure a divorce

at Anna Young's cost; and although the allegations of the complaint that the plaintiff agreed to execute the instrument only if it would guarantee him a divorce from his wife, Anna Young, and refused to sign it unless this clause was inserted and made a consideration therein, are denied by the answer, it was admitted that the deed of trust which was an exhibit to the complaint was executed, and that it contains the clause already set out. The exhibits to the pleadings may be considered on demurrer and even control the allegations thereof, and a fair construction of the deed brings the instrument within that class of contracts for procuring divorces, which are held void as against public policy.

No error was committed in the chancellor's ruling, and the decree is affirmed.

BOLEN v. STILL.

Opinion delivered April 10, 1916.

1. LIQUOR DEALERS—STATUTORY LIABILITY—INJURY TO PERSON PURCHASING LIQUOR.—No statutory liability for the payment of damages, occasioned by reason of liquor sold at the place of business of a retail liquor dealer, is created by the bond required under the provisions of Kirby's Digest, § 5121.
2. LIQUOR DEALER—INJURY TO PURCHASER OF LIQUOR—LIABILITY.—A saloon keeper, licensed to sell liquors, who sold two quarts of whiskey to deceased, a man of reasonable intelligence, fifty-six years of age, and sober at the time, with nothing to indicate that deceased usually drank to excess, will not be held to be guilty of such negligence as will entitle deceased's administrator to recover damages for his death, which was caused by a fall from his horse, while deceased was intoxicated from drinking the liquor so purchased, after leaving the saloon.

Appeal from Searcy Circuit Court; *John I. Worthington,* Judge; affirmed.

STATEMENT BY THE COURT.

Appellant, administrator of the estate of Louis Bolen. deceased, brought suit on the bond required to be given by retail liquor dealers, to recover damages for his widow and children resulting from his death alleged to

have been caused by reason of liquor sold at the house or place of business of appellees.

The complaint alleged that Louis Bolen, on the 10th day of April, 1915, went to the appellee's saloon and purchased a quantity of liquor from which he became intoxicated and after the purchase started home on horseback and as a result of the intoxication, fell from his saddle, his foot hanging in the stirrup, and the horse became frightened and ran away and dragged him to death.

The answer admitted the sale of whiskey to the deceased and alleged that he came to the saloon in company with Lige Alexander, a man about 40 years of age, a responsible person, that both parties were walking when they reached the saloon and duly sober, that each purchased some whiskey and went away not having taken more than one or two drinks, and in a duly sober condition; that defendants were only slightly acquainted with deceased at the time he purchased the whiskey; that he left their premises in a duly sober condition; that after he had gone more than half a mile from the saloon, he got on his horse, a young animal of a wild disposition and after riding several miles from their place of business, became so intoxicated that he got down off of his horse and lay down on the ground; that his companion and three or four other men, naming them, all responsible persons, knowing his condition put him back on his horse and he starting riding again towards home and the animal afterwards became frightened and threw him off and the injury resulted therefrom. The answer denied that the fall and resultant death was the approximate result of the intoxication caused from the sale of the intoxication caused from the sale of the whiskey.

It appears from the testimony that the deceased and Lige Alexander on the day of the injury rode their horses to the river near the saloon; that they went across the river in a boat and that Alexander bought two drinks of whiskey, one for each of them. Deceased bought two quarts of whiskey and half a pint of apricot cordial. They then bought a pint together to drink on the way

home and Alexander also bought some whiskey for himself. They were at the saloon about half an hour and were put back across the river and walked down to where their horses were hitched and mounted and started riding back towards home, Bolen living about 15 miles from the saloon. They drank all the pint of whiskey that they bought together and then began on Alexander's supply. By this time they had gotten several miles from the river and deceased was so intoxicated that he fell or got down off his horse and lay down near a blacksmith shop. Alexander and three or four other men put him back on the horse and they had ridden probably a quarter of a mile further, when the horse became frightened and threw him, or he fell off, and his foot hung in the stirrup and he was dragged to death. The witness riding along with him was not clear as to how he came to fall or to be thrown from the saddle.

The testimony tended to show that the mare ridden by him was gentle, the earning capacity of the deceased, his life expectancy, etc.

The court instructed the jury, refusing to give appellees' requested instruction for a directed verdict and giving over appellant's objection their requested instruction numbered 6, telling the jury in effect that if they found deceased after becoming drunk was off his horse in a place of safety and afterwards by acts of third parties put in a perilous position and the injury caused thereby, they should find for the defendant.

From the judgment on the verdict for the defendants, plaintiff appealed.

Bratton & Bratton, for appellant.

1. The verdict is contrary to the law and the evidence and the court erred in its charge to the jury. Under Kirby's Digest, § § 5121 to 5124 defendants were liable for all damages occasioned by the sale of liquor at their house of business. 66 Ark. 68; 38 Ia. 489; 51 Kan. 171; 62 N. W. 891; 31 N. E, 425; 94 Ill. 358; 19 Atl. 390; 38 N. E. 190; 26 Hun (N. Y.) 608; 19 S. Dak. 11; 16 *Id.*

118; 44 Am. Rep. 42; 69 N. E. 298; 61 N. W. 1087; 109 N. E. 905.

2. As to concurring causes producing injury, see 95 Ark. 297; 23 Atl. 733; 76 S. C. 262; 47 L. R. A. 647. As to intervening cause, see 66 S. W. 221; 127 Iowa 483; 35 Pac. 549; 169 Fed. 321.

3. The selling of the liquor producing drunkenness was the proximate cause. 3 Q. B. 327; 212 U. S. 159; 146 Ala. 273, 404; 50 Cal. 307; 96 Md. 683.

The appellees, *pro sese.*

1. There is no statutory liability. 66 Ark. 68; 77 *Id.* 606. Nor were appellees liable under the common law.

2. The evidence was not sufficient even if there was a statutory liability.

KIRBY, J., (after stating the facts). (1) This court has already held that no statutory liability for the payment of damages occasioned by reason of liquor sold at the place of business of a retail liquor dealer is created by the bond required under the provisions of Section 5121, Kirby's Digest. *Anderson Co.* v. *Diaz,* 77 Ark. 608; *Gage* v. *Harvey,* 66 Ark. 70. In the latter case, the court construing the statute and the condition of such bond said: "They should be construed according to the general rule fixing the limit of the liability of parties for the consequences of their acts in other cases, as they in no way indicate an intent to make the liability of the saloon keeper an exception to such rule. According to their legal effect, they bind him to pay all damages that may be the natural and proximate result of the use or consumption of liquor sold by him or his agents at his place of business. Further than this the law does not extend the liability of his bond on account of the sale of liquor." It was there held that the saloon keeper was not liable to the payment of money lost by one who became intoxicated upon liquors sold to him and thereby so incapacitated that some third person forcibly, or by stealth, took his money away from him.

The saloon keeper's business does not advertise him to the public as the protector of those who become his patrons, but rather to the contrary, as said in *Anderson* v. *Diaz, supra.* The testimony herein shows that the deceased, a man of mature years and reasonable intelligence, came with a companion of like kind to the place of business of appellees where both purchased liquors presumably for their own consumption and both were duly sober at the time and neither drank enough liquor on the premises to intoxicate him or prevent the normal exercise of his faculties. There was nothing to indicate that the deceased, who was only slightly known to the appellees, was not such a person as was legally entitled to purchase their goods nor to cause a reasonably prudent person to anticipate that such sale would likely produce the injury it is claimed resulted therefrom.

(2) It cannot be said that the action of a saloon keeper licensed to sell liquors, in selling two quarts of whiskey to a man of reasonable intelligence, 56 years of age, and sober at the time, with nothing to indicate that the purchaser drank to excess, was guilty of such negligence as would entitle the administrator of deceased to recover damages for his death, caused by the fall from his horse while intoxicated from drinking the liquor so purchased, after leaving the saloon.

There being no statutory liability under the bond, and no evidence of any negligence on the part of the saloon keeper in making the sale of the liquors to the deceased, his administratrix was not entitled to recover, and since appellees were entitled to a directed verdict, no prejudice could have resulted from the giving of said instruction number 6, if it was incorrect.

The judgment is affirmed.

MORRIS v. STROUDE.

Opinion delivered April 10, 1916.

PARTNERSHIP ACCOUNTS—ADJUSTMENT—JURISDICTION OF PROBATE COURT.—The probate court has no authority to adjust partnership accounts between an executor or administrator of a decedent and a surviving partner.

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

STATEMENT BY THE COURT.

Appellant filed a petition in the probate court, alleging that she was the owner of a judgment of allowance in favor of G. W. Morris, her husband, now deceased, against the estate of L. F. Tapscott, deceased, asking that the appellee administratrix be ordered to sell certain lands, describing them, which was the homestead of said L. F. Tapscott, who was survived by his widow and certain minor children, now of age, for the payment of said judgment.

A response was filed to said petition, denying there was a valid judgment against the estate or any lien upon the lands and pleading laches and statutes of non-claim and limitation, and upon the hearing the court found that the claim was a valid judgment against the Tapscott estate and a legal demand and ordered the lands sold for the payment thereof, from which judgment an appeal was taken to the circuit court. Upon the hearing there, the record of the probate court was introduced in evidence showing a citation issued upon the petition of the administratrix of the estate of L. F. Tapscott against G. W. Morris, a surviving partner, to require a settlement of the partnership affairs with his statement of the partnership business filed in the probate court, showing a balance due him of $182.20, which was exhibited as a claim against the Tapscott estate and allowed, after being disallowed by the administratrix. Said judgment of allowance recites: "Now on this day this cause coming on to be heard and is heard by the court upon the petition for citation, upon G. W.

Morris, and the response of the said G. W. Morris filed herein, from which the court finds that, during the lifetime of L. F. Tapscott he and G. W. Morris were partners in the warehouse business. That when the business of said firm was closed up by G. W. Morris, the surviving member, after the death of the said L. F. Tapscott, the deceased was indebted to G. W. Morris in the sum of $182.20."

It is admitted that no appeal was taken from the probate court allowance, that Tapscott died in November, 1901, intestate, leaving surviving his widow and her minor children as alleged, five and seven years of age; that G. W. Morris, died November 24, 1906, leaving as his surviving heirs the petitioners, that Mrs. G. W. Morris, the appellant, is the sole owner of the judgment against the Tapscott estate; that the land sought to be sold under the order of the probate court was the homestead of Tapscott at his death and that his widow and children occupied it as such until 1904, when they moved to Hempstead County, where they have since remained. The administratrix testified that she was appointed administratrix of her first husband's, L. F. Tapscott's estate, and had paid all the claims against the estate, except this one; that her said husband before his death was in business with G. W. Morris; that she tried to get a settlement with Mr. Morris of the firm's affairs as he kept the books and other things and that she never did get a settlement from him.

Here the court stated: "She had him brought in and a settlement by the probate court."

The witness continued: "No proceeding in the chancery court has been had to wind up the partnership affairs of the firm of Morris & Tapscott." It was also agreed that no proceeding had ever been instituted in the chancery court against the administratrix or the children of L. F. Tapscott concerning the partnership affairs.

The testimony further shows that the lands sought to be subjected to sale for the payment of the judgment of allowance were sold and conveyed by the son and

daughter, now of age, and their mother, in the year 1915, to one Hickson.

The court held the judgment of allowance of the claim by the probate court was void, having been rendered without jurisdiction and quashed same, from which judgment this appeal is prosecuted.

D. B. Sain and *T. D. Crawford*, for appellant.

1. The judgment was not barred by limitation. 48 Ark. 277. The probate court had no jurisdiction to sell the land during the minority of the children. 47 Ark. 445; 49 *Id.* 75; 52 *Id.* 213; 56 *Id.* 563; *Ib.* 574; 50 *Id.* 329. Until their right of homestead ceased, the statute of limitations did not begin to run. 97 Ark. 189. Minors cannot abandon a homestead. 29 Ark. 263; 73 *Id.* 266, etc.

2. The probate court had jurisdiction. Kirby's Digest, § 110 *et seq.* The partnership had been settled and this claim was for a balance due, a debt against the estate and it was properly allowed. 54 Ark. 397; 23 *Id.* 443; 26 *Id.* 135, 154; 117 Ark. 600; Lindley on Partnership, (8 ed.) 693; 4 Gratt (Va.) 293; 30 Mich. 304; 28 Ind. 109; 1 Woodw. (Pa.) 362.

3. The allowance was a judgment and cannot be collaterally attacked. 11 Ark. 519; 49 *Id.* 397; 44 *Id.* 426.

W. C. Rodgers, for appellee.

1. The claim is barred.

2. The probate court had no jurisdiction. 57 Ark. 299; 22 *Id.* 547. Jurisdiction cannot be had by consent, nor can want of jurisdiction be waived. 48 Ark. 151; 49 *Id.* 443; 90 *Id.* 195. The judgment was a nullity and subject to collateral attack. 29 Ark. 47; 4 Cranch. 241; 122 N. C. 64; 8 How. 495; 9 S. D. 850; 58 Ark. 181; 81 *Id.* 440, 463; 91 *Id.* 527, 534; 1 Pet. 328; 85 Ark. 213.

KIRBY, J., (after stating the facts). The jurisdiction of the probate court is confined to the administration of assets, which come under its control and incidentally to compel the discovery of assets and it has no jurisdiction to adjust partnership accounts between an executor or administrator of a decedent and a surviving partner.

Fowler v. *Frazier,* 116 Ark. 350; *Choate* v. *O'Neal,* 57 Ark. 299.

In this case, the testimony shows and the record of the allowance in the probate court, that it was made upon the statement of account of the partnership business by the surviving partner, showing a balance claimed to be due from the decedent of $182.20. The record also shows that this statement was made in said court after the surviving partner had been cited, upon the petition of the administratrix, stating she had made repeated demands upon him for a settlement of the partnership affairs, to appear and render an accounting. The statement of account was in writing and began as follows: "L. F. Tapscott estate, debtor to the firm of Morris and Tapscott." It then showed L. F. Tapscott, debtor to G. W. Morris in certain sums and concluded by certain credits and showing a balance due to G. W. Morris of $182.20. There were two affidavits to the account by said Morris, one showing the amount demanded justly due and the other stating "The above and foregoing account against the estate of L. F. Tapscott embraces all the items and transactions had between Geo. W. Morris and L. F. Tapscott, during the fall and winter of 1901 and 1902, except the Cudahy Packing Co.'s agency, which was managed by Tapscott and which leaves a balance due me of $182.20."

The recital of the judgment of allowance already set out, shows that the statement was an attempted settlement of the partnership business which was a matter beyond the jurisdiction of the probate court. In *Choate* v. *O'Neal, supra,* the court said: "As that court could not ascertain whether anything was due to the appellant except from an account, which it had no power to state, it should have refused to take jurisdiction of his claim; and the circuit court should have dismissed the case on appeal."

The record of the judgment of allowance of the claim against the estate of L. F. Tapscott by the probate court, shows it was made in an attempt to settle and

adjust the accounts of the partnership between the surviving partner and the decedent and that the court was without jurisdiction of the matter. Such being the case, its judgment was void and the circuit court in the trial below committed no error in so holding. The judgment is affirmed.

SCHOOL DISTRICT NO. 25 *v.* PARKER.

Opinion delivered April 10, 1916.

1. SCHOOLS—RURAL SPECIAL SCHOOL DISTRICT—FORMATION.—The law providing for the establishment of rural special school districts, requires merely that a majority only of those voting at the election therefor, shall vote in favor of the proposition.
2. SCHOOLS—RURAL SPECIAL SCHOOL DISTRICTS—FORMATION—HARDSHIP.—A hardship worked upon a common school district, by the taking of certain of its property in the formation of a rural special school district, can not be relieved by the courts, everything being done in accordance with the statute.

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

J. I. Alley, for appellant.

1. It was necessary in order to form this special district, that a majority of all the electors residing in the territory vote for its establishment. 103 Ark. 304; 102 *Id.* 411.

2. In forming the district it left less than thirty-five children of school age in district 25. Kirby's Digest, § 7543.

Elmer J. Lundy, for appellee.

1. A majority of those voting at the election is sufficient. Acts 1909, 947; 106 Ark. 306; 103 *Id.* 304; 102 *Id.* 411, 416.

2. The proposition that a rural special district cannot be formed if less than 35 children of school age are left in some other district is untenable. The Legislature has full power. 97 Ark. 71; 102 *Id.* 401; 112 *Id.* 437; 102 *Id.* 411.

SMITH, J. On September 5th, 1914, an election was held for the purpose of forming Special School District No. 24 in Polk County. In forming this special school district a large portion of Common School District No. 25 was taken, so much so that less than thirty-five children of school age were left in the common school district. The validity of the Special District is questioned upon two grounds: *First,* that it was necessary, in order to form this special district, that a majority of all the electors residing in the territory to be formed into the special district, vote for its establishment before the court could make an order establishing it, and that a majority of the electors did not so vote. *Second,* that in forming the special district less than thirty-five children of school age were left in Common School District No. 25, and that the Legislature did not intend that any such results should be accomplished, and that to uphold the Special District in this case leaves the Common School District without sufficient territory, revenue or children to maintain an efficient school.

(1) As sustaining his first position appellant cites the cases of *Common School Dist.* v. *Oak Grove School Dist.,* 102 Ark. 411, and *Bonner* v. *Snipes,* 103 Ark. 298. But those cases do not so decide. In the case of *Rural Special School District No.* 6 v. *Blaylock,* 122 Ark. 418, we said:

"The law providing for the establishment of rural special school districts requires only that a majority of those voting at the election therefor shall vote in favor of the proposition. * * * It is true the opinions in *Common School District* v. *Oak Grove Special School District,* 102 Ark. 416, and *Bonner* v. *Snipes,* 103 Ark. 304, contain the statement that 'The district is established under the law if a majority of the qualified electors within the territory named in the petition before the county judge, shall vote for the establishment of such district,' which was evidently inadvertently made, the court intending only to say the district is established when a majority of the ballots cast at the election are in favor

thereof. The question was not raised nor a determination of it requisite to a decision in either of said cases."

(2) We have also decided the second proposition adversely to appellant's contention. In the case of *Crow* v. *Special School District No.* 2, 102 Ark. 401, it was held that, under the authority of Act No. 321 of the Acts of 1909, page 947, any given territory in any county might be organized and established into a rural special school district except territory already included within a special school district; and this holding was repeated in the case of *Bonner* v. *Snipes,* 103 Ark. 298; and the proceedings here questioned were had under this act. The subject was again reviewed in the case of *Eubanks* v. *Futrell,* 112 Ark. 437. Similar questions were there involved and it was there pointed out that the efficiency of common school districts might be impaired or destroyed if the Act of 1909 was given a literal interpretation, and it was urged that this act of 1909 had been repealed by necessary implication by Act No. 116 of the Acts of 1911. But we held in the last cited case that the Act of 1911 did not repeal the Act of 1909 and that the effect of the last legislation on this subject was to provide a method by which common school districts might be consolidated as entireties, and had left in effect a statute providing a procedure by which portions only of common school districts might be organized into special school districts.

Manifestly results are being reached which work hardships and injustice on some rural communities, but, as we have said in all these cases, we have nothing to do with the questions of policy involved. This relief can come only from the Legislature.

The judgment of the court below must be affirmed, and it is so ordered.

LOVELAND v. STATE PHARMACY.

Opinion delivered April 10, 1916.

APPEALS FROM JUSTICE COURT—TIME—PULASKI COUNTY.—An appeal from a justice to the circuit court in Pulaski County, can not be perfected unless the transcript is lodged in the office of the circuit court within thirty days after the judgment is rendered. (Kirby's Digest, § 4666; section 5, Act 64, p. 204, Acts of 1913.)

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

Richard M. Mann and *Price Shofner,* for appellant.

The appeal from the justice of the peace should have been dismissed. Acts 1913, p. 204; 96 *Id.* 175; 42 *Id.* 88; 103 *Id.* 44; 104 *Id.* 379; Kirby's Digest, § 4670; 110 Ark. 284; 161 S. W. 201.

Mehaffy, Reid & Mehaffy, for appellee.

1. The clause in the Act of 1913, providing for the time to file transcripts on appeal is void. The object and purpose of a bill must be stated in its title. 11 N. E. 180; 68 Pac. 295. The act was void also because a general law was applicable. Const., Art. 5, § 24; 48 Ark. 370; 61 *Id.* 21; 61 *Id.* 26; etc. Kirby's Dig., § 4670 is still in force.

2. The appeal was properly taken in time, and the court had jurisdiction. Kirby's Digest, § § 4666-4670; 44 Ark. 482; 140 S. W. 1079; 32 Ark. 292; 87 *Id.* 230; 31 *Id.* 368; 110 *Id.* 284; 24 Cyc. 704, 705.

SMITH, J. Appellant recovered judgment against appellee in the court of a justice of the peace on August 7, 1914, and the appeal which was prayed therefrom was not perfected until September 11, 1914, by the filing of a transcript with the clerk of the circuit court. There was a motion in the court below to dismiss the appeal, but this motion was overruled, and upon the trial before a jury the court directed a verdict in appellee's favor, and this appeal has been prosecuted from that judgment.

Appellant questions by this appeal, not only the action of the court below in directing a verdict against him, but also insists that the court below acquired no juris-

diction of the cause for the reason that the appeal was not perfected within the time limited by law.

Under section 4670 of Kirby's Digest, it is provided that appeals from the courts of justices of the peace shall be perfected on or before the first day of the next term of the circuit court after the appeal has been granted. This section was construed as being directory, yet we said that its provisions could not be ignored, and that the party who did not comply with it must offer some satisfactory explanation of his failure so to do, the sufficiency of the explanation being a question to be passed upon by the circuit court. *Hart* v. *Lequieu,* 110 Ark. 284.

It is insisted that this question should be disposed of under the rule announced in the case of *Hart* v. *Lequieu, supra.* But the practice in Pulaski County, has been changed by Act No. 64 of the Acts of 1913, p. 204. This is an act entitled "An Act to provide for an additional circuit judge for the Sixth Judicial Circuit, and to regulate the practice in the circuit court of Pulaski County." Section 5 of this act reads as follows:

"Section 5. All appeals in criminal cases whether from justice, mayor or police courts as provided in Act 151 of the Acts of 1905 of the General Assembly of Arkansas must be filed in the office of the circuit court of Pulaski County within thirty days after the judgment is rendered and not thereafter. All appeals in civil cases shall follow the procedure set out in section 4666 of Kirby's Digest; provided, that the transcript of said appeal must be lodged in the office of the clerk of the circuit court within thirty days after judgment is rendered and not thereafter."

Section 4666 of Kirby's Digest provides that "No appeal shall be allowed unless the following requisites shall be complied with: First, the applicant, or some person for him, shall make and file with the justice an affidavit that the appeal is not taken for the purpose of delay but that justice may be done him. Second, the appeal must be taken within thirty days after the judgment was rendered, and not thereafter." Another pro-

viso relates to the bond which must be given if a supersedeas is desired. But the appeal may be prosecuted without giving this bond, provided an appeal taken without the bond shall not operate to suspend the proceedings.

It will be observed that this section 5 provides that all appeals in civil cases shall follow the procedure set out in section 4666 of Kirby's Digest, "Provided, that the transcript of said appeal must be lodged in the office of the clerk of the circuit court within thirty days after judgment is rendered and not thereafter." Inasmuch as the second proviso in section 4666 required that the appeal must be taken within thirty days after the judgment was rendered and not thereafter, we can not give the proviso contained in section 5 of the Act of 1913 any effect without holding that an appeal can not be perfected unless the transcript is lodged in the office of the clerk of the circuit court within thirty days after the judgment is rendered and not thereafter. Indeed, the language employed appears to be so plain and unambiguous as to preclude any other construction.

Section 2614 of Kirby's Digest, regulating appeals to the Supreme Court in misdemeanor cases, provides that the appeal shall be prayed during the term at which the judgment was rendered and shall be granted upon the condition that the record is lodged in the clerk's office of the Supreme Court within sixty days after the judgment. This section was construed in the case of *Bromley v. State,* 97 Ark. 116, where it was held that this court would not take cognizance of an appeal unless it is perfected within sixty days, although the failure to do so was due to the failure of the circuit clerk to prepare the transcript in time.

We think the language employed in section 2614 of Kirby's Digest is no more mandatory than that employed in the Act of 1913, and as the act regulating the practice in the Pulaski circuit court was not complied with, we must hold that the circuit court acquired no jurisdiction, and the judgment of that court will be reversed, and the cause remanded with directions to dismiss the appeal from the justice court. It is so ordered.

KANSAS CITY SOUTHERN RAILWAY COMPANY v. CITY OF MENA.

Opinion delivered April 10, 1916.

RAILROADS—CITY STREET OVER RIGHT-OF-WAY—DAMAGES.—Where a city opened a street across the right-of-way and tracks of a railroad company, the railroad company is required to construct and maintain the crossing, but it can not recover from the city any damages or compensation on that account.

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

James B. McDonough, for appellant.

1. A railway company is entitled to the expense of structural changes when a city condemns a right-of-way across the company's property. 75 Ark. 530 and 75 *Id.* 534, are not authority to sustain the ruling of the court below. 139 Mich. 347; 102 N. W. 947; 51 N. J. L. 428; 17 Atl. 971; 43 *Id.* 730; 69 Pac. 1050; 59 Atl. 1032; 63 N. E. 96; 102 N. W. 947; etc.

Charles A. Zweng, for appellee.

The railway company was not entitled to the expense of structural changes when a city condemns a right-of-way across its property for street purposes under the police power. Acts 1913, p. 328; 75 Ark. 530; 88 *Id.* 129; 75 *Id.* 534; 166 U. S. 226; 86 N. E. 84; 16 N. D. 313; 83 N. E. 503; 29 *Id.* 1109.

SMITH, J. This suit was brought by the City of Mena to condemn a right-of-way for a street over the property of the appellant. Judgment was rendered for appellant for the sum of $50, which included only the value of the right-of-way taken. Appellant offered to introduce evidence that it was required to expend $181.39 in the re-arrangement and shifting of its tracks made necessary by the opening of the street, and that it had already expended $137.37 in installing the crossing. But this evidence was excluded by the court upon the ground that the railway company was not entitled to compensation for these expenses and the correctness of this holding presents the only question for our consideration. The

proof shows that the railway company has a number of tracks across the proposed street and that the construction of this crossing will necessitate the "shifting" of these tracks and the removal of a switch-stand.

Since the opinion of this court in the cases of *St. Louis S. W. Ry. Co.* v. *Royall,* 75 Ark. 530, and *St. Louis & S. F. Rd. Co.* v. *Fayetteville,* 75 Ark. 534, section 6681 of Kirby's Digest has been amended by the Act No. 89 of the session of the General Assembly of 1913, Acts 1913, p. 328. This amendment consisted in adding after the words "road or highway" the phrase "or street in any incorporated city or town of this State," the effect of the amendment being to impose upon the railway companies the same duty to erect crossings over the streets of cities and towns as previously existed to erect them over the roads and highways of the State. Therefore, what was announced in the cases cited as the duty of railroads with respect to roads and highways became their duty, upon the passage of the Act of 1913, with respect to the streets of cities and towns.

In the case of *St. Louis S. W. Ry. Co.* v. *Royall,* Mr. Justice Riddick, speaking for the court, said: "It would seem that under this provision of the law it was the duty of the viewers to assess the damages sustained by the company by reason of the laying out and establishing the roadway across the track, unless the statute permits highways to be established across the right-of-way and roadbed of the company without compensation for damages. But we find nothing in the statute that gives such authority. The statute provides that where any public road or highway shall cross any railroad, the railroad company shall construct the crossing, and also keep it in repair. Kirby's Digest, section 6681. Now, this does not say that any public road may be established and opened across a railroad without compensation, but that when public highways are established across a railroad, the railroad company must construct the crossing and keep it in repair. We think it may well be inferred from the language of this

statute that no compensation was intended to be paid the company either for constructing the crossing or for keeping it in repair. When a highway is established across a railroad track in this State it becomes its duty under this statute to construct the crossings and keep it in repair. This is a police regulation and similar provisions are found in the statutes of other states. As nothing is said in the act about compensating the company for this burden which the law places upon it, we think that none can be implied. It seems plain to us that none was intended, for it is not usual to allow compensation for expense of obeying a police regulation. *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226."

And in the case of *St. Louis & S. F. Rd. Co.* v. *Fayetteville, supra,* the court, again speaking through Mr. Justice Riddick, said:

"In the case of *C., B. & Q. Ry. Co.* v. *Chicago,* 166 U. S. 226, 255, the Supreme Court of the United States, after quoting decisions to the effect that no damages could be claimed, either by a natural person or corporation, on account of being compelled to render obedience to a police regulation designed to secure the common welfare, said: 'We concur in these views. The expenses that will be incurred by the railroad company in erecting gates, planking the crossing, and maintaining flagmen, in order that its road may be safely operated—if all that should be required—necessarily result from the maintenance of a public highway, under legislative sanction, and must be deemed to have been taken by the company into account when it accepted the privileges and franchises granted by the State. Such expenses must be regarded as incidental to the exercise of the police powers of the State. What was obtained, and all that was obtained, by the condemnation proceedings for the public was the right to open a street across land within the crossing that was used, and was always likely to be used for railroad tracks. While the city was bound to make compensation for that which was actually taken, it can not be required to compensate the defendant for obeying lawful regulations

enacted for the safety of the lives and the property of the people."

In the case of *City of Grafton* v. *St. Paul, etc., Ry. Co.,* 16 N. D. 313, 113 N. W. 598, the cases on this subject are reviewed at length. The question there involved arose under facts very similar to those of the case under consideration, and the decision of that case turned upon the construction of a statute very similar to our own. The court cited those cases which hold that railway companies are entitled to such damages as are here claimed and in that connection said:

"An examination of the foregoing cases will disclose, we think, that the conflict in the holdings of these courts is mainly due to the difference in the statutes of the respective states; but some of them are based upon the decisions in Massachusetts, in which State there are express statutory provisions requiring compensation for these structural changes. Cases decided upon a statute such as the one in Massachusetts can not possibly have any weight in construing a statute so widely different as the one in this State."

The court announced its conclusion as follows:

"In our opinion the better rule, as the one we shall adopt, is that the railroad company should be compensated for the diminution in value of its exclusive right to the use, for railway purposes, of the property sought to be condemned, caused by the use of the same by the public for a street crossing, and that the items proved by appellants for grading, planking, and constructing sidewalks at such crossing, are not proper elements of damage. The trial court, in view of the state of the record, there being no proof relating to the proper measure of damages, correctly instructed the jury to return a verdict for nominal damages merely. We are supported in our views by what we consider the weight of authority and the best considered cases."

The court cited as supporting that conclusion a number of cases, including our case of *St. Louis & S. F. Rd. Co.* v. *Fayetteville, supra.* This North Dakota case is

reported in 22 L. R. A. (N. S.) page 1, where an extended discussion of this and collateral questions can be found.

It follows from what we have said, and from the previous decisions of this court cited above, that the appellant was not entitled to the damages claimed, and the judgment of the court below is, therefore, affirmed.

HAMILTON v. BOARD OF IMPROVEMENT OF LIGHT AND WATER DISTRICT NO. 2, OF WYNNE, ARKANSAS.

Opinion delivered April 10, 1916.

1. LOCAL IMPROVEMENT—CREATION OF DISTRICT BY LEGISLATURE—CONSENT OF MAJORITY.—The Legislature may, by special statute, create improvement districts in cities and towns; it may determine the necessity for the improvement and the method of ascertaining the benefits; or it may determine for itself what the benefits are and levy the assessments; but there is a constitutional guaranty that so far as concerns improvement districts in cities and towns, the power of taxation is dependent upon the expressed consent of the majority in value of the property owners within the locality to be affected.
2. LOCAL IMPROVEMENT—CONSENT OF MAJORITY.—In the formation of a local improvement district, under the Constitution, the consent of the property owners must be affirmatively manifested, and some means must be provided by a statute attempting to organize such a district, for actually obtaining the consent of the property owners. Consent manifested by silence merely, is insufficient within the meaning of the statute.
3. LOCAL IMPROVEMENT—FORMATION BY LEGISLATIVE ENACTMENT—CONSENT OF PROPERTY OWNERS.—In the formation of a local improvement district, the ascertainment of the consent of the property owners can not be dispensed with by the Legislature, and where the organization of such district has failed on account of something required by the Constitution the Legislature can not, in taking up the subject anew for the purpose of perfecting the organization, determine that a former expression of the consent of the property owners, may be treated as a renewed expression of the present consent of the property owners merely on account of their failure to appear and withdraw the former expression.
4. LOCAL IMPROVEMENT—CONSENT OF PROPERTY OWNERS.—Act No. 5, page 9, Acts of 1915, entitled "An Act validating the organization of Water and Light Improvement District No. 2 of Wynne, and authorizing the organization of improvement districts for the

purpose of reconstructing and extending waterworks and electric light plants;" *held*, not to provide an adequate means of obtaining an affirmative expression of the will of the property owners, within the provisions of the Constitution.

Appeal from Cross Chancery Court; *T. E. Lines*, Special Chancellor; reversed.

S. W. Ogan, for appellant.

1. The act attempting to validate the district is unconstitutional and void. Art. 19, § 27, Constitution; 58 Ark. 117, 121; 26 Md. 195; 79 Ind. 274; 74 Mo. 457.

2. It levies an assessment without the consent of a majority of the property holders within the district. It also attempts to divest vested rights. Cooley, Const. Lim. 238; 54 Tex. 153; 31 Am. Rep. 218; 10 Barb. 223.

Rose, Hemingway, Cantrell, Loughborough & Miles, for appellees.

1. The act is not unconstitutional nor void. Its curative provisions dealt only with matters within the province of the Legislature and remedied those features that it could have dispensed with in the first instance. 83 Ark. 344; 112 *Id.* 357; 110 *Id.* 544; 114 *Id.* 23; 99 *Id.* 508; 29 *Id.* 99; 110 *Id.* 511, 514; 117 Ark. 93.

McCULLOCH, C. J. In the year 1912 there was an attempt to organize, under the general statutes of the State, an improvement district in the City of Wynne for the purpose of reconstructing, taking over and extending the system of waterworks theretofore constructed and put in operation by another improvement district. The district was declared to be organized and the petition of property owners asking for the construction of the improvement was duly filed with the city council, but subsequently litigation arose concerning the validity of the organization and on appeal to this court it was decided that the statutes conferred no authority for the organization of an improvement district for the purpose of reconstructing and taking over an improvement constructed by another district, for the reason that there was no legal warrant for such merger of the interests

of the two districts or for the new district to take over the property of the old one. The organization was therefore declared to be invalid. *Sembler* v. *Water & Light Improvement District No.* 2, 109 Ark. 90.

The General Assembly of 1915* enacted a special statute entitled "An Act validating the organization of Water and Light Improvement District No. 2 of Wynne, and authorizing the organization of improvement districts for the purpose of reconstructing and extending waterworks and electric light plants." The first section of the statute declared that the organization of said improvement district "is hereby validated and confirmed" and that "the plans of the commissioners heretofore reported to the city council in the City of Wynne are hereby confirmed."

Section 2 of the act reads as follows: "As more than a majority of the owners of real property within the district aforesaid petitioned the City Council of the City of Wynne for the making of the improvements described in section 1 of this act, and consented that the cost thereof be assessed against the real property in the district according to the benefits received, now, therefore, if any owner of real estate within said district shall desire to withdraw his name from said petition and cancel his consent to the making of said improvement, he may do so within thirty days after the passage of this act by filing with the commissioners of said district a petition in writing, signed by himself, asking that his name be withdrawn from said petition and his consent cancelled. Other owners of real estate within the district may sign said petition within said thirty days."

Section 4 provides that the chancery court should, on the first day that it is in session more than thirty days after the passage of this act, "ascertain whether said petition is signed by a majority in value of the owners of real property within said district, as shown by the last county assessment, and shall eliminate from said peti-

*Act 5, page 9, Acts 1915 (Rep.).

tion all signatures in which the parties signing have filed with the commissioners in writing, expressing their desire to withdraw their names from said petition," and that "if on said hearing the said court shall ascertain that said petition is signed by a majority in value of the owners of the real property within said district, as shown by the last county assessment, it shall enter a judgment accordingly, and its finding in the premises shall be conclusive, subject to the right of appeal to the Supreme Court," and that if the court should find that said petition was not signed by a majority in value it should enter a judgment terminating the existence of the district.

The commissioners of the district are attempting to proceed under the new statute and this is an action instituted by a property owner of the district to restrain them from such proceeding, it being contended that the special act of the Legislature attempting to validate the organization of the district and to authorize further proceedings thereunder is unconstitutional and void. The chancery court dismissed the complaint for want of equity and an appeal has been prosecuted to this court.

(1) It is a misapplication of the term to speak of the special statute under consideration as a validating act for the former organization of District No. 2 was unauthorized and void. It had no legal existence and it was so declared by the decision of this court. If the special statute has any force at all, its effect is to create a new organization where none existed prior thereto. The Legislature may by special statute create improvement districts in cities and towns. It may determine the necessity for the improvement and the method of ascertaining the benefits, or it may determine for itself what the benefits are and levy the assessments. But there is a constitutional guaranty that so far as concerns improvement districts in cities and towns, the power of taxation is dependent upon the expressed consent of the majority in value of the property owners within the locality to be affected. Constitution of 1874, article 19, section 27.

In construing this provision of the Constitution with respect to its requirement for ascertaining the consent of the property owners, we have said: "It created a vested property right in owners of real estate in cities and towns. It is a guaranty to them that their property shall not be taxed for local improvements except upon an *ad valorem* basis, and upon the consent of a majority in value of those to be affected by such improvement. Having this constitutional guaranty that their property shall not be subject to assessment except in this manner, then, until it is assessed in this manner, they have a right to object to any taxation upon it for the purpose of local improvements. This right can not be taken from them by an assumption that the Legislature ascertained that a majority desired this improvement, as this limitation created and protects a property right, and is not a mere direction to the Legislature. The right of property owners to a hearing before their property can be subjected to this tax can not be taken away by presumptions of regularity of legislative proceedings. The only way in which this constitutional requirement can be fulfilled is by the enactment of such a statute as section 5667 *et seq.* of Kirby's Digest, wherein a certain procedure is prescribed to obtain the consent of a majority in value, and a forum to determine whether such consent has been obtained. * * * Until such plan as prescribed in the section just cited or some similar plan which likewise meets the constitutional requirements is provided, the Legislature is powerless to impose an assessment for local improvement in cities and towns. It is not the province of the Legislature to determine whether such consent has been obtained as a basis for the improvement. Its province is to create a procedure for obtaining such consent and a forum to determine whether such consent is obtained." *Craig* v. *Russellville Waterworks Improvement District,* 84 Ark. 390; *Bell* v. *Phillips,* 116 Ark. 167.

(2) The question in the present case is whether or not the Legislature has met the constitutional re-

quirement by providing a method of ascertaining the will of the property owners with respect to the right to assess property to pay for the construction of the improvement. If it has done so then the statute is valid even though it constitutes the organization of the district by the Legislature itself and not the mere validation of the former organization. It will be observed that section 2 of the special statute starts out with the use of language which shows it was meant to be a determination that the majority of the owners of property in the district had already consented to the construction of the improvement and it then turns to a method of verifying that ascertainment by providing that if any property owner in the district who had signed the original petition desired to withdraw his name and cancel his consent he could do so within thirty days and that any other property owner who had not signed could sign the petition within the same period of time. The statute does not provide for any affirmative act on the part of the property owners who had already signed the petition unless they desired to withdraw from the petition. It treats the former petition as an expression of the will of the property owners and merely undertakes to give them an opportunity to withdraw their consent. We are of the opinion that this provision does not meet the constitutional requirement. It is not sufficient to say that it will be assumed that property owners who had signed the former unauthorized petition mean to express their consent to the new organization by failing to appear and ask that their names be withdrawn. That would constitute merely a legislative ascertainment of such consent without providing adequate means for a real ascertainment. It might as well be urged that the Legislature could create improvement districts without obtaining a petition at all, merely upon the assumption that property owners acquiesced by mere silence. The present statute does not even provide for any notice to the property owners. It is true that this is a special statute, and the presumption will be indulged that notice of its presentation to the Leg-

islature was given, but that is far from constituting notice to the property owners to appear in the chancery court to either ratify or repudiate their former signatures. The provision of the Constitution as construed in the case just referred to, means more than mere silent acquiescence by the property owners. It means that the consent of the property owners must be affirmatively manifested and that some means must be provided for actually obtaining the consent of the property owners. Consent manifested merely by silence was not within the contemplation of the framers of this constitutional provision.

(3-4) The decisions of this court cited by learned counsel for appellee do not conflict in any measure with the conclusions we reach with respect to the validity of the statute now before us. The latest case which they cite as sustaining their contention is *Gibson* v. *Incorporated Town of Hoxie,* 110 Ark. 544. That case, however, did not involve the question which we now have before us relating to an ascertainment of the consent of the property owners. In fact that question was not involved in the case at all, but the validating statute was only to cure defects which arose by the failure to give a notice which the Legislature might have altogether dispensed with in the first instance. That case fell within the principle so often announced by this court that it is within the power of the legislative branch of government to cure all omissions in proceedings as to matters which could have been dispensed with in the beginning. That question is not involved here, for, as we decided in the *Craig case, supra,* the ascertainment of the consent of the majority could not be dispensed with by the Legislature and we think that it necessarily follows that where the organization has failed on account of something required by the Constitution the Legislature cannot, in taking up the subject anew for the purpose of perfecting the organization, determine that a former expression of the consent of the property owners may be treated as a renewed expression of the present consent of the property owners merely

on account of their failure to appear and withdraw the former expression. The provision in the new statute does not in other words, provide an adequate means of obtaining an affirmative expression of the will of the property owners and therefore it does not meet the constitutional requirement.

It follows that the appellant is entitled to the relief for which he prays, and the chancery court erred in failing to grant that relief. The decree is therefore reversed and the cause remanded with directions to the chancery court to enter a decree in accordance with this opinion.

HART, J., dissents.

POLK v. ROAD IMPROVEMENT DISTRICT NO. 2, OF LINCOLN COUNTY.

Opinion delivered April 10, 1916.

1. ROAD DISTRICTS—FORMATION—JURISDICTION OF COUNTY COURT.—A county court acquires jurisdiction to take the initial steps for establishing a proposed highway, upon the presentation to it of the petition of ten free holders of the county, after notice given by publication, as required by the statute.
2. ROAD DISTRICTS—FORMATION—PUBLICATION OF NOTICE.—Where the county court has jurisdiction of the proceedings for the establishment of a road district, and the notice by publication to the land owners, having been properly given, and no objections, having been filed to the report of the viewers appointed by the court, the judgment of the county court approving the report and awarding damages as assessed is binding upon the land owners.
3. ROAD DISTRICTS—FORMATION—NOTICE TO LAND OWNER—JURISDICTION.—The fact that a land owner had no notice of the meeting of the viewers for the assessment of damages, is an irregularity which does not affect the jurisdiction of the county court, and does not render its judgment void.

Appeal from Lincoln Circuit Court; *W. B. Sorrells*, Special Judge; affirmed.

STATEMENT BY THE COURT.

This is an appeal from the judgment of the circuit court refusing to review and quash the order and judgment of the county court of Lincoln County, establishing a public road, for want of jurisdiction in the court, it be-

ing claimed that no notice of the proceeding for the laying out of the road and the assessment of damages was given as required by law.

It is alleged that the petitioner is a resident of Lincoln County, the owner of certain designated lands; that on the 7th day of July, 1913, C. S. Bacon and others at the July term of the Lincoln County court presented a petition praying for the appointment of viewers to view and lay out a public road from a point near Star City, via Furth and Meroney to Grady in said county, a copy of which was exhibited. That on the back of said petition was an endorsement: "Filed this 7th of July, 1913, signed by the clerk and "Petition examined and granted and M. O. Adams, J. M. Meroney and E. J. Hall are appointed to view out said road. W. H. Harvey, Judge." That there was a public road traversing the same territory and almost parallel to the proposed route, and that the new road was intended to straighten the old road from Star City to Grady and to be improved under the supervision of the commissioners of Road Improvement District No. 2 of Lincoln County. That after the filing of the petition said viewers filed with the clerk of the county court what purports to be a viewer's report, and that an order was made at the October term, 1913, establishing the county road petitioned for; that the road so established traverses the premises of the petitioner for a distance of half a mile and if fifty feet wide; that the land appropriated is in cultivation and of the value of $50 per acre and that petitioner will be required to maintain two strings of wire fence the entire length of his land at an original cost of $125. That the old road traversed one side of petitioner's property and is ample for public traffic, and the opening of the new road will greatly depreciate the value of his lands. That the damages awarded to the petitioner by the county court is the sum of $1.00. A copy of the order establishing the road is exhibited with the complaint.

It is further stated that said proceedings in the county court were without jurisdiction and void because,

(1) the principal petitioner did not execute the bond required by law; (2) because the court did not issue its order appointing viewers and naming the day on which they should meet and lay out the road, (3) because the notice required under section 2995, Kirby's Digest was not given to the petitioner or his agent that said petition would be presented or that the viewers so acting were to meet on a day certain or within five days thereafter to view said road and that said purported notice did not describe the petitioner's land, (4) that the damages awarded to petitioner are so wholly inadequate as amounts to a confiscation of his property.

It was further alleged that the petitioner had no notice, knew nothing whatever of the proceeding in the county court until about the first day of April, 1915, when the board of directors of the improvement district began to open the road through his premises; that he knew previous to that time that said board was preparing to build a gravel road along the old road but did not know that his property as herein mentioned was to be appropriated therefor; that he immediately applied to the board for compensation before they appropriated his property and was advised that the county court had established a road through the premises, and "that he had no notice whatever of said proceedings," that he could not make himself a party thereto and appeal to the circuit court from the order of the county court. That said right of appeal was lost without fault on his part.

It is further alleged that about the fifth day of April, 1915, after he had notified the directors of the road improvement district of his intention to take steps to secure compensation for his land so appropriated, that the president of said board filed a petition in the county court of Lincoln County, praying the court to enter a *nunc pro tunc* order of the appointment of viewers and naming the day on which they should meet. That said court on the fifth day of April, 1915, without notice to petitioner heard the petition filed by said Norton and entered an order of record *nunc pro tunc* appointing the viewers

and fixing the day of their meeting as of the date of the 7th of July, 1913, reciting that through an error of the county clerk acting in July, 1913, said order was omitted from the record.

Stated further that the only order made in fact appointing viewers, by the county court was the endorsement on the back of the petition and that no date was named therein for their meeting and that it was not through inadvertence of the clerk that the order did not appear on the record, that no such order was in fact made.

Exhibit A is a copy of the petition for the establishment of the road with the description thereof.

Exhibit B is a copy of the judgment reciting that on this day "comes on to be heard the report of viewers M. O. Adams, J. M. Meroney and E. J. Hall, appointed by this court at its July term, 1913, to view certain proposed county roads from Star City" describing them, as in the petition, and "the report of said viewers on the said proposed route heretofore filed with the clerk, is directed on this second day of the October term, 1913, publicly read, and it appearing to the court that due and proper notice having been made by the petitioners to the property owners whose property is to be traversed by said proposed road as required by law and no legal objections to said report are made or filed and same is submitted to the court for its consideration and judgment." Then follows the recital that the court finds from the report of the viewers that they recommended certain routes as practicable and demanded by the public convenience, including the proposed road, describing it, and finds that the expense of the survey and report have been paid by the petitioners and that there is no objection made to the report and findings.

Judgment was rendered establishing the road described and recommended and it was further ordered that the damages found and assessed be paid. The assessment of damages by the viewers was attached, showing the damages of appellant assessed at $1.00.

Exhibit C recites the filing of the petition by E. C. Norton on the 13th day of May, 1915, praying for the entry of the order appointing the viewers *nunc pro tunc* as on the 7th day of July, 1913.

Exhibit D was the report of the viewers, stating they were appointed at the July term, 1913, as viewers of the road proposed by petition filed by Bacon and others; that they proceeded to view the routes for the proposed road as described in the petition and their recommendations as to the establishment thereof.

A demurrer in short was interposed to the petition for *certiorari*. Appellant testified by affidavit, stating the location of the old road, the value of the land that would be appropriated by the establishment of the new road and the expense of enclosing the remaining land, of $200 for two new strings of wire fence that would be required, and that no notice written or otherwise was given him of the action of the petitioner for the road; that he knew nothing whatever of the establishment of such road through his property until about the 1st of April, 1915, when the commissioners began to open it; that he then demanded compensation and was informed the road had been established by order of the court and the compensation fixed.

Charley George, J. R. Lee and Vest Hays also stated that they owned land traversed by the public road going through the land owned by appellant and that neither of them had any notice whatever of the action of the petitioners for the establishment of the road nor of the viewers in assessing damages nor their meeting for the purpose. On the 9th day of September, 1915, a response was filed denying the material allegations of the petition, alleging that appellant was one of the most active of the promoters of the improvement district for the construction of the road, and referring to the public notice of the intended presentation of the petition for the opening of the road and also the proof of publication of the notice and a plat of the road proposed was exhibited therewith.

The judgment of the court recites that the cause was submitted on the petition and exhibits thereto, the affidavits of appellants and the three others already mentioned; the certified copy of the original petition, proof of publication, oath of viewers, report of viewers, opening order October term, 1913, order of establishment, petition for *nunc pro tunc* order on same, together with opening order, response of respondents and exhibits thereto, and demurrer to petition, from which the court finds that said demurrer should be sustained and the writ of *certiorari* should be denied. Judgment was thereupon entered dismissing the petition from which this appeal is prosecuted.

E. W. Brockman, for appellant.

1. The petition alleges facts sufficient to constitute a cause of action. Appellant had no notice of the proceeding. Kirby's Digest, § § 2995, 2998-9. The statutes were not complied with. He had no notice until the time had passed and the order made and it was too late to appeal. Where there is want of jurisdiction, or an excess of it, or where the right of appeal is lost without fault, *certiorari* is the proper, if not the only remedy. 69 Ark. 587; 44 *Id.* 509; 29 *Id.* 173; 39 *Id.* 248.

2. Before one's land can be taken under section 2993, Kirby's Digest, the notice must be given and the lands described. No notice was given and no description of his land given. 73 Ark. 604; 102 *Id.* 553.

3. No just compensation was allowed. The court erred in sustaining the demurrer.

A. J. Johnson for appellee.

Due notice was given and Kirby's Digest, § § 2995 to 2999 duly complied with. The court had jurisdiction. 47 Ark. 440; 98 Ark. 345. Notice was given as required by law and appellant will not be heard to say that he was deprived of his right to appeal, or that the court had no jurisdiction. *Ib.*

2. He was a party. *Certiorari* can not be used as a substitute for appeal. 52 Ark. 213, 222; 61 *Id.* 287, 294; 43 *Id.* 33. It is not a writ of right and its allowance rests

in the sound discretion of the court. 89 Ark. 604; 52 *Id.* 221; 43 *Id.* 243.

KIRBY, J., (after stating the facts). If it be conceded that the petition for *certiorari* stated a cause of action and that the demurrer thereto should have been overruled, it can make no difference here in the review of the proceedings, if the judgment of the court was correct in dismissing same, since the record shows the matter was heard upon the petition, the response thereto and the exhibits showing the record and proceedings of the county court and the viewers in the establishment of the road and the assessment of damages for the lands taken, as well as the affidavit in support of the allegations of the petition as to the want of notice of such proceedings.

(1) The county court acquired jurisdiction to take the initial steps for establishing the proposed highway upon presentation of the petition by ten freeholders of the county after notice given by publication as required by the statue. *Howard* v. *State,* 47 Ark. 440; *Lonoke County* v. *CarlLee,* 98 Ark. 346.

(2-3) The court being satisfied that the notice required by statute had been given had the right to and did appoint three viewers to view the proposed route, assess the damages and report thereon. Proof of publication of the notice of the presentation of the petition shows that it was published for five weeks prior to the beginning of the July, 1913, term of the county court, at which the petition was presented, and the judgment of the county court, upon the report of the viewers and assessment of damages shows "that due and proper notice had been made by the petitioners to the property owners, whose property is to be traversed by the said proposed road as required by law and no legal objections to said report have been made or filed," and the court having jurisdiction of the proceedings, its judgment approving the report and awarding the damages as assessed was binding upon the land owners. If in fact appellant had no notice of the meeting of the viewers for the assessment of damages, it would have been but an irregularity

that did not affect the jurisdiction of the court and could not have rendered its judgment void. *Lonoke County* v. *CarlLee, supra.*

The county court having jurisdiction of the matter of the proposed road, the court committed no error in denying the petition for *certiorari* and dismissing it, upon the record as presented here and even though the judgment recites that the demurrer to the petition was sustained, it further recites that the whole matter was heard and the court found that the petitioner was not entitled to the relief prayed and the decision being right the judgment is affirmed.

TURK AND WALLEN *v.* STATE.

Opinion delivered April 3, 1916.

1. CONTEMPT—PUNISHMENT FOR—POWER OF COURTS.—The power of punishment for contempt is inherent in courts of justice and the right to inflict punishment upon an offender against their dignity and authorty is an incident of judicial power which can not be removed by statutory enactment.
2. CONTEMPT—NOTICE TO ACCUSED.—A written charge made by the circuit court upon its record, of which the accused were notified and given an opportunity to answer, charging them with contempt of court, *held,* sufficient to give the court jurisdiction.
3. CONTEMPT—PREVENTING A PARTY LITIGANT FROM ATTENDING COURT—PUNISHMENT.—Defendants by threats prevented one A. from appearing in the circuit court to prosecute a case in which he was plaintiff; *held,* the defendants could properly be prosecuted for contempt of court; and that a judgment assessing their punishment at fines of $500 and $250 and ninety and forty-five days imprisonment respectively, was within the jurisdiction of the court.

Certiorari to Cross Circuit Court, First Division; *W. J. Driver,* Judge; affirmed.

STATEMENT BY THE COURT.

Appellants bring this proceeding to review the action of the circuit court in adjudging them guilty of con-

tempt and assessing their punishment at a fine and imprisonment in the county jail.

The circuit court entered of record on the 24th day of February, 1915, the following charge:

"On this day it being made to appear to the court from the consideration of evidence that on a former day of this term, towit: On the 8th day of said term, the above entitled cause was set for trial; that the plaintiff appeared in person on the forenoon of said day for the purpose of prosecuting his cause of action; that before reaching the courthouse in the City of Wynne, he was accosted by one Bob Turk in the interest of the defendant, and thereafter was accosted by the defendants in person; that threats were made by said parties against plaintiff, and he was placed under fear and was intimidated from appearing in said court and prosecuting said action; and was, through said means and agencies, and through fear and intimidation, induced to leave said City of Wynne, which caused a nonsuit to be entered in the action herein."

It directed a citation to issue against said parties requiring them to appear and answer the charge of contempt "in so placing said J. L. Andrews under fear and intimidating him and preventing him from being and appearing in this court and prosecuting his cause of action aforesaid. The citations did not contain a recital of the purpose for which the parties were required to appear, but no objection was made thereto on that account.

Testimony was introduced from which it appears that J. L. Andrews and Luther Wallen one of the defendlants had a fight on the streets of Earle as a result of which Andrews filed a suit for damages against Wallen in the Cross County circuit court which was set for trial on November 8, 1915. Shortly after the fight Wallen made a statement to Jake Bryan, a mutual friend of the parties, that "if Andrews sued him he would never sue anybody else," which threat was communicated to Andrews. On the day set for the trial, while Andrews the plaintiff was proceeding to the courthouse at Wynne, he was accosted by Bob Turk, the marshal of the town of

Earle and deputy sheriff of Crittenden County, who desired to speak to him. They went some distance from the courthouse and Turk asked to know if the law suit could not be stopped, telling Andrews that he was a friend of both parties. Andrews replied that it had gone too far and he knew no way in which it could be stopped. Turk then insisted that he talk to Wallen about the matter and called him. Wallen inquired if the suit could not be kept from coming to trial, and Andrews said he did not think so, it had gone too far, whereupon Wallen repiled in a threatening manner: "It is like this, I am not going to tell you what I am going to do, but I am going to do it, if you do not stop this trial." Andrews said he could not stop it and Wallen said: "You can stop it, you can stop it by catching the first train out of here and that is what you had better do." Andrews finally said: "Well, if I have got to do it, I guess I can, and they started towards the station going by the livery stable and Andrews suggested that there was no train he could get out on, but Turk who had again joined them said: "There is the Hot Springs Special, you can get out on that" and upon his suggestion that the train did not stop at Kensett, Turk replied, "Yes it does." Wallen and Turk had stepped aside at the livery stable and talked together, then all proceeded to the depot. Andrews was in such a hurry to take the train that he attempted to get on without a ticket. After he got on the train Turk handed him a small package, which was afterwards discovered to contain three $5 bills. Andrews went to Kensett and from there to Heber Springs, where he talked to his attorney over the phone who told him to come on back to court, which he did, after he was assured that protection would be given him.

Appellants denied having used any threats or intimidation to prevent the appearance of Andrews in court and the further prosecution of his suit and stated that he agreed to settle and dismiss the suit upon the payment of $15, which he said he had already paid out as part of an attorney's fee, and it was paid him accordingly.

The court found appellants guilty and assessed a fine of $500 and imprisonment for ninety days against Bob Turk and a fine of $250 and forty-five days imprisonment against Wallen.

J. C. Brookfield and *L. C. Going,* for appellant, petitioners.

1. The court had no jurisdiction to punish for contempt, the petitioners. No affidavit nor information was filed. 89 Ark. 73; 46 Kans. 613; 26 Pac. 937; 81 *Id.* 409; 82 *Id.* 583; 65 Ind. 508; 45 N. Y. 116; 10 S. C. 38; 145 S. W. (Tex.) 911; 221 U. S. 448.

2. The punishment is in excess of the court's authority. The offense was not committed in the presence of the court. Art. 7, § 26, Const.; Kirby's Digest, § 721.

3. The alleged contempt was civil and no affidavit was filed. Authorities *supra.* The judgment was void; the punishment was excessive; the judgment should be quashed upon *certiorari.*

Wallace Davis, Attorney General, *Hamilton Moses,* Assistant, for appellee.

1. Appellants rely upon 89 Ark. 76. That was a civil contempt case and is covered by section 3989, Kirby's Digest. It does not apply here. The court had jurisdiction to punish. 14 Ark. 538; 46 *Id.* 384; 69 *Id.* 550. The crime was in disobedience of process. Const. Art. 7, § 27; 102 Ark. 127. This was a criminal contempt. 114 Ill. App. 323; 117 Fed. 448; 150 U. S. 637; 20 Wall. 387; Hughes Crim. Law & Proc, § 1673; 128 Minn. 153; 221 U. S. 448; Wells on Jurisdiction, § 179; Oswald on Contempt, 36; Rapalje on Contempt, § 21 and 30, other citations.

2. The procedure here was clearly statutory. Kirby's Digest, § 722-3; 49 N. J. L. 115. As to the power of courts to punish for both direct and constructive contempts in a summary manner, see 36 Miss. 331; 63 N. C. 404; 55 N. H. 355; 37 Ind. 454; 24 W. Va. 473; 102 Ark. 129; 27 How. Pr. 14; 172 Mass. 294; 64 Ill. 195; 102 Ark. 127.

3. The intimidation of a witness is a grave criminal contempt. 137 N. C. 553; 47 Md. 528; 46 Ind. 298; 37 Pa. 83; 11 Oh. 681; 14 N. C. 653; 36 Ind. 196; 71 Fed. 943; 36 Pac. 633; 47 Ind. 528; Wharton Cr. Law (8 ed.), § 894; *Ib.*, § 1333; Hughes, Cr. Law, § 1701; Bishop New Cr. Law, § 258; 131 U. S. 267, and many others.

4. The punishment was not excessive. 99 Ark. 162; 69 *Id.* 550; 99 *Id.* 163; 172 S. W. 763; 97 *Id.* 427; 85 Cal. 600; 137 Pac. 121; 102 Fed. 473; 102 N. W. 883; 51 L. R. A. 373; 58 Mich. 337; 83 Ala. 55.

KIRBY, J., (after stating the facts). Appellants contend that the court was without jurisdiction to punish them for contempt and that the amount of the fine and imprisonment assessed against them was beyond its authority. They insist that the filing of an affidavit or information containing the charge of contempt was necessary to give the court jurisdiction thereof, within the doctrine announced in *York* v. *State,* 89 Ark. 76.

(1-2) The written charge made by the court upon its record of which the appellants were notified and given an opportunity to answer, was sufficient to give the court jurisdiction of the offense. *CarlLee* v. *State,* 102 Ark. 122; *Dickerson* v. *State,* 179 S. W. 324, 120 Ark. 9.

The power of punishment for contempt is inherent in courts of justice and the right to inflict punishment upon an offender against their dignity and authority is an immemorial incident of judicial power which can not be removed by statutory enactment. *Cossart* v. *State,* 14 Ark. 538; *State* v. *Morrill,* 16 Ark. 384; *Ford* v. *State,* 69 Ark. 550.

Our Constitution provides, "The General Assembly shall have power to regulate, by law, the punishment of contempts not committed in the presence or hearing of the courts or in disobedience to process." Section 26, article 7. Const. 1874.

Our law provides that punishment for certain contempts may be by fine or imprisonment in the jail of the

county, where the court may be sitting, or both, in the discretion of the court; but the fine shall in no case exceed $50, nor the imprisonment ten days. Section 721, Kirby's Digest.

Appellants insist that the offense with which they are charged was not committed in the presence or hearing of the court and was not in disobedience of any process of the court and that its power to punish was exceeded in the fine and imprisonment assessed.

"Criminal contempts are all acts committed against the majesty of the law, or against the court as an agency of government and in which, therefore, the State and the whole people are concerned." Thomas on Constructive Contempt, 203; Oswald's Contempt, 36; *Powers* v. *People,* 114 Ill. App. 323; *In re Swan,* 150 U. S. 637; *CarlLee* v. *State, supra.*

Another writer says "Criminal contempts are all acts in disrespect of the court or its process or which obstruct the administration of justice or tend to bring the court into disrepute." Rapalje on Contempt, section 21; *State* v. *Shepherd,* 177 Mo. 205; *Eaton Rapids* v. *Horner,* 126 Mich. 52.

It is universally held that intimidating a witness and preventing his appearance at court or procuring him to absent himself from the trial, is a contempt of court. Preventing the appearance of a litigant in court, for the prosecution of a suit brought to enforce a right, by intimidation and threats, is such an obstruction of judicial procedure as renders absolutely worthless all process of the court, which is instituted for the enforcement and protection of the rights and the redress and prevention of wrongs of the litigants. It destroys the dignity and power of the court and brings the administration of justice into disrepute.

Here a citizen appealed to the court for the redress of an alleged wrong only to find himself confronted by the wrong doer and his associate on the day set for the trial, at the door of the court, and so intimidated with threats, that he found it necessary to absent himself from

the court of justice to which he had appealed, and abandon the prosecution of his cause of action through fear.

The conduct of appellants was a flagrant offense against the dignity and power of the court, whose arm is long enough and strong enough to keep open and unobstructed the way to its door to all who must invoke its authority, which is not limited in the right to punish offenses of this kind except by the infliction of such punishment as is commensurate with the enormity of the offense and calculated to preserve and uphold the dignity and honor of the court and its respect in the confidence of the people. *Ford* v. *State*, 69 Ark. 550. The court had jurisdiction to hear the proceeding and did not exceed its authority in the assessment of the punishment.

The judgment is affirmed.

ACKER, TRUSTEE, *v.* DEVORE.

Opinion delivered March 27, 1916.

1. CLOUD ON TITLE—SHERIFF'S DEED—LINE OF TITLE—INNOCENT PURCHASERS.—Land was sold at a sheriff's sale and purchased by plaintiffs. Before the execution and sale the original owners had conveyed the property to defendant's grantees. In an action by plaintiffs to quiet their title, *held*, that the conveyance being made to defendant's grantors before the sheriff's sale, that the defendant was not required to take notice of the sheriff's deed.
2. JUDGMENTS—CLOUD ON TITLE JUDGMENT IN ANOTHER COUNTY—LIS PENDENS.—A judgment rendered in the Mouroe circuit court, will not be a lien upon defendant's lands in Arkansas county, no copy of the judgment having been filed for record in Arkansas County, and the sheriff of Arkansas County, holding an execution, not having complied with the *lis pendens* statute.

Appeal from Arkansas Chancery Court; *Jno. M. Elliott*, Chancellor; affirmed.

W. N. Carpenter and *Manning, Emerson & Morris*, for appellant.

1. The conveyances were fraudulent and void as to creditors. 73 Ark. 174; 46 *Id.* 542; 45 *Id.* 520; 8 *Id.* 261; 14 *Id.* 69; 106 *Id.* 230; Kirby's Dig., § § 365-8; 59 *Id.* 614; 110 *Id.* 350; 96 *Id.* 531; 55 *Id.* 59-64.

2. Devore was not an innocent purchaser; he had constructive notice of the sheriff's deed to Hattie Carpenter. Kirby's Dig., § 762; 14 Ark. 294; 16 *Id.* 543; 28 *Id.* 825.

3. Farmer was insolvent; a judgment was standing against him; execution had been issued and returned showing no property found. While thus insolvent, he conveyed to his cousin. In a short time the cousin conveyed back to his wife. *Prima facie,* at least, this was a fraud. 46 Ark. 542. Besides, the testimony shows Farmer deliberately planned these transfers to defeat creditors.

Botts & O'Daniel, for appellee.

1. Plaintiff shows no title and must fail. He must recover on the strength of his own title. 73 Ark. 350; 94 *Id.* 306; 37 *Id.* 643; 97 *Id.* 370; 90 *Id.* 423.

2. Devore had no actual or constructive knowledge of the alleged fraud. He was an innocent purchaser. 79 Ark. 215, 399; 25 *Id.* 223. Neither Acker nor Carpenter were innocent purchasers. A purchaser at a judicial sale or execution sale acquires no better title than the party whose property is sold.

3. The judgment was no notice to Devore. Kirby's Digest, § 5152-3, 5149; *Hudgins* v. *Schultice,* 118 Ark. 139.

WOOD, J. This suit was brought by the appellants against the appellee to quiet title to a certain tract of land in Arkansas County. Plaintiffs alleged that the land in suit was sold by I. W. Ingram, trustee, and W. N. Carpenter to C. M. Farmer on October 10, 1903; that subsequent to that time a judgment was obtained against C. M. Farmer and W. N. Carpenter in the Monroe Circuit Court; that the land in suit was sold under an execution issued on that judgment and purchased by Hattie O. Carpenter; that Hattie O. Carpenter conveyed the land to Clinton Acker, as trustee for the children of W. N. Carpenter, the plaintiffs; that the defendant Wm. DeVore claimed an interest in the land. Plaintiffs alleged that the claim of Devore was a cloud upon their title; that Devore deraigned title from the same source as plaintiffs, and

they asked that Devore's title be set aside and cancelled as a cloud upon their title.

The defendant, in his answer, denied every allegation of the complaint, and set up that the judgment mentioned in the complaint was not a lien upon the land in controversy; that no *lis pendens* notice was filed in Arkansas County, and that defendant was an innocent purchaser.

The court found that appellee was an innocent purchaser for value and entered a decree dismissing appellants' complaint and quieting title in appellee. Whether this finding and decree of the court was correct, is the only question we need consider on this appeal.

Appellants, the trustees, and the beneficiaries, deraigned title through a deed from Hattie O. Carpenter, who purchased the land in controversy under an execution issued against C. M. Farmer. The deed of W. N. Carpenter and Hattie O. Carpenter to Acker, the trustee, under which appellants claim, was executed December 30, 1905, and was recorded in Arkansas County, where the land was situated, January 1, 1907. As early as 1904, C. M. Farmer conveyed the land in controversy to Fred Farmer, and in about three months thereafter, Fred Farmer conveyed the land to Mrs. C. M. Farmer. The deed from C. M. Farmer and wife, under which appellee claims title was executed March 28, 1906, and was filed for record and recorded in the county where the land is situated the 31st of March, 1906. It therefore appears that the deed under which appellants claim title was not recorded until about one year after appellee's deed was recorded.

(1) The deed from Farmer and wife to appellee Devore recited a consideration of $3,840, and it is not contended by the appellants that he was not a purchaser for value. True, the sheriff's deed to Hattie O. Carpenter was executed January 2, 1906, and recorded January 23, 1906, in the county where the land was situated, and was therefore executed and placed on record before appellee obtained his deed from Farmer and wife. But this sheriff's deed to Hattie O. Carpenter, although placed on rec-

ord before appellee obtained his deed, did not affect the rights of appellee as an innocent purchaser for value. There is no allegation and proof that appellee knew at the time he purchased from Farmer and wife that his grantors were indebted to Acker or to any one else. The question of the rights of Hattie O. Carpenter as a grantee in the sheriff's deed can not be considered here for she was in no way a party to this suit. There is no evidence in the record to warrant a finding that appellee was in any manner connected with the alleged fraud in the conveyance by the Farmers of the lands in controversy to defraud their creditors, if there was in fact such conveyance, constructive notice of the sheriff's deed to Hattie Carpenter and her quitclaim deed would not have put appellee on notice or have made him a party to any conveyances made by the Farmers or Carpenter to defraud creditors. See *Kerr* v. *Birnie,* 25 Ark. 225. C. M. Farmer, having conveyed the land to Fred, and he to Mrs. C. M. Farmer, before the sale under execution, the sheriff's deed was not in the line of title of appellee, and he did not have to take notice thereof.

Conceding, without deciding, that appellee's vendor had made prior conveyances of the property in controversy to defraud creditors before appellee purchased, still appellee, having no knowledge of, and being in no manner connected with, such fraud, and having no knowledge that his vendor was even indebted to any one, so far as the proof in this record shows, would be protected as an innocent purchaser for value. See *South Omaha National Bank* v. *Boyd,* 79 Ark. 215; *Hoskins* v. *Fayetteville Gro. Co.,* 79 Ark. 399.

(2) The judgment against C. M. Farmer, rendered in the circuit court of Monroe County, in May, 1903, and under which the lands were sold and purchased by Hattie Carpenter, was not a lien against the land in controversy, because the same was situated in Arkansas County, and no copy of the judgment was filed for record in Arkansas County, and the sheriff of Arkansas County, who held the execution, did not comply with the *lis pendens* statute.

Kirby's Digest, § § 5149 to 5154, inc.; *Hudgins* v. *Schultice,* 118 Ark. 139.

The decree is therefore correct, and it is affirmed.

STUTTGART RICE MILL CO. *v.* REINSCH.

Opinion delivered March 27, 1916.

1. EMBLEMENTS—SALE OF LAND.—Land was sold under foreclosure of a deed of trust, the trust deed not covering the growing crops; before the sale the crops were cut and removed. *Held,* the purchaser did not acquire the crops.
2. SALES—TITLE TO CROPS—DEFENSES.—In an action against appellant by appellee, for the value of certain rice which had been deposited in appellant's mill, the appellant may set up both defenses, that it held the rice for one P. who held the same under authority of appellee, and that P. had acquired the same under a commissioner's sale.

Appeal from Arkansas Circuit Court; *Thos C. Trimble,* Judge; reversed.

Robert E. Holt, for appellant.

1. Appellee is bound by the decree and subsequent proceedings in the foreclosure suit of Hoyt, trustee, against Reinsch *et al.* He was a party defendant, and Dahne, his tenant, was likewise a party defendant. So far as Reinsch is concerned, the proceedings in the chancery are "*res adjudicata.*"

2. The matter set up in appellant's amendment to answer with reference to the abandonment of the rice crop to J. I. Porter by Reinsch and appellee's reply thereto raised a question of fact which should have been submitted to the jury for adjudication. It was error to withdraw the case from the jury.

J. E. Ray, for appellee.

1. The rice was harvested before the sale under the decree and did not pass on sale of the land. 3 Jones on Mortg., pp. 195, 238; Kirby's Digest, § 6323; 22 Ark. 23; 23 *Id.* 601. A growing crop is a chattel. 75 Ark. 336; 93

Ind. 411. Porter did not purchase the rice, and knew it. 47 Ark. 320.

2. The bankrupt court set this rice aside as exempt, and its action is final. Loveland on Bankruptcy, pp. 85, 119, 93 etc.; 178 U. S. 542; 198 *Id.* 539; 96 Fed. 758.

3. Porter and the bank are both bound by the judgment of the bankruptcy court, and can not attack it collaterally. 73 Ark. 480; 33 *Id.* 522; 10 Ann. Cas. 740; 18 *Id.* 600; 96 Ark. 540.

4. The sale of the rice was void. The court properly directed a verdict. 43 Ark. 220. It is clear there was no violation of the parol evidence rule. 27 Ark. 511; 3 Page on Cont., § § 1339, 1348-9; 2 *Id.*, sections 608-1206.

SMITH, J. Appellee was the plaintiff below and alleged in his complaint that on February 2, 1914, he leased to Charles Dahne a tract of land on which to grow a crop of corn and rice. The contract was for an agreed share of crop, which was to be one-half of the rice and one-third of the corn. The contract was later so changed that Dahne agreed to furnish everything relating to the crop, and to pay only one-fourth of the rice. When the crop had been harvested, Dahne delivered appellee's share to the Stuttgart Rice Mill Company, and this suit was brought for the value of the rice so delivered, upon the refusal of the mill company to pay appellee therefor. Proof was offered in support of these allegations.

On behalf of the mill company it was shown that on June 27, 1912, appellee had conveyed the land on which the crop was grown to one J. G. Hoyt, as trustee, to secure an indebtedness there described. A decree of foreclosure of this deed of trust was rendered on September 10, 1914, and a sale was had under this decree on October 30, 1914, which was reported to and approved by the court at its February term, 1915.

The commissioner who was appointed to make the sale under the decree executed a bill of sale which contained a recital of the rendition of the decree of sale of the land and of the purchase of J. I. Porter at the sale had thereunder, and that at the time of the rendition of said decree

of sale there was growing on the land a crop of rice, which constituted a part of the real estate, and that the rice crop had been severed from the soil and was then in the warehouse of the rice mill company at Stuttgart. In consideration of these recitals, and of the sum paid by Porter at the commissioner's sale of the land, the bill of sale was executed by the commissioner to Porter on February 10, 1915. It was further contended by the mill company that appellee had directed Porter to apply the proceeds of his share of the rice to the payment of a second mortgage held by the German-American Bank, of which Porter was president, and that when the check for the value of the rice was given Porter, he had applied this check to that indebtedness pursuant to the agreement made at the time the car of coal was paid for. Appellant mill company offered at the trial to introduce in evidence the report of the commissioner showing the sale of the rice, and that this report had been endorsed, examined and approved by the chancellor; but the court excluded this evidence. Appellant offered evidence to the effect that appellee found himself unable to comply with his contract with Dahne in regard to the cultivation of the land, and applied to Porter for assistance, and agreed that Porter, if he would buy the coal required in the farming operations, might apply appellee's interest in the rice crop to the payment of the indebtedness due by appellee to the bank. The court also excluded this evidence, and at the conclusion of the evidence directed the jury to return a verdict for the admitted value of the rice, and this appeal has been duly prosecuted from that judgment.

The deed of trust foreclosed did not cover the growing crops, and the proof is that the rice was cut and removed from the land by October 15, before the commissioner's sale on the 30th. Under these circumstances, the court below was correct in his view that the purchaser did not acquire the crop, which had been removed from the land before his purchase, and might very well have directed the verdict, as was done, if this had been the only question raised by the evidence. But such was not the

case. The mill company presented the defense that appellee had applied this rice to the satisfaction of his debt due the bank when he induced Porter to pay for a car of coal required in Dahne's farming operations. Although this result was alleged to have been consummated by a parol sale of the growing crop, such agreement was valid, if made. *Cannon* v. *Matthews,* 75 Ark. 336.

It is argued that this defense is contradictory to the one that Porter acquired the title at the commissioner's sale. But inasmuch as the mill company appears to have been acting for Porter, who seems to be the real party in interest, we think making one of these defenses did not estop the mill company from also making the other, and as appellee would have no right to recover the value of this rice if he had, in fact, sold it to Porter for the benefit of the bank, the court should have submitted that issue to the jury, and for the failure so to do, the judgment will be reversed and the cause remanded.

TEGARDEN v. HURST.

Opinion delivered April 17, 1916.

1. REFORMATION OF DEEDS—SUFFICIENCY OF EVIDENCE.—Where appellee's grantor deeded certain land to appellant's grantor, which included a certain tract which appellee's grantor continued to occupy for fourteen years, and which appellant made a claim to; after a survey was made; *held,* the evidence was sufficiently strong and convincing to warrant a reformation of the deed at the suit of the appellee.
2. DEEDS—POSSESSION OF GRANTOR—PRESUMPTION.—When the grantor continues to occupy a portion of certain land conveyed, for a period of fourteen years, openly and notoriously, the presumption that he holds the claim in subordination to the grantee, is overcome.

Appeal from Marion Chancery Court; *T. H. Humphreys,* Chancellor; affirmed.

S. W. Woods, for appellant.

1. There was no mistake in the deed from Hurst to Estes and there could be no reformation of deeds. 105

Ark. 455; 104 *Id.* 475; 71 *Id.* 185; 84 *Id.* 349; 75 *Id.* 72. The deeds are the best evidence of the intentions of the parties. 75 Ark. 72; 71 *Id.* 614. Before there can be a reformation of a deed, it must be shown by clear and convincing testimony, not only that there was a mistake in the deed, but that the mistake was mutual. 74 Ark. 336; 101 *Id.* 135; *Ib.* 461; 104 *Id.* 475.

2. Tegarden was an innocent purchaser. 96 Ark. 512; 83 *Id.* 131; 42 *Id.* 362.

3. The record does not establish the appellee's claim or plea of limitation and sustain the decree of the court. Title by limitation must be established by a preponderance of the testimony. 110 Ark. 571; 79 *Id.* 109. The plea of limitation is not sustained. Hurst never held adversely. 58 Ark. 142; 69 *Id.* 562; 84 *Id.* 52; 43 *Id.* 469; 85 *Id.* 520; 96 *Id.* 512; 101 *Id.* 163. The holding was permissive and friendly, not adverse. 43 Ark. 469; 111 *Id.* 604.

4. The burden was appellee's to establish title by limitation. They have failed. 110 Ark. 571; 65 *Id.* 422; 43 *Id.* 469; 57 *Id.* 97.

Williams & Owens and *Gus Seawel,* for appellees.

1. The evidence warranted a reformation of the deed so as to except the strip of land in controversy. 71 Ark. 614; 76 *Id.* 43.

2. At the time Tegarden purchased from Estes, he had no sufficient notice of Hurst's claim to the strip. The general rule is that actual possession is sufficient notice. 90 Ark. 149; 82 *Id.* 455. But there is an exception, as where the grantor continues in possession after the grant. 69 Ark. 562; 84 *Id.* 52. Actual possession is sufficient to put subsequent purchasers on notice. 101 Ark. 171.

3. The doctrine of estoppel does not apply. 76 Ark. 25; 66 *Id.* 167; 55 *Id.* 318; 90 *Id.* 149; 82 *Id.* 455.

4. The evidence does not sustain the plea of limitation. 669 Ark. 562; 80 *Id.* 575, 444; 81 *Id.* 258; 80 *Id.* 435.

McCULLOCH, C. J. This is an action instituted in the chancery court of Marion County, seeking the reformation of a deed conveying lands in that county, and the liti-

gation concerns the ownership of a small tract of land containing about four acres. It is a part of the northeast quarter of the northwest quarter of section 6, township 18 north, range fifteen west, and lies north of Crooked Creek, which runs through the above mentioned subdivision. The land originally belonged to John M. Hurst, who owned about five hundred acres including the land in controversy. The deed sought to be reformed is one which was executed by Hurst to Nathaniel Estes on February 25, 1899. At that time Hurst owned five hundred acres, as above stated, of which above three hundred acres were south of Crooked Creek, and the remainder north of the creek. A portion of the lands on each side of the creek was fenced and in cultivation, and the land in controversy was embraced in the fence which enclosed the farm lying on the north side of the creek.

In the year 1895, Hurst mortgaged the lands south of the creek to Mr. A. S. Layton, including said northeast quarter of the northwest quarter of section 6, which embraced the lands in controversy. The description in the deed from Hurst to Estes was copied from the mortgage executed by Hurst to Layton. The trade between Hurst and Estes was that the former was to convey to the latter the lands which had been mortgaged to Layton in consideration of the payment of the mortgage debt by Estes. The contention of Hurst is that the land in controversy was not intended to be included in the mortgage to Layton, or, at least, that he did not understand that it was so included, and that in the trade with Estes, it was understood that he was only conveying the lands south of the creek, and not any of the lands embraced in his farm on the north side of the creek. Hurst continued in possession of the lands in controversy on the north side of the creek, and no question was ever raised as to his right thereto until the summer of 1913. Estes sold the lands to U. S. Tegarden and conveyed the same to him by deed dated September 8, 1908, and Hurst conveyed the land in controversy, with other lands, to W. H. Bryant on July 16, 1913. Bryant took possession under his purchase from

Hurst and shortly thereafter a controversy arose between Bryant and Tegarden as to ownership of this land.

This suit was instituted by Bryant and Hurst against Tegarden and Estes to require a reformation of the deed from Hurst to Estes, and Tegarden filed a cross-complaint, asking for recovery of possession of the lands in controversy, and the rents. The defendants denied in their answer that there was any mistake in the deed from Hurst to Estes, and in the cross-complaint alleged that Bryant was unlawfully in possession of the land in controversy. Bryant answered the cross-complaint, among other things setting up the seven years statute of limitation in bar of Tegarden's right to recover possession of the land. On the final hearing of the cause, the chancellor found against the plaintiffs as to a right to a reformation of the deed, but found in Bryant's favor on the plea of limitations, and dismissed, for want of equity, the cross-complaint of Tegarden.

We are of the opinion that the chancellor was correct in rendering a decree in favor of Bryant on his plea of limitations, but we are also of the opinion that the evidence was sufficient to warrant the reformation of the deed, and that the decree should have been in favor of Bryant on that additional ground. The testimony is undisputed that the small tract of land in controversy was, at the time of the conveyance to Nathaniel Estes, inclosed as a part of the Hurst farm lying north of the creek, and Hurst continued to occupy it without any question being raised about his right to do so until he sold it to Bryant in the year 1913—a period of about fourteen years. Hurst testified positively that the trade made with Estes was that he was to sell and convey only the lands south of the creek, and that there was no intention to embrace any of the lands which constituted the farm lying north of the creek. Another witness—one of Hurst's sons—testified that he was present when the trade was made, and that the understanding was that the sale was only to cover lands south of the creek. L. M. Duren testified that Hurst employed him to prepare the deed to Estes, and told him

that it was intended to convey only the lands south of the creek, and that Estes also told him that he was buying all of the Hurst lands south of the creek, and wanted to get the descriptions accurate so as to cover that land. He testified that he prepared the deed covering only the land south of the creek, and after reading it over to Estes, delivered it to the latter for the purpose of having the latter's son examine it. There is no explanation in the record as to what became of the deed which Duren said that he prepared, but the proof establishes the fact that Estes did not deliver that deed to Hurst, but on the contrary, had another deed prepared by his son which described the whole of the northeast of the northwest quarter of section 6, thus including the land in controversy.

There are quite a number of witnesses who testify that Mr. Estes told them, about the time the trade was made and at times thereafter, that he had not purchased any land north of the creek, and that the creek was the line between his lands, and those which Hurst remained the owner of. Some of those witnesses were relatives of Hurst, and were not altogether disinterested in this controversy, but several of them were, so far as appear in this record, disinterested. Mr. Estes testified in the case, and he admits that he always considered the creek as practically the line between the two tracts. In fact, he wrote a letter to Bryant in which he stated that he did not know where his corner was across the creek, but that he did not suppose that it took in any land that amounted to anything in Hurst's field, and that the creek was the boundary line "in a practical sense." Duren testified, as has already been mentioned, that he wrote the description so as to exclude any part of the land lying north of the creek, and that he read the deed over to Mr. Estes at the time he delivered it to him. This is not denied by Mr. Estes in his deposition.

(1) The inference is very strong that the parties never intended that any of Hurst's farm lands north of the creek were to be embraced in the sale to Estes. This view is very greatly strengthened by the fact that Hurst

remained in unchallenged possession of this land for fourteen years, and that his right to hold the lands in controversy was never questioned until a survey was made by Tegarden in the summer of 1913. It is true that Hurst concedes that it was understood that he was selling the lands that were embraced in the Layton mortgage, but he explains that it was not intended that the land in controversy should be included in the Layton mortgage, and that he did not suppose that it was so included, and that it was distinctly understood in his trade with Estes that none of the land north of the creek was to be included. So we are of the opinion that the evidence is sufficiently strong and convincing to justify a reformation of the deed, and that that relief ought to have been granted.

(2) We are also of the opinion that the evidence shows very clearly an intention on the part of Hurst to hold the land in hostility to any other claim, and that even if there was no right to reformation that Hurst's occupancy ripened into a title by adverse possession for the statutory period. On that branch of the case, the defendants invoke the doctrine that where a grantor remains in possession, there is a presumption that he does so in subordination to the title he has granted, and not in hostility thereto. While that is true, there is an exception where the occupancy continues unexplained for an unreasonable length of time and under those circumstances, the presumption is gradually overcome by lapse of time. *American Building & Loan Association* v. *Warren*, 101 Ark 163. The fact that Hurst remained in undisputed possession of the land, openly and notoriously, for a period of fourteen years is sufficient to overcome the presumption that he was holding in subordination to his original grant. Such occupancy was, under the circumstances, sufficient notice to Tegarden as to the hostility of the possession. He admits in his testimony that when he was negotiating a purchase from Estes, he was told that the line went right across the river, and to some extent into Hurst's field, and he was therefore put upon notice that there was an adverse occupancy which had at that

time continued for a period of about nine years. He is therefore in no better attitude than was his grantor, Nathaniel Estes, for he had notice of the adverse claim, and had no right to rest upon a presumption that Hurst, the original grantor, was holding possession in subordination of his conveyance to Estes.

The decree fixes the title in the plaintiff, Bryant, and in effect gives him the relief which he sought in his complaint, or at least relief which is tantamount thereto. The decree is therefore affirmed.

HOME LAND & LOAN COMPANY v. ROUTH.

Opinion delivered April 17, 1916.

1. TRUSTS—CONSTRUCTIVE TRUST—PROOF—PAROL.—A constructive or resulting trust may be established by parol, as it arises by operation of law, and not from the contract of the parties.
2. GARNISHMENT—MONEY DEPOSITED BY AGENT.—Money deposited in a bank by a party as agent of the principal defendant, can not be reached by garnishment proceedings by a creditor of such agent.
3. GARNISHMENT—TRUST FUNDS.—A creditor can not have the debt satisfied out of property held in trust by the debtor, for another, no matter how completely the debtor may have exercised apparent ownership over it, unless it was upon the faith of such ownership that the credit was given.
4. GARNISHMENT—INTERVENTION — SUFFICIENCY. — The intervener in garnishment proceedings, need state only that the property belonged to him.

Appeal from Benton Circuit Court; *J. S. Maples,* Judge; affirmed.

W. N. Ivie, for appellant.

1. The intervener did not comply with the statute. Kirby's Digest, § 391; 58 Ark. 446.

2. The money in the hands of the bank was J. T. Powell's, and subject to garnishment. The relation between Routh and Powell was that of debtor and creditor, and the court erred in finding for the intervener. 70 Ark. 444; 15 Enc. Pl. & Pr. 733; 101 Ark. 455; 103 *Id.* 279; 104 *Id.* 37; 39 Cyc. 49; 57 Ark. 635; 89 Ark. 185; 63 Ark. 246.

John R. Duty, for appellee.

1. The question of a trust is not involved.

2. The court's finding is conclusive. 80 Ark. 249; 104 *Id.* 154; 96 *Id.* 606. Money held in a fiduciary capacity can not be garnished. 20 Cyc. 1021-2; 43 Am. St. 849.

3. The case was properly tried; no error was committed. 95 Ark. 118; 95 *Id.* 405; 82 *Id.* 407; 83 *Id.* 1.

McCULLOCH, C. J. Each of the two appellants, Home Land & Loan Company, and Benton County Hardware Company, recovered a judgment at law against J. T. Powell for money due on contract, and each caused to be issued and served a writ of garnishment on the Farmers State Bank of Rogers, each of the writs being issued upon allegations to the effect that the garnishee had money of J. T. Powell on deposit and was indebted to him. The garnishee filed an answer stating that it had on deposit to the credit of J. T. Powell the sum of $1,466.93 and was therefore indebted to him in that sum. Appellee, E. A. Routh, intervened in each of the garnishment proceedings and filed a plea stating that the sum of money in the hands of the garnishee to the credit of J. T. Powell was not the property of Powell, but was the property of the intervener, and not subject to garnishment or other process for the debts due from the defendant Powell. The two cases were consolidated and tried together before the court sitting as a jury, and the court found in favor of the appellee, as intervener in the action, and discharged the garnishee.

The evidence adduced at the trial tends to establish the fact that the funds deposited in the bank to the credit of the defendant Powell were derived from the sale of a tract of land in Benton County by Powell to one Thompson, and that said land, when originally purchased by Powell, was paid for by appellee Routh, upon an express agreement that Powell was acting as agent of appellee in the purchase and was to take the title in his own name for convenience, and that when the land should be sold the funds should be accounted for as the property of ap-

pellee Routh. In other words, the testimony is that the appellee furnished the money with which to buy the land; that Powell acted as his agent, taking the title in his own name, and that he deposited same upon appellee's direction and held the money as agent for the latter. During the time that the land was held in the name of Powell he occupied the same, but the testimony shows that it was under an agreement with appellee to pay rent. The land was sold to Thompson for a consideration of $1,500, of which he paid $185 in cash and gave his note for $200 and transferred a note of a Mrs. Vandover for $1,115 and accrued interest, which was secured by a mortgage on another tract of land which Thompson had sold to Mrs. Vandover. Powell sold and transferred Thompson's note for $200, and testified that this was done under the direction of appellee. Mrs. Vandover paid the amount of her note into the bank to be placed to the credit of Powell when he should satisfy the mortgage. All of the money was placed in the bank as a general deposit to Powell's credit, and in the aggregate amounted to the sum set forth in the garnishee's answer. The writs of garnishment were sued out and served two or three days after the money was placed to the credit of Powell. As soon as the money was placed there, or at least the amount paid over by Mrs. Vandover, Powell gave appellee a check for $1,175, and appellee sent it to his bank in another town for collection and credit, but the garnishment was served before the money could be collected. Appellee and Powell each testified that the remainder of the money in the bank was left there to Powell's credit, at appellee's request, for use by appellee subsequently for another purpose.

This, in substance, is the state of facts to which the proof of appellee was directed, and it is sufficient to warrant a finding that those were the facts in the case, and that Powell held the funds as agent of appellee Routh. The question in the case is, therefore, whether under those facts as found by the court the funds were subject to garnishment for the debt of Powell.

(1) It is contended in the first place that the court erred in allowing oral testimony tending to establish the fact that Powell held the title as trustee for appellee Routh. Counsel for appellants base their contention upon the well-established rule that an express trust can not be established by parol testimony. They fail, however, to take into consideration the nature of a resulting trust, and the fact that such trust can be established by parol, as it results by operation of law and not from the contract of the parties. Appellee furnished the money for the purchase of the land and a trust resulted in his favor. It was not, according to the evidence, a loan of money to Powell, but a payment of the price of the land, the title to which was conveyed to Powell. But even if there were any doubt on that score, the fact remains that according to the proof Powell held this particular fund, which he derived from the sale of the land, as the agent of appellee. It was not a debt of Powell to appellee, nor was the attempt to pay it over to appellee a donation, but the money was held by Powell as agent in discharge of his obligation to account to appellee. Under those circumstances, the money was really the property of appellee, though it was on deposit in the name of Powell, his agent.

(2) There is abundant authority to sustain the contention of counsel for appellee that "money deposited in a bank by a party as agent of the principal defendant can not be reached by garnishment proceedings by a creditor of such agent." 20 Cyc. 1022.

The case of *Morrill* v. *Raymond,* 28 Kan. 415, is directly in point. There certain funds were paid over by Speer & Co. to their agent, Orth, to be used in purchasing corn, and the latter deposited the money in bank in his own name to be checked out as he made purchases of corn for his principal. There was an attempt to reach the funds by garnishment issued at the instance of Orth's creditors, and the court held that the money was not subject to garnishment for the debt of Orth, notwithstanding

the fact that the funds stood as a general deposit in his name.

The Supreme Court of Kansas, in disposing of the case, said: "The money on deposit was Speer & Co.'s, not Orth's. * * * A creditor of Orth, therefore, was not entitled either by attachment or garnishment to have the deposit in the bank held by Orth as a fund for the use and as the property of Speer & Co. applied to the payment of Orth's debts. Orth had no right to apply this fund in whole or in part, to pay or reduce the judgment of Raymond against him, and the judgment creditor stood in no better position than the depositor. * * * If the claim of Raymond had accrued originally upon the faith and credit that the money on deposit was Orth's individual property, another and a different question would be presented for adjudication; but this we find to be distinctly and fully negatived by the fact that Raymond's judgment was obtained long prior to the deposit."

So it can be said in this case that the evidence does not show that the credit was extended by appellants on the faith of the money deposited being the property of Powell, and the evidence warrants the conclusion reached by the trial court that the transaction was conducted in good faith.

(3) The question was decided in the same way by the Supreme Court of Washington in the case of *Marx* v. *Parker*, 9 Wash. 473, 43 Am. St. Rep. 849, where it was said: "It is a general rule in garnishment that the plaintiff can obtain no greater beneficial relief against the garnishee than the judgment debtor would be entitled to, and that if the debtor's recovery would be limited to a mere legal title, without beneficial interest or right of enjoyment in himself, the proceeding must fail. A judgment creditor can not have the debt satisfied out of property held in trust for another, no matter how completely his debtor may have exercised apparent ownership over it, unless it was upon the faith of such ownership that the credit was given. * * * Therefore, if the deposit in the bank was, in equity, the property of the city, although it

stood in Parker's name, respondents had no right to a judgment against the garnishee."

See, also, to the same effect, *Jones* v. *Bank,* 44 Pa. St. 253; *Ingersoll* v. *First National Bank,* 10 Minn. 396; *Des Moines Cotton Mill Company* v. *Cooper,* 93 Ia. 654. It follows, therefore, that the trial court was correct in holding that the funds were not subject to garnishment for the debt of Powell.

(4) Another contention is that the court erred in overruling the motion of appellants to require the intervener to make his plea more definite and certain. The plea did in fact state that the funds held by the garnishee were not the property of Powell, but that the same were the property of the intervener, and that was, we think, a sufficiently definite allegation concerning the ownership of the property. It was unnecessary to set out in the plea the evidence upon which the intervener's claim of ownership was based. All that was necessary was that the fact be stated that the funds were the property of the intervener. That was a statement of fact and not a statement of a legal conclusion.

Affirmed.

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

Opinion delivered April 17, 1916.

CARRIERS—DELIVERY OF FREIGHT TO CARRIER—LIABILITY FOR LOSS.—Plaintiff procured a freight car to be set out on its spur track and on the following day loaded the same with cotton and closed the doors of the car, and during the night the car and contents were destroyed by fire. *Held,* the carrier was not liable for the loss, the car and contents not having been delivered to it.

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

D. S. Plummer and *Daggett & Daggett,* for appellants.

1. There was a delivery of the cotton to the company. 79 Ark. 100; 60 Ark. 333; 79 *Id.* 353; 89 *Id.* 178;

87 Am. Dec. 301; 104 S. W. 377. The shipper had done everything within his power to deliver the freight. 87 Am. Dec. 301; 104 S. W. 377. The liability attaches when the shipment is delivered for immediate transportation. 104 S. W. 377.

The company had notice that the car was loaded and ready for shipment when the freight train passed. 4 R. C. L., § § 171-2; 32 L. R. A. (N. S.) 319. The delivery was complete and the company was liable.

Troy Pace and *W. R. Satterfield,* for appellee.

1. There was no delivery of the cotton. 4 R. C. L., § 170; 96 Am. Dec. 742; 60 Ark. 333; 80 *Id.* 178; 87 *Id.* 298; Hutchinson on Car. (3 ed.), § 105.

HART, J. J. L. Matthews and J. B. Hood sued the St. Louis, Iron Mountain & Southern Railway Company to recover the value of a car load of cotton which they alleged was destroyed by fire after they had delivered the cotton to the railroad company for immediate shipment. The facts are as follows:

The plaintiffs, Matthews and Hood, are partners engaged in the farming and supply business and in the operation of a gin near Gassett. Gassett is a flag station on the defendant's line of railroad between Memphis and Marianna.

The railroad company, at the request of Matthews & Hood, put in a sidetrack for their use and benefit in shipping over defendant's line of road. Other parties in the neighborhood also used the spur track for the shipment of their goods. The spur track was constructed at the cost of the plaintiffs, but was situated on the right-of-way of the defendant. There was no agent at Gassett and when the plaintiffs or any one else wanted a car for the shipment of their cotton, cotton seed or any product they would request the agents of the defendant to furnish the same and it would do so.

The defendant knew that all the cotton of the plaintiffs delivered for shipment would be consigned to Memphis. The established custom was that when the plain-

tiffs or any other shippers wanted a car, they would notify the conductor of the defendant's local freight train of that fact and he would bring in an empty car on his next trip and set it on the spur track. When the car was loaded, the plaintiffs would notify the conductor of the next train going in the direction of the place to which the goods was shipped and would present to the conductor what was called a conductor's receipt for the goods and the conductor would sign the receipt in duplicate and then attach the car to his train and carry it to destination. The conductor's receipt contained the statement that the goods were received in apparent good order and consigned to the place named in the receipt. Article and weights were also given and the receipt then contained the following: "This memorandum is neither a receipt nor a bill of lading, and the property will be transported only under the terms and conditions of a regular bill of lading to be procured by the shipper upon delivery of this memorandum at the first agency station in the direction that the freight moves."

In November, 1914, the local freight train of the defendant made tri-weekly trips between Memphis and points south. The plaintiffs applied to the conductor on the south-bound local freight train for a car to be set in at the spur to be loaded with cotton to be shipped to Memphis. On the following day, while the train was on its return trip to Memphis, the conductor set in the car as requested by the plaintiffs. On the next day the plaintiffs caused this car to be loaded with cotton, closing all the doors. On this date the local freight train went south. On the next morning, before the train reached the spur on its return trip north to Memphis, the car containing the cotton was discovered to be on fire and the cotton was destroyed by the fire.

The circuit court was of the opinion that there had been no delivery of the cotton and the case is here on appeal.

Counsel for the plaintiffs rely on the cases of *Railway Company* v. *Murphy,* 60 Ark. 333, and *Pine Bluff &*

Arkansas River Ry. Co. v. *McKenzie,* 75 Ark. 100. In the McKenzie case the facts were in all essential respects similar to the case at bar, with the addition that in that case the plaintiff notified the conductor of defendant company of the fact that the cars had been loaded and the conductor promised to take them out on the next morning. They were destroyed before that time, however, by fire.

In the opinion the contention of the railway company and the ruling of the court is stated as follows: "Appellant contends that the evidence fails to show a complete delivery of the cotton and seed, that a bill of lading was executed; and fails to show that it was the custom of appellant to accept the delivery of freight until it was executed. This was not necessary. The bill of lading properly follows the delivery, and is an acknowledgment of that fact. While it may be used as evidence of that fact, it is not the only evidence. Here appellant, in pursuance of its custom, at the risk of the appellee, had left cars on its sidetrack, with the agreement, implied if not expressed, that it would remove the cars the next day, if they were loaded, and carry them on to their destination. Notice of that fact was given to appellant. The cars were loaded and closed. The control and possession of their contents were completely surrendered to the railroad company. Nothing remained to be done by the appellee. The cotton and seed awaited the coming of the appellant's train. The cars were in its possession, and were the receptacles in which it accepted the delivery of the cotton and seed. They were left there for that purpose and with that understanding. The delivery was complete and appellant is responsible for their loss."

All opinions should be construed with reference to the facts to which they apply. It will be noted that in the quotation from the McKenzie case, it is stated that the railroad company in pursuance of its custom, at the request of the shipper, had left cars on its sidetrack with the agreement that it would remove the cars the next day if they were loaded and carry them on to their destina-

tion. The court then says that notice of that fact was given to the railroad company, evidently meaning, notice of the fact that the cars had been loaded and were ready to be removed, had been given to the railroad company. Stress is laid upon the fact that nothing else remained to be done by the shipper and that the control and possession of the cars had been completely surrendered to the railroad company. The court evidently meant to lay stress on the fact that the cars had been loaded by the shipper and notice of that fact had been given to the railroad company through the conductor of the train which was to carry the cars, and the conductor accepted the shipment. So the court might well say that the delivery was complete and that the railway company was responsible for the loss, notwithstanding the conductor's receipt had not been issued in accordance with the customs.

In the Murphy case the court said: "Now, recurring to the facts of this case, it appears that the shipper, Murphy, had done all that was required of him, according to his particular course of dealing with the carrier, to further the shipment of his cotton. He had called for a car when his cotton was ready for transportation. The company had complied with his request by placing its car upon its own switch to be loaded. Murphy had loaded it, closed it, filled out the blank form of receipt to be signed by the conductor, and had notified the agent that the cotton was loaded and ready for shipment giving the place of destination. He had flagged every passing freight, and requested removal. He had done, it seems, all in his power, and all that the company required of him before shipment. What remained was exclusively the work of the carrier."

In that case, too, the court held that the delivery to the carrier was complete, notwithstanding no bill of lading had been issued. Those cases are clearly distinguishable from the facts in the present case. In both the McKenzie and Murphy cases, the shipper had done all that he could do. He had loaded the cars and notified the

proper agents of the railroad company that the cars were ready to be moved. In the McKenzie case the conductor of the train which was to move the cars had accepted the shipment. Therefore, the court held that the delivery was complete, even though the conductor's receipt had not been issued according to custom. This was so because the shipper had done all that he was required to do and the conductor having authority to accept the shipment might receive it whether the conductor's receipt was or was not issued. So, too, in the Murphy case the shipper had done all that he could do, and the removing of the car after it was loaded and closed awaited solely the convenience of the railroad company.

We do not think under the facts of the present case that there was any delivery of the cotton. There could have been none until the conductor had been notified that the car was loaded and ready for immediate shipment, and had accepted the same either verbally or by issuing a conductor's receipt according to custom.

It follows that the judgment of the circuit court must be affirmed.

DISSENTING OPINION.

McCULLOCH, C. J. The opinion of the court is, I think, founded on an immaterial distinction between the facts of this case and the McKenzie case (75 Ark. 100) in regard to the notice to the carrier that the commodity had been loaded for shipment. The right to recover was not, in that decision, based on the fact that such notice had been given, but on the fact that the cotton and cotton seed had been loaded into the car which the carrier had, by arrangement with the shipper, placed on the sidetrack for the purpose. Judge BATTLE, speaking for the court, said: "The cars were in its (the carrier's) possession and were the receptacles in which it accepted the delivery of the cotton and seed. They were left there for that purpose and with that understanding. The delivery was complete, and appellant is responsible for their loss."

It is true, the fact is mentioned in the opinion that the shipper notified the conductor of the train that the

cotton and seed had been loaded into the cars, and that the conductor promised to take the cars out the next day; but if the giving of such notice was the essential element of such delivery, why was it necessary to say anything in the opinion about the cotton and seed having been loaded into "the receptacles in which it accepted delivery" and which had been "left there for that purpose and with that understanding" What the court decided in that case was that where the parties (the shipper and the carrier) had agreed in advance that delivery should be made by loading into cars placed by the carrier on its own sidetrack for the purpose of receiving the commodity, the delivery was complete as soon as the commodity was so loaded, for at that time it passed into the possession of the carrier. That is familiar law, for the parties to a contract for delivery of chattels may always agree in advance what shall constitute such delivery, and it is complete when made in the manner so agreed on. "It is entirely competent for the parties to agree as to what shall constitute a delivery as between themselves, and their agreement in this respect will usually be given effect." 2 Mechem on Sales, § 1186.

It appears to me that there is no well founded distinction between this and the McKenzie case, and that the latter should control as the established law on the subject. I therefore dissent from the conclusions of the majority.

Mr. Justice KIRBY concurs.

KNIGHTS OF HONOR OF THE WORLD v. EPPS.

Opinion delivered April 17, 1916.

1. INSURANCE—SERVICE—FRATERNAL ORDER.—Under Kirby's Digest, section 4378, service of summons upon a subordinate officer of a fraternal insurance order, is invalid where the chief officer of the order is within the county at the time.
2. JUDGMENTS—INVALID SERVICE—FRATERNAL ORDER.—A judgment, based upon invalid service, in an action against a fraternal insurance order, may be set aside.

Appeal from Drew Circuit Court; *Turner Butler,* Judge; reversed.

STATEMENT BY THE COURT.

This appeal comes from a judgment denying a motion to vacate a judgment of the circuit court against the Knights of Honor of the World Lodge, alleged to be void as having been rendered without notice, and to dismiss a writ of garnishment issued thereon.

It is alleged "that said judgment is void and of no effect for the reason that no notice of the pendency of said suit, either actual or constructive, was had by defendant; that defendant was unaware that judgment had been obtained or suit filed against it; that the G. W. Wiley, recited in the judgment as the officer of the lodge upon whom service had, was not either chief officer, secretary, or other officer upon whom service may be had in accordance with the law; that said Wiley was merely a financial reporter and hence service upon him was not service upon the order."

Also that the defendant has a meritorious defense, in that the policy sued on and upon which judgment was rendered was void, having been canceled prior to the death of the insured, because he had become unfinancial, and that fraud was practiced upon the court in procuring a judgment rendered for penalty and attorney's fee, contrary to law. A copy of the judgment was exhibited with the motion.

It appears that suit was brought by Eliza J. Epps on August 25, 1914, upon a benefit certificate or policy of insurance issued by said society or order, and judgment was rendered by default for the sum of $450, $60 penalty and $50 attorney's fees and costs. The judgment recites that service was had upon G. W. Wiley, reporter of Subordinate Lodge Knights of Honor of the World No. 764 at Rives, Drew County, Arkansas, on August 31, 1914." Summons was served on August 31, 1914, on said Wiley and the return of the sheriff showed that he was "the reporter of the lodge." A writ of garnishment was issued on April 10, 1915, upon said judgment against the Arkan-

sas National Bank of Hot Springs, garnishee, and served on the 14th day of April.

The garnishee answered upon that day admitting having funds in its hands belonging to the order to the amount of $155.88. On September 13, 1915, this motion to vacate the judgment and dismiss the garnishment was filed and appellee entered her appearance thereto.

J. M. Rhone testified that he was the Grand Reporter of the Knights of Honor of the World and had active control and management of the order and at the time service was had upon G. W. Wiley he was the financial secretary of the local lodge, the chief officer at the time being J. A. Stevenson, who was the dictator. He then read the by-laws of the order, defining the dictator's duties and also prescribing the duties of the financial reporter'' to keep a faithful record of account between the lodge and its members, receive all moneys due the lodge and pay the same to the treasurer, taking his receipt, and shall notify all members when in arrears for dues, etc.''

He stated further that the policy sued on was void, having been canceled on account of the suspension of the insured, who was afterward reinstated, but under a different policy. That under the new policy the beneficiary could only have been entitled to $115 upon the death of the insured.

The court held a *prima facie* valid defense was shown to the action and allowed time in which to show that proper service had been had. On September 17, appellee filed a motion to amend the return of the sheriff or deputy, who served the summons to conform to the facts.

E. I. Rogers, the deputy, who served the summons, stated that on the day of the service as shown by the return, he went to the plantation upon which he was informed the chief officer of the Knights of Honor of the World, Lodge No. 764, a subordinate lodge, of the defendant lived, having been instructed to serve the summons on the chief officer of the subordinate lodge, if he could find him, and if not, on the next officer. After making inquiry, he went to the residence pointed out as that of

the chief officer, but found no one at home, and after leaving his house, was directed to the home of G. W. Wiley as one of the officers of the lodge, and not finding him at home, started to return and met Wiley on the road in the field, who informed him that the chief officer was away. The sheriff told him his business, and being informed that he was "either reporter or secretary of said subordinate lodge," served the summons on him and stated he accepted the service. Wiley stated that he lived on the same plantation where the chief officer, J. A. Stevenson, lived, and was financial reporter. Upon the day the deputy sheriff inquired at his home for Stevenson, the deputy asked his name and gave him a copy of the summons, he said, and told him "Eliza Epps has a case against the Knights and I suppose you are to meet them at Monticello." He took the summons to Monticello on the day designated and gave it to the sheriff, Mr. Wilson. He stated that he had no correspondence with the Grand Lodge and that on the day the summons was left with him J. A. Stevenson, the chief officer of the lodge, lived on the plantation, about a mile and a half from his home, and he supposed he was at home that day, and, if not, he knew nothing of his absence.

Stevenson testified that he lived on the plantation of the Valley Planting Company and was living thereon the 31st of August, 1914. That if he was not at his home upon that day when the officer called, he was on the plantation attending to his duties and that he was not away from home or out of Drew County; that he was the dictator of the local lodge and its chief officer, and D. W. Johnson was the reporter or corresponding secretary; that he did not see the sheriff on that day.

The court thereupon permitted the return of the sheriff to be amended to conform to the testimony and held the service valid and overruled and denied the motion to vacate the judgment and dismiss the garnishment,

from which order this appeal is prosecuted. It also rendered judgment against the garnishee.

Henry & Harris and *Scipio A. Jones,* for appellant.

No valid service was had on appellant and the judgment was void. It should have been set aside as a good and valid defense was shown. Kirby's Digest, § § 4378, 6045; Sand. & Hill's Digest, § 5669; 62 Ark. 144; 104 *Id.* 417.

R. W. Wilson, for appellee.

1. The appeal is premature. 83 Ark. 371; 99 *Id.* 496.

2. Proper service was had of the summons upon appellant. Kirby's Digest, § 4378; 86 Ark. 504; 172 U. S. 602; 102 Ark. 255. The burden was on appellant. 39 Ark. 307; 93 *Id.* 471, 490; 86 Ark. 504-6.

KIRBY, J., (after stating the facts). Section 4378 of Kirby's Digest relating to the service of process in suits upon policies or certificates of insurance against fraternal orders and societies, such as Knights of Honor, etc., provides, "Service of process on the chief officer, or in case of his absence, the secretary of the subordinate lodge or society through which the policy was issued or obtained, or on the chief officer, or in case of his absence, on the secretary of any subordinate lodge in this State, of such fraternal society, shall be a good and valid service on such lodge, society or institution."

Section 6045, Kirby's Digest, providing for the service of summons upon domestic corporations, after giving the name of the officers upon whom the service shall be had, continues: "In case of the absence of the above officers, then it may be served upon the cashier, secretary, etc."

The court, construing this statute, held that the return on a summons showing service upon a domestic corporation upon an agent other than the president without showing that the president of the company was absent from the county, did not show a legal service. *Arkansas Coal, etc., Co.* v. *Haley,* 62 Ark. 144; *Arkansas Construction Co.* v. *Mullins,* 69 Ark. 429.

(1) We think the language of said section 4378 relative to the service of process upon fraternal societies, authorizing its service upon the chief officer, "or in case of his absence, the secretary of the subordinate lodge or society, through which the policy was issued or obtained, etc.," must be construed as was virtually the same language in the other section, to mean absence from the county, where the process is to be served.

The undisputed testimony herein and the sheriff's return, show that the summons was not served on J. A. Stevenson, the dictator and chief officer of the lodge, and that he was not out of the county but upon the plantation where he lived, about his usual duties, on the day of the service and neither was it served upon the secretary of the lodge, but only upon the reporter or collector, who had no duties that required him to write to the Grand Lodge.

(2) The service of summons not having been upon the officer of the lodge or society as required by law, was not a valid service upon said lodge or society and the judgment rendered thereon was void, and the court having found that the lodge had a valid defense to the suit, erred in not vacating the judgment and permitting it set up.

The contention that the judgment is not final and can not be appealed from is without merit. The court heard the matter upon the allegations of the motion and denied the motion to vacate the judgment which was a finality precluding appellant from any further right to have the alleged void judgment set aside or defend against the cause of action therein adjudicated.

It follows that the judgment must be reversed and the cause remanded with directions to sustain the motion and vacate said judgment, and for further proceedings, according to law. It is so ordered.

MUTUAL AID UNION *v.* BLACKNALL.

Opinion delivered April 17, 1916.

1. BENEFIT INSURANCE—ACTION—FORUM.—An action to recover upon a certificate of benefit insurance, under Kirby's Digest, section 4377, may be brought in the county of the residence of the decedent and beneficiary.
2. INSURANCE—MUTUAL COMPANIES—SERVICE.—Kirby's Digest, section 4348 does not control the matter of service of process upon mutual insurance companies.
3. INSURANCE—STATEMENTS OF APPLICANT—FRAUD.—It is error to refuse to submit to the jury the question of fraud in the procurement of a policy of life insurance, where there was testimony showing that the applicant knew of a rule of the company that insurance would not be issued to a man over sixty years of age, and that the applicant was sixty-six years of age.

Appeal from Logan Circuit Court, Southern District; *James Cochran,* Judge; reversed.

The appellant, *pro se.*

1. The summons should have been quashed. Kirby's Digest, § § 4377, 6067, 4348, etc., 4350; 104 Ark. 417; 74 *Id.* 1.

2. The court erred in refusing to permit appellant to amend the answer. Kirby's Digest, § § 6145, 6149; 64 Ark. 253.

3. The policy was void for fraud. 103 Ark. 201; 74 *Id.* 1; 72 *Id.* 620; 25 Cyc. 798 to 801. Having made false answers to questions relative to his health, no recovery could be had. 103 Ark. 201; 74 *Id.* 1; 72 *Id.* 620; 25 Cyc. 798 to 801.

4. A verdict should have been directed for defendants as the policy was void. 89 Ark. 24; 71 *Id.* 445; 80 *Id.* 190.

5. It was error to refuse the instructions asked by appellants as to fraud, bad faith, etc., of the deceased. 58 Ark. 528; 163 S. W. (Ky.) 482; 153 *Id.* (Mo.) 1065; 25 Cyc. 803.

6. If the insured signed the application he is presumed to know the contents. 71 Ark. 185; 70 *Id.* 572; 9 Cyc. 389, 390, 802; 143 S. W. (Ky.) 45; 103 Ark. 201.

J. H. Evans, for appellee.

1. The court properly overruled the motion to quash the service of summons. Kirby's Digest, § § 4377-8-9; 87 Ark. 72; Kirby's Dig., § § 6072, 4352.

2. There was no abuse of discretion in refusing to permit appellants to amend their answer after Mrs. Vandiever had testified. 64 Ark. 253. The testimony showed that no fraud was practiced. The policy was issued by the agent of defendant with full knowledge of all the facts.

3. There is no error in giving or refusing instructions. The court's charge fully covers all the law of this case. 103 Ark. 201; 102 *Id.* 151; 65 *Id.* 581; 71 *Id.* 295; 57 *Id.* 11.

SMITH, J. Appellee, as the beneficiary under a certificate of membership in the appellant company, recovered judgment against appellant for the amount of this certificate. The suit was brought in the circuit court of Logan County, where the decedent and the beneficiary lived, and a motion to quash the summons was filed upon the ground that the company is a mutual aid society organized and existing for the mutual aid of the beneficiaries of its members, in case of death, and that said organization is not based upon a subscribed or paid-up capital, either in whole or in part, but alone upon membership dues and *pro rata* assessments upon its members, and that its principal office and place of business is in Rogers, in Benton County, where its chief officers reside, and that appellant does not have or maintain any branch or agency in the county of Logan, and that the sureties upon appellant's bond, who were also made defendants, were also resident citizens of Benton County at and prior to the time of the filing of the complaint, and that service was had upon all parties who were made defendants in Benton County.

(1) It is insisted that unless the provisions of section 4377 of Kirby's Digest apply, this action could have been properly brought only in Benton County. Proof was offered on the motion to quash the service in support

of the allegations of that motion showing the character of business done by appellant and to sustain appellant's contention that it was not such a company as was described in that section. This section provides (insofar as its provisions are material here) that when any death has occurred of a person whose life shall have been insured that the beneficiary, or his assigns, may maintain an action against the insurance company in the county of the residence of the party whose life was insured, or in the county where the death of such party occurred.

Section 4379 of Kirby's Digest provides that in all actions against assessment or mutual insurance companies, or against the bonds of such companies, by any policy holder or beneficiary, it shall be sufficient to bring such company into court by the usual summons on the secretary, or president, or managing agent thereof, and in suits upon the bond by ordinary summons as in other cases upon the several bondsmen sued.

Section 4377 of Kirby's Digest was first enacted on March 2, 1887, and became section 4142 of Sandels & Hill's Digest. As so enacted it did not apply to suits on life insurance policies, but the act was amended on February 27, 1897, to read as it now appears in Kirby's Digest. By the amendment the statute was made applicable to actions on life and accident policies.

A very similar question to the one now before us was presented in the case of *Neimeyer* v. *Claiborne,* 87 Ark. 72. That was a suit in Garland County for a loss which occurred there against a mutual fire insurance company whose place of business was in Pulaski County and the sureties on the bond of that company who also resided in Pulaski County. It was there insisted that a suit against the company and the bondsmen jointly could only be maintained in Pulaski County, the home of the sureties, but in disposing of that contention it was said:

"*Third.* The appellant contends that the Garland Circuit Court had no jurisdiction over him because he neither resided nor was summoned in that county. Section 4376 of Kirby's Digest provides: 'That the sureties

on the bond of an insurance company may be made parties defendant, and final judgment rendered against them at the same time and in like manner as against the company.' Section 4377 of Kirby's Digest expressly authorizes a suit upon a fire insurance policy to be brought in the county where the loss occurred. It is not contended that the Garland Circuit Court did not have jurisdiction of the insurance company, the principal defendant, and of the subject-matter. The loss occurred in Garland County, and the suit was brought there. Under the above sections, the suit was properly brought against appellant in Garland County, and the circuit court of that county had jurisdiction of his person. This special statute applies to suits against sureties on the bond of fire insurance companies, and not section 6072, Kirby's Digest, which applies to other actions. The sureties under the above statute may be made parties defendant in the suit against the principal, and service had upon them in any county in which the principal may be served, *i. e.,* in any county of the State. The words 'in like manner' evidently refers to the process or procedure for bringing the defendants, sureties, into court, as well as any and all other procedure necessary and incident to obtaining final judgment against them.''

(2) Appellants also say the service is bad by reason of the portion of section 4348 of Kirby's Digest which provides that the insurance laws of this State shall be so construed as not to apply in their operations and requirements to any mutual aid society in this State for the relief of the members thereof in case of pecuniary loss by fire or otherwise, and for mutual aid of the beneficiaries of such members in case of death, and which is not based upon a subscribed or paid-up capital, in whole or in part, but alone upon membership dues and *pro rata* assessments upon its members. This section provides for the bonds to be given and the periods of their renewal for the insurance companies to do business in this State, but does not undertake to deal with the subject of service upon such mutual companies and can not, therefore, be held to

provide for a different manner in which such companies may be sued and served with process.

(3) It is insisted that the policy was procured through the fraud of the insured in regard to the statement of his age. The by-laws of the company provided that no person shall be eligible to membership who is past sixty years of age, and it is undisputed that the insured was sixty-six years of age at the time his application was taken. It is said, however, in behalf of appellee that the answers to the questions contained in the application were written by appellant's agent, and that a truthful answer to the questions concerning age was given by the insured, and that if the answers were not correctly written, this failure was the fraud of appellant's own agent, and it was charged with his knowledge and became liable upon the death of the insured. In support of this position appellee cites the cases of *Gray* v. *Stone,* 102 Ark. 146.

Appellant requested a number of instructions which dealt with the question of fraud in the procurement of the policy. These instructions were to the effect that if the insured induced the company to issue him the membership certificate by falsely representing that he was only sixty years of age, when, in fact, he was sixty-six, or that if he falsely stated that his age was only sixty, when in fact he was sixty-six, or that he knew the agent had incorrectly stated his age in the policy, there could be no recovery.

Instructions were also asked to the effect that if the agent was not authorized to receive applications for membership from persons over sixty years of age, and this fact was known to appellee at the time the application was prepared, then there could be no recovery, and that if the insured gave his correct age and the agent wrote his age incorrectly in the application, then the company would be bound by the knowledge of its agent as to the correct age of the insured, provided the insured acted in good faith, but if the insured had knowledge of the incorrect statement as to his age and failed to inform the company of

that fact the insured can not be held to have acted in good faith and the company would not be liable.

All of these instructions were refused, and it is insisted by appellee that no error was committed in so doing for the reason that the question of fraud did not enter into the case, that if for any reason the insured was not eligible for membership this fact was fully known to the agent, and his knowledge is imputable to the company, and that as the proof shows that the insured did not sign the application himself, nor read it over, nor heard it read, he is not chargeable with the fraud of the agent. But this contention leaves out of account the evidence of another agent for the appellant company who testified in the case. This witness was a Mr. Sively, who testified that he knew the insured during his lifetime, and solicited him to become a member of the appellant company, and that he discussed with him the requirements of membership with reference to age, when assured said he was sixty-three years old, and, therefore, too old to join, and for that reason the policy was not written. Three years later the policy sued on was written. If this testimony is true, the insured knew he was not eligible for membership at the time his application was taken. If he knew that he was sixty-six years old and that no one past sixty could become a member, then he must have known that only a false answer to the question concerning his age could secure him a membership certificate, and if he knew a false answer had been written then his policy was void. Of course, it was the province of the jury to pass upon the evidence of the agent, Sively, and to say what inferences should be drawn from such portions of his evidence as they believed, but with this evidence in the record it can not be said that the instructions were abstract, and for the failure to submit the question of fraud in the procurement of the policy the judgment will be reversed and the cause remanded. *United States Annuity & Life Ins. Co.* v. *Peak,* 122 Ark. 58.

BEAKLEY v. FORD.

Opinion delivered February 14, 1916.

1. PROBATE COURTS—STATUTORY JURISDICTION.—Probate courts have only such special and limited jurisdiction as is conferred upon them by the Constitution and statutes, and can only exercise the powers expressly granted and such as are necessarily incident thereto.
2. PROBATE COURTS—SALE OF INFANT'S LANDS—REINVESTMENT.—There is no authority giving the probate court jurisdiction to order the guardian or curator to invest the funds of the estate of minors in his hands, in real estate.
3. PROBATE COURTS—ESTATE OF INFANTS—STATUTORY JURISDICTION.—Where a probate court acts solely under its statutory authority, its jurisdiction to exercise such authority must appear from the record and will not be presumed.

Appeal from Lawrence Circuit Court, Eastern District; *Dene H. Coleman*, Judge; affirmed.

STATEMENT BY THE COURT.

The probate court of Lawrence County, on the 3d day of its April term, 1912, directed the appellant, Beakley, who was curator of the estate of the minor heirs of Eugene Pickett, deceased, to purchase certain real estate at a certain price with the funds of the estate, and to take credit in his settlement for the amount paid out under the order. In compliance with this order the appellant purchased the lands, paid the purchase price, $1,850, and took a deed in the name of the minors. They, with their mother, lived on the place for a year or so. The appellant paid the incidental expenses connected with the ownership of the property and in his final settlement with the probate court at the July, 1914, term asked credit for the funds so expended, which were as follows:

Purchase price	$1,850.00
Recording deed	1.50
Taxes for 1911	20.46
Taxes for 1912	3.49
Taxes for 1913	15.03
Insurance on house	28.00
Interest 6 per cent to be deducted from interest charged	158.87
Total	$2,077.35

Exceptions were made to this settlement by the appellee and the probate court denied the appellant any credit on his account for the above expenditures, entered a judgment and directed him to pay the amount in cash to the appellee as curator in succession. Appellant seeks by this appeal to reverse this judgment.

Gustave Jones, Ponder & Ponder and *John W. Newman*, for appellant.

1. The order of the court was a judicial act, and after the term expired the court was powerless to revoke, nullify or ignore its provisions. The probate court, under Const. 1874, Kirby's Dig., § 3801, has exclusive jurisdiction of the estates of minors, with power to order an investment of the funds in real estate. 98 Ark. 63; 21 Cyc. 91; 12 Ark. 94; 35 *Id.* 205; 70 Ark. 88; 102 *Id.* 114; 84 *Id.* 32. There is no evidence of waste, fraud or imposition.

S. A. D. Eaton, for appellee.

1. The probate courts have only such powers and jurisdiction as have been specifically granted them by the Constitution and statutes of this State. 33 Ark. 429, 494; 47 *Id.* 462; 95 *Id.* 166; *Ib.* 262. There is no law empowering or authorizing probate courts to permit a guardian to invest his ward's money in real estate. 33 Ark. 429, 494; Kirby's Digest, § § 3801, 3804, 3806; 98 Ark. 63. The order was null and void and may be impeached collaterally. 32 Ga. 266; 23 Cyc. 1099; 21 *Id.* 91; 27 Ark. 197.

2. The burden was on appellant to show that the credits asked are correct and just. 76 Ark. 217. He has failed.

WOOD, J., (after stating the facts). The appellant contends that the order of the probate court at its April term, 1912, directing the curator to purchase certain lands with the funds in his hands belonging to the minors and to take credit therefor in his settlement at the expiration of the term became a final order and after this order had been carried out by the curator of the estate, the probate court, at a subsequent term, "was powerless to revoke, nullify or ignore its provisions," and that inasmuch as this order directed the appellant to take credit for the sums expended thereunder that the probate court, at a subsequent term, erred in refusing to allow him credit for such expenditures on his final settlement, and that the judgment of the circuit court to the same effect, from which this appeal comes, was also erroneous.

The appellant contends that the order of the probate court at its April term, 1913, was within its jurisdiction under the Constitution of 1874 and section 3801 of Kirby's Digest, citing *Watson* v. *Henderson,* 98 Ark. 63. Section 3801 of Kirby's Digest provides: "When it shall appear that it would be for the benefit of a ward that his real estate, or any part thereof, be sold or leased and the proceeds put on interest, or invested in productive stocks, or in other real estate, his guardian or curator may sell or lease the same accordingly upon obtaining an order for such sale or lease from the court of probate of the county in which such real estate, or the greater portion thereof, shall be situate."

The Constitution gives to probate courts "exclusive original jurisdiction in matters relative to * * * the estates of deceased persons, * * * guardians and persons of unsound mind and their estates as is now vested in the circuit court, or may be hereafter prescribed by law." Const. of Ark., article 7, section 34.

In *Watson* v. *Henderson, supra,* the question at issue was whether or not the chancery court had juris-

diction to order the sale of a minor's land for reinvestment. In discussing that question it was shown that the Constitution of 1874 vested exclusive jurisdiction in the probate court to order a sale of a minor's land for reinvestment. The question now under consideration was not before the court at all and it was not there decided that the probate court had jurisdiction to order the funds of an estate in the hands of a guardian or curator to be invested in real estate.

(1) This court, in numerous cases, has held that probate courts have "only such special and limited jurisdiction as is conferred upon them by the Constitution and statutes, and can only exercise the powers expressly granted and such as are necessarily incident thereto." *Lewis* v. *Rutherford,* 71 Ark. 218-220.

(2) There is no authority giving the probate court jurisdiction to order the guardian or curator to invest the funds of the estate of minors in his hands in real estate. Section 3801 of Kirby's Digest, invoked by the appellant, does not confer any such authority. It authorizes the sale of real estate for reinvestment "when it shall appear that it would be for the benefit of the minor to do so." And there are statutes authorizing guardians and curators to loan the money of minors under the conditions prescribed in those statutes. Kirby's Digest, sections 3804 to 3806 inclusive.

(3) We have held that the probate court has no power, under its general jurisdiction, to order the lands of a minor to be exchanged for other lands, there being no statute conferring such power. *Meyer* v. *Rousseau,* 47 Ark. 460; *McKinney* v. *McCullar,* 95 Ark. 166; *Gatlin* v. *Lafon,* 95 Ark. 256.

The order of the probate court under review contains no recitals that would bring it within the exercise of the jurisdiction conferred upon it by the statute. The probate court having no such common law jurisdiction, and proceeding solely by virtue of statutory authority, its jurisdiction to exercise such authority must appear

from the record and will not be presumed. *Gibney* v. *Crawford,* 51 Ark. 34; *Hindman* v. *O'Connor,* 54 Ark. 627-43; *Morris* v. *Dooley,* 59 Ark. 483-87; *St. Louis, I. M. & S. Ry. Co.* v. *Dudgeon,* 64 Ark. 108-10. See also *Willis* v. *Bell,* 86 Ark. 473.

It follows that the judgment of the circuit court is correct, and it is therefore affirmed.

McCULLOCH, C. J., (Dissenting). I am unable to reconcile the views expressed by the majority in the opinion in this case with the former decisions of this court with respect to the jurisdiction of the probate court over the estate of infants and deceased persons, and the presumption attending the judgments of those courts in the exercise of that jurisdiction. It has always been declared by this court, in the earliest decisions as well as recent ones, that the probate court is a court of superior jurisdiction, and that the sale by an administrator or guardian under orders of the probate court "is a proceeding *in rem* by a superior court having jurisdiction of the subject matter * * * and consequently all reasonable presumptions must be indulged in favor of the regularity of the proceedings." *Borden* v. *State,* 11 Ark. 519; *Marr ex parte,* 12 Ark. 87; *Rogers* v. *Wilson,* 13 Ark. 507; *Sturdy* v. *Jacoway,* 19 Ark. 499; *Apel* v. *Kelsey,* 52 Ark. 341; *Alexander* v. *Hardin,* 54 Ark. 480.

In the case of *Apel* v. *Kelsey, supra,* which involved a question of the validity of a private sale of land under orders of the probate court, there being no statute authorizing such a sale, Mr. Justice Sandels, in delivering the opinion, after restating the rule so often announced by this court that the probate court was a court of superior jurisdiction, and that "all presumptions are in favor of the propriety of its acts," said:

"It is impossible upon principle to distinguish the question here presented from those so often decided heretofore; and in obedience to the settled doctrine of this court, fixing the character of the probate court, and the effect of its judgments, we hold that a private sale of land

by an administrator, upon order of that court, is not void when confirmed."

One of the few cases which appears to express the contrary doctrine is that of *Myrick* v. *Jacks,* 33 Ark. 425, which was expressly condemned by this court is the recent case of *Watson* v. *Henderson,* 98 Ark. 63. In the reference to that case, we said: "Therefore the language of the court above quoted, while applicable to the jurisdiction of probate courts in 1865, was not applicable to the jurisdiction of such courts in 1878, when the opinion in *Myrick* v. *Jacks* was rendered. Nor is it applicable in the present case. For, as we have shown above, the Act of April 22, 1873, gave to the circuit courts jurisdiction to order guardians to make sale of the lands of their wards and to invest the proceeds in other real estate, and the Constitution of 1874 vested exclusively in the probate courts the jurisdiction 'in matters relative to the estates of deceased persons, guardians,' etc., that theretofore had been vested in the circuit court."

The record in the present case shows that the guardian was directed to invest certain funds in real estate, and he complied with the order of the court and asked credit for the funds so invested. The present objection to the allowance constitutes a collateral attack on the former order of the probate court which I think, according to the settled doctrine of this court ought not to be permitted. The statute (Kirby's Digest, section 3801), authorizes the probate court to direct a guardian or curator to invest the funds of his ward in real estate. It is true this authority is limited to funds which arise from the sale of real estate for reinvestment, but where the court orders the funds invested there is a presumption when the inquiry arises collaterally, that they were funds over which the court exercised that kind of authority. It is unnecessary for me to cite the decisions of this court which hold that where there is a presumption attending the record of a court of superior jurisdiction, that presumption is as complete from mere silence of the record

as it is where there is an affirmative showing of regularity in the record itself.

It seems to me that this decision goes very far towards unsettling the law which has heretofore been regarded as so well settled on this subject. I dissent, therefore, from the conclusions announced in the opinion of the majority.

TIPTON, ADMINISTRATOR, EX PARTE.

Opinion delivered April 10, 1916.

1. HOMESTEAD—EXEMPTION—LEVY AND SALE.—Under the Constitution, the land itself, which constitutes the homestead, and not the mere right of occupancy, is exempt from levy and sale.

2. HOMESTEAD—RIGHT OF WIDOW AND CHILDREN.—The same exemption that was given to a husband in his lifetime is extended to his widow and children, until their homestead rights cease.

3. HOMESTEAD—MINOR—WAIVER AND ABANDONMENT.—A minor, being under disability, can not waive his right to a homestead during minority; he can neither waive nor abandon his homestead rights.

4. HOMESTEAD—SALE FOR DEBTS.—There can be no sale of the homestead for the payment of debts until the termination of the homestead interest.

5. HOMESTEAD—SALE SUBJECT TO RIGHTS OF WIDOW AND CHILDREN.—The homestead can not be sold subject to the rights of occupancy by the widow and children.

6. HOMESTEAD—DEBTS—PROBATE SALE.—The probate sale of the homestead by the guardian in cases where there are debts is absolutely void. *Semble.* If there are no debts, the probate court may order a sale of the homestead upon the application of the guardian where it was deemed to be to the best interest of the minor to do so.

7. HOMESTEAD—SALE—NOTICE TO PURCHASERS.—Purchasers at a probate sale of a minor's homestead lands, take subject to notice of the minor's interest.

8. COURTS—JURISDICTION—PRESUMPTIONS.—The proceedings of a superior court with respect to jurisdictional facts, about which the record is silent, are presumed to be within the scope of its jurisdiction until the contrary is shown, but where special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of a court are ex-

ercised over a class not within its ordinary jurisdiction, upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court; in such cases the facts essential to the exercise of the special jurisdiction must appear upon the record.

Appeal from St. Francis Circuit Court; *J. M. Jackson,* Judge; affirmed.

STATEMENT BY THE COURT.

This is an appeal by an administrator from an order denying his application to sell the land of his intestate. The material facts are as follows:

John New at the time of his death, owned and occupied as his homestead, one hundred acres of land in St. Francis County, Arkansas. He was survived by his widow and a minor son, who was his sole heir at law.

At the time of the trial of this action in the court below in September, 1915, the minor was about fourteen years of age. Shortly after the death of John New, J. B. Chambers was appointed guardian of the person and estate of said minor. At its January term, 1910, the probate court, upon the petition of said guardian ordered him to sell the homestead for the maintenance and education of his ward. The sale was made pursuant to the order of the court and the sale was approved by the court and a deed ordered made which was done. The deed conveyed to the purchaser the entire estate in and to the lands. The minor has since removed to the State of Mississippi. Subsequently the present proceedings were commenced.

The administrator of the estate of John New, deceased, made application to the probate court to sell the homestead for the payment of the debts of the estate of John New, deceased. A showing was made that the condition of the estate necessitated that the homestead should be sold for the payment of debts. The application of the administrator was denied and he appealed to the circuit court. There again his application was denied and he has appealed to this court.

C. W. Norton, for appellant.

The sale by the widow worked a forfeiture of her homestead privilege; the sale of the minor's interest by his guardian, under order of the probate court, extinguished his entire right in the land and forfeited his homestead privilege. No one else is entitled to hold the lands against creditors and they should be sold to pay debts. 65 Ark. 357.

Mann, Bussey & Mann, for appellee.

The object of the homestead law is to save the property from creditors. 65 Ark. 357. A minor can not abandon his homestead right, nor can his right be sold to pay debts. The rights of creditors are not prejudiced. 97 Ark. 189. The probate court had no jurisdiction. 55 Ark. 222; 72 *Id.* 329; 15 *Id.* 381; 16 *Id.* 474.

HART, J., (after stating the facts). It is contended by counsel for appellant that the probate sale of the homestead upon the application of the guardian was valid under the principles announced in *Merrill* v. *Harris,* 65 Ark. 355. It is further contended that the homestead right of the minor ceased when the sale was made and that the homestead then fell back into the residuum of the estate and became subject to administration and sale for the payment of decedent's debts. So before proceeding to a discussion of what was decided in the case of *Merrill* v. *Harris,* it may be well to note the state of our laws on the subject at the time of the decision. Article 9, section 3, of the Constitution of 1874 provides that the homestead of any resident of this State who is married and the head of a family shall be exempt from levy and forced sale except in certain enumerated cases. Article 9, section 6, reads as follows:

"If the owner of a homestead die, leaving a widow, but no children, and said widow has no separate homestead in her own right, the same shall be exempt, and the rents and profits thereof shall vest in her during her

natural life, provided that if the owner leaves children, one or more, said child or children shall share with said widow and be entitled to half the rents and profits till each of them arrives at twenty-one years of age—each child's rights to cease at twenty-one years of age—and the shares to go to the younger children, and then all to go to the widow, and provided that said widow or children may reside on the homestead or not; and in case of the death of the widow all of said homestead shall be vested in the minor children of the testator or intestate."

(1-2) It is a cardinal rule of construction that different sections of the Constitution bearing on the same subject should be read in the light of each other. When this is done, it is manifest that the framers of the Constitution meant that it is the land itself which constitutes the homestead and not the mere right of occupancy that is exempt from levy and sale. It is equally evident that the framers of the Constitution intended to extend to the widow and children until their homestead rights ceased, the same exemption that was given to the husband in his lifetime. In the case of *Nichols* v. *Shearon,* 49 Ark. 75, the court in discussing the attempted sale of the homestead by an administrator to pay debts of the decedent's estate, said: "The sale of the homestead was void. The defendant was aware of all the circumstances which gave the plaintiffs a homestead right in the premises. He must take notice of their right to receive the rents during their nonage and that the land in the meantime is protected from sale for the ancestor's debts."

The court also held that a widow being under no disability may abandon the homestead and surrender and forfeit all claims to it and when she does so it becomes assets in the hands of the administrator for the payment of debts of the estate. *Garibaldi, Administrator* v. *Jones,* 48 Ark. 230.

(4) A minor being under disability, can not waive his right to a homestead during minority. He can neither waive nor abandon his homestead rights. *Altheimer* v. *Davis,* 37 Ark. 633; *Booth* v. *Goodwin,* 29 Ark. 633. So

that at the time *Merrill* v. *Harris,* was decided, it was settled in this State that under the Constitutions of 1868 and 1874 the probate court had no jurisdiction to order the sale of a homestead of a deceased person for the payment of his debts, during the minority of his children, or so long as his widow remains unmarried, and does not abandon it, or shall not be the owner of a homestead in her own right. During this time the homestead is exempt from sale for the payment of the debts of the deceased owner. The order of sale in such cases is void. *Bond* v. *Montgomery,* 56 Ark. 563.

In *Merrill* v. *Harris,* 65 Ark. 355, the opinion begins by the question, has a probate court, in which a guardianship of minors is pending, the power to order the sale of the homestead left them by the parent, for the benefit of said minors? A brief statement of facts follows in which it is stated that the owner of the homestead left no other property and no debts and no children except her minor sons. The court after stating that the question is a new one in this State reaffirms the doctrine that the homestead, during the holding of the widow or the minority of any of the children, can not be sold to pay the debts of the father's estate. The court then says, the question is, can the probate court in any case lawfully order the sale of such homestead for the benefit of the minor children who enjoyed it as a descended or transmitted homestead from the deceased homesteader?

The court then makes a quotation from a Mississippi case but it will be noted that in Mississippi and Kentucky the homestead may be sold subject to the rights of occupancy by the widow and children if a sale is necessary to pay the debts of the husband. In this State it is not the mere homestead right of occupancy which is exempt from levy and sale but it is the ground occupied as a residence. Therefore we have held that there can be no sale of the homestead for the payment of debts until the termination of the homestead interest. Continuing the court said: "Following the argument of the author, suppose, as in the case at bar, there were no

debts, no other property, and that there was but one child, and he or she, as the case may be, the only child and heir; and, upon that, suppose that the rents and profits of the homestead place were nothing, or not enough to support and educate the child, and that there was no one willing or bound to occupy the premises with the minor, and thus assist in his support and education. In other words, suppose the homestead right was unavailable or utterly inadequate for the purpose. Can it be the law that the probate court, or the court of general, original and exclusive jurisdiction of minors and their estate, can not sell the property and thereby give it the only real value it has so far as the minor is concerned? We can not think such is the law. The Constitution does not, in terms, seek to do more than protect from the grasp of creditors. There is neither expressly nor by implication a restriction upon the powers of the probate court in respect to this class of the property of minors. The case we have supposed presents the question fairly, and in such a case we can not see how but one answer can be given. If one case could exist wherein the probate court would possess the power, that is all that is necessary to solve the question. To carry the discussion further than that would simply be to discuss questions pertaining to the proper or improper exercise of the court's discretion in the instances as they may arise, accordingly as the facts may determine."

It is contended by counsel for appellant that the latter part of the quotation bears out their contention that the probate court in its discretion in all cases may sell the homestead of the minor and that its action in making the sale is only subject to review for an abuse of its discretion or its improvident exercise. We can not agree with their contention.

Law is not an exact science and all opinions should be considered in the light of the facts to which they apply and with due regard to other decisions of the same court on the same subject. That is true for the reason

that the passing from that which is lawful to that which is unlawful is frquently by almost imperceptible degrees.

It will be noted that the court both in the statement of the case and in its argument in the opinion states that there were no debts and the question is propounded, can the probate court in any case lawfully order the sale of the homestead of the minor? The reading of the whole opinion makes it manifest to our minds that the words "no debts" were an essential element of the opinion and that they were intended as expressing one of the real grounds of the decision.

(5) The rule invoked by counsel for appellant would either result in a ruinous sacrifice of the homestead of the minor or the sale by the guardian at probate sale would be a vain and useless thing. As we have already seen, it is the settled law in this State that the homestead can not be sold subject to the rights of occupancy by the widow and children, but it is the land itself which constitutes the homestead that is sold. The homestead then falls back into the residuum of the estate and becomes subject to administration. Such being the case, it is evident that in cases where there were debts the purchaser would get nothing and it would be a vain and useless thing to sell the minor's homestead. If the right of the minor in the homestead ceased when it was sold at guardian's sale and the homestead then fell back into the residuum of the estate subject to be sold for the payment of the debts of the intestate, it is obvious that no useful purpose could be served by allowing the guardian to sell it where there were debts. But it is said that an improvident exercise of the power could be corrected on appeal. Examples readily occur which show that this would not protect the interest of the minor. If the minor should be too young to appreciate what was being done and had no friends interested in his behalf, the land might be again sold at an administrator's sale for the payment of debts and it would then be too late to set aside the guardian's sale of the homestead in a collateral attack on it.

(6) The better rule is to hold that the probate sale of the homestead by the guardian in cases where there are debts is absolutely void. As we have already seen the framers of our Constitution plainly intended to preserve for the minor the homestead exemption of the parents after their death and to prevent the sale thereof for the debts of the parents during the minority of the children and it has always been the policy of this court to give such a liberal construction to the homestead laws as will best effectuate this humane intention of the framers of the Constitution. We think this result can best be accomplished by holding that the decision in *Merrill* v. *Harris, supra,* applies only to cases where there are no debts and that such holding is more in accord with the trend of our other decisions on the subject. Where there are no debts the homestead would sell for its full value, for the only question would be whether the court abused its discretion in making the sale and such question not being subject to review on collateral attack, the purchaser would pay full value for the homestead and the homestead rights of the minors would be fully preserved. The object of the homestead laws being to preserve the exemption of the parent from debts to the children during their minority, if there are no debts, there would seem to be no good reason why probate courts might not order a sale of the homestead upon the application of the guardian where it was deemed to the best interest of the minor to do so.

It is evident the framers of the Constitution intended to extend to the minors during their minority the same exemption that was given to the parents; and the construction we have given does this, and also preserves to the creditors their rights, which can be exercised after the minority of the children has terminated.

(7) Therefore we think that the fact that there were "no debts" was a cogent reason for the decision in *Merrill* v. *Harris.* It is no answer to this to say that the creditor is not a party to the application of the guardian to sell the homestead and should not be bound by a find-

ing of the court that there were no debts. Purchasers at such sales as well as at administrator's sales are required to take notice of the rights of the minors and for like reason, it may be said that creditors must take notice of the rights guaranteed the minors by the Constitution and it is not likely that a sale of the homestead could be made without their knowledge.

(8) We also think the judgment in the present case should be affirmed because there is no affirmative showing in the record of the guardian's sale in the probate court that there were no debts. It is true as a general rule that the proceedings of a superior court with respect to jurisdictional facts, about which the record is silent, are presumed to be within the scope of its jurisdiction until the contrary is shown, but where special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of a court are exercised over a class not within its ordinary jurisdiction, upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. In such cases the facts essential to the exercise of the special jurisdiction must appear upon the record. *Oliver* v. *Routh, et al.,* 123 Ark. 189; *Beakley* v. *Ford,* 123 Ark. 383.

In the application of this rule we think the record of the probate court in the matter of selling the minor's homestead upon the application of the guardian should show the fact that there were no debts, and the record being silent on that point, the order of sale was void.

In making the application we have also considered that cardinal rule of construction that provisions of the Constitution relating to the same subject must be read in the light of each other. When this is done, the section of the Constitution giving probate courts jurisdiction over guardians must be read in connection with that section of the Constitution relating to the homestead exemption of minors.

It follows that the court was right in denying the application of the administrator to sell the homestead of the minor, and the judgment will be affirmed.

McCULLOCH, C. J., (dissenting). It seems to me that the erroneous declarations of the law made by the majority of the court in the case of *Beakley* v. *Ford* is accentuated in the opinion of the majority in the present case, and extends very far the disastrous effect of unsettling the law with respect to presumptions which ought to, and which have heretofore, attended the judgments of probate courts when collaterally attacked. The writer in his dissenting opinion in the other case referred to, showed that it has long been the settled policy of this court to treat probate courts as courts of superior jurisdiction, and that on collateral attack every presumption is to be indulged concerning the regularity of their proceedings. *Borden* v. *State,* 11 Ark. 519; *Marr, ex parte,* 12 Ark. 87; *Rogers* v. *Wilson,* 13 Ark. 507; *Sturdy* v. *Jacoway,* 19 Ark. 499; *Apel* v. *Kelsey,* 52 Ark. 341; *Alexander* v. *Hardin,* 54 Ark. 480.

Prior to the decision of this court in *Merrill* v. *Harris,* 65 Ark. 355, it was a mooted question whether the probate court had any jurisdiction to order a sale by the guardian of an infant's homestead derived from his deceased parent, but the question was decided in the affirmative in that case. The court now holds that the power of the probate court with respect to the sale of the infant's homestead is limited to cases where there are no debts of the decedent, and that where there are debts the probate court is without jurisdiction to proceed. I find no such distinction made in the opinion in *Merrill* v. *Harris.* On the contrary, it seems to me that the court expressly put the decision upon the broader ground that the probate court had complete jurisdiction over the homestead as a part of the infant's estate, and that the judgment of the probate court ordering the sale could not be attacked collaterally. The recital of facts in the opinion was only made to emphasize the necessity of holding that the probate court possessed that power, and

the fact that there were no debts of the estate was not stated as a limitation upon the power and jurisdiction of the probate court. After reciting by way of illustration, the facts of a supposed case, the court said: "The Constitution does not, in terms, seek to do more than protect from the grasp of creditors. There is neither expressly nor by implication a restriction upon the powers of the probate court in respect to this class of the property of minors. The case we have supposed presents the question fairly, and in such a case we can not see how but one answer can be given. If one case could exist wherein the probate court would possess the power, that is all that is necessary to solve the question. To carry the discussion further than that would simply be to discuss questions pertaining to the proper or improper exercise of the court's discretion in the instances as they may arise, accordingly as the facts may determine."

The language just quoted is, I think, an express declaration that the probate court has jurisdiction under all circumstances to sell the homestead of the infant for his own benefit, and that questions of propriety or expediency will not be inquired into in a collateral attack on the judgment. But even if that were not the necessary effect of the decision, the presumption ought to be indulged, according to the doctrine so often announced by this court, that the probate court, which is a court of superior jurisdiction, found the facts to exist which gave it jurisdiction. Suppose the court had found and recited in its record the fact that there were no debts of the decedent. Would that adjudication be binding upon creditors of the estate of the decedent who were neither actually nor constructively parties to the proceeding in which the guardian's sale was ordered? Certainly not. We then have the anomalous situation, possibly, of the probate court making its order of sale valid by reciting a finding that there were no debts of the decedent, and on the other hand, when the infant comes of age, the creditors, who are not bound by that judgment, can show that there are debts of the decedent's estate

and can establish their claims for the purpose of enforcing the same against the lands. It is illogical in any point of view to say that the probate court has the authority to order a sale of an infant's homestead when it is found that there are no debts of the decedent but the order is void if the record fails to recite such finding. That conclusion also ignores all the presumptions which attend the regularity of the proceedings in the probate court in a matter over which it exercises jurisdiction as a superior court.

The distinction is sometimes made between judgments of the probate court in matters in the exercise of ordinary jurisdiction and those in the exercise of a special jurisdiction, but that distinction is often more imaginary than real. Certainly it has no application to a proceeding concerning the estate of deceased persons and infants, for those matters are within the constitutional jurisdiction of the probate court and can not be said to be within the exercise of any special jurisdiction. The rule sustained by all the authorities is stated in one of the encyclopedias as follows: "When a court of general jurisdiction proceeds in the exercise of special powers, wholly derived from statute, and not exercised according to the course of the common law, or not pertaining to its general jurisdiction, its jurisdiction must appear in the record, and can not be presumed in a collateral proceeding." 23 Cyc. p. 1081.

While that is undoubtedly the correct rule, its application does not sustain the majority opinion for the reason that the probate court in ordering the sale of an infant's estate, whether it be the homestead or other property, acts within its general jurisdiction.

The probate court, by the issuance of letters of administration or of guardianship, acquires general jurisdiction over all the estate of the decedent or the infant, and all proceedings thereafter are in the nature of proceedings *in rem*. The rule as to presumptions concerning the regularity of probate courts sometimes works hardships in individual cases, but it has been often said

by this court that it is better that there should be individual hardships than that the integrity of judgments of superior courts should be destroyed.

Now, as to the effect of the sale of the infant's interest in the homestead, if it be treated as a valid sale and as having passed to the purchaser all the interest of the infant: It has been decided by this court in the cases cited in the opinion of the majority that an infant can not himself waive the homestead right. That is undoubtedly true, but if the probate court has the power to sell his interest it operates as an abandonment of the privilege of claiming the homestead. It is, after all, a mere privilege which does not pass to the purchaser. It was held in *Garibaldi* v. *Jones,* 48 Ark. 230, that an attempt by a widow to sell the homestead operated as an abandonment of the privilege of occupancy. The same rule would apply to the sale by an infant acting through his guardian under orders of the probate court. The right to occupy as a homestead being a privilege which is personal to the infant, it does not pass to the purchaser, and it would be anomalous to say that under those circumstances the title which had passed to the purchaser was protected by the infant's privilege which had been abandoned by the sale. It may be an improvident act of the probate court in ordering the sale of the infant's homestead, but that does not appear upon the record in this case for we do not know whether the property brought an adequate price or not. That is not shown in the present proceeding.

The effect of this decision, however, is to declare invalid the sale and to render void the title of the purchaser, who doubtless purchased on the faith of the decision of this court in *Merrill* v. *Harris, supra,* that the probate court had complete jurisdiction over the subject-matter and that a sale of the infant's homestead was valid. Whatever differences of opinion may be entertained as to the correctness of the decision in *Merrill* v. *Harris,* it certainly constituted a rule of property and ought not to be disturbed.

SMITH, J., (concurring). I think the opinion of the majority, and the dissenting opinion of the Chief Justice as well, are dictum. The necessary effect of both the opinions is to adjudge invalid the title of the purchaser at the guardian's sale, and this has been done without having that party before us.

The only question which we are required to decide, or which is presented by this record, is whether the court properly refused to grant the application of the administrator for an order to sell the infant's homestead to pay the debts of his ancestor; and in answer to this question I say these general creditors, for whose benefit the administrator petitioned for the order of sale, should be postponed until the heir has come of age, for neither the minor himself nor anyone for him has the right to waive his homestead privilege, so far as these general creditors are concerned. It appears to me that, if any subject can be regarded as settled, we should say that the presumption is conclusive that it is not to the advantage of the minor to have his homestead sold during his infancy for the payment of his ancestor's debts and therefore neither the minor himself nor anyone for him can confer jurisdiction to make a sale for that purpose.

I think we should now hold simply that the court properly refused to order a sale for the payment of debts, and we would then leave to the purchaser at the guardian's sale an opportunity to be heard in his own behalf against these creditors, when the infant comes of age and the creditors through the administrator move for an order of sale.

I concur, therefore, in the judgment affirming the refusal to order the sale of this homestead, but I do not agree with the reasoning by which that result is reached.

BANK OF SEARCY v. MERCHANTS GROCER COMPANY.

Opinion delivered April 24, 1916.

1. LIENS—CORPORATION'S LIEN ON STOCK—PARTNERSHIP DEBT.—A corporation has a lien on its stock for the debt of a partnership, where the stock is the property of one of the partners.
2. BANKRUPTCY—ELECTION.—An election by a creditor to appear as an unsecured creditor constitutes an abandonment of security held by the creditor.
3. BANKRUPTCY—SECURED CLAIM.—Under the bankrupt statute a claim is not deemed to be secured, unless it constitutes either directly or indirectly a lien on the property of the bankrupt estate.
4. BANKRUPTCY—SECURED CLAIM—COLLATERAL SECURITY.—The fact that a debt is secured collaterally does not make it a secured claim within the meaning of the Federal statute.
5. BANKRUPTCY—COPARTNERSHIP—ESTATES OF MEMBERS.—The adjudication of the bankruptcy of a copartnership necessarily draws to it the estates of the individual members of the copartnership.
6. BANKRUPTCY—PARTNERSHIP DEBT—PERSONAL SECURITY—ELECTION.—A copartnership creditor who holds security from the individual members of the firm, is not put to an election when he comes to prove his claim against the estate of the partnership, and he does not have to surrender his security before he can prove his claim. He may collect his dividend and then proceed against the security for the balance.
7. BANKRUPTCY—STOCK LIEN—PARTNERSHIP DEBT.—P, a member of a copartnership, owned stock in the M. company; the copartnership became indebted to the M. company, and thereafter P. undertook to assign said stock to S. The copartnership became bankrupt, and the M. company proved its claim and received dividends in the estate as an unsecured creditor. *Held*, under the facts the M. company was entitled thereafter to enforce its lien on the said stock, and that S. was not entitled to a transfer to it of the same.

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

Brundidge & Neelly, for appellant.

1. When the appellee filed its claim in bankruptcy and accepted dividends as such it waived any lien it had upon the stock pledged to the bank. 9 Fed. 371; 5 *Id.* 55; 217 *Id.* 20; U. S. Law Ed., volume 26, p. 1042; 69 Ark. 271. Appellee made its election of remedies and is bound thereby. U. S. 39 Law Ed. 62; 115 N. Y. 387,

393-4; 5 Metc. 49-51; 111 Mass. 272; 174 Fed. 409; 209 U. S. 385; U. S. 33 Law Ed. 705; 94 Fed. 631; 74 *Id.* 398; 78 Ark. 569; U. S. 11 Law Ed. 238; 219 Fed. 421.

2. Appellee is estopped from claiming a lien by the acts of its agent and treasurer. 101 Ark. 580; 112 *Id.* 180.

Moore, Smith, Moore & Trieber, for appellee.

1. Appellee had a lien upon Mrs. Petty's stock to secure the firm indebtedness. Kirby's Digest, § 6010; 6 Ark. 24; 21 *Id.* 186; *Ib.* 411; 19 *Id.* 701; 4 *Id.* 164; Kirby's Digest, § 853; 4 Thompson on Corp., § 4010; 69 N. W. 663; 43 S. W. 407; Fed. Cases, No. 1395; 68 Ark. 234. This corporate lien is prior to all others. 4 Thompson on Corp., § 4003; 68 Ark. 234; 3 R. C. L., § 24.

2. It did not waive this lien by filing its claim in bankruptcy. 3 R. C. L. § 47; 65 Ark. 290; 136 Fed. 165; 97 *Id.* 771; Collier on Bankruptcy, p. 724; 12 Fed. Cas. No. 6750; 169 Fed. 92-97.

3. There was no waiver nor estopped by the act of appellee's officers. Thompson on Corp. (2 ed.), § 4017; 24 Ark. 371; 82 *Id.* 367; 99 *Id.* 260; 2 Pom. Eq. Jur., § 804.

McCULLOCH, C. J. Appellee, Merchants Grocer Company, is a domestic corporation engaged in the wholesale grocery business, and Mrs. N. A. Petty was one of its stockholders, being the owner of thirty shares of the capital stock of the company of the par value of $25 per share, which stood on the books of the company in her name. E. C. Petty & Company, a partnership composed of E. C. Petty and Mrs. N. A. Petty, who were engaged in the retail grocery business, became indebted to appellee on a promissory note and an open account, all of which indebtedness aggregated the sum of $864.41 at the time the present litigation arose. Mrs. N. A. Petty subsequently became indebted to appellant, Bank of Searcy, in the sum of $1,584 for borrowed money and assigned to appellant her said shares of stock in appellee corporation as security for said indebtedness. Said

assignment of stock by Mrs. Petty to the bank was not recorded on the books of the corporation.

While the conditions thus described existed, the firm of E. C. Petty & Company, and each of the individual members thereof, filed a voluntary petition in bankruptcy and were adjudged to be bankrupt and a trustee was subsequently elected for each estate. Appellee proved its claim in full against the estate of the copartnership, without making any claim of preference or offering to surrender its security, but did not file any claim against the bankrupt estate of Mrs. Petty. A small dividend was declared on the estate of the bankrupt copartnership and appellee accepted its share thereof. Appellant proved up its claim against the bankrupt estate of Mrs. Petty, as a secured creditor, and obtained from the trustee an order for the sale of the pledged shares of stock, and at the sale became the purchaser thereof. Demand was then made by appellant upon the officers of appellee corporation for transfer of said shares of stock on the books of the corporation, and upon the same being refused this action at law was commenced by appellant against appellee to require such transfer to be made. The circuit court heard the case upon the testimony of witnesses and refused to order a writ of mandamus, from which judgment denying relief appellant took an appeal to this court.

(1) The contention of appellee is that it had a lien on said shares of stock under the statute of this State which provides that "such corporation shall at all times have a lien upon all the stock or property of its members invested therein for all debts due from them to such corporation." Kirby's Digest, section 853. On the other hand it is contended by appellant that such lien, if it ever existed, was waived by appellee in proving up its claim against the estate of the bankrupt copartnership, as an unsecured creditor, without offering to surrender the asserted security of the statutory lien. It is not contended by counsel for appellant that appellee did not originally have a lien on the stock which was superior

to appellant's lien as pledgee. It is clear that under the statute such lien on the shares of stock of Mrs. Petty existed, even though the indebtedness was that of a copartnership of which she was a member. The individual liability of a member of a copartnership for debts of the firm is primary and not collateral. "But the fact remains as true as ever," says Mr. Justice Holmes, speaking for the Supreme Court of the United States in *Francis* v. *McNeal,* 228 U. S. 695, "that partnership debts are debts of the members of the firm, and that the individual liability of the members is not collateral like that of a surety, but primary and direct, whatever priorities there may be in the marshalling of assets."

The view that such a character of indebtedness falls within the statutory lien of the corporation on the stock of its share holders is sustained by abundant authority. In Thompson on Corporations, volume 4, section 4010, the law is stated to be that "among other forms of indebtedness the lien has been held to attach to * * * debts due the corporation from a partnership in which the stockholder is a partner." See also *Planters & Merchants Mutual Insurance Co.* v. *Selma Savings Bank,* 63 Ala. 585; *In re Bigelow,* 3 Fed. Cases, 1395; *Arnold* v. *Suffolk Bank,* 27 Barb. (N. Y.) 424; *Citizens Bank* v. *Kalamazoo Bank,* 111 Mich. 313.

This court has not had occasion heretofore to pass directly upon the question but our decisions construing the section of the statute referred to give it the broadest effect in declaring liens in favor of a corporation for debts due by its stockholders. *Oliphint* v. *Bank of Commerce,* 60 Ark. 198; *McIlroy Banking Co.* v. *Dickson,* 66 Ark. 327; *Springfield Wagon Co.* v. *Bank of Batesville,* 68 Ark. 235; *Bankers Trust Co.* v. *McCloy,* 109 Ark. 160.

(2) The lien undoubtedly existed, but the real question in the case, which counsel on each side debate with much earnestness and force, is whether or not appellee waived this lien by proving up its claim against the estate of the bankrupt copartnership as an unsecured cred-

itor and by accepting dividends based on the allowance of the full claim. The solution of this question depends upon whether or not, under a proper construction of the Federal bankruptcy law, the appellee was required to surrender its security before it could be permitted to prove up the full amount of its claim as an unsecured creditor. It involves the doctrine of election, because if appellee made an election to stand as an unsecured creditor it can not afterwards take the inconsistent position of being a secured creditor and assert the right to enforce its security. In other words, the election to appear as a secured creditor constitutes an abandonment of the security.

The bankruptcy act (section 57, subdivision "e") contains the following provision on the subject of secured creditors: "Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities, or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities." Another subdivision of the same section ("h") contains the following provision: "The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance." The bankruptcy act (section 1, subdivision 23) defines the words "secured creditor" as follows: "Secured creditor' shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets."

(3-4-5) So it appears from the express terms of the bankruptcy statute that a claim is not deemed to be a secured one unless it constitutes either directly or indirectly a lien on the property of the bankrupt estate. The fact that the debt is secured collaterally does not make it a secured claim within the meaning of the Federal statute. The adjudication of the bankruptcy of a copartnership necessarily draws to it the estates of the individual members of the copartnership. *Francis* v. *McNeal, supra; Abbott* v. *Anderson,* 265 Ill. 285, 106 N. E. 782, L. R. A. 1915 F., p. 668. But for certain purposes the statute recognizes the copartnership as a separate entity. The Supreme Court of the United States, in *Francis* v. *McNeal, supra,* after calling attention to the different sections of the bankruptcy act having reference to partnership assets, said that "No doubt these clauses taken together recognize the firm as an entity for certain purposes, the most important of which, after all, is the old rule as to the prior claim of partnership debts on partnership assets and that of individual debts upon the individual estate." The statute expressly provides that the "net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts." Section 5, subdivision F.

It follows that if this separate entity is preserved for the purposes indicated, a specific lien on the separate property of an individual member of a copartnership does not constitute a claim against a copartnership a secured one within the meaning of the bankruptcy statute so as to require a surrender of the security before the full amount of the claim can be proved against the copartnership. There are no cases directly on that point but we think that the necessary result of the construction of the act given by the Federal courts leads to that conclusion.

District Judge Lowell, in deciding a case under the bankruptcy statute of 1867, said: "When one partner has pledged his shares for the debt of the firm, proof

may be made in full against the assets of the firm, because it is only when the proof is against the same estate which furnished the security that a sale and application of the security is required by the bankrupt law." *Ex parte Whiting,* 29 Fed. Cases, No. 17573. This is the construction of the statute which is given by all the text writers on the subject of the National bankruptcy Act. "An individual creditor of one partner having a security on the firm estate may prove for the full amount of his debt against the individual estate without giving up his security, and on the other hand a creditor of a partnership, whose debt is secured by mortgage or lien on the individual estate of one of the partners, may prove for the full amount of his debt against the firm estate, without giving up his security." Loveland on Bankruptcy, p. 566. In Remington on Bankruptcy (volume 1, section 756), the law is stated to be that "property of individual members of a partnership held as security for a firm debt need not be deducted in the allowance of the claim against the partnership estate." And in Collier on Bankruptcy, p. 724, the law is stated as follows: "No matter how great may be the security which one may have, if it be property of another than the bankrupt, the creditor may prove his entire claim against the bankrupt estate, and receive a dividend thereon, and thereafter institute proceedings to enforce his claim upon the security for the balance. And this rule applies even where the security that is held is security for a partnership debt but is property of individual members of the firm, the partnership and the individual estates being considered distinct and separate."

(6-7) We think that is the correct interpretation of the bankruptcy statute. The fact that the statute recognizes the right of the partnership creditors to have satisfaction out of the individual assets of the partners after the individual debts are paid does not make the security against the property of the individual creditor a secured claim as against the corpartnership. The provisions of the bankruptcy act with respect to

priorities between creditors of copartnerships and creditors of the individual members thereof is a mere recognition of the common law rule on the subject, and there would be no equity in requiring the creditor of a copartnership to give up his security on the property of an individual member as a condition upon which he can participate in the assets of the copartnership on an equality with other creditors. Such a creditor is not denied, upon any rule of equity, an equal participation because he holds individual security. Any other view would deny him the advantage which he has obtained by that vigilance which the law not only permits but which sound policy encourages. Therefore a copartnership creditor who holds security from the individual members of the firm, is not put to any election when he comes to prove his claim against the estate of the copartnership, and therefore he does not have to surrender his security before he can prove his claim in full. Such is the rule applicable to the facts of this case, and we hold that appellee did not abandon its lien against the stock of Mrs. Petty as an individual member of the firm of E. C. Petty & Co. It could not be compelled to make a transfer of the stock on the books of the company to a third party until its debt had been paid, and the circuit court was correct in so deciding.

It is also contended that the treasurer of the corporation waived the lien, *pro tanto,* by paying to Mrs. Petty the dividends on the stock after he acquired information that appellant was asserting a claim of ownership of the stock. The proof on the part of appellant is that its cashier, Mr. Watkins, went to Mr. Ward, the treasurer of the Merchants Grocer Company, and consented to the payment of the dividend to Mrs. Petty on condition that the stock be transferred to appellant. The proof is that Mr. Ward stated that he had no authority to make any transfer, but that in accordance with the agreement between appellant and Mrs. Petty he would give the latter a check for the dividend, which was done. It can not be said that there was a waiver of

the lien to the extent of the amount of dividend which appellant lost by reason of its consent to the payment over to Mrs. Petty, for according to the findings of the court upon legally sufficient evidence Mr. Ward had no authority to make the transfer, and in addition thereto the appellant at that time knew that the appellee was asserting its lien against the stock.

Upon the whole we are of the opinion that the decision of the circuit court in favor of appellee was correct, and the judgment is therefore affirmed.

DONAGHEY v. WILLIAMS.

Opinion delivered April 24, 1916.

1. MONEY PAID—DEFENDANT'S REQUEST—RECOVERY.—In an action to recover money paid out by plaintiff at defendant's request in managing a political campaign for the defendant, the evidence *held* not to show that plaintiff had paid out the money claimed at the defendant's request.
2. MONEY PAID—PREVIOUS REQUEST—RATIFICATION.—To sustain a cause of action for money paid out on request, the previous request must be proved, or else it must be shown that the party for whose benefit the money was paid, ratified the payment after it was made.
3. MONEY PAID—REQUEST—PURPOSE OF EXPENDITURE.—In an action to recover money paid out on request, the plaintiff must show the specific purpose for which the money was expended, in order that it may be determined whether or not the money was spent for a legitimate purpose.
4. MONEY PAID—REQUEST—PURPOSE.—In an action by plaintiff, who managed a political campaign for defendant, to recover money of his own paid out at defendant's request, plaintiff must "lay his finger" upon the specific services rendered defendant, and for which he paid out his own money, and he can not recover money paid out without a showing that the same was paid out for legitimate expenses.
5. MONEY PAID—CHECKS—HEARSAY EVIDENCE.—In an action by plaintiff to recover from defendant, money paid out as manager of defendant's political campaign, checks and drafts, introduced by plaintiff, as independent evidence, made payable to plaintiff himself, introduced to show that he had paid out the various sums specified therein, are hearsay and self-serving and incompetent.

6. EVIDENCE—MONEY PAID—LETTER.—Where the testimony of the writer of a letter is the best evidence, the letter can not be introduced in evidence.

7. PRINCIPAL AND AGENT—AUTHORITY OF AGENT—INSTRUCTIONS.—Where the scope of an agent's authority depends in whole or in part upon the instructions of the principal, such instructions may be given in evidence where they have been communicated to the third party.

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

STATEMENT BY THE COURT.

The appellee instituted this suit against appellant, and alleged in his complaint that appellant was running for Governor of the State of Arkansas, and about eighteen days before the primary election in 1912 requested the appellee to manage his campaign; that appellant stated that he had plenty of money and desired appellee to come into his headquarters and handle the financial end of the campaign, and specifically told appellee to run the campaign as if it were appellee's own campaign, to pay the debts and bills and that appellant would repay appellee and foot the bills. Appellee set forth various itemized checks and drafts which he drew in his own name on the Bank of Forrest City, amounting in the aggregate to $8,679.70; and these checks and drafts were paid and the money thus realized was paid out by appellee at the instance and request of appellant and for purposes connected with the expenses incident to the management of appellant's campaign for governor. The specific purposes for which most of the money was used appellee was unable to state. Appellee alleged that appellant borrowed from appellee the sum of $2,500, which sum appellee used, as the other moneys were used, for paying the expenses incident to conducting appellant's campaign for governor, but appellee was unable to state the particular purposes to which it was devoted by the parties to whom the money was paid.

The appellant denied that he had ever entered into a contract with appellee, as alleged in his complaint; denied that he had stated to appellee that he had plenty of money, and that appellee should run the campaign as if

it were appellee's own; denied that he had authorized appellee to pay out any money of his own, and denied that appellee had loaned or advanced him any sum whatever; and denied specifically that appellee had paid out at appellant's instance and request any or all of the sums mentioned in his complaint and that he had authorized appellee to incur any liability or debt of any kind on appellant's behalf, but alleged, on the contrary, that it was understood and agreed between appellant and appellee that appellee should not incur any indebtedness or liability of any kind on behalf of appellant, and that appellee would receive from appellant the sum of $2,500, which appellant instructed the appellee was the limit that the latter should pay for all expenses of every kind in connection with appellant's headquarters and in the conduct of the campaign; that in pursuance of this agreement appellant's headquarters were opened at the Capital Hotel, in the City of Little Rock, on March 11, 1912, and that appellee entered said headquarters as manager thereof, and appellant paid over to him the sum of $2,500; that thereafter, at the earnest solicitation of appellee, appellant's friends, without appellant's knowledge, paid over to appellee, in addition to the $2,500, the sum of $1,500, making the total sum of $4,000 which was turned over to appellee for the purpose of paying the expenses of the headquarters and campaign.

Appellant set up by way of counterclaim that appellee, in violation of his agreement and in excess of the authority given him, had incurred, in the name of the appellant, liabilities and indebtedness to various persons in large sums which appellant had been forced to pay, amounting in the aggregate to the sum of $7,664.44, for which appellant asked judgment over.

Appellee, in his reply to the counterclaim, denied specifically each item claimed by appellant.

The appellee testified, in substance, that he lived in Forrest City, and was engaged in the banking business there; that he, in company with Judge Rolfe and Mr. Buford, came to Little Rock on March 3 at appellant's re-

quest, and went to appellant's residence; that appellant told appellee that he (appellant) and his friends had decided that they wanted appellee to manage appellant's campaign; that appellee, Judge Rolfe and Mr. Buford told appellant that appellee could not manage his campaign; that they left appellant and went to the hotel, thinking the matter was ended; that afterward appellant called appellee over the phone and requested him to come back, which he did, in company with the same gentlemen as above, and they again went over the matter, and that then appellant said that he engaged rooms at the Capitol Hotel and wanted appellee to take charge of the campaign, saying that he would stand the expenses of headquarters; that he had plenty of money and expected to win, and wanted appellee to take charge of the campaign and handle it as though it was appellee's own business. Appellee still objected. The following week appellee, in appellant's behalf, made a trip to Hot Springs, and on his return he went to the Governor's office, and the Governor's friends insisted that he go by and see the headquarters that were being opened at the Capital Hotel, stating that the Governor was expecting appellee to come over and take charge of it; that he consented and went into the headquarters on Monday the 11th day of March, 1912, and found there Mr. Bullion, Judge Moore, of Helena, and Mr. Joe Frauenthal; that on that morning, Mr. Bullion handed appellee $1,000 in currency, saying "here is one thousand dollars for you to use, and when that is gone, there is plenty more," and probably two days thereafter he gave appellee another thousand, saying, "when that is gone there is plenty more;" that on the following Friday he told Mr. Bullion he needed some more money, and Bullion replied that he had only $500 more; that $2,500 was all that he had.

Appellee then, over the objection of appellant, introduced various checks and drafts drawn in appellee's name on the Bank of Forrest City, which were paid; and appellee testified that the sums realized in this way were paid out to various parties whose names appellee men-

tioned, and that these sums were to be used in connection with the business of the headquarters and in conducting the campaign. He specified the purpose for which some of the money was used, and was not able to state the specific purposes for which other sums were used by the parties to whom such sums were paid.

Appellee stated that he kept no books and had no receipts or vouchers for most of the money paid out. In regard to the alleged loan of $2,500 he testified that on Sunday, March 17, in a conversation with appellant, appellant told appellee that he (appellant) had put up $2,500; that appellee stated that he had got the $2,500. Appellant then told appellee to put up $2,500 for him, and that he (appellant) would pay it back; that he did not want this to show in his expenses; that he told appellant that that would not be enough. Appellee testified that he paid out this last $2,500 "to fellows over the State; did not keep any account of it." He could not recall any bills that he paid, but the money was paid to people for services. No accounts were rendered. It was to people who did the best they could in campaign work; that is, witness presumed they did. Witness did not give everybody who came to headquarters money, but he gave a whole lot of them money; could not remember the names. He paid them for supposed to be services in the campaign; that while he was in the headquarters, about eighteen days, he spent a total of about $12,000 which did not include any newspaper bills or any clerical hire or any stenographer work; that all these expenses and bills were paid by Governor Donaghey, so far as witness knew.

Witness further stated that he did not render any statement to appellant of the sums that he had expended with a request for repayment except as to the $2,500 which he had loaned the appellant. He saw appellant on two or three different occasions, and on one occasion, when they were speaking about the finances, the appellant asked "How much is it?" Then appellee called up the bank at Forrest City and they replied that it was about $7,000, whereupon appellant said, "We will see about

that," stating that there was a settlement between them. The next time appellee saw appellant was at Forrest City where appellant came to see appellee about newspaper bills, and appellee did not demand any payment from appellant at that time or mention it to him; that on still another occasion, when appellant came to see appellee about the newspaper bills, he did not say anything to appellant about what he owed appellee. Appellee stated that appellant knew what he owed, or about what he owed; that he knew that he owed appellee something. He wrote appellant a letter about it, asking for $2,500. There was no difference between the $2,500 that appellee had loaned appellant and the balance that appellee had expended for appellant. Appellee was just demanding the $2,500 loaned to appellant because appellee did not think appellant would deny that, and appellee did not want any controversy. Appellee did not demand all that appellant owed him because he wanted to keep out of a political controversy or a newspaper controversy, which he detested. On October 2, 1912, he wrote appellant the following letter:

"Dear Governor: If convenient, I would appreciate it if you would let me have your check for the $2,500 which I loaned you during the recent campaign. Yours very truly, Eugene Williams."

About a year after this he authorized his attorney to take the matter up with appellant, and told his attorney that if appellant would pay him $2,500 to accept it, and that his attorney wrote to the appellant, stating that he had an account of appellee's against him for $2,500 for collection, and further stating: "I presume you know of this account and the correctness of the same. So forward me a check at your earliest convenience for settlement of the same," etc.

The testimony of E. A. Rolfe and T. A. Buford was substantially to the effect that they came to Little Rock with appellee at the request of appellant; that appellant requested the appellee to come over and manage his campaign, stating that he wanted him to take hold of it and run it like he was running his own business; that in the

course of the conversation appellant said: "That is all right about the money. I want Mr. Williams to come over here and finance this thing, and I don't think anybody else can do it but Mr. Williams."

One witness stated that appellant said that he had the money to foot the bills; that Mr. Williams must come; that he (appellant) was going to the country and would not be around and would need somebody like Mr. Williams, and that he was going to put enough money into the campaign to win.

Witness W. T. McCauley testified on behalf of appellee, by deposition, that he resided in Fort Smith; that he had met appellant there on March 18, 1912; that he wrote the following letter:

"Fort Smith, Ark., Feb. 18, 1912.

Mr. Gene Williams, Little Rock, Ark.

Dear Sir and Friend: I met my friend and our next Governor a few hours ago and he told me to write you and tell you to send me some funds to work on. I have been working for him ever since he announced and have not called on him before, and as you well know, it takes some money to work on. As to the amount use your own judgment, but send by return mail, as I am a poor man and cannot afford to spend any more of my own, but I do want to see George W. Donaghey elected Governor by a big majority. I am as ever,

Yours truly,

W. T. McCauley,

Captain of Police."

Witness was then asked: "If you say you met Governor Donaghey, tell where you met him and tell all he said about who was managing his campaign, and give his exact words as nearly as you can as to what he said in regard to you writing to Gene Williams about funds?" and answered, "I don't remember."

Appellant testified that he was acquainted with Buford and Rolfe; that some time the latter part of February 1912, Williams, Rolfe and Buford came to Little

Rock for the purpose of having a political conference with him, and in the conference on that day he mentioned that there was a request on the part of his friends for campaign headquarters to be opened up in the city. The conference was at appellant's residence, in the afternoon, on Sunday. There was another conference on Sunday night. At the first conference the gentlemen named were present at his request. At the second they came to his residence on their own motion. The gentlemen had come over to Little Rock at appellant's request, but not to talk about or to become campaign managers, but only for a political conference; that during this conference he asked Mr. Williams as to whether he would come over and go into the headquarters; that both Williams and Mr. Rolfe strenuously objected thereto, and appellant thereupon gave the matter up and never thought about it any more. Appellant first learned that Mr. Williams had become his campaign manager about March 16, 1912. On Sunday, the 17th, appellee came to see appellant twice. Appellee spoke to appellant about the finances and appellant told appellee that he (appellant) would not spend more than $2,500. Appellant thought that appellant ought to spend more, and appellant said he would not spend more, even though it would elect him. That was the first time appellant and appellee talked about the finances. During the conferences and conversations had with appellant while Rolfe and Buford were present many days earlier, there was not a single word said about any money; money was not mentioned at that time at all.

Appellant then testified that he had delegated to his agents Frauenthal and Bullion authority to secure a campaign manager. When appellant returned to Little Rock on March 17th he found that appellee had been secured as campaign manager, and that he was in charge. In a conference with him at his residence appellant asked appellee if word had been delivered to him as to what he was to spend, and he said it had, and appellant asked him how much he understood he was to spend and appellee

said $2,500, and said that he could not get along with that sum. Appellant then told appellee that he could not spend more than that even if it would get the governor's office for him; that he had made up his mind not to spend more than that, and he would not do it. He told appellee not to leave anything unpaid, stating to him distinctly, "You must confine every matter of expense within the $2,500," and appellee said nothing further about expenses. Appellant stated that he did not directly or in any other way authorize appellee to spend any more than $2,500, and the understanding between them was that the appellant himself should pay that amount.

Concerning the alleged loan of $2,500, appellant testified denying that he ever spoke to appellee with reference to borrowing $2,500 from him, or any other sum; that on no occasion did he ask the appellee to loan him $2,500; that he did not at any time state to appellee that he wished to borrow this amount and did not want the amount to appear in his campaign expenses. "There was never anything of that character or nature mentioned;" that he never did in any manner direct or suggest to the appellee that he wanted him to pay any money into the campaign, and never did expect him to do so. Appellant stated that appellee was not employed by him individually, when he was at his residence with Mr. Rolfe and Mr. Buford, but that he was secured through Mr. Bullion and Mr. Frauenthal, appellant's friends; that appellant expected Bullion and Frauenthal to select a different individual as appellant's campaign manager, and the first time that he heard that appellee had been secured was while he was away from the city on his campaign.

Appellant then testified to various bills of newspapers, stenographers and others, making a total of $7,760, which he had paid after the campaign was over, after a conference with his attorney, who advised him that under the circumstances he should pay them; that they were accounts made by Williams in his behalf, and he had paid them for the reason that he did not care to get into a controversy over those things. Appellant further

testified that after the campaign appellee told him that he had spent more money than he had been authorized to spend.

There was testimony on behalf of the appellant tending to show that he had authorized his friends, Bruce Bullion and Joe Frauenthal, to employ a campaign manager, and that he had directed that they should limit the amount to be expended by the manager employed to the sum of $2,500; that when appellee was employed he was informed by the gentlemen employing him of this fact. Bullion, one of the gentlemen who requested appellee to take charge of the campaign, stating "on the morning after the headquarters were opened up I had a conversation with Mr. Williams and told him that the appellant had left instructions to furnish him $2,500, which was the limit of the campaign expense which Mr. Donaghey would pay, which they agreed would be furnished in cash." Witness stated that he paid this sum over to appellee.

Witnesses testified on behalf of the appellant also that they had heard the appellee state, while he was managing the campaign, that $2,500 was all that he was authorized to spend in the campaign; that appellee was complaining because he had been limited to that sum, stating that he needed more money.

The appellant offered to prove by witness Frank Robbins that he was directed by Governor Donaghey to request Bullion and Frauenthal to make arrangements for opening up headquarters for appellant in Little Rock, and in doing so had directed them to limit the expenditures to $2,500. The court refused to permit the witness to testify and appellant saved his exceptions.

The court also refused to permit appellant to testify that he had Robbins to tell his friends to limit the expenditures of maintaining the headquarters and conducting the campaign to $2,500, and appellant excepted to the ruling of the court.

The jury returned a verdict in favor of appellee in the sum of $2,500. Judgment was entered accordingly,

and this appeal has been duly prosecuted. Other facts stated in the opinion.

Mehaffy, Reid & Mehaffy and *Sam Frauenthal,* for appellant.

1. This action is to recover money paid out at appellant's request and before appellee can recover there must have been such previous request, or a ratification of such payment. He had no right as a volunteer to pay out moneys of his own without a request from appellant. 27 Cyc. 837. Appellant repudiated the payments and no ratification is shown. Nor was there any contract to pay these moneys out of appellee's own funds. On the contrary all expenses of headquarters, etc., were to be paid by appellant himself.

2. It was error to allow appellee to introduce checks or drafts in evidence, because they were hearsay testimony and in the nature of self-serving declarations. 2 Jones on Ev., § 298, p. 640; 4 Chamberlayn on Ev., § 2756, 3088; 82 App. Div. (N. Y.) 202; 177 N. Y. 542; 131 *Id.* 169; 2 Aiken (Vt.) 133; 8 Enc. Ev. 626; 78 S. W. 744; 92 Ark. 472; 173 S. W. 179; 2 Jones on Ev., § 297; 7 Cranch (U. S.) 290, 3 Law Ed. 348. They were not even admissible as memoranda to refresh the memory of the witness. 1 Greenl., Ev. (16 ed.) 439 C; Wigmore on Ev. 763; 3 L. R. A. (N. S.) 1152; 5 Jones on Ev., § 883; 82 Ark. 485.

3. McAuley's letter was inadmissible as evidence and prejudicial. It was hearsay.

4. The court erred in refusing to permit Robbins to testify to the authority given by appellant in securing a manager and the limitation to $2,500 that should be spent. It is always proper to show the authority given by the principal to the agent and any limitations thereon. 31 Cyc. 1326; 80 Ark. 228; 105 *Id.* 111. Evidence of the agent is admissible to prove the fact of agency and its extent. 2 Gr. on Ev. (16 ed.), § § 60, 61, 64a; 2 Chamb. on Ev., § 1339; 31 Cyc. 1651. The power of an agent to bind his principal must be determined by the authority

given by the principal and a person dealing with an agent is at once put upon notice of the limitations of his authority. 23 Ark. 411; 62 *Id.* 33; 15 Kans. 492; 31 Ark. 212.

5. The court erred in giving instruction No. 1 for appellee and in refusing No. 5 for appellant. 31 Cyc. 1456, 1474.

M. B. Norfleet, Coleman & Lewis and *Carmichael, Brooks, Powers & Rector,* for appellee.

1. The finding of the jury is conclusive that appellee was entitled to $2,500. There was a conflict in the testimony and the verdict is final. 101 Ark. 51; 100 *Id.* 330; 103 *Id.* 260; 101 *Id.* 120; 90 *Id.* 100. The checks were admissible as evidence.

2. The jury's finding was right and in accordance with the great preponderance of the evidence and there was no error in the instructions. Appellant can not complain because appellee recovered less than he was entitled to. 89 Ark. 195.

WOOD, J., (after stating the facts). The pleadings raise two distinct issues of fact: 1st, whether of not appellant requested the appellee to become his campaign manager, and, as such, to spend his own money in conducting the campaign for appellant with the promise on the part of the appellant to repay appellee the sums expended by him out of his own funds; and, 2nd, whether or not appellant borrowed of appellee the sum of $2,500.

I. While there is testimony to warrant a finding that appellant requested the appellee to become his campaign manager, there is no testimony whatever to warrant a finding that appellant requested the appellee to defray the expenses incident to the headquarters and the management of the campaign out of his own funds. On the contrary, the undisputed evidence is that the appellant himself was to pay the expenses of his headquarters and of conducting the campaign. The allegation of the complaint that appellant "desired the ap-

pellee to come into his headquarters and handle the financial end of the campaign and to pay the debts and bills and the defendant would repay the plaintiff whatever the plaintiff paid out," was sufficient to admit testimony on this issue, but the burden was on the appellee to prove this allegation, and he has failed.

(1-2) The testimony of the appellee, and of the witnesses who corroborate him concerning the understanding between appellee and appellant as to the expenses of the headquarters and the campaign shows that these expenses were to be paid by the appellant out of his own funds, and not by the appellee. Giving the testimony in favor of the appellee on this point its strongest probative force, it does not justify an inference that appellant intended that appellee should pay the expenses out of his own funds. Appellee himself testified that appellant said, "he would stand the expenses of headquarters; he had plenty of money and expected to win. He wanted me to take charge of the campaign and handle it as though it were my own business."

The testimony of other witnesses for appellee, who claimed to have heard what appellant said at this time, was to the same effect.

On this issue, the suit by appellee is to recover for money paid by appellee at appellant's request. To sustain a cause of action for money thus paid the previous request must be proved, or else it must be shown that the party for whose benefit the money was paid, ratified such payment after it was made. We have set forth the testimony as abstracted on this issue fully in the statement, and it fails to show any ratification whatever upon the part of appellant of the payments which appellee claims that he made in conducting appellant's campaign. On the contrary, the only affirmative evidence in the record is to the effect that appellant repudiated these expenditures as soon as they were brought to his attention, and nowhere acquiesced in or gave his

assent to them. Appellee therefore, in paying out his own money for the expenses which he claims were incurred by him in conducting appellant's headquarters and campaign without any request upon the part of appellant so to do, was a mere volunteer, and he cannot hold appellant liable for such payments. 27 Cyc. 837 g.

The utmost that the testimony on behalf of the appellee tends to prove is that appellant requested him to manage his campaign, and that appellant would defray the expenses. But this is quite a different thing from a request by appellant of the appellee to pay the expenses himself out of his own funds with a promise of repayment by the appellant. Appellee's cause of action upon this issue must stand or fall upon the proof to the effect that the appellant specifically told the appellee to run the campaign as if it were his own business, and that he (appellant) would "foot the bill." This falls far short of a request on the part of appellant of appellee for the latter to "foot the bills" out of his own funds.

(3) The court therefore erred in submitting to the jury the issue as to whether or not appellee had either express or implied authority to spend his own money in behalf of appellant. Furthermore, even if appellee had proved that he had express or implied authority to spend his own money in conducting the headquarters and the campaign for appellant, the burden was upon the appellee to show the specific purposes for which the money was expended in order that it might be determined whether or not the money was spent for a legitimate purpose. Appellee kept no books and had no receipts or vouchers. Appellee testified that he knew the money he paid out was used in the campaign and for campaign purposes, but whether the parties to whom he paid it used it for that purpose he could not say.

During the cross-examination of appellee, he was asked this question: "You would just pay out anything anybody told you to when you were in there and you found them there?" and answered, "It seems so." And he further testified that he could not remember the names

of the persons to whom he paid money nor what they did. He stated that he paid them for services, and when asked what these services were replied: "It was supposed services in the campaign."

(4) Now in order to justify a recovery on behalf of appellee against appellant it was incumbent upon appellee "to lay his finger" upon the specific services that were rendered the appellant for which appellee expended his own money. Appellee could not expend his own money for appellant for *supposed services* rendered in the interest of the latter in connection with his campaign. Appellee would have to show that the money expended was in good faith and for a particular service rendered which would have been a legitimate charge against appellant. A reckless, and indiscriminate expenditure of funds to anyone without inquiry as to the particular service rendered and without a showing that the service was a legitimate expense would tend to debauchery of voters and the corruption of elections. A contract authorizing the expenditure of money in this manner would be contrary to public policy and void.

It is not necessary to discuss the instructions in detail. What we have said would sufficiently indicate what the instructions should have been, and shows that the cause, on this issue, was not correctly tried.

(5) II. As independent evidence, the checks and drafts introduced by the appellee made payable to himself to show that he had paid out the various sums specified therein were but hearsay testimony and incompetent. 2nd. Jones on Evidence, sec. 298, p. 640, and sec. 297, p. 630; 4 Chamberlaine on Evidence, sec. 3088; *Simons* v. *Steele,* 82 App. Div. (N. Y.) 202, affirmed in 177 N. Y. 542. See also, 8 Enc. Ev. p. 626.

Checks and drafts were drawn by the appellee and many of them made payable to himself. On their face they do not show that appellant was in any manner connected therewith, and the evidence affirmatively shows that appellant was not present when the checks and drafts were drawn. They related wholly to transactions

with other persons. These checks and drafts were but in the nature of self-serving evidence by the appellee, tending to corroborate his testimony that he had paid out the various amounts testified to by him on account of appellant. It was not competent for appellee to corroborate his testimony in this way. See *Hamburg Bank* v. *George,* 92 Ark. 472; *Fechheimer-Kiefer Co.* v. *Kempner,* 116 Ark. 482, 173 S. W. 179. The checks and drafts made payable to third parties would be competent to show the fact of such payment and would be relevant and competent testimony provided appellee went further and proved that he had authority to issue them and that they were given in payment for legitimate services rendered appellant.

It does not appear from the record that the checks and drafts were used merely to refresh the memory of appellee when he was on the witness stand, but that he was allowed to use them as independent evidence to corroborate his testimony as to the amounts he claimed that he had paid at the instance and in the interest of the appellant.

(6) III. The court erred in permitting the introduction of the letter written by W. T. McCauley to the appellee. The contents of this letter tended to show that appellant had authorized the writer to call on the appellee for money, and the purpose of the evidence was to show that appellee was correct in his contention that appellant had expressly authorized him to use his (appellee's) own funds in furthering appellant's campaign. Appellant was not present when this letter was written, and it was hearsay testimony.

As we have seen, there was no testimony to show that appellee was authorized to spend his money in conducting appellant's campaign. This letter tended to prove such fact and was highly prejudicial to the appellant. If such facts existed they should have been testified to directly by the writer of the letter, and the letter, in no case, could be used to bolster up the testimony of the witness.

IV. The court erred in excluding the proffered testimony of witness Frank Robbins. Appellant contends that appellee was procured as his campaign manager through his special agents for that purpose, Bullion and Frauenthal, and that these special agents were under limited authority to see that the campaign manager they selected did not expend of appellant's funds exceeding the sum of $2,500; that these special agents were instructed to limit the expenditures to that sum.

The testimony of Robbins tended to prove that such were the instructions of appellant to his special agents, Bullion and Frauenthal. Robbins was the instrumentality through whom these instructions were communicated from the appellant to his special agents, Bullion and Frauenthal.

The testimony of Bullion shows that he told appellee that "the appellant had left instructions to furnish him (appellee) $2,500, which was the limit of campaign expenses which Mr. Donaghey would pay, and asked him how he wanted the money furnished, which they agreed should be furnished in cash." Appellee does not deny that Bullion communicated to him these instructions.

(7) The law is well settled that where the scope of an agent's authority depends in whole or in part upon the instructions of the principal such instructions may be given in evidence where they have been communicated to the third party, although they are opposed to the apparent authority of the agent. See 31 Cyc. p. 1657, and cases cited.

V. The issue as to whether or not appellee had loaned the appellant the sum of $2,500 raised by the pleadings and the evidence, it appears was not submitted to the jury in the instructions of the court. The only issue submitted to the jury under the instructions was as to whether or not appellee was entitled to recover the money he claimed to have expended out of his own funds by the express or implied authority of the appellant.

Counsel for appellee contend that the evidence was sufficient to warrant the verdict for money loaned by the

appellee to appellant. While there was evidence on the part of the appellee tending to prove that he had loaned appellant the sum of $2,500, the testimony on this issue was conflicting, and inasmuch as the issue as to the loan was not submitted to the jury in the instructions, we must hold that the verdict was not responsive to such issue, but, on the contrary, was responsive to the issue as to whether or not appellee had expended his own funds at the instance and request of appellant, or under express or implied authority from him to do so, and, as we have shown, such issue was not properly submitted.

For the errors indicated, the judgment is reversed and the cause remanded for a new trial.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. ELLENWOOD.

Opinion delivered April 24, 1916.

1. APPEAL AND ERROR—RULING OF TRIAL COURT—INSUFFICIENT EVIDENCE.—Where a trial court has overruled a motion for a new trial, based upon the insufficiency of the evidence, the verdict of the jury will be upheld on appeal, where there is any substantial evidence to support it.
2. APPEAL AND ERROR—JUDICIAL NOTICE—PHYSICAL FACTS.—Appellate courts take notice of the unquestioned laws of nature, of mathematics, of mechanics and of physics; and where by the application of such laws to the facts in evidence it is demonstrated beyond controversy that the verdict is based upon what is untrue and what can not be true, this court will declare as a matter of law that the testimony is not legally sufficient to warrant the verdict.
3. NEGLIGENCE—PERSONAL INJURIES—TESTIMONY OF PLAINTIFF—SUFFICIENCY.—Where a recovery, in an action growing out of personal injuries, was dependent upon the truth of the plaintiff's testimony, his testimony relating to matters, conditions and situations which might or might not have existed, and which was not contradicted by the physical facts, the evidence held sufficiently substantial to warrant a verdict in his favor.
4. RAILROADS—INJURY TO YARD-MAN—BAD-ORDER CAR—NOTICE.—A railway yard-man is not, as a matter of law, required to take notice that a certain car was a "bad-order car" because printed notices to that effect were tacked on each end of the sides of the car.

5. RAILROADS—INJURY TO YARD-MAN—NOTICE OF DANGER—BAD-ORDER CARS.—Plaintiff, a yard-man, employed by defendant railway, was injured by falling from the top of a freight car, caused by a hole in the roof of said car. *Held*, if a telegram was posted in the yard-master's office containing information that the train in question was a train of bad-order cars, and that if the plaintiff, before going on duty, failed to examine the telegram on file in his office, he is bound by the information imparted by the telegram and can not claim that he did not have notice of the nature of the train upon which he was injured.

6. DAMAGES—PERSONAL INJURY ACTION—AMOUNT.—Where plaintiff, an employee of a railway company, was injured by the negligence of the defendant, sustaining serious and permanent injuries, held under the evidence that a verdict awarding $20,000 damages, would not be disturbed on appeal.

7. TRIAL—MISCONDUCT OF JUROR.—A cause will not be reversed on the ground of the misconduct of certain jurors, where the same were treated to cigars and soft drinks, by plaintiff's counsel, during the progress of the trial, when the trial judge examined carefully into the matter, and found that no prejudice resulted to the defendant from the conduct of the jurors.

Appeal from Dallas Circuit Court; *Turner Butler*, Judge; affirmed.

Edw. A. Haid, A. L. Burford, F. G. Bridges and *W. T. Wooldridge,* for appellant.

1. Under the Federal Employer's Liability Act, as construed by the courts, under the evidence there is no liability:

(1) Because no negligence was proven.

(2) Because appellee assumed the risk.

The car was a *bad order* car. 233 U. S. 492, 501-3; 92 Atl. 1060; 144 Pac. 762; 118 Ark. 304; 177 S. W. 875; 95 Ark. 562; 167 S. W. 128; 125 *Id.* 1056; 58 Tex. 434; 135 Mass. 418; 61 Ill. 131; 59 Kans. 72; 144 Pac. 763; 76 Ark. 69; 7 N. W. 337; 179 U. S. 658; 211 *Id.* 459; 29 N. W. 173; 44 S. E. 709; 96 Fed. 713; 169 *Id.* 557; 105 S. W. 747; 65 Fed. 48; 67 *Id.* 507, 510; 14 Atl. 735; 119 Tenn. 401; 104 S. W. 1088.

2. It was error to give appellee's instructions 1, 2, 3 and 4 and to refuse appellant's instructions 4, 6. 7, 11 and 13.

3. The cause should be reversed for improper conduct of appellee's attorney. 6 Ark. 537; 104 *Id.* 616; 40 S. W. 352; 11 Ga. 203; 17 *Id.* 364; 34 *Id.* 379; 12 Ill. 531; 12 Kans. 539; 36 N. W. 583; 11 N. W. 668; 45 Fed. 542; 55 S. E. 216; 95 Pac. 540; 53 So. 803; 164 S. W. 1036; 147 N. W. 566; 113 Pac. 186.

4. The judgment is excessive.

W. D. Jackson, Pace, Seawell & Davis, for appellee.

1. The evidence is sufficient to sustain the verdict. There was negligence and appellee did not assume the risk. 78 Ark. 213; 17 *Id.* 209; 198 Fed. 1; 98 Ark. 145; 77 *Id.* 367; 79 *Id.* 53; 232 U. S. 94; 169 Fed. 567; 191 U. S. 64; 187 Fed. 949; 67 Ark. 217; 92 *Id.* 560; 87 *Id.* 443; 82 *Id.* 11; 179 Fed. 801; Sher. & Redf. on Negl. (4 ed.), § 198; 196 U. S. 51; Cyc. 1140; 1156-7, 1168, 1275.

2. There was no error in the instructions. 201 Fed. 56; 235 U. S. 376; 238 *Id.* 507; 232 *Id.* 94; 89 Ark. 424; 93 *Id.* 564; 92 *Id.* 102.

3. There was no improper conduct of either the jurors or attorneys. 104 Ark. 622; 238 U. S. 507; 26 Ark. 323, 334; 20 *Id.* 36; 34 *Id.* 341; 40 *Id.* 454; 66 *Id.* 545; 32 Oh. St. 328; 50 Atl. 217; 34 Iowa 41; 38 N. E. 136; 4 Pac. 977; 105 Mo. 24; 49 Kans. 643; 237 Ill. 148; 68 Miss. 432; 57 S. W. 52.

4. The verdict was not excessive.

HART, J. W. C. Ellenwood sued the St. Louis Southwestern Railway Company to recover damages for personal injuries which he alleges he sustained by reason of the negligence of the railway company while in its employment as yard master. The defendant denied liability upon the ground that it was not guilty of negligence and that the plaintiff assumed the risk.

The issues were tried before a jury which returned a verdict for the plaintiff. From the judgment rendered the defendant has appealed. The material facts relating to the happening of the accident are as follows:

The plaintiff was severely injured on the night of December 21, 1914, by falling or being thrown from the

roof of a car in a train which was being stored on a side track in defendant's yards in the city of Pine Bluff, Arkansas. The plaintiff was thirty-nine years old and had been engaged in railroad work practically ever since he was twelve years of age. He started as call boy and worked in that position for about eight years. He then became a brakeman and served in that capacity until the latter part of the year 1897. Since that time he had been serving as yard master and conductor. He had been working as night yard master for defendant for about ten months when he was injured.

The repair shops of the defendant were situated at Pine Bluff and the yards there were about four miles long. The yards contained a number of tracks upon which trains are received and are made up and sent out of the yards. The yards also contained tracks on which cars are stored. The cars that are sent in to be repaired are usually stored on what are called rip-tracks. It is the duty of the yard master to receive trains and store them on the various tracks in the yards and to make up trains that are made up at Pine Bluff. At the time the plaintiff was injured he went to work at seven o'clock in the evening and quit at seven o'clock in the morning. The yard master had an office in the yard and when the day yard master went off duty, he left a train card which advised the night yard master of the condition of the tracks in the yards. There was also posted in the office a "line up" which gave the number of the regular trains, the time of the extra trains, the direction and time of arrival of the trains. This "line-up" gave no idea of the character of the trains or what they contained. This information is obtained from the manifest or consist. The consist gave information which showed the class of loads in the train, where they were going, their tonnage, whether empties, bad-order or good-order cars. Bad-order cars were usually noted "B. O. Shops," which meant they were bad-order cars to go to the shops. When a train of empties was to arrive ordinarily the message would sim-

ply contain the number of the train and the number of empty cars in it.

On the night of the injury the plaintiff said he went to the office of the yard master and examined the clips posted there and that there was nothing in them advising him that a bad-order train was due to arrive that night. He went on out in the yard to work as there were a great many trains coming in that night, and while out there received information that train number 500 consisting of about ninety empty cars was due to arrive at 11 P. M.; that this information was delivered to him in the yards by the train dispatcher but he was not advised that it was a bad-order train; that it was the duty of the dispatcher to notify him if there were bad-order cars in the train; that the only information he had was that it was a train of empties, consisting of about ninety cars; that about twelve o'clock he received information that extra train number 500 would be in ahead of number 15 or right behind it; that the dispatcher gave him this information; that as soon as he received this information, he went to the north end of the yards to receive the trains which were coming while he was talking to the dispatcher; that it was about two o'clock at night; that it was dark, cold and sleeting some; that he went out and personally headed the trains in on track number 3 and told them to double back on the Dewey track; that he meant by this for them to store all the cars on number 3 that it would hold and take the rest to the Dewey track; that track number 3 would hold about sixty of the cars; that when he told them to go to the Dewey track he was asked by one of the train crew, "Where is the Dewey? That he got on the train to show them where the Dewey track was and that he intended to get down and ride back when he was sure they were back in on the Dewey track; that he started to get down off of the cars and while doing so looked around and saw that there was no one there to take care of the cars and there not being much time, he went on top and began to signal the engineer to slow down; that he saw that he must ride on the rear end

of the cars because there was no one else to do so; that he walked to the second car to the rear and was still giving the slow signal, the last signal that is given before the signal is given to stop; that the track was a little rough and the motion of the car made him mis-step from the running board to the side of the car; that as he made the step he saw that there was a plank off of the roof; that he tried to over-step the hole caused by the missing plank and fell off. He supposed he over-stepped the hole and slipped and fell off of the car; that he does not remember where he fell, but does remember trying to catch his feet as he stepped over the hole.

Other witnesses for the plaintiff testified that two boards were gone off the top of the car near the center and that two were off at the end of the car and that the end crown moulding was gone; that under the boards was the tin roof of the car and that this tin roof was four or five inches below the boards that were gone; that this would make a hole there from four to six inches deep extending from the running board to the outer edge of the car. The plaintiff and other employees of the company for him testified that when a car was in this condition that it was customary to temporarily repair the roof, or upon a failure to do that, to rail the running board of the car with 2x4 pieces.

On the part of the defendant it was shown by several witnesses who worked in the yards that they knew that extra train number 500 was a bad-order train and was due to arrive some time during the night; that it consisted of about ninety cars and that most of them were bad-order cars; that the car upon which the plaintiff was walking when he was injured was a bad-order car and was so marked on each side of it; that the board on each side of the car contained the words "B. O. Pine Bluff Shops," printed on the opposite corners of it; that there was also marked in yellow chalk, which would not wash out by rain, the words "B. O. Rip." This mark meant bad-order, rip track or repair track. The printed letters on

the board were about one inch and one half letters and the boards were fastened on the side of each end of the car by being nailed. The letters meant bad-order and the car was being billed to Pine Bluff shops.

W. P. Turner a switchman testified, that he knew that extra number 500 was a bad-order train; that it was supposed to arrive before twelve o'clock but did not come in until about two o'clock A. M.; that plaintiff told him at two different times about this train and knew that it was a bad-order train.

J. C. Larew the day yard master testified, that there was on file in his office a telegram showing that extra number 500 was a bad-order train at the time the plaintiff went on duty on the night he was injured; that this telegram was placed by him on the file in the yard master's office; that it was there when he went off duty at seven o'clock in the evening and was still on file when he returned at seven o'clock the next morning; that he had a conversation with plaintiff after he was hurt and that plaintiff admitted to him that he knew extra number 500 was a bad-order train.

After he was injured, plaintiff signed a statement detailing the manner in which he got hurt. He detailed the circumstances substantially as they appear in his testimony and in this statement he refers to the fact that the Dewey track was the only available place for bad-order cars without interfering with the fruit extra and number 15.

It is also shown by the defendant that the "line up" posted in the yard master's office gave the information as to whether or not a train contained bad-order cars. It was shown that the train in question contained about ninety cars, and that most of them were bad-order cars. It is also shown by the defendant that the running board of cars which were no more defective than the one on which plaintiff was injured were not protected by railing on each side of it.

The day yard master and others testified that the company had bad-order cars coming in every day and that many of them came in with one or two planks off of the roof and the tin roof still underneath and in such cases it was not the custom to rail the running board.

The plaintiff in rebuttal denied that he told Larew, after he got hurt that the train from which he fell was a bad-order train; that he only told Larew the reason why he got on the cut of cars; that he did not tell Turner at any time that he was expecting a bad-order train that night; that he did not discuss with other employees as stated by them that he was expecting a bad-order train that night.

It is earnestly insisted by counsel for the defendant that the evidence is not sufficient to support the verdict.

(1) In view of the testimony in this case, once more we will take occasion to point out the distinction between the rules which govern trial courts and this court with respect to setting aside verdicts. This court has repeatedly declared the rule to be that where the trial court has overruled a motion for a new trial based upon the insufficiency of the evidence and where there is any substantial evidence to support it the verdict of a jury will be upheld on appeal. The reason for the rule is, first that the jury have weighed the evidence and found the verdict; second that the circuit judge who also heard the testimony from the mouths of witnesses and weighed the same has by overruling the motion for a new trial, given the approval of his legal judgment to the verdict; third, this court cannot have the benefit of seeing and hearing the witnesses and observing the peculiarity of their expressions while testifying, but only has the opportunity generally to read the substance of their testimony. Therefore the court has repeatedly declared the law to be that if after a consideration of all the evidence, the trial court is of the opinion that the verdict of the jury was contrary to the weight of the evidence, it is the duty of that court to set aside the verdict. This distinction

has been uniformly made. *St. L. Sw. Ry. Co.* v. *Britton,* 107 Ark. 158; *McDonnell* v. *St. L. Sw. Ry. Co.,* 98 Ark. 334; *Blackwood* v. *Eads,* 98 Ark. 304; *Richardson* v. *State,* 47 Ark. 567; *Catlett* v. *Railway Co.,* 57 Ark. 461. So under the settled rules of this court we must uphold a verdict on appeal if there is any substantial evidence to support it.

(2-3) Appellate courts take notice of the unquestioned laws of nature, of mathematics, of mechanics and of physics. So where there are undisputed facts shown in the evidence, and by applying to them the well known laws of nature, of mathematics and the like, it is demonstrated beyond controversy that the verdict is based upon what is untrue and what cannot be true, this court will declare as a matter of law that the testimony is not legally sufficient to warrant the verdict. In the case at bar the conditions surrounding the plaintiff, as testified to by the defendant's witnesses, furnish a very strong argument against the credibility of his testimony, but this is as far as the record authorizes us to go. It can not be said that the testimony of the plaintiff is contradicted by the physical facts or is opposed to any unquestioned law of nature. His testimony related to matters, situations and conditions which might or might not have existed, and his right to recover depended wholly upon the truth or falsity of his testimony. His testimony was, therefore. evidence of a substantial character and if believed by the jury, was sufficient to warrant a recovery in this case.

According to the testimony of the other employees of the defendant who worked in the switch yard, bad-order cars came into the yards every day and it was the duty of the plaintiff to handle them. They said they all knew that the train in question was composed mostly of bad-order cars and they thought that the plaintiff also knew of this fact. The defendant's yard master says, there was on file a telegram in his office stating that the train in question was a train containing bad-order cars and that this telegram was on file when the plaintiff went on duty;

that it was the duty of the plaintiff to have read the telegrams on file and to take notice of the information contained therein. Besides this, printed notices with letters to the effect that the car in question was a bad-order car, were tacked at each end of the sides of the car. So it seems probable that the plaintiff had notice that this was a train composed mostly of bad-order cars. However, the plaintiff flatly contradicted all this testimony and stated positively that no telegram was on file when he went on duty informing him that the train in question contained bad-order cars. He said the first information he had about the train was that the train dispatcher telephoned to him out in the yards that the train was due about 11 o'clock P. M. and said that it was a train of empty cars. He denied in positive terms that he had any knowledge whatever that the train contained bad-order cars. He said that it was customary for the train dispatcher to notify him when such was the fact, that information that a train of empty cars was coming in was not information that the cars were bad-order cars. There were other cars on the Dewey track and the plaintiff got on top of the cars in question to prevent them from bumping into the cars already on the Dewey track. He did this because there was no brakeman on the cars and it was therefore a part of his duties to go upon the cars and prevent them striking those already on the track. When the cars reached an uneven place on the track, they jostled to such an extent that one of his feet was thrown from the running board and that as he went to catch himself on the side of the top of the car, he saw the defective flooring of the roof and in attempting to step over the hole, he fell and was thrown from the car and severely injured. It was raining or sleeting at the time and the accident happened in a very natural manner. Under all the circumstances it can not be said that the testimony was not legally sufficient to warrant the verdict.

As we have already seen, according to the plaintiff's testimony, it was the custom of the defendant to protect bad-order cars like the one in question when being trans-

ported from one terminal to another by placing a railing around the running board on the roof or by temporarily repairing the roof so that there would be no missing planks in it. On the other hand, the defendant adduced evidence tending to show that this was never done in cars in no worse repair than the one in question; that the custom in case of cars containing no worse defects than the one in question was to nail boards on each end of the side of the car with printed letters indicating that the car was a bad-order car. The respective theories of both parties in this respect were submitted to the jury under appropriate instructions prepared by their respective attorneys.

At the request of the plaintiff the court gave the following instruction: "While the servant assumes all the ordinary risks incident to his employment, yet a duty rests upon the company to commit no act of negligence whereby he may suffer injury, and to exercise ordinary care to protect him from danger, and in this case, if you believe from a preponderance of the evidence that plaintiff was in the employ of the defendant, St. Louis Southwestern Railway Company, and engaged in the performance of his duty, riding upon a freight car, in the yards of the company, at Pine Bluff, Ark., and that there was a hole in the roof of said car, and that while upon the top of said car the plaintiff stepped into the hole in the roof of said car, and was thrown from said car to the ground, and was thereby injured, and that the defendant railway company knew of the condition of the roof of said car, and that the condition of the same was unknown to the plaintiff, and if you find that the company thereby failed to exercise ordinary care to protect plaintiff from danger, and that its act in leaving said hole in the roof of said car thus exposed, was the proximate cause of the injury, and that plaintiff at the time was exercising ordinary care for his own safety, and had not assumed the risk, you will be authorized to find for the plaintiff and assess his damages at such a sum as you may find from the evidence will compensate him for the injuries received."

(4) Counsel for defendant say that the car had been inspected and found to be in bad order on account of a defect in the roof, and for this reason was being sent to the shops at Pine Bluff or repairs. They contended that the instruction in effect tells the jury that if they found the defendant knew of the condition of the roof and that the same was unknown to the plaintiff, they might find for the plaintiff regardless of the fact that it was a bad-order car and was designated by the customary marks, and of plaintiff's knowledge of the character of the car. We can not agree with counsel in this contention. We do not think it can be said as matter of law that plaintiff must take notice that it was a bad-order car because printed notices to that effect were tacked on each end of the side of the car. In *Marshall* v. *St. Louis, I. M. & S. Ry. Co.*, 78 Ark. 213, the court held that where a car is reported to a brakeman as being in bad order the burden of ascertaining the defect and source of danger is cast upon and assumed by him. It is well known that cars are frequently damaged and they become defective by use. This may occur on any part of the line of road and it then becomes necessary to carry them to the shop for repairs. This duty necessarily devolves upon the crew operating the trains and the dangers of moving the car from one point to another is one of the perils of the business assumed by the train crew when they are hired. So it may be said that the purpose of posting notices indicating that the cars are defective is to give the train crew the general knowledge that the cars are out of repair and to warn them to look out for defects.

(5) We do not think, however, that this rule would apply to a person working in the yards. It is true it is the duty of the switchmen to store bad-order trains on the repair tracks and to take bad-order cars out of a train and place them on the repair tracks, but this duty is required to be performed hurriedly and the switchmen do not have time to examine the cars for defects. On this account the rules of the company provide that the train dispatcher's office shall give them notice in advance of

trains containing bad-order cars. The instruction in question submitted to the jury, the negligence of the defendant, the contributory negligence of the plaintiff, and the question of assumed risk. In the case of *K. C. S. R. Co.* v. *Livesay,* 118 Ark. 304, the court, following a decision of the Supreme Court of the United States, held that the defense of assumed risk was not abolished by the Federal Employers' Liability Act. We do not deem it necessary to set out all the instructions or to comment upon them at length. It is sufficient to say that the court fully and completely submitted the respective theories of the parties to the jury. It told the jury that if a telegram was posted in the yardmaster's office containing information that the train in question was a train of bad-order cars, and that the plaintiff before going on duty failed to examine the telegram on file in his office, he is bound by the information imparted by the telegram and can not claim that he did not have notice of extra train No. 500 and its contents.

(6) It is also contended that the verdict is excessive. The jury returned a verdict for $20,000. The plaintiff was injured on the night of the 21st day of December, 1914, and the trial was commenced on June 25, 1915. The plaintiff testified that on account of his injury some of his teeth were knocked out and loose; that his nose was broken or dislocated; that his head, shoulders and elbows were bruised; that his hand, and also three ribs, were broken; that there was a black and blue place on his stomach; that he was paralyzed and unable to move himself at all; that he had no use of his limbs and has lost all sexual desires; that he has no sensation in his body and can not stick his tongue out of his mouth; and suffers excruciating pain; that he is unable to control his urine; that soon after he received his injuries he went to Memphis and was treated by Dr. C. E. Duvall; that his doctor bill amounted to $1,400; that he was earning $130 per month at the time he received his injuries and was a stout able-bodied man. At the time plaintiff received his injuries he weighed 200 pounds and at the time of the trial,

six or seven months afterward, he weighed from 135 to 140 pounds.

Dr. C. E. Duvall, a graduate of a regular school of medicine and surgery, testified: I began to treat the plaintiff some time in April, 1915. I found plaintiff complained of considerable pain in his head. He complained of pain most of the way from his head to the length of his spine. He was unable to stand. His speech was somewhat impaired; his power to swallow wasn't normal; found him with paralysis of the left side and partial paralysis of the right side; and mostly total loss of feeling of the skin; also noted a depression in the spine near the middle of the back or lumbar region; also a depression in the skull in the back of the head. Plaintiff was unable to move his left arm and left leg, and had no sense of feeling in either. In order to test plaintiff's sensation in his left leg and arm, I used the test used in all cases, which consisted of a sharp-pointed instrument or needle which I used when the plaintiff was not expecting me to do so. I would make the test while I engaged plaintiff in conversation and when plaintiff was unawares. Plaintiff gave no evidence of sensation. I repeated the test several times. Plaintiff's right leg was partially paralyzed and is more so now than when I first examined him. He has also the same loss of sensation in the right leg that he has in the left. I used the recognized treatment for conditions found in plaintiff, such as nerve tonics, stimulants and electric treatment. Plaintiff's condition is worse now (the time of the trial) than it was when I first saw plaintiff in April. Plaintiff has been gradually growing worse. In my judgment, plaintiff weighs less; from his general appearance he is more emaciated; his muscular tissue has become more flabby and plaintiff looks smaller than he did two months ago. From examination and treatment of plaintiff, thought he was paralyzed, which I thought was due to an injury to the spinal cord. I believed the spinal cord was injured. Plaintiff's injury is permanent. I do not think plaintiff has any chance for recovery. There was a dribbling of plaintiff's

urine and he seems to have no control of it. I examined testicles and they were considerably atrophied. They have gotten much smaller, especially the right one.

Dr. Carle Bentley also examined the plaintiff and in the main corroborated Doctor Duvall as to his condition. Both of the physicians testified that his injuries were permanent. On the other hand, the plaintiff was examined by two physicians at the request of the defendant and they both said that his injuries were not permanent. They stated that his paralysis was caused from hysteria and was only temporary. Here again, however, we can not invade the province of the jury, and the testimony of the witnesses for the plaintiff warranted the jury in finding for him in the sum of $20,000.

(7) Counsel for defendant, also, ask that the judgment be reversed because of the alleged misconduct of two of the jurors. It appears that the jurors were permitted to separate while the trial was in progress. G. W. Mann, one of the jurors, while walking down the street met Wallace Davis, one of the plaintiff's attorneys, and one John Harris, who testified that he had no connection with the case. Harris proposed that they go in a drug store and get a soft drink of some kind. They all three went in and took a drink of grape juice or coca cola. According to the testimony of Mann, Harris paid for the drinks. Other witnesses said Davis paid for them. Davis denied this, and said Harris asked him to buy some cigars after they had taken the drinks. Davis refused, saying, "No, I won't buy a cigar, because Mr. Mann is a juror and I want to get away from him as quick as possible." Davis said that Mann then turned and walked out of the drug store.

It was also shown that Paul Matlock, another of plaintiff's attorneys, treated William Scarborough, a juror, to a cigar. Matlock testified that he was going in the drug store to get himself a cigar and met the juror, who was a fellow-townsman. That he gave him a cigar as an act of courtesy as he had done before and had no thought of influencing the verdict, and did not think his

conduct was so understood by the juror. The juror corroborated his statement. It was shown that both the jurors were men of standing in the community, and they stated that their verdict was in no wise affected by what occurred. The court examined at length the jurors, attorneys and other witnesses present, and found that nothing was done to prejudice the rights of the defendant. The circuit court found that the acts in question were not done for the purpose of influencing the minds of the jurors and did not have that effect. In the case of *Brookhaven Lumber & Mfg. Co.* v. *Illinois Cent. Rd. Co.,* 68 Miss. 432, the court held that where the trial court has investigated a charge of misconduct on the part of a juror, and where, upon the evidence, it can not be said that the verdict rests under any suspicion of having been obtained by improper influence, the action of the court in refusing to set aside the verdict will not be disturbed on appeal. The court said: "While it can not be too strongly insisted that the stream of justice shall be kept pure—so pure as to afford no suspicion of corrupt or improper intermingling of any foreign or hurtful matter, yet it must not be forgotten that no mere irregularities of behavior in this day of greater and wiser freedom for jurors, at least in civil trials, will be permitted to disturb the stability of judicial proceedings."

This court has made substantially the same holding as the Supreme Court of Mississippi. *Bealmear* v. *State,* 104 Ark. 616.

We have carefully examined the record, and, finding no prejudicial errros in it, the judgment will be affirmed.

CITIZENS BANK OF LAVACA *v.* BARR.

Opinion delivered April 24, 1916.

1. JUDGMENTS—PETITION TO VACATE—DEFENSE—DEFAULT JUDGMENT.—A judgment by default may be set aside only where the defendant has a meritorious defense.
2. JUDGMENTS—DEFAULT—PETITION TO VACATE.—Upon a petition to vacate a default judgment, it is necessary that the particular facts

constituting the defense of the party seeking to set aside the judgment, shall be disclosed in order that the court may determine whether it could have availed the party or not on the trial of the case.

3. JUDGMENTS—DEFAULT—PETITION TO VACATE.—A party moving to set aside a judgment rendered against him by default must state his defense and make a *prima facie* showing of merit in order that the court may determine whether he is injured by not being permitted to have the benefit of it.

Appeal from Sebastian Circuit Court, Greenwood District; *Paul Little,* Judge; affirmed.

Geo W. Johnson, for appellant.

1. The appellant was prevented from attending the trial by unavoidable casualty. It was the duty of the court to set aside the verdict and grant a new trial and its refusal was an abuse of discretion. 89 Ark. 359; 107 *Id.* 415.

A good defense was shown.

R. W. McFarlane, for appellee.

No meritorious defense to the suit was shown and no unavoidable casualty was shown. All the evidence was not in the record. No abuse of discretion is shown. 54 Ark. 159; 55 *Id.* 126; 72 *Id.* 185. The bank has disclosed no rights in the controversy. 76 Ark. 326.

HART, J. The Citizens Bank of Lavaca prosecutes this appeal to reverse a judgment of the circuit court refusing to set aside a judgment in favor of the plaintiff in a case wherein J. J. Barr was plaintiff and Tom Harrison was defendant, and the bank was intervener. Barr sued Harrison before a justice of the peace to enforce his landlord's lien for supplies. The Citizens Bank of Lavaca was permitted to intervene, but the record does not show the nature of its intervention. The justice of the peace rendered judgment for the plaintiff against the defendant and found that the plaintiff had a prior lien upon the property attached in the action. The bank appealed to the circuit court.

In the trial in the circuit court, the bank did not appear and the plaintiff Barr again recovered judgment

against Harrison and his landlord's attachment was sustained. A few days thereafter and at the same term of the court, the bank moved to set aside the judgment on the ground of unavoidable casualty. It set up that its attorney had informed it that the court had continued for a week his cases for the purpose of allowing him to go to the State of Oklahoma to try an important lawsuit; that on the day before the case was tried it communicated with the clerk of the court and was informed that the case would not be reached until the following day; that one of the officers of the bank called up the clerk of the court about 2 o'clock in the afternoon and that the clerk in a short time told him that he had called the matter to the attention of the court and that the court had directed him to tell the bank that the case could not be reached until the next day. The bank is situated at the town of Lavaca and the court was being held at the town of Greenwood. Shortly after 3 o'clock of this same day, the case was reached upon the call of the calendar and the court tried it. It appears that the attorney for the bank failed to include this case in the list of those requested to be passed for a week. The bank in its motion sets up that the plaintiff did not furnish to Harrison any supplies; that Harrison did not owe the plaintiff anything either for supplies or for rent. If it be assumed that the bank was prevented from appearing at the trial by unavoidable casualty, it does not follow that the judgment should be reversed. Section 4431 of Kirby's Digest provides, that the court in which a judgment has been rendered shall have power after the expiration of the term to vacate or modify it for certain enumerated causes. One of these is for unavoidable casualty or misfortune preventing the party from appearing or defending. The court has held that a judgment by default against the defendant in such cases may be set aside only where the defendant has a meritorious defense. *Capital Fire Ins. Co.* v. *Davis,* 85 Ark. 385; *Leaming* v. *McMillan,* 59 Ark. 162; *Hunton* v. *Euper,* 63 Ark. 323. Again to vacate a judgment for fraud under subdivision 4 of sec-

tion 4431 of Kirby's Digest, the party seeking such relief must make at least a *prima facie* showing of a valid defense to the action in which the judgment was obtained. *Quigley* v. *Hammond,* 104 Ark. 449; *Simpson & Webb Furn. Co.* v. *Moore,* 94 Ark. 347. It is true the motion to set the judgment aside was made at the same term of the court in the present action but the governing principle is the same. Upon an application of this nature, it is indispensable that the particular facts constituting the defense of the party seeking to set aside the judgment should be disclosed in order that the court may determine whether it could have availed the party or not on the trial of the case. It is well settled in this State that judgments will only be reversed for errors prejudicial to the rights of the party appealing. Consequently a party moving to set aside a judgment rendered against him by default must state his defense and make a *prima facie* showing of merit in order that the court may determine whether he is injured by not being permitted to have the benefit of it.

In its motion, the bank states that Harrison was not indebted to Barr for rent or supplies but Harrison has not appealed. Moreover, his defense to the action would not make any *prima facie* showing of merit on the part of the bank. It could make no difference to the bank that the judgment against Harrison was erroneous unless it had a valid claim which it might assert against the attached property. The record as abstracted by counsel for appellant does not show that it had any valid claim or defense to the action of Barr against Harrison. It sets up no defense other than that contained in its motion to set aside the judgment.

As we have already seen no matter was set up in the motion which would entitle the bank to prevail against the plaintiff. Therefore, we are of the opinion that the court properly denied its motion to set aside the judgment. As bearing on the question, see *Plunkett* v. *State National Bank,* 90 Ark. 86.

It follows that the judgment must be affirmed.

OSBORNE *v.* LAWRENCE.

Opinion delivered April 24, 1916.

1. JUDGMENTS—MOTION TO VACATE—RULE.—To vacate a motion on final order after the expiration of the term at which such judgment or order was made, it is essential, not only that the petitioner therefor show the existence of same on the grounds named in Kirby's Digest, section 4431, upon which such action may be taken, but it is also necessary, under Kirby's Digest, section 4434, that a showing be made that there is a valid defense to the action in which the judgment is rendered.
2. JUDGMENTS—WHEN VACATED—MERE FILING OF ANSWER.—The mere filing of an answer is insufficient under the above rule; while a *prima facie* showing merely of a valid defense is required, it is not necessary that the cause be heard fully on its merits; but such a showing should be made as that, in the absence of proof to the contrary, a finding would be made that a valid defense existed to the cause of action sought to be set aside.

Appeal from Sebastian Circuit Court, Greenwood District; *Jo Johnson,* Special Judge; reversed.

Geo W. Johnson, for appellant.

1. It was error to set aside a judgment rendered at a former term without a showing or an adjudication that a valid defense existed to the action. 102 Ark. 252; 94 *Id.* 347; 104 *Id.* 449.

2. The answer tendered states no defense to the action. 92 Ark. 535; 105 *Id.* 309; 84 *Id.* 462; 89 *Id.* 412; 91 *Id.* 212.

SMITH, J. A judgment was rendered against appellee, and he filed a motion at a subsequent term of the court to set it aside, and upon the hearing of this motion in the court below it was conceded that a sufficient showing was made to entitle appellee to the relief prayed under sections 4431 and 4434 of Kirby's Digest except that there was a failure to show the existence of a meritorious defense to the cause of action set out in the original complaint. This complaint alleged that the plaintiff was a real estate dealer, and that the defendant there, who is the appellee here, was the owner of certain real estate, which he listed with him for sale at fixed terms and price, and in a written contract agreed that plaintiff should

have the exclusive right, for the period of one year, to sell said property for the sum of $2,500, with a commission of 5 per cent., and that the plaintiff immediately advertised said property for sale and began negotiating with prospective buyers, but was prevented from making a sale by the defendant's sale of the property, in violation of the contract, and that the plaintiff had been damaged in the sum of $125.

At the hearing below appellee exhibited with his petition a copy of the answer which he had filed in the original suit against him. This answer was unsigned and unverified.

The court vacated the judgment, and this appeal has been duly prosecuted from that action, which appellant insists was erroneous because of the failure to show any meritorious defense to the original suit.

To vacate a judgment or final order after the expiration of the term at which such judgment or order was made, it is essential, not only that the petitioner therefor show the existence of some one of the eight grounds named in section 4431 of Kirby's Digest, upon which such action may be taken, but it is also necessary, under section 4434, that a showing be made that there is a valid defense to the action in which the judgment is rendered. These sections have been frequently construed, one of the latest cases being that of *Quigley* v. *Hammond,* 104 Ark. 449. In this case it was said:

"To vacate a judgment for fraud practiced by the successful party in obtaining it, the party seeking such relief must make at least a *prima facie* showing of a valid defense to the action in which the judgment was obtained. Kirby's Digest, section 4434; *Simpson & Webb Furn. Co.* v. *Moore,* 94 Ark. 347; *Martin* v. *Gwynn,* 90 Ark. 44; *Broadway* v. *Sidway,* 84 Ark. 527; *Knights of Maccabees of the World* v. *Gordon,* 83 Ark. 17; *State* v. *Hill,* 50 Ark. 458."

See, also, *Holman* v. *Lowrance,* 102 Ark. 252, and cases there cited, and *Citizens Bank of Lavaca* v. *Barr,* 123 Ark. 443.

The only attempt made by the petitioner to show the existence of a valid defense was to introduce the answer above mentioned; and we think this showing insufficient to meet the requirements of the statute. It is true that only a *prima facie* showing of a valid defense is required and it is not contemplated that the cause shall be fully heard upon its merits; but such showing should be made as that, in the absence of proof to the contrary, a finding would be made that a valid defense existed to the cause of action sought to be set aside. We think the mere filing of an answer insufficient to meet this requirement.

No valid defense, therefore, having been shown, it follows that the court should not have set the judgment aside, and the judgment to that effect will be reversed and the cause remanded.

STATE v. SPEAR AND BOYCE.

Opinion delivered April 24, 1916.

1. CRIMINAL LAW—FELONY CASES—APPEAL BY STATE.—Appeals by the State in felony cases are not allowed except in cases where it is important to have the court correct errors which prevent the "uniform administration of the criminal law." Appeals are not allowed merely to demonstrate the fact that the trial court has erred.
2. CRIMINAL LAW—APPEAL BY STATE.—The State can not ask for a decision of the Supreme Court on a question which is purely abstract in its nature, and the statute granting the State the right of appeal in certain cases does not contemplate an appeal in a case in which the only error alleged is that the court incorrectly decided that the evidence was not sufficient to warrant a submission of the issue to the jury.

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

Wallace Davis, Attorney General, *Hamilton Moses*, Assistant; *J. N. Rachels*, Prosecuting Attorney and *W. H. Yarnell, Jr.*, Deputy Prosecuting Attorney, for appellant.

1. It was error to instruct a verdict for defendant upon the testimony. 94 Ark. 169; 99 *Id.* 121; 17 *Id.* 1.

PER CURIAM: The two defendants, Will Spears and Arch Boyce, were indicted for the crime of grand larceny, alleged to have been committed by stealing one hog, the property of Wylie Goad, and on the trial of the case before a jury the court gave a peremptory instruction in favor of the defendants. Judgment of acquittal was entered on the verdict and the State has appealed.

The only question presented is whether or not the evidence was sufficient to warrant a submission of the issue to the jury. The statute provides that the State may appeal from a judgment acquitting the defendants in a felony case, but that "a judgment in favor of the defendant, which operates as a bar to a future prosecution of the offense, shall not be reversed by the Supreme Court." Kirby's Digest, sections 2602-2604. The appeal is, according to the terms of the statute, taken by the Attorney General filing in the office of the clerk of this court a transcript of the proceedings, if he is satisfied that error has been committed to the prejudice of the State, "and upon which it is important, to the correct and uniform administration of the criminal law, that the Supreme Court should decide." Kirby's Digest, section 2603.

It is clear that appeals in felony cases are not allowed by the State except in cases where it is important to have the court correct errors which prevent the "uniform administration of the criminal law." Appeals are not allowed merely to demonstrate the fact that the trial court has erred. The question of the legal sufficiency of the evidence in a given case constitutes a question of law for the decision of the court, but it can not become a precedent for application in another case because of the varying state of facts in different cases, and therefore the decision of that question, even though it be one of law, is not important in the "uniform administration of the criminal law." The State has no right to ask for the decision of this court on a question which is purely

abstract in its nature, and we are of the opinion that the statute does not contemplate an appeal in a case in which the only error alleged is that the court incorrectly decided that the evidence was not sufficient to warrant a submission of the issue to the jury.

Of course, it is different in misdemeanor cases where there is no punishment by imprisonment authorized and in which a judgment of reversal may be entered, but not so in a case which this court has no power to reverse and remand for a new trial.

The State's appeal is therefore dismissed.

STORTHZ v. BANK OF ENGLAND.

Opinion delivered April 24, 1916.

REFORMATION OF DEEDS—ALLEGATIONS—MUTUAL MISTAKE—NOTICE.—Before a court of equity will assume jurisdiction for the purpose of reforming a deed, there must be a distinctly accurate allegation concerning the mutual mistake of the parties, and in order to establish the right to reform the deed against intervening mortgagees, there must be a distinct allegation as to notice. Relief from mistake can be obtained only upon specific allegations and convincing proof.

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

W. T. Tucker, for appellant.

1. A mistake in the description of property mortgaged can be corrected. 51 Ark. 394-5; 48 Mo. 367; etc. The description should have been reformed. The appellees had notice sufficient to put them on inquiry. Under the facts appellant had a mortgage on the right land, the land intended. 60 Ark. 304; 77 *Id.* 41; 50 *Id.* 179; 79 *Id.* 592; 83 *Id.* 131; 87 *Id.* 371; 89 *Id.* 259; 61 *Id.* 123; 92 *Id.* 63; 98 *Id.* 10.

2. Reformation in a series of deeds works back to the original. 33 Ark. 120; 61 *Id.* 123; 54 Ark. 153.

4. Equity will reform although the statute provides a mortgage is not a lien until recorded. 33 Ark. 119; 61

Id. 123; 18 *Id.* 105; 20 *Id.* 190; 6 *Id.* 595; 43 *Id.* 464; 37 *Id.* 511; 11 Ohio St. 283.

Watson & Perkins, for appellee.

1. The complaint was fatally defective as a bill for reformation of a mortgage. 18 Enc. Pl. & Pr., p. 802-3 and note 2; 34 Cyc. 974; 83 Ark. 131; 89 *Id.* 309; 61 W. Va. 561; 56 S. E. 902; 69 Ill. 329; 34 Cyc. 957.

2. The complaint is also insufficient in its allegations of notice, mutual mistake, etc. Cases *supra.*

Trimble & Williams, for Bank of England.

1. A properly executed, delivered and recorded mortgage will take precedence over a prior one where there is a total mistake in description of the land. A *bona fide* purchaser for value, without notice will prevail in equity. No case for reformation was made. 42 Ark. 370; 34 Cyc. 956; 28 L. R. A. (N. S.) 909.

2. Appellant had no lien. Kirby's Digest, § § 5395-6; 97 Ark. 436. The demurrer was properly sustained.

McCULLOCH, C. J. It appears from the pleadings in this case that one Eli Green owned forty acres of land in Lonoke County, Arkansas, described as the southeast quarter of the southeast quarter of section 29, township 1 south, range 9 west. In the year 1905 Green executed to appellant Storthz a mortgage to secure a debt of $900 for borrowed money on a tract of land described in the mortgage as the southeast quarter of the northwest quarter of section 29, township 1 south, range 9 west, in Lonoke County, Arkansas. Subsequently Green mortgaged his land, under a proper description, (southeast quarter of the southeast quarter of said section 29) to the Colonial & United States Mortgage Company, and still later, on January 12, 1914, he executed to appellee, Bank of England, a mortgage on said land to secure a debt of $550. On February 11, 1914, which was after the execution and recording of the mortgage to the Bank of England, Green renewed his note to appellant Storthz and executed a new

mortgage correctly describing the land as the southeast quarter of the southeast quarter of said section 29.

The Bank of England instituted proceedings in the chancery court of Lonoke County for the foreclosure of its mortgage, and appellant Storthz filed an intervention, setting up the execution of his mortgages, and asked that the first mortgage be reformed so as to correctly describe the land. The Colonial & United States Mortgage Company was made a defendant in said intervention, as well as the Bank of England, and both of said defendants in the intervention demurred to the complaint of Storthz. The court sustained the demurrer to the complaint of the intervener and dismissed the same insofar as it was sought to reform the first mortgage and establish the same as a lien prior to those of the Bank of England and the Colonial & United States Mortgage Company, but allowed the last mortgage executed to appellant Storthz to be foreclosed, subject to prior liens of the other two mortgagees. Storthz has appealed to this court.

The intervention plea of appellant was deficient, we think, in two particulars, namely in failing to allege that there was a mutual mistake or that either of the two intervening mortgagees had notice of the fact that the mortgage to appellant was intended to cover the southeast quarter of the southeast quarter of section 29. It will be noticed that the two descriptions are widely at variance with each other, describing forty acre subdivisions in different quarter-sections. The record of Storthz's mortgage containing the inaccurate description did not, therefore, constitute constructive notice that it was intended to cover the lands in controversy. *Neas* v. *Whitener-London Realty Co.*, 119 Ark. 301, 178 S. W. 390.

The only allegation in the plea of appellant concerning the intention of the parties in the execution of the first mortgage is as follows: "That when the first described mortgage was executed and delivered to L. Storthz, and which is attached hereto and made a part of this complaint, the description therein given of the premises intended to be given as the security was erro-

neous in that it was described as follows: The southeast quarter of the northwest quarter of section 29, township 1 south, range 9 west. And that as described the defendant did not own the land passed as security on the description, as that was not land owned, to L. Storthz, and to make it conform to the actual intention of the parties it is necessary that the description should be amended so as to make it read as follows: Southeast quarter of the southeast quarter of section 29, township 1 south, range 9 west." And the only allegation in said plea concerning notice to either of the two prior mortgagees is the statement "that when the deeds of trust last above described were executed the records of Lonoke County showed that he had his mortgage on file and recorded, except his last deed of trust, and the records show that the defendants, Eli Green and wife, Lulu Green, did not own any other land in Lonoke County, Arkansas; that when the Colonial & United States Mortgage Company, Ltd., received their deed of trust two of its men had personal notice and were told that L. Storthz had a mortgage on the place for $900; that it was well known in that part of Lonoke County where the land lies and the defendants Green reside that that was all the land that the Greens owned, and that said land is valuable as farming land and worth more than $2,000."

Before a court of equity will assume jurisdiction for the purpose of reforming a deed, there ought to be a distinctly accurate allegation concerning the mutual mistake of the parties, and in order to establish the right to reform the deed against intervening mortgagees there ought to be a distinct allegation as to notice. Relief from mistake, like relief on the ground of fraud, can be obtained only upon specific allegations and convincing proof. We think, therefore, that the chancery court was not in error in holding that the allegations of the complaint were not sufficient to warrant the interposition of a court of equity. The allegation that "two men of the Colonial & United States Mortgage Company, Ltd.," had personal notice of the fact that Storthz had a mortgage

on the land is not sufficient, because it fails to state that they were officers or employees clothed with sufficient authority to act for the company so that the latter would be chargeable with information which came to the possession of its agents.

The decree is therefore affirmed.

SIMS v. LOUGHRIDGE.

Opinion delivered April 24, 1916.

1. JUSTICE'S COURTS—AMENDMENT OF JUDGMENTS.—A justice court may amend its own records so as to make them speak the truth.
2. APPEAL AND ERROR—BILL OF EXCEPTIONS—REVIEW.—The Supreme Court will not review for errors not apparent on the face of the record, in the absence of a motion for a new trial and a bill of exceptions.
3. JUSTICE'S COURTS—APPEAL FROM ORDER AMENDING RECORD.—Defendant is justice court may appeal from as order of the justice amending the record *nunc pro tunc.*
4. JUDGMENTS—PARTIES—JUSTICE COURT.—A judgment against certain parties in a justice court, as "deacons of the Presbyterian Church and the Presbyterian Church," will be held to be a judgment against the parties individually.

Appeal from Baxter Circuit Court; *J. B. Baker,* Judge; affirmed.

Allyn Smith, for appellants; *Miles & Wade,* of counsel.

1. The original judgment was against the Presbyterian Church, the corrected judgment was against Loughridge *et al.* deacons and the Presbyterian Church. These words are merely *descriptio personae* and surplusage and the judgment was personal. 8 N. Y. 472; 17 Abb. Pr. 59; 140 Barb. 374; 11 How. Pr. 11; 22 *Id.* 372; 16 Ga. 192.

2. After the term the justice had no power to enter a new *judgment nunc pro tunc.* 87 Ark 438; 92 *Id.* 299; 93 *Id.* 234; 79 Ill. 515; 65 Ind. 27; 43 Mich. 376. The corrected judgment is a nullity.

McCULLOCH, C. J. Appellants took an appeal to the circuit court of Baxter County from an order of a justice of the peace amending, *nunc pro tunc,* a former judgment of that court, and from an adverse judgment of the circuit court they have appealed to this court. No bill of exceptions was filed, and there was no motion for new trial, so we are limited to a review for errors apparent on the face of the record. It appears that the action in which the original judgment was rendered was one instituted by the appellee, Mrs. L. V. Loughridge, against W. C. Sims, L. Loughridge, J. W. Wooley, "deacons of the Presbyterian Church, and the Presbyterian Church." The form of the verdict of the jury was "we, the jury, find for the plaintiff in the sum of $142.25," and the former judgment rendered therein by the justice of the peace was in favor of the plaintiff, naming her, for the recovery of said sum of money "from the defendant, the Presbyterian Church."

The judgment was rendered on October 25, 1912, and the plaintiff in the original judgment commenced the present proceedings on August 7, 1915, before the justice of the peace, seeking to have the record of the judgment amended so as to recite that it was rendered against "the defendants, L. Loughridge, J. W. Wooley and W. C. Sims, deacons of the Presbyterian Church of Cotter, Arkansas, and the Presbyterian Church." The justice of the peace made an order amending the judgment according to the prayer of her petition, and the appellants here, who were the persons whose individual names were inserted in the judgment and who were duly notified of the presentation of the petition to amend the judgment, appealed to the circuit court. The record of the circuit court shows that the parties appeared by attorneys and that the proceeding was heard by the court, and that the appeal was dismissed on the ground that "the justice of the peace had authority to correct the original judgment, and further finding that proper service of summons had been upon defendants in the original cause." The defendants in the original proceeding, who are the appellants here,

had the right to appeal to the circuit court from the order amending the judgment, and it was improper to dismiss the appeal, but when the whole record entry is considered together it is manifest that the court heard the matter *de novo* upon its merits and made a finding in favor of the appellee that the original judgment of the justice should be affirmed. We will therefore treat the judgment of the circuit court as one affirming the judgment of the justice instead of dismissing the appeal, for it was evidently intended by the circuit court to have that effect.

We must presume, in the absence of a bill of exceptions and a motion for a new trial, that there was sufficient evidence to justify the finding of the circuit court, and the only question is, as before stated, whether or not there is any error on the face of the record in the judgment of the court finding that the justice court had the power to amend its own judgment. There is some conflict in the authorities as to whether the inherent power of courts to amend their own judgments so as to make them speak the truth applies to courts of justices of the peace, but that question has been put at rest by a former decision of this court in the case of *Gates* v. *Bennett,* 33 Ark. 475, where it was held that a justice of the peace has the power to amend his own records so as to make them speak the truth, and that his successor in office, to whom his docket, books and papers have passed, would have power to make such amendment on paper application and "notice to interested parties and proof of the error."

An examination of the pleadings in the suit in which the original judgment was rendered shows that it was against the parties named, not in any representative capacity but individually, as the words which followed their names were only descriptive of the persons and not of any particular capacity. *Lawrence County Bank* v. *Arndt,* 69 Ark. 406; *Thompson* v. *Bowen,* 87 Ark. 490. The designation in the pleadings of "the Presbyterian Church" amounted to nothing because it was not a sufficient description to designate an entity capable of being sued.

Therefore the verdict of the jury in favor of the plaintiff necessarily was against the defendants named individually, and the judgment of the court should have been against them. In other words, the amendment entering a judgment against the defendants W. C. Sims, L. Loughridge and J. W. Wooley was in accordance with the pleadings in the case and the verdict of the jury, and it was correct to amend it so as to show that fact.

The judgment is therefore affirmed.

IZARD COUNTY v. BANK OF MELBOURNE.

Opinion delivered April 24, 1916.

1. COUNTIES—CALLING IN WARRANTS—TRIAL BY JURY.—A trial by jury is not provided for, when the county court issues an order calling in outstanding county warrants for reissuance or cancellation. On appeal to the circuit court the matter is heard *de novo*, in the same manner as is authorized in the county courts.

2. COUNTIES—CONTRACTS—ALLOWANCE OF CLAIMS.—A contract was let to construct a county courthouse, including a systetm of waterworks. The latter part of the contract was cancelled, and a contract for the waterworks was let to one H. *Held*, where the warrants issued in pursuance of said contract were called in for reissuance and cancellation, that on appeal to the circuit court, an order establishing the validity of such warrants would be sustained.

3. COUNTIES—COURT HOUSE—CONTRACT—CONSTRUCTION OF WATERWORKS.—Where the construction of a system of waterworks is a part of the construction of the county court, no previous appropriation of funds is necessary, although the contract for the same was let separately.

4. COUNTIES—ALLOWANCE OF CLAIMS—CLAIMS OF COUNTY JUDGE.—Claims allowed by the county judge to himself for expenses incurred by himself in the superintendence of the construction of a county courthouse, will be declared invalid.

5. COUNTIES—CLAIM OF COUNTY JUDGE.—A county judge is disqualified to allow any claim presented against the county, in which he is interested, except his own salary.

Appeal from Izard Circuit Court; *Z. M. Horton*, Special Judge; affirmed in part.

Bradshaw, Rhoton & Helm, for appellant; *E. B. Buchanan,* of counsel.

1. The court erred in refusing a trial by jury. Const. Art. 2, § 7, 4 Ark. 158; 8 *Id.* 436; 56 *Id.* 391; 75 *Id.* 443; 109 *Id.* 536; Const. Art. 7, § 33; Kirby's Digest, § 1492; 32 Ark. 552; 73 *Id.* 462; 26 Fed. Cases, 1024, 1030.

2. The trial court erred in its findings of fact, for the orders and judgments of the county court were conclusive and unimpeachable in this proceeding. 96 Ark. 433; 60 *Id.* 155; 27 *Id.* 202; 10 *Id.* 241; 92 *Id.* 299; 87 *Id.* 438; 93 *Id.* 237.

3. There was no appropriation for waterworks. Kirby's Digest, § 1502; 54 Ark. 645; 61 *Id.* 74; 103 *Id.* 468.

4. The script issued to the county judge by himself was invalid.

McCaleb & Reeder, for appellee.

1. No trial by jury was contemplated in these statutory proceedings to call in warrants for reissue. Kirby's Digest, § 1175, 1179; 52 Ark. 502; 43 *Id.* 553; 26 *Id.* 281; 32 *Id.* 17; 52 *Id.* 330; 105 *Id.* 594; 38 *Id.* 485.

2. The warrant was never issued to Wright & Co. The allowance was cancelled. The allowance to Hill was final, no fraud being shown.

3. No appropriation was necessary for the waterworks. 93 Ark. 11; Kirby's Digest, § 1020; 38 Ark. 557; 72 *Id.* 331.

4. The warrants issued to the county judge were not void. They were issued to pay for necessary expenses in building the court house. The court had jurisdiction to allow these expenses. 47 Ark. 80; 44 *Id.* 225; 26 *Id.* 461; 30 *Id.* 578. Mere irregularities must be corrected by appeal. 73 Ark. 523; 93 *Id.* 11; 102 *Id.* 277; 96 *Id.* 427. The judgment can not be attacked collaterally. 22 Ark. 595; 37 *Id.* 532; 39 *Id.* 485; 118 Ark. 524.

McCULLOCH, C. J. The county court of Izard County made an order, pursuant to terms of the statute, calling in the warrants of the county for re-issuance or cancellation, and the Bank of Melbourne in response to

the call presented certain warrants which it held as owner. Four of the warrants, aggregating the sum of $800, had been issued by the county court to M. F. Hill, and four others, aggregating the sum of $151, had been issued by the county court to P. C. Sherrill, who was county judge at the time the warrants were issued but who had been succeeded by the present incumbent who made the order calling in the warrants. The county court rendered a judgment cancelling all of the warrants just mentioned and the Bank of Melbourne appealed to the circuit court where the cause was heard and a judgment was rendered establishing the validity of said warrants and directing that they be re-issued to the present owners. From that judgment an appeal has been prosecuted by Izard County.

(1) It is contended in the first place that the court erred in denying the county the right of trial by jury. It is clear, though, that the right of trial by jury is not given in this class of cases where the county court is authorized to call in outstanding warrants, and when the warrants so called in are presented "it shall be the duty of said court thoroughly to examine the same, and to reject all such evidences of indebtedness as in their judgment their county is not justly and legally bound to pay." Kirby's Digest, section 1179. On appeal to the circuit court the matter is heard *de novo* in the same manner as is authorized in the county courts. Trial by jury is therefore not contemplated.

The four warrants issued to M. F. Hill, aggregating the sum of $800, were to cover the allowance of a claim in favor of that individual for the construction of a system of waterworks for the new court house. It appears that the plans for the court house contemplated a system of waterworks for the building, and the original contract was let as a part of the contract with L. R. Wright & Co. for the construction of the building, but subsequently a separate contract was made with M. F. Hill to construct the waterworks. The evidence shows that the original contract with L. R. Wright & Co. contained an item of

$2,500 for the construction of the waterworks, and that the contract with Hill was to construct the waterworks for the sum of $800.

(2-3) The contention is that the allowance to Hill was fraudulent and void because a previous allowance for the same item had been made to the original contractor, but the evidence in the case shows that the allowance made to the original contractor was cancelled and that no warrant was issued thereon, but that on the contrary a new contract was made with M. F. Hill, who constructed the waterworks and to whom the present warrants were issued.

In the recent case of *Monroe County* v. *Brown,* 118 Ark. 524, the power of the county court in proceedings of this sort was declared as follows: "The statute is not construed to mean that the county court is authorized to review former judgments of the court for mere errors in the allowance of claims, but they are authorized to reject claims which have been illegally or fraudulently issued. In other words, where the claim against the county was one which, under any evidence which might have been adduced, could not have been a valid claim against the county, or where the judgment of allowance was obtained by fraud, it may be set aside and warrants issued pursuant thereto cancelled." The same rule was announced in the more recent case of *Izard County* v. *Williamson,* 122 Ark. 596.

The county court had jurisdiction to hear and determine the claim of M. F. Hill, and, in the absence of fraud in the procurement of the allowance, the judgment is not open to collateral attack.

It is urged that the allowance is void because there was no appropriation, but it is sufficient answer to that contention to say that the construction of the waterworks was a part of the construction of the public building and no previous appropriation of funds was essential. *Sadler* v. *Craven,* 93 Ark. 11. There was no error in the judgment of the circuit court as to the re-issuance of the four warrants just referred to.

(4-5) The other four warrants stand upon a different footing, and a determination of their validity is controlled by different principles. They were issued by the county judge, who was sitting in the matter, to himself for expenses incurred in and about the superintendence of the construction of the court house. One of the items was for money paid by the county judge personally to an engineer who was called to Melbourne for the purpose of giving advice with reference to the water supply, and the other warrants were for items of traveling expenses of the county judge in going to different places for the purpose of making purchases for the court house and furniture. The evidence shows conclusively that the money was spent by the county judge in good faith and that it resulted in substantial benefit to the county in the way of reducing the cost of certain articles to be purchased. The good faith of the county judge is fully established by the testimony, but that does not establish the validity of the allowances. In the first place, there is no authority in the statutes for a county judge to expend money in that way, and in the second place there is no authority for the county judge to make allowances to himself. In passing upon accounts presented against the county, the county judge acts judicially and he is disqualified on account of his interest in any claim presented. Of course, the warrants issued for his own salary go by operation of law and are not void because the orders for the allowances are made by the county judge who is to draw the salary, but allowances covering other claims stand upon a different footing, and where the county judge is the claimant or interested in the claim he is disqualified to act in the matter.

The claim is on its face one which the county judge had no authority to make an allowance for, regardless of any evidence which was introduced, and therefore these items fall squarely within the rule announced by this court in the cases just cited, and as to them the judgment will be reversed and the cause remanded with directions to the circuit court to cancel the warrants and certify its judgment down to the county court.

THORNTON v. BOWIE.

Opinion delivered April 24, 1916.

1. BILLS AND NOTES—JOINT MAKER—PAROL EVIDENCE TO SHOW SURETY RELATION.—The endorsement of his name on the back of a note before delivery constitutes the endorser a maker of the note, but parol evidence is admissible to show that he in fact signed as surety only, and that this was known to the payee.
2. SURETYSHIP—BILLS AND NOTES—DISCHARGE—NEW CONTRACT.—In order to discharge a surety on a note by a new contract for the extension of the time of payment, the extension must be for a definite period, and the new contract must be based upon a new consideration.
3. PRINCIPAL AND SURETYSHIP—DISCHARGE OF SURETY—FAILURE TO SUE PRINCIPAL.—Mere delay or failure to sue the principal, or to pursue other available remedies for the collection of the debt, will not discharge a surety.
4. PRINCIPAL AND SURETY—MORTGAGE—FAILURE TO FORECLOSE—DISCHARGE OF SURETY.—The failure of a mortgagee to foreclose a lien on the mortgaged chattels does not discharge the surety.

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

L. J. Brown and *Thomas J. Price,* for appellant.

1. The court erred in directing a verdict and the verdict is contrary to the law and the evidence. Thornton was only an accommodation surety and parol evidence was admissible to show this. 76 Ark. 140; 98 *Id.* 200; 92 *Id.* 204; 128 U. S. 590; 64 N. W. 455; 54 Ark. 97; 118 N. C. 671; 3 R. C. L. 1138, § 354.

2. The extension of time discharged the surety. 77 Ark. 53; 65 *Id.* 204, 29 *Id.* 588; 49 *Id.* 465; 87 Tex. 578; Cent. Law Journal, 144 No. 17, p. 340.

3. Laches of the holder discharges the surety. Jones on Ch. Mortg., p. 27, § 632; 1 Mont. 347; 34 Ark. 80; 59 *Id.* 47; 3 *Id.* 90; 60 *Id.* 90.

Hinton & Rogers and *Charles C. Sparks,* for appellee.

1. The note is the best evidence and the writing of appellant's name on the back thereof was a conclusive presumption that he was a joint maker and liable as such. 77 Ark. 53; 116 Ark. 420; 34 Ark. 524; 103 *Id.* 473; 24

Id. 511; 40 *Id.* 546; 80 *Id.* 285; 94 *Id.* 333; 28 L. R. A. (N. S.) 1039; 91 Am. Dec. 519.

2. The cases cited in regard to notice, extension of time and laches do not apply here. Appellant was a joint maker. Presentment and extension were waived in the instrument and no definite extension of time was ever granted. 80 Ark. 285. Appellee was not required to exhaust other securities before suit. *Ib.* Appellant should have paid the note and been subrogated to appellee's rights. 103 Ark. 473.

McCULLOCH, C. J. On January 2, 1911, J. S. Stone and Annie Rogers borrowed the sum of a thousand dollars from the plaintiff, Monroe Bowie, and they, together with W. E. Stone, the father of J. S. Stone, executed to the plaintiff their joint promissory note for said sum of money, due and payable one year after date with 8 per cent. interest per annum until paid. The defendant, J. G. Thornton, indorsed his name in blank on the back of the note before the same was delivered to the plaintiff. The money was borrowed for the purpose of paying the price of a lot of furniture purchased by J. S. Stone and Annie Rogers for use in a boarding house which Annie Rogers was operating in the city of Hot Springs in a building rented from the plaintiff, and on that date they (J. S. Stone and Annie Rogers) executed to plaintiff a chattel mortgage on said furniture and other furniture in the building to secure the payment of said note. Nothing has ever been paid on the note except a portion of the interest, and this is an action instituted by the plaintiff against J. S. Stone and J. G. Thornton to recover the amount of the note and the unpaid interest.

Defendant Thornton answered, stating, among other defenses, that he was only a surety on the note and that the plaintiff, without his consent, had, for a valuable consideration, entered into an agreement with the makers of the note for an extension of the time of payment, and also that said plaintiff had been guilty of negligence in permitting the chattels upon which he held a mortgage to be lost and destroyed without enforcing his mortgage

lien thereon. The case was tried before a jury and the court gave a peremptory instruction in the plaintiff's favor. The question presented is whether there was evidence sufficient to warrant a submission of the issues to the jury.

(1) The indorsement by defendant Thornton of his name on the back of the note before the delivery constituted him a maker of the note, but parol evidence was admissible to show that he in fact signed only as surety and that this was known to the plaintiff. Annie Rogers died a few months after the note was executed and J. S. Stone took charge of the boarding house and the property therein. The testimony of Stone tends to show that he urged plaintiff to accept a surrender of the property, which plaintiff declined to do but told Stone to go ahead with the operation of the boarding house and promised to take charge of the property at the end of that year. The evidence does not show that there was any agreement on the part of the plaintiff to extend the day of payment to any definite time or that there was any demand made upon the plaintiff to sue the principals on the note or to foreclose the mortgage. All that the evidence tends to show is that plaintiff declined to take possession of the property and that he delayed bringing suit on the note until after the property had been destroyed by fire.

(2-3) In order to discharge the surety by a new contract for the extension of the time of payment, the extension must be for a definite period and the new contract must be based upon a new consideration. *King* v. *Haynes,* 35 Ark. 463; *Vaughan* v. *Vernon,* 82 Ark. 28. Mere delay or failure to sue the principal or to pursue other available remedies for the collection of the debt will not discharge a surety. *Wilson* v. *White,* 82 Ark. 407.

(4) The question of the discharge of the surety by a failure of the plaintiff to take possession of the property is ruled by the case of *Grisard* v. *Hinson,* 50 Ark. 229, where this court held that the failure of a mortgagee to foreclose a lien on the mortgaged chattels did not discharge the surety. The court, after laying down the

rule that where "funds or securities are placed in the hands of a creditor by a principal for the security of a debt, and they are lost through the want of ordinary diligence of the creditor, the surety bound for the payment of the debt so secured is discharged to the extent of the loss," said that the rule does not apply to a mortgagee who has not obtained possession of the chattels, and that it was equally the duty of the surety to see that the chattels were applied to the payment of the mortgage debt. Speaking of the duty of the surety under those circumstances, the court said: "For he was entitled to pay the note at any time after it became due, and take control of the mortgages, or, through the aid of a court of equity, upon giving the proper indemnity against costs and delay, to call on appellants to proceed against his principal and require them to do the most they could for his benefit, or, under our statutes, to compel them to commence suit, and proceed in it with due diligence, in the ordinary course of law, to judgment and execution. If he was damaged, it was as much by his own neglect and failure to discharge his duty as by any omission of appellants. If he had performed his obligations to appellants, he would have had control of the note and mortgage before any part of the ninety-five bushels of corn was consumed or disposed of. To allow him now to take advantage of the delay of appellants in foreclosing the mortgage, under such circumstances, seems very much like allowing a man to take advantage of his own wrong. If appellants were guilty of negligence, he was guilty of a positive omission of duty. They were under no higher obligation to foreclose the mortgage, than he was to pay the note and foreclose the mortgage himself. Under these circumstances it would be contrary to the most obvious principles of justice to inflict upon appellants the loss of their debt."

So it is in the present case. The most that the defendant claims is that the plaintiff failed to foreclose the chattel mortgage, but the duty rested upon the defendant to pay off the debt and take advantage of the security.

himself if he intended to claim the advantage. Not having done that, or proceeded under the statute to require the plaintiff to sue the principals on the note, he can not complain of the loss which resulted by the destruction of the property.

Judgment affirmed.

ROGERS v. SEMMES.

Opinion delivered April 24, 1916.

1. IMPROVEMENT DISTRICTS—CONTERMINOUS DISTRICTS—VALIDITY.—The second of two sewer districts, being organized to complete the work begun by the first, the two being conterminous will be held invalid, where the formation of the second district will make the assessed benefits of the two exceed 20 per cent. of the assessed value of the property therein.
2. IMPROVEMENT DISTRICTS—CONTERMINOUS DISTRICTS—VALIDITY.—There is no authority in the law for the creation of two improvement districts embracing the same territory, for a single improvement.

Appeal from Mississippi Chancery Court, Osceola District; *Charles D. Frierson,* Chancellor; affirmed.

STATEMENT BY THE COURT.

On March 20, 1911, the city council of Osceola passed an ordinance creating Sewer District No. 1, which included in its territory the entire city of Osceola. Bonds were issued and assessments were levied to the extent of 20 per cent. of the assessed value of the real property in the town, including interest. In order to reach an outlet it became necessary to drain into a drainage ditch about a mile or more beyond the corporate limits. The system was almost completed when quicksand was encountered in constructing the outlet, which resulted in a total failure of the entire drainage project.

During the current year, on petition of more than ten in number of the property owners in the city of Osceola, the city council passed another ordinance crea-

ting Sewer District No. 2, for the purpose of constructing an outlet for the sewerage contemplated by the creation of Sewer District No. 1. After the district was created a majority in value of real property owners within the district petitioned the city council to proceed with the work and to assess the costs thereof against the real property within the district. Thereupon this suit was instituted by the appellee, a tax payer, against the appellants, who constituted the city council of Osceola, to restrain them from letting the contract and levying any tax for the purpose of making the improvement contemplated in the creation of Sewer District No. 2, that is, to complete the outlet of Sewer District No. 1.

The appellee, among other things, set up in her complaint that the commissioners of Sewer District No. 1, in the construction of the improvement contemplated by that district had already incurred an indebtedness equal to 20 per cent. of the assessed value of the property in the district at the time the improvement was undertaken, which was the limit allowed by law for the payment of such improvement, and that, notwithstanding this fact the appellants had passed an ordinance creating Sewer District No. 2; that unless restrained they would proceed to let a contract for the work contemplated in the creation of Improvement District No. 2 and would proceed to levy a tax upon the property of the appellee and others included in the district to pay for such work, and that such levy would be an unlawful assessment.

The appellants answered, setting up substantially that on account of the difficulties encountered by reason of the quicksand in constructing the outlet to Improvement District No. 1, the entire sewer system contemplated in the creation of that district had been abandoned and could not be used until the proper outlet had been established; that such an outlet involved an expenditure beyond the capacity of Sewer District No. 1 to bear; that such outlet could be built within a cost of not exceeding 20 per cent. of the assessed value of the property within the city, and that Sewer District No. 2 had

been created for the purpose of completing the outlet begun by Sewer District No. 1.

The court sustained a demurrer to the answer and entered a decree enjoining the mayor and aldermen from passing any additional ordinance or levying any tax in addition to the tax already levied for the building of sewers or outlets for the sewer system already created, and appellants duly prosecute this appeal.

J. T. Coston, for appellants.

The first district was organized under the old law providing that the cost should not exceed 20 per cent. of the assessed value. Kirby's Digest, § 5683. Both principal and interest must be treated as part of the cost. 67 Ark. 30. In 1913 the Legislature amended the section. Acts 1913, p. 530. This opened the way for the creation of district No. 2 and the levy of an additional tax. 1 Page & Jones, § 507; 113 N. W. 700; 145 Ark. 97. The court erred in sustaining the demurrer. The Legislature may by curative acts remedy and validate defects and omissions, which might have been dispensed with.

The appellee, *pro se.*

Improvement District No. 2 was created without authority of law and is void. Kirby's Digest, § 5683; 67 Ark. 30; Acts 1913, p. 530; Act 245, Acts 1909, § 3. The decree should be affirmed.

WOOD, J., (after stating the facts). Sewer District No. 1, in the city of Osceola, was created under section 5683 of Kirby's Digest, which provides, among other things, that "no single improvement shall be undertaken which alone will exceed in cost 20 per centum of the value of the real property in such district as shown by the last county assessment."

(1) The outlet for the sewer system contemplated by the creation of Sewer District No. 1, which was the same work contemplated by the creation of Sewer District No. 2, constitutes but a single improvement. The two districts were coterminous, embracing the entire city, and if they had been created for the purpose of making

two district improvements, both districts would be valid, although the aggregate cost of both improvements exceeded 20 per cent. of the value of the real property in the district. *Crane* v. *Siloam Springs,* 67 Ark. 30. But, under the facts set forth in the answer and conceded by the demurrer, it appears that Sewer District No. 2 was organized for the purpose of completing the same work, or part of the same work, for which Sewer District No. 1 was created. Both districts therefore contemplated, under the law, but a single improvement, and inasmuch as the cost of such improvement would exceed 20 per cent. of the assessed value of the real property in the districts, the improvement contemplated by such District No. 2 can not be undertaken, and an assessment to pay for the work of such improvement would be void, under the provisions of the above section.

This court, in *Fitzgerald* v. *Walker,* 55 Ark. 148-159, held that where money is borrowed to make the improvement and interest is stipulated for, it becomes a part of the cost of the work, and that the principal and interest necessary to be paid in order to complete the improvement, must not exceed 20 per centum of the assessed value of the property in the district. See also, *Oliver* v. *Whittaker,* 122 Ark. 291.

In 1913 the Legislature amended section 5683 of Kirby's Digest so as to provide that "in determining what shall be 20 per centum of the value of the real property in the district, interest upon borrowed money shall not be computed as part of the cost." Act 125, Acts of 1913, p. 527-530. This act was held valid in *Oliver* v. *Whittaker, supra.*

(2) Improvement districts are creatures of the statute. No authority can be found in the law for the creation of two improvement districts embracing the same territory for a single improvement. No such authority is conferred by the act of 1913, *supra.* The old law was not amended by this statute so as to bring it within the power of the city council of Osceola to create

two improvement districts for one and the same improvement.

The law was not intended as a curative statute and to validate the creation of districts and assessments for the making of improvements the cost of which, including principal and interest, on the bonds, would exceed 20 per cent. of the assessed value of the property in these districts; nor did the lawmakers intend to authorize the creation of an additional improvement district embracing the same territory of a former district for the purpose of completing or carrying out the project contemplated by the creation of the former district, nor for the maintenance and repair of the improvement of the district already created. The facts set up in the answer show that the improvement contemplated by the creation of District No. 2 was but a completion and repair of the work that had been done by District No. 1. The law makes provision for the maintenance and the keeping of improvement districts in cities and towns in a good state of repair. Act 245, Acts of 1909, p. 742.

Improvement District No. 2 was therefore created without authority and is void, and appellants had no power to make the improvement and assess the property of the appellee to pay for same. The decree of the chancellor restraining them from so doing was correct, and it is affirmed.

FURLOW AND TURNER v. STATE.

Opinion delivered April 24, 1916.

GAMING—POOL TABLES.—A judgment convicting defendant of exhibiting a gambling device in violation of Kirby's Digest, § 1732, can not be sustained where there is no testimony that the pool tables kept by defendant were used for gaming, or were exhibited to attract betters, nor proof that gaming was carried on in the pool hall.

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

June R. Morrell, for appellants.

1. A pool table is not *per se* a gambling device and there is no evidence whatever that gambling was allowed or permitted. Kirby's Digest, § 1732; 86 Ark. 353; 84 Ala. 13; 116 Ark. 390.

Wallace Davis, Attorney General, *Hamilton Moses,* Assistant, and *Abe Collins,* Prosecuting Attorney, for appellee.

1. The judgment should be affirmed under the decision in 120 Ark. 450.

2. The facts proven were sufficient to prove a public offense and sustain the conviction. Kirby's Digest, § 1732; 120 Ark. 450; 27 Ark. 360; 72 *Id.* 382; 101 *Id.* 159; 141 S. W. 493.

HART, J. Appellants were indicted and convicted of the charge of exhibiting a gambling device contrary to the provisions of section 1732 of Kirby's Digest. From the judgment of conviction they have duly prosecuted an appeal to this court. The facts are as follows:

Appellants were engaged in operating a pool hall in Ashdown, Little River County, Arkansas. The pool tables in the hall were ordinary pool tables and the usual games that are played on such tables were played by appellant's customers. Appellant had a sign up which read, "No gambling allowed" and the prosecuting witness stated, so far as he knew no gambling had been allowed in the pool hall. It is contended that the judgment should be affirmed under the authority of *Riley* v. *State,* 120 Ark. 450, 179 S. W. 661. There appellant filed a motion in arrest of judgment which challenged the sufficiency of the indictment. We held that the indictment was sufficient to charge a public offense but the court expressly said that it could not enter upon the question as to whether the evidence was sufficient to sustain the charge.

In *Town of Dardanelle* v. *Gillespie,* 116 Ark. 390, the court held that in the absence of any showing that a pool hall was operated for the purpose of gaming, or was so

conducted as to be a nuisance, a town council would have no authority to pass an ordinance prohibiting the maintenance of the pool hall.

There is not the slightest testimony that the pool tables of appellants were used for gaming and that the tables were exhibited to attract betters. There is no proof even that any gaming was carried on in the pool hall. The defendants were not guilty of exhibiting a gaming device under section 1732 of Kirby's Digest. *Gershner* v. *State,* 106 Ark. 488; *Johnson* v. *State,* 101 Ark. 159; *State* v. *Sanders,* 86 Ark. 353.

It follows that the judgment must be reversed and inasmuch as the proof has been fully developed, the case will be dismissed here.

McDONALD, ADMINISTRATOR v. NORTON, ADMINISTRATOR.

Opinion delivered April 24, 1916.

1. ATTORNEY'S FEES—LIEN FOR.—Under Act 293, Acts of 1909, § 1, an attorney has a lien upon his client's cause of action from the commencement of the suit thereon, and if afterward the same becomes merged in a verdict, report, decision, judgment or final order in his client's favor, such lien shall attach thereto. The lien is upon the cause of action until merged, and then attaches to the thing into which the cause of action is merged.
2. ATTORNEY'S FEES—LIEN—CAUSE OF ACTION.—Act 293, Acts of 1909, gives to attorneys a lien upon their client's cause of action, and does not give merely a lien upon the suit and the proceeds which might result from the prosecution of it.
3. DEEDS—RECORD—LACK OF ACKNOWLEDGMENT.—An unacknowledged deed is not entitled to record, and the recording of such a deed is not constructive notice to any subsequent *bona fide* purchaser of the land for value.
4. ATTORNEY'S FEES—RECOVERY OF TIMBER—LIEN ON THE LAND.—A. deeded the timber upon certain land to R., but did not acknowledge the deed. Thereafter A. deeded the land to M., his son; R., through his attorneys thereafter brought an action against M. and regained possession of the timber for. R. *Held,* under Act 293, Acts of 1909, R.'s attorneys had a lien upon the land for their fees.

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

STATEMENT BY THE COURT.

This action was instituted in the chancery court by appellees against appellants to enforce an attorney's lien. The material facts are as follows:

On the 4th day of April, 1899, John P. Moore conveyed to W. D. Reeves the timber of a certain class and description upon certain designated land. The deed was not acknowledged but it was filed for record by the grantee on the 3d day of July, 1901. On June 8, 1901, John P. Moore conveyed the remaining timber on said lands to W. D. Reeves by a timber deed. This deed was not acknowledged but it was filed for record by the grantee on the 9th day of July, 1901. The grantee was given five years to remove the timber in the first deed, and by the second deed the time for the removal of all the timber was extended to ten years. In July, 1907, John P. Moore conveyed by deed to his son Frierson Moore the lands upon which was situated the timber conveyed to Reeves by the two contracts or timber deeds mentioned above.

In September, 1907, W. D. Reeves instituted an action in the chancery court against John P. Moore and Frierson Moore to set aside the conveyance from John P. Moore to Frierson, alleging that the conveyance was a voluntary one and also that it was made to defeat his rights under the timber deed.

The prayer of his complaint was that the deed from John P. Moore to Frierson Moore be canceled; that John P. Moore be required to execute and acknowledge in his favor proper deeds to the timber sold to him and that said John P. Moore be restrained from disposing of the land until this was done.

The chancellor entered a decree in accordance with the prayer of the complaint and the defendants appealed to this court. The decree of the chancellor was affirmed. See *Reeves* v. *Moore,* 105 Ark. 598.

Judge N. W. Norton and W. W. Hughes, who were law partners, represented Reeves in that action. Subsequently Judge Norton died and C. W. Norton became

administrator of his estate. So the plaintiffs in the present action are C. W. Norton, administrator of the estate of N. W. Norton, deceased, and W. W. Hughes. Reeves died and John McDonald was appointed administrator of his estate.

Prior to his death Reeves had become insolvent and had conveyed the timber in question to certain persons in trust for his creditors. The administrator of his estate and these trustees are defendants in the present action.

The parties agreed that the services of plaintiffs as attorneys in the case of *Reeves* v. *Moore* was worth $3,500, and the only contest between them is as to the right of the plaintiffs to enforce their lien on the timber involved in the suit of *Reeves* v. *Moore.*

The chancellor found in favor of the plaintiffs and a decree was entered in accordance with his opinion. The defendants have appealed.

Moore, Vineyard & Satterfield, for appellants.

1. There was no recovery of property. The Reeves-Moore suit was one merely to set aside a fraudulent conveyance and there was no lien. 47 Ark. 86; 56 *Id.* 324, 329; 64 *Id.* 438, 443; 69 *Id.* 34; 76 *Id.* 43; 65 *Id.* 84; 68 *Id.* 80; 85 *Id.* 101.

2. If appellee had a lien it can not be enforced in this action. Act 293, Acts 1909; Kirby's Digest, § § 4458, 4462, etc.; 103 Ark. 306. Plaintiffs could only have a lien upon the cause of action of Reeves against the Moores. This cause of action was not tangible nor of any monetary value but was merely to remove a cloud from and confirm title to timber. If there was a lien it could only be enforced by petition in the original cause of *Reeves* v. *Moore.*

H. F. Roleson and *Mann, Bussey & Mann,* for appellees.

1. There was a recovery by Reeves from Moore of the timber. There was a lien and the court had jurisdiction to enforce it. 47 Ark. 86; Acts 1909, 892; 179

S. W. (Ky.) 449; 87 N. Y. 521; 87 *Id.* 407; 77 U. S. 483; 4 Cyc. 1015; Pom. Eq. (3 ed.), § 279. The decree should be affirmed.

HART, J., (after stating the facts). Counsel for the plaintiff claimed a lien under Act 293 of the Acts of the General Assembly of 1909. Section 1 of the act reads as follows: "The compensation of an attorney or counsellor at law for his services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action or special proceeding, or the service of an answer containing a counter-claim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counter-claim, which attaches to a verdict, report, decision, judgment or final order in his client's favor and the proceeds thereof in whosoever hands they may come; and the lien can not be affected by any settlement between the parties before or after judgment or final order." Acts of 1909, p. 892.

It is insisted by counsel for the defendants that the act of 1909 just referred to, was passed for the purpose of protecting attorneys who recovered judgments in damage suits, and does not include decrees such as the one rendered in the chancery court in the case of *Reeves* v. *Moore,* referred to in the statement of facts. We can not agree with the contention of counsel for the defendants. If the statute in question meant to limit the right of an attorney of record to enforce his lien only in an action for the recovery of damages, it would have read "cause of action for tort" or "cause of action for a personal tort" as the Legislature might intend to limit it. The statute in general terms gives the attorney a lien upon his client's cause of action.

(1) In 1 Cyc. p. 643, it is said that "cause of action" is different from suit, action and the like. The author says that the cause of action is the right to be enforced or the injury to be redressed; and the action or remedy is the means which the law has provided whereby such enforcement or redress may be effected. This includes an action on contract as well as an action for tort

and embraces a claim for property as well as a demand for the payment of money. The meaning of the section is that the attorney shall have a lien upon his client's cause of action from the commencement of the suit thereon, and if afterwards the same becomes merged in "a verdict, report, decision, judgment or final order in his client's favor," such lien shall attach thereto. In other words this lien is upon the cause of action until merged, and then attaches to the thing into which the cause of action is merged. See *Taylor* v. *St. Louis Transit Co.* (Supreme Court of Mo.), 97 S. W. 155.

In the case of *Smoot* v. *Shy,* 139 S. W. (Mo.) 239, the facts were, there was an order of sale in a suit for partition of real estate and the property was bid off by one Shy for a stipulated price. On the report of sale coming in, all parties to the action objected to the confirmation of the sale on various grounds and moved to set it aside. A firm of attorneys was employed by the parties to the partition suit who agreed to pay them a certain sum out of the proceeds of re-sale of the amount the land brought in excess of the original price. The attorneys procured the sale to be set aside and the land was sold at an increased price, Mr. Shy again being the purchaser. The re-sale was approved by the court and the proceeds ordered paid out to the parties according to their interests. Shy purchased the interests of certain of the parties to the partition suit with full knowledge of the terms and conditions of the employment of the attorneys. The St. Louis Court of Appeals held that the attorneys were entitled to a lien under a statute of precisely the same terms as the section of our statute above quoted.

(2-3) As we have already seen, the statute gives to the attorney a lien upon his client's cause of action and not merely a lien upon the suit and the proceeds which might result from the prosecution of it. It is true that under the timber deed executed by Moore to Reeves, although the deed was not acknowledged, Reeves had the right to go upon the land and cut down and remove the timber. It is also true that Reeves filed the deed in the

recorder's office for record, but an unacknowledged deed is not entitled to record in this State, and the recording of the deed in question was not constructive notice to any subsequent *bona fide* purchaser for value of the land on which the timber was situated, of the rights of Reeves under the timber deed. Reeves could not compel Moore to acknowledge the deed without bringing a suit which would have that effect.

In his suit against Moore, Reeves alleged that the conveyance from John P. Moore to his son Frierson Moore was a voluntary one and was made to defeat his rights under the timber deed. He also alleged that Frierson Moore had notice of the execution of the timber deed to him and he asked that John P. Moore be required to execute a proper deed to him for the timber; or that other appropriate relief be granted.

Frierson Moore in his answer averred that he was a *bona fide* purchaser for value and denied that he had any knowledge of the conveyance of the timber to Reeves at the time he purchased the land from his father. The deed from his father to him gave Frierson Moore the right to take possession of the land and after doing so, he denied the right of Reeves to enter the land and remove the timber.

(4) The chancellor found all the issues in favor of Reeves and granted him the relief prayed for in his complaint. So it will be seen that Frierson Moore by virtue of his alleged ownership of the land was holding possession of the timber. Hughes & Norton, by virtue of their legal services in that suit, in effect regained the timber for Reeves, and we think their right to a lien on the land is within the spirit, if not the letter of the statute.

The decree will therefore be affirmed.

McCULLOCH, C. J. (Dissenting). The Act of 1900 does not enlarge the rights of an attorney so far as concerns the subject-matter of the cause of action or the recovery thereon, but merely protects him by giving

him a lien on the cause of action of his client as well as on the recovery in which the cause of action is merged. The statute does not even give the attorney the right to control the cause of action, but merely fixes a lien on the fruits of the litigation. *St. Louis, I. M. & S. Ry. Co.* v. *Blaylock,* 117 Ark. 504; *St. Louis, I. M. & S. Ry. Co.* v. *Kirtley,* 120 Ark. 389, 179 S. W. 648.

In the case last cited, this court said that the lien "attaches to any proceeds realized out of such claim or cause of action resulting from the litigation, either through a settlement, compromise, or judgment, and of which he (the attorney) can not be deprived by the parties to the action by any settlement they may make."

The statute under consideration shows very clearly on its face that it was only intended to fix a lien on the fruits of the litigation, that is to say on the subject-matter of the litigation which is recovered or which may be recovered in the action, and that it was not intended to give a lien merely for the preservation or protection of the client's interest in the property involved. An attorney who merely defends a right of his client has no lien on the subject-matter of the litigation because it constitutes no cause of action and nothing is recovered. In this respect the statute is the same as the pre-existing statutes on the subject, and they have been construed by this court to confer no rights unless some kind of property is recovered.

In *Hershy* v. *Du Val,* 47 Ark. 86, the court held that an attorney had no lien on his client's land for services rendered in an action to remove a cloud from the title. In construing the statute, Mr. Justice Smith, speaking for the court, said: "The lien on the specific property recovered, * * * is limited to cases where there has

been an actual recovery, and can not be extended to professional services which merely protect an existing title or right to property. * * * It (the statute) does not give the attorney a lien on the estate he has rescued from an unjust claim, and saved for his client, but only on the property he has actually recovered.

Reeves did not sue to recover the timber, but sued only to remove a cloud from his title and to protect the interest which he already possessed. It was merely a suit to remove the cloud cast on his title by the deed executed by Moore, his grantor, to the latter's son, and was not in any sense a suit to recover the timber, for that had passed to Reeves under the conveyance to him by Moore, and all the relief that he needed was to remove the cloud from the title. There is nothing in the record to show that Frierson Moore was in possession of the timber, but he was merely asserting a claim to it under his father's deed, which constituted a cloud upon Reeves' title.

Mr. Justice KIRBY concurs.

MILLER v. STATE.

Opinion delivered April 24, 1916.

1. HUSBAND AND WIFE—ABANDONMENT OF WIFE—SUFFICIENCY OF INDICTMENT.—An indictment charging the crime of wife abandonment, *held* valid.
2. HUSBAND AND WIFE—ABANDONMENT OF WIFE—SUFFICIENCY OF EVIDENCE.—Evidence held sufficient to support a conviction of defendant under act of 1909, page 134, denouncing the crime of abandonment and non-support of wife.
3. HUSBAND AND WIFE—ABANDONMENT OF WIFE—"WITHOUT GOOD CAUSE."—The words "without good cause," in the statute denouncing the act of abandoning a wife, as a crime, *held* to mean such cause as is a sufficient ground for divorce and the severance of the marital relation under the law.

4. EVIDENCE—CRIMINAL TRIAL—WIFE ABANDONMENT—LETTER.—In a prosecution for the crime of wife abandonment, where the wife, on cross-examination, was asked about certain statements contained in a certain letter written by the wife to the husband, the State may thereafter introduce the letter in evidence.

Appeal from Bradley Circuit Court; *Turner Butler*, Judge; affirmed.

STATEMENT BY THE COURT.

Charles Miller prosecutes this appeal from a judgment of conviction of wife abandonment or desertion.

The indictment, formal parts omitted, alleges: "The said Charles Miller, in the county and State aforesaid, on or about the 1st day of July, A. D., 1915, then and there unlawfully and without good cause did abandon and desert his lawfully wedded wife, Della Miller, and then and there did neglect and refuse and fail to maintain and provide for his wife, the said Della Miller, contrary to the statute in such cases made and provided, and against the peace and dignity of the State of Arkansas."

A demurrer to the indictment was interposed and overruled.

It appears from the testimony that appellant was married to his wife Della Miller, on March 21, 1915, and they lived together as husband and wife at the home of his father until the first of July following. He was nineteen years old at the time of the marriage and she was eighteen the following July. She was treated as a member of the family and worked in the field most of the time along with her husband and the others. She stated that appellant told her the night before he took her home the next morning, which was the first intimation she had that he was displeased, that he was going to take her back to her father's house and leave her there, giving as his only reason that he did not need a wife and could not

make a living. She said after she was convinced that he was going to abandon her, she asked him to take her home and he did so and "while I was living with him he contributed to my support one pair of slippers. He has contributed nothing to my support since the 1st of July. I am expecting soon to become a mother." She stated further that she had done her best to make him a good wife and failed in no respect that she knew of. That she still loved him, but did not know that she would be willing to return now, under the existing conditions and live with him. She told her husband that she was going to become a mother, or thought so, on the day he took her home; that she did not object to working in the field with her husband, as she had worked in the field at home before marrying him. She also said that he had always treated her right.

Della's brother stated that he asked appellant why he brought his sister back home, to which he replied: "Well I decided I could not make a living for her and did not need no living for her." He insisted that that was no excuse and wanted to know the truth about it and appellant said "he didn't want to tell the truth, and that she would do things and keep it a secret, and she used snuff."

Albert Berthea stated that appellant had told him he quit his wife because she dipped snuff and also that his father gave him $10 to marry her as he had more work than he could do, "and that was as good a way as he knew to get a hand to work." Another witness stated, he said he would not give his reason for quitting his wife until he was put on the witness stand.

His father stated that appellant had no means of support of his own and brought his wife to his home to

live with him and that he made a certain agreement with his son whereby he was to deed him forty acres of land when he was twenty-one years of age and build him a house on it if he continued to work with him at home until that time. He stated also that he told Della if she wanted anything to tell him and he would buy it for her, that if Charley and Della had any difficulty, he did not know it, and noticed them as they lived in the house with him and that she worked in the field with his wife and himself.

Appellant's mother testified that Della appeared to be angry during the last week of her stay; that her husband treated her well, so far as she could tell and she did not know they were going to separate until the morning that Della went away. That she had never heard a quarrel between them; that after Della told her she was going away to stay, she requested her to talk to Charley, who was going to his work. He stated his wife wanted to go home and he was going to take her, that she would not give him any satisfaction or reason about it.

Appellant stated that he had made a contract with his father at the time he married and had been working under it a little over two years; that he had no property of his own when he got married; that he lived with his father and took his wife there to live. That they got along all right until about three weeks before she went home. Said that she told him when they married that she did not use snuff and he discovered afterwards that she had gotten to using it and he tried to get her to quit and she agreed to but did not. The quarrel about this lasted but a short time however, and his wife stated that she did not want to live with his people, that his home was not big enough for two families; that he insisted on her continuing there as he would lose his work on the contract if he quit. He stated that he did not have any money to buy clothes for her but wanted to get some

and did not want her to go back home without any new clothing. She said that that did not matter, and on the way home stated that she did not expect to live with him again, to which he replied, that he "had never begged a woman to live with him and never expected to." He denied having the conversations stated by the other witnesses about his reason for quitting his wife; said he tried to get her to come back and live with him and had written a letter to that effect, but made no effort to get her to return to him until after he was indicted.

His wife was asked on cross-examination if she had not written to him that she wanted a divorce and that if he would pay for it, she would set him free. She stated that she had said something in this letter about a divorce, but that she had written the letter, which was introduced over appellant's objection, insisting that he tell her why he had abandoned her. That the reason he had given would not do. The letter concluded: "It is too little excuse and if you bring anything up it is not so and I am ready and willing to face it and you will have to prove anything to show that I did not prove true to you. You know I went there and worked hard and what did I get? Nothing but one pair of slippers and what I eat. I wanted to get along with all of you, and you promised to get me some clothes and you have not got them yet, but that don't matter so bad, what I am after is your reason for leaving me, so write soon and tell me your excuse, for my mind will not be content until I do find out your reason and that is what I want to know at once."

E. E. Williams, for appellant.

1. The court erred in overruling the demurrer to the indictment and the testimony in insufficient to sustain the verdict. 168 S. W. (Mo.) 339; 108 Ark. 76.

2. Improper evidence was admitted and the court erred in its instructions.

Wallace Davis, Attorney General, *Hamilton Moses*, Assistant, for appellee.

1. The demurrer was properly overruled. Acts 1909, 134; 102 Ark. 454; 98 *Id.* 577; 95 *Id.* 48; 94 *Id.* 65;

84 *Id.* 487; 26 *Id.* 323; 102 *Id.* 170. The indictment charges the crime in the words of the statute. This is sufficient. 12 Ark. 156; 39 *Id.* 216; 47 *Id.* 476; 49 *Id.* 499; 100 *Id.* 409; 72 *Id.* 382, etc.

2. The verdict was responsive to the evidence. 168 S. W. 339; 108 Ark. 79.

3. Della Miller's letter was properly admitted. 81 Ark. 579; 85 *Id.* 23; 86 *Id.* 145; 86 *Id.* 486.

4. There was no error in the court's charge. 70 Mo. 468; 114 Ark. 399; 109 *Id.* 510; 109 *Id.* 523; 102 *Id.* 186.

KIRBY, J., (after stating the facts). (1) It is contended that the court erred in overruling the demurrer to the indictment and that the testimony is insufficient to sustain the verdict. The indictment makes the charge in virtually the language of the statute, which does not contain the word "wilfully" in describing the offense and its allegations are sufficient. *State* v. *Witt,* 39 Ark. 216; *Houpt* v. *State,* 100 Ark. 409; *Petty* v. *State,* 102 Ark. 170.

The statute was held valid in *Green* v. *State,* 96 Ark. 175, and in *Dempsey* v. *State,* 108 Ark. 79, the court held that desertion alone of the wife did not constitute the offense, saying: "In order to make out the offense there must also be failure and neglect or refusal to maintain and provide for the wife and children. This means, of course, a wilful or negligent failure to provide, and not mere failure on account of inability. It does not necessarily mean, however, that there must be a complete failure in that respect, for an abandonment by a man of his wife and children, coupled with a wilful failure or neglect to adequately provide for their wants, would be sufficient to complete the offense."

(2) The undisputed testimony shows that appellant made no provision for his wife during the time they lived together, in the way of furnishing any clothing except a pair of slippers and that he made none whatever after deserting her, to the time of trial.

(3) It appears from his father's testimony that he could and would have supplied clothing if he had been requested so to do, and certainly appellant, who with his wife was working for his father, should have had no hesitancy in making such demand and providing such wearing apparel as she may have needed and his failure and refusal to do so can not be attributable to inability under the circumstances. The flimsy excuse given by appellant for quitting his wife, could not in any event be held to be good cause therefor. The statute in defining the offense in the use of the words "without good cause" evidently meant such cause as was a sufficient ground for divorce and severance of the marital relations under the law. *State* v. *Dvoracek*, 140 Iowa 266, 118 N. W. 399; *State* v. *Williams*, 116 S. W. 1128; *State* v. *Schweitzer*, 57 Conn. 532, 18 Atl. 788, 6 L. R. A. 125.

(4) No error was committed in permitting the introduction of the letter written to appellant by his wife, since on cross-examination by his attorney, she had been asked about certain things and statements contained therein, and was entitled to introduce the whole letter in explanation thereof. *Stuckey* v. *O'Neal*, 86 Ark. 145; *Mitchell* v. *State*, 86 Ark. 486.

Finding no prejudicial error in the record, the judgment is affirmed.

CODDINGTON v. BROWN.

Opinion delivered April 24, 1916.

1. ACTIONS—PARTIES—ACTION AGAINST SEVERAL PARTIES—PLEA BY ONE PARTY ALONE.—Where several parties are sued on a contract, a successful plea by one going to the validity of the contract, or to the satisfaction or discharge of the debt, operates as a discharge to all the defendants, but it is otherwise where the plea goes to the personal discharge of the party interposing it.
2. PRINCIPAL AND SURETY—ALTERATION OF CONTRACT—DISCHARGE.—Any material alteration in the terms of a contract, whereby a surety is bound, discharges the surety, if he has not consented to the change, even if the alteration be for the benefit of the surety.

Appeal from Sebastian Circuit Court, Fort Smith District; *Paul Little,* Judge; reversed.

STATEMENT BY THE COURT.

Appellant brought this suit against E. J. Wills, Stephen Brown and M. W. Murray, the sureties on his bond, for rent claimed to be due under a contract of lease of the Majestic Theatre Building in Fort Smith, with the property and appliances therein contained to be operated as a moving picture theatre.

By the terms of the lease the building "together with all the personal property in said building and connected therewith, which personal property is listed and described in the schedule attached and made part of the lease," were let to the lessees. It is also stipulated that the lessees should not remove or cause to be removed from said building any of said personal property and that each article of same should be returned and delivered to the possession of the lessors at the expiration of the term in as good order as at the beginning, ordinary wear and tear excepted, the lessees being liable for any loss of said property or damage thereto. The schedule included 1 Edison kinetoscope picture machine, and other articles making up the equipment of a moving picture theatre.

The bond in the sum of $1,000 recited the execution of the lease, some of the conditions and stipulations thereof and bound the lessee and sureties to the faithful performance of the contract of lease.

Suit was brought for the rent claimed to be due under the terms of the lease, against the lessees and Stephen Brown and M. W. Murray, sureties on the bond. Brown filed a separate answer to the complaint, alleging that he had been released as surety by reason of a material change made in the lease contract without his consent, in that the lessor and lessees had made a new contract on October 18, 1913, permitting the lessees to sell the Edison Picture Exhibition machine leased with the building for the sum of $75 and to purchase and install a new Powers 6-A machine at a cost of $260, to be paid by the lessees except the value of the old machine should be

credited thereon, the parties agreeing that if the lessees desired to remove the new machine, they should repay the said $75 used in its purchase, and if not, they could relieve themselves from the liability for its return at the end of the term, by leaving the new machine so purchased in its stead.

A demurrer was interposed to the answer and overruled and the appellee filed an amended separate answer containing virtually the same allegations as the first and alleged that appellant was bound to furnish the lessees under the terms of the lease the said Edison exhibition picture machine; that same was a necessary part of the machinery and fixtures to be used in the operation of the theatre under the terms of the lease; that notwithstanding the terms of the contract, the lessor failed and refused to furnish said machine after October 20 and sold and disposed of same and refused thereafter to lease and hire it to the lessees and thereby violated and put an end to the lease contract releasing him as surety thereafter. A demurrer to this answer was likewise overruled.

The lease, the bond and the contract between the lessor and lessees, relative to the sale of the Edison kinetoscope machine furnished by the lessor and the installation of the new Powers 6-A machine by the lessees at the increased expense, with the credit of the price of the old machine thereon, were introduced in evidence and appellant testified that the sum of $375 was due him as rent under the lease for the months of May, June, July, August and September, 1914, at $75 per month, with 10 per cent. interest on each installment from the date it was due.

He also stated on cross-examination that he leased the Majestic Theatre building and the personal property therein, for the purpose of it being operated as a moving picture show; that the Edison picture exhibition machine was designated in the schedule of the lease and was in the building and part of the property leased; that under the contract of October 18, the picture machine was disposed of.

Appellant moved for judgment by default against M. W. Murray, the other surety on the bond who had failed to answer and his motion was overruled.

E. J. Wills filed no answer. The cause was submitted to the court and judgment rendered in favor of the plaintiff against E. J. Wills for the amount claimed and the court declined to enter judgment against either of said sureties. From his judgment refusing to do so, this appeal is prosecuted.

Geo. F. Youmans, for appellant.

1. The liability of appellees, so far as they were bound for the payment of rent, was not affected by the agreement, for the terms of the lease relating to the payment of rent were in no way modified by said agreement. 1 Brandt on Sur. & Guar. (3 ed.), § 442; 110 Cal. 658; 43 Pac. 202; 56 Minn. 283; 57 N. W. 663; 71 Fed. 110; 32 Cyc. 177-8, and note 75, p. 178.

2. The judgment dismissing the complaint is not sustained by the evidence.

3. Judgment should have been entered against Murray. He made no defense and was not entitled to the benefit of Brown's defense.

John P. Woods, for appellee.

1. Appellees did not consent to the sale of the machine. The terms of the contract were materially altered and the sureties were thereby released. 93 Ark. 472; 77 *Id.* 128. The judgment is right and should be affirmed.

KIRBY, J., (after stating the facts). (1) The court erred in its refusal to render judgment against surety M. W. Murray. "Where several parties are sued on a contract a successful plea by one going to the validity of the contract, or to the satisfaction or discharge of the debt, operates as a discharge to all the defendants but it is otherwise where the plea goes to the personal discharge of the party interposing it." *Hall* v. *Bonville,* 36 Ark. 494; *McDonald* v. *Smith,* 24 Ark. 614; *Gunnells* v. *Latta,* 86 Ark. 304.

In *Simpson & Webb Furniture Co.* v. *Moore,* 94 Ark. 347, the court held, (quoting syllabus): "A separate answer of one defendant will be held to inure to the benefit of all the defendants when it states a defense common to all of them."

Although it is true that the same state of facts as to the change in the terms of the lease contract relied upon by appellee Brown in defense of the suit, existed as to his co-surety, said M. W. Murray, it does not necessarily follow that he was discharged from liability as a surety thereby since he would not have been if he consented to the change. Appellee Brown answered, setting up this defense and alleging that a change of the terms of the contract had been made without his consent. This was personal to him and the court erred in rendering judgment discharging both him and his co-surety said M. W. Murray, who had failed to answer.

(2) It can not be said as contended by appellee that the lease was terminated after the execution of the new agreement providing for the selling of the old picture machine by the lessor and the installation of the new one furnished by appellees for the execution of this agreement can not be said to be a refusal to furnish the motion picture machine agreed to be and which was in fact furnished under the terms of the lease. The lessor did not fail to comply with his contract to furnish this machine because he consented to the sale of it at the instance of the lessees and the application of the price received, to the payment of the purchase price of the new machine installed by the lessees in its place. The court is of opinion however that the transaction constituted a material change in the lease contract which released the sureties on the bond from the payment of the rent if done without their consent. "The courts have long held," as said in *Snodgrass* v. *Shader,* 113 Ark. 429, "that any material alteration in the terms of a contract, whereby a surety is bound, discharges the surety if he has not consented to the change, and this is so even if the alteration be for the benefit of the surety; for, although the princi-

pals may change their contract to suit their purpose or convenience, they can not bind the surety thereto without his consent, and, as the new contract abrogates the old, the surety is discharged from all liability unless he has consented to the alteration. (Citing cases.)"

The building, fixtures and appliances including the Edison machine for exhibition of pictures, were leased for the purpose of operating a moving picture show and the sureties upon the failure or refusal of their principals to perform the lease contract, could have undertaken it themselves, being bound to its performance. They may have been willing to be bound for the payment of the rent upon the moving picture theatre, thinking their principal would be able out of the money realized from its operation to pay the sum agreed upon and expenses, when they would not have been willing to sign the bond had they known that a new machine for exhibition of the pictures was to be installed at an additional expense to their principals of $185. If the parties to the lease had agreed to sell the furnishings in the theatre leased and purchased others at a cost to the lessees of say $5,000 more than the price received for the old furnishings and fixtures, it would certainly have constituted a material change in the conditions and reduced the liability of the lessees accordingly to perform their obligation for which the surety was bound and should discharge the surety no less than if the terms of the contract itself were expressly changed. Moreover, said contract was materially altered by the agreement and installation of the new Powers 6-A machine in lieu of the Edison disposed of which they were bound to return, providing for the payment of the price for which it sold or the return of the new machine in its stead.

It follows that no error was committed in the rendition of the judgment in favor of appellee Brown discharging him from liability and same is affirmed as to him, but the judgment of dismissal as to said M. W. Murray being erroneous is reversed and the cause remanded with directions to enter a judgment in appellant's favor against him.

JOYCE v. McCORD.

Opinion delivered April 24, 1916.

1. FRAUD AND DECEIT—FALSE REPRESENTATIONS—SALE OF STOCK.—One who has been induced to purchase property by the fraudulent representations of the vendor thereof, may recover in a court of law the damages which he has sustained thereby.
2. FRAUD AND DECEIT—FALSE REPRESENTATIONS—SALE OF PROPERTY.—In order for representations to be fraudulent in law, they must be material to the contract or transaction, and must be made by one who either knows them to be false, or else, not knowing, asserts them to be true, and made with the intent to have the other party act upon them to his injury, and such must be their effect.
3. FRAUD AND DECEIT—SALE OF STOCK—FALSE REPRESENTATION.—Where the seller of certain corporate stock made representations to the buyer which were false, and knowingly made by the seller to induce the purchaser to rely thereon to his injury, and such was their effect, then they were fraudulent, and the seller may be required to answer in damages for the injury to the buyer by reason thereof.

Appeal from Sebastian Circuit Court, Greenwood District; *Paul Little,* Judge; reversed.

STATEMENT BY THE COURT.

This is a suit for damages alleged to have been sustained through false representations as to the value of certain bank stock, made in the sale thereof.

The complaint alleges that the defendant sold the plaintiff ten shares of stock in the Bank of Commerce of the city of Fort Smith, upon the express representation that the stock was worth par or more; that the bank was earning more than expenses and had earned certain funds out of which a dividend would be declared in the near future. That said representations were false and fraudulent and made with the intent to cheat, defraud and deceive plaintiffs and induce them to purchase said stock. That they relied upon said representations; had the right to do so and purchased same at the par value of $250; that defendant knew said representations were false and also at the time of the sale that an assessment of 50 per cent. had been levied against all stock in said bank and did not impart said knowledge to plaintiffs. That by reason of the representations and concealments,

they were damaged in the sum of $250 and prayed judgment accordingly.

The answer denied the material allegations of the complaint.

The testimony tends to show that appellants told appellee their stock of merchandise for a certain piece of land estimated at a certain price and for ten shares of $25 each of stock in the Bank of Commerce at Fort Smith, at its face value of $250, representing at the time to plaintiffs, who told him they knew nothing about the stock, that it was good stuff and he regretted he did not have $500 more of it; that no more could be had, all having been bought up and that there was none for sale; that although it had not paid a dividend he had been in a stockholder's meeting a short time before and they had figured it out and that it would pay a dividend for 1914. The sale of stock was completed on the 10th day of February, 1914.

Appellants testified that they were led to believe by McCord's statement that the stock was worth $250, but for which they would not have accepted it for that price. It was also shown that in December, 1913, a meeting of the stockholders of the bank was held to consider getting its affairs in such shape as that it could operate under the new banking law. That on the 6th day of January, 1914, at the stockholder's meeting at which defendant was present, the condition of the bank was freely discussed and all realized its bad condition. The directors held a meeting on the 23d day of January, 1914, to reduce the stock or assess the stockholders and on the 11th day of February, 1914, at a stockholder's meeting it was resolved, on account of the depreciation of certain assets of the bank, for restoring its capital, that the stockholders be required to pay 50 per cent. of the face value of their stock within thirty days and that all who failed to do so should have the amount of their stock reduced to 50 per cent. of its face value. Appellee denied having made any false representations whatever as to the value of the stock and said that he had told the appellants the

par value of the stock and that it had never paid a dividend, but he thought it would do so and had said nothing that should have misled them, about the value thereof.

The court instructed the jury refusing appellant's instructions submitting the issue to the jury upon the question of appellee's liability to the payment of damages for the alleged false representations made, and giving appellee's instructions limiting his liability to a breach of warranty or such representations as would amount thereto.

From the verdict upon the judgment against them appellants prosecute this appeal.

Geo. W. Johnson, for appellants.

1. The court erred in refusing to give the plaintiff's instructions. Those given are contradictory. Instructions must be harmonious and consistent. 99 Ark. 377; 83 *Id.* 61. The instructions given do not state the law and plaintiffs were entitled to have their cause submitted to the jury upon correct instructions.

2. A vendee may rely upon the representations of the vendor where he has no knowledge and the matter is peculiarly within the knowledge of the vendor. 98 Ark. 44; 97 *Id.* 265. In No. 2 given, the court attempted to define warranty, which has no place in this case. 92 Ark. 282; 73 *Id.* 542; 11 *Id.* 340. No. 3 is abstract and misleading. 90 Ark. 104. No. 4 is defective and erroneous. 99 Ark. 438; 30 *Id.* 535. No. 5 repeats the error in No. 1. 47 Ark. 148. The others are not the law. 47 Ark. 335; 55 *Id.* 296.

Chester Holland, for appellee.

1. There is no error in the court's charge to the jury. 98 Ark. 44; 20 Cyc. 37; 47 Ark. 148; 20 Cyc. 49, 51.

2. The instructions asked by appellant were covered by those given for appellee. The evidence was conflicting and the verdict will not be disturbed.

KIRBY, J., (after stating the facts). The court erred in giving appellee's said instructions and in refusing to give instructions one and two requested by appellants.

The suit was brought for damages for alleged false representations made in the sale of the stock and the issue was not properly submitted to the jury upon the instructions given.

(1-2) It is well settled that one who has been induced to purchase property by the fraudulent representations of the vendor has the right to recover in a court of law the damages which he has sustained thereby, but "in order for representations to be fraudulent in law, they must be material to the contract or transaction and must be made by one who either knows them to be false, or else, not knowing asserts them to be true, and made with the intent to have the other party act upon them to his injury, and such must be their effect." *La. Molasses Co. Ltd.* v. *Fort Smith Wholesale Gro. Co.,* 73 Ark. 542; *Jarratt* v. *Langston,* 99 Ark. 438; *Brown* v. *LeMay,* 101 Ark. 95; *Bank of Monette* v. *Hale,* 104 Ark. 396.

The said instructions asked by appellants properly stated the law applicable to the issue upon their contention and the court erred in not giving them. The testimony was in conflict but was sufficient if believed, to show that the representations as to the value of the stock had been made and that appellee stated further that while the stock had paid no dividends, he had been in a stockholder's meeting, recently before the sale, in which it was determined that there were sufficient funds already made by the bank, out of which a substantial dividend was to be declared, and that the stock was good stuff and no more of it was on the market; that he himself would like to be the owner of a great deal more of it.

(3) These representations were evidently made to assure the buyers of the value of the stock and induce them to purchase without any further investigation of the matter. If the representations were false and knowingly made by the seller to induce the purchaser to rely thereon to his injury and such was their effect, then they were fraudulent and the seller could be required to answer in damages for the injury to the buyer by reason thereof.

The instructions given by the court ignored the theory of appellants' cause of action for damages for alleged fraudulent representations made in the sale of the stock, and erroneously submitted it upon the question of appellee's liability only in the event that the representations amounted to a warranty of the value. *La. Molasses Co. Ltd.* v. *Fort Smith Wholesale Gro. Co.*, 73 Ark. 542.

The representations were only an inducement to the making of the contract of sale, while a warranty would have been part of the contract and an action for its breach would have been upon the contract instead of for the fraudulent representations in the making of it. *Adams Machine Co.* v. *Castleberry*, 84 Ark. 573.

For the error in refusing said instructions one and two and giving those in conflict with the law as stated therein, the judgment is reversed and the cause remanded for a new trial.

GORDON v. McLEARN.

Opinion delivered April 24, 1916.

1. MALICIOUS PROSECUTION—CAUSING ARREST.—Defendant held liable in damages for causing plaintiffs' arrest, having falsely charged plaintiffs with attempting to defeat defendant's lien upon certain cotton in his possession.
2. MALICIOUS PROSECUTION—CIVIL ACTION—INSTIGATION OF PROSECUTION—MALICE.—One who advises and procures a third person to institute a malicious prosecution, may be held liable in damages therefor, and one who aids and abets the prosecutor in such action is liable equally with the latter for damages therefor, nor will the fact that the person who, at the defendant's instigation, made the complaint had probable cause for believing it to be well founded, avail the defendant as a defense, where he acted without probable cause.
3. MALICIOUS PROSECUTION—PUNITIVE DAMAGES.—Punitive damages may be assessed against the defendant, when he caused the plaintiff to be arrested, having acted wilfully, in a wanton and oppressive manner, and in conscious disregard of his civil obligation and of plaintiff's rights.
4. MALICIOUS PROSECUTION—PUNITIVE DAMAGES—AMOUNT.—Puntive damages may not be assessed against the defendant in an action for

malicious prosecution, unless some compensatory damages were also assessed, although the amount of punitive damages awarded may largely exceed the award of compensatory damages; and in such a case where $25 compensatory damages were assessed, a verdict for $1,000 punitive damages will be reduced to $200.

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

Spence & Dudley, for appellant.

1. To sustain the judgments it was necessary to find against both defendants. Since Malin was discharged it is evident there was no conspiracy. The acquittal of one co-conspirator operates as a discharge of the other, 117 Ark. 384; 87 Ark. 34.

2. There is no evidence to sustain the allegation that there was a conspiracy and the jury so found. The court erred in refusing appellant's prayer for a directed verdict. 20 Ark. 225; Words & Phrases, vol. 2, p. 1454.

3. The court erred in its charge to the jury. Where a person does no more than to give information by affidavit to an official, relative to a matter over which he had jurisdiction, he is not liable for trespass for false imprisonment for acts done under a warrant which the officer issues on said charge. 19 Cyc. 330; 95 Ark. 227. Appellant did not make the affidavit. The court should have given appellant's instruction No. 4. He had a landlord's lien for rent. 103 Ark. 91. Appellant's instruction No. 5 should also have been given. 69 Ark. 441; 107 *Id.* 74. Malice and want of probable cause must be shown. 33 Ark. 321; 101 *Id.* 37.

4. Where one lays all the facts before a public prosecutor, or counsel and acts upon his advice, this is conclusive of probable cause. 100 Ark. 316; 107 *Id.* 74.

5. A verdict should have been directed for defendant. The verdict is the result of passion and prejudice and the judgment should be reversed.

S. R. Simpson, for appellees.

1. Appellant was actuated by malice. He had had a fight with appellee, and the rent was paid. 90 Ark. 463.

2. The finding for Malin does not release appellant. There is no error in the instructions.

3. Nominal actual damages will carry punitive damages. 104 Ark. 92; Ann. Cases, 1913, A. 351; 37 L. R. A. (N. S.) 533; 247 Mo. 222; 251 *Id.* 431; 176 Mo. App. 239; 35 Ark. 494; 59 *Id.* 224. The amount of exemplary damages is left to the sound judgment and discretion of the jury. 84 Ark. 250. One who urges a malicious prosecution is liable. 3 L. R. A. (N. S.) 929; 97 Ark. 24; Ann. Cas. 1914, B. 636.

4. The verdict is not excessive. 58 Ark. 239; 101 *Id.* 90; 101 *Id.* 120. The instructions were the law.

SMITH, J. Appellees recovered damages, both compensatory and punitive, against appellant in a suit for malicious prosecution. Appellees brought separate suits against appellant and R. B. Malin, but by consent the causes were consolidated and tried together and a verdict rendered in each case against appellant Gordon for $25 compensatory damages and $1,000 punitive damages, but a verdict was rendered in each case in favor of Malin. It was alleged in each of the complaints that Malin and Gordon conspired together to cause the arrest and prosecution of appellees upon the false charge of having removed and disposed of two bales of cotton, upon which there existed a landlord's lien in favor of Gordon, with the intention of defeating said lien. Upon the verdict being returned in favor of Malin appellant insisted that judgment be pronounced in his favor notwithstanding the verdict, upon the ground that he alone could not be guilty of a conspiracy, and inasmuch as a verdict was rendered in Malin's favor he is also discharged from liability. . . . . .

The evidence is conflicting, but the verdict of the jury has resolved the conflicts in appellees' favor and, when so resolved, the facts may be stated as follows: Appellee McLearn was a minor and made a crop of six acres on land which his brothers Ray and Raymond had rented from appellant. Two other brothers had rented portions of appellant's land for the same year, but they

had made a final settlement of their accounts with appellant and had moved off the place before the cotton in question was sold. Appellee Arthur was also a minor and was employed by McLearn at the time of the sale of the cotton which resulted in their arrest. All of the McLearn brothers except appellee had rented lands from appellant and had agreed to pay the sum of $6.50 per acre money rent. Their tenancy had expired and all of the McLearns were leaving the farm to take charge of another, and friction existed between them and appellant. Under directions from appellant the McLearns had delivered their cotton at Marmaduke to a Mr. Waxmon, who receipted for the cotton received and credited the same to appellant's account. There were also some credits for wood which the McLearns had cut for appellant, and as a result of these credits there was no rent due appellant on the land on which the cotton in controversy was produced. Upon the contrary, it was shown that appellant was slightly indebted to the McLearns, and paid a small balance when a settlement was finally had. Much evidence was offered to the effect that the McLearns pressed appellant for a settlement, but were unable to procure one, as they were desirous of vacating appellant's farm, and of taking possession of the other one which they had rented. Appellee McLearn started to haul a load of hay from the place when appellant forbade him doing so, and a fight ensued in which appellant was worsted, and he thereafter procured the arrest of appellee McLearn for assault and battery.

Appellees hauled the two bales of cotton to Halliday on December 23, where they sold it to Malin for a cent a pound more than they had been able to procure from Waxmon at Marmaduke. Before purchasing the cotton Malin asked appellees about the existence of liens, but was told there were none, and he bought the cotton under the impression that it belonged to Arthur, and the check given in payment therefor was made payable to Arthur's order. There was evidence also of the fact that after loading the cotton appellees changed wagons, of which

fact Malin was apprised after his purchase, and this tended to confirm his suspicions, after they had been aroused by appellant's statements. In appellees' behalf, however, it was shown that the change was made on account of the condition of the road. When appellant learned of this sale he represented to Malin that his rent was not paid and that there was a balance of $80 or $85 due him and that the cotton was subject to his lien, and he told Malin of the circumstances under which the cotton had been removed and that he had forbidden the removal of any cotton, or any product, until his rent was paid. Malin was made to believe from these statements that he would probably lose the money he had paid for the cotton, and he and appellant consulted about the kind of charge to prefer against appellees. Before taking any action, however, Malin conferred with the deputy prosecuting attorney and related to that officer all the facts of which he had knowledge and also what appellant had said, and he was advised by that officer to have appellees arrested. Appellant and Malin went together to the justice of the peace who issued the warrant of arrest, and both were sworn to the statement of fact upon which the warrant of arrest was issued, although only Malin signed it. Thereafter appellees were both arrested, and McLearn was in custody for five hours, during which time he was carried around as a prisoner in the town near which he lived while he was attempting to procure bondsmen to secure his release. He finally made the required bond and was discharged. Arthur was not so fortunate and failing to make his bond he was confined in jail and kept there for three days. Before the trial the McLearns told Malin that they owed appellant nothing, and this statement was repeated to appellant but was denounced by him as being false, but Malin became convinced their statement was true, and so advised the prosecuting attorney, who ordered the dismissal of the criminal charge against appellees, and thus the prosecution was ended.

Separate answers were filed by Malin and by appellant, and both denied the existence of any conspiracy to

prosecute appellees falsely. Malin defended on the grounds of absence of malice, the advice of counsel, which he had acted upon in good faith, and the existence of probable cause for his action. In support of his defense he testified that appellant told him the cotton was his, that he had a rent note signed by all the McLearns when, in fact, he had no note, and that the rent was not paid, and he demanded the possession of the cotton and said, "These boys have sold that cotton and more than likely he (McLearn) is fixing to get away." Appellant and Malin went together to the justice of the peace and together fixed up the affidavit, whereupon Malin said to the justice of the peace that appellant was the man to make the affidavit and stated to appellant at the time, "I don't know anything about it only what you say," but appellant said, "No, you sign it," and the officer said, "You can both sign it," but Malin said, "He is the man who knows," and the officer said, "You can both swear to it," and this was done, although Malin alone signed his name to the affidavit.

Appellant's defense is and was that he had probable cause to have appellees arrested, although he denies having done so. Under the allegations of his answer appellees are guilty of the crime charged in the warrant of arrest which was issued by the justice of the peace, and he testified that the action taken by him was done to protect his lien as landlord.

(1) It is insisted that inasmuch as there had been no settlement, appellees had no right to remove any portion of the crop from the premises. If it be conceded that this is true, and that appellant had the right to attach the cotton, it still does not follow that he had the right to have appellees arrested. He would have had no right to procure appellees' arrest unless he had reasonable groud for believing that they were removing the cotton from the premises to defeat him in the collection of his debt. Under the proof the jury could have found that appellant, not only knew there was no rent due him, but also that he knew there was being held on

the place enough cotton to pay any balance claimed by him. However, this question was passed upon by the jury. In instruction numbered six the court told the jury that, if, at the time of the removal of the cotton from the farm, or at the time of its sale to Malin, any part of the rent on the land on which said cotton was produced was unpaid, and that the cotton was removed and sold without the consent of Gordon, to return a verdict for both defendants. A more favorable instruction could not have been asked.

Appellant was cross-examined at length about his failure to consent to or to order the discharge of appellees prior to the time their discharge was ordered by the deputy prosecuting attorney upon Malin's direction, and about the state of his feelings towards appellees and particularly towards McLearn, and the jury might have found that his answers but ill-concealed the express malice which other facts and circumstances tended to establish. Appellant testified at the trial that, at the time of the removal and sale of the cotton, there was due him a balance of $80 or $85 on account of the rent, and had the jury credited this statement that this sum, or any other sum, was then due him, the verdict, under instruction numbered six, must necessarily have been in his favor.

(2) We think appellant's contention that the verdict of the jury in Malin's favor requires his own discharge is not well taken. It is true, of course, and has been so decided by this court, that, upon the indictment of two persons only for criminal conspiracy, the acquittal of one is an acquittal of the other. *State* v. *Smith*, 117 Ark. 384; *Cumnock* v. *State*, 87 Ark. 34.

But this is not a criminal prosecution against appellant and Malin. The complaint did not charge that they conspired together to wrongfully procure appellees' prosecution, and proof of concert of action was necessary to support a finding of joint liability for the tort committed. But the individual liability did not depend upon the proof of the existence of a conspiracy. At least two persons must be guilty to constitute an unlawful conspiracy,

whereas one person alone may be guilty of conduct which furnishes the foundation for an action for malicious prosecution, even though such person induces another to set the machinery of the law in motion. The court submitted these questions to the jury under appropriate instructions, and the jury was told the circumstances under which one or the other or both of the defendants might be held liable. Here the jury had evidence to support its finding that appellant alone was liable for this prosecution, and their verdict in Malin's favor shows that they so found. It is true Malin signed the affidavit and appellant did not do so. But this fact does not necessarily make one liable, nor does it necessarily excuse the other. Malin may have been excused by the jury because of a finding in his favor that he had probable cause, or was not prompted by malice, or was justified in acting upon the advice of counsel; but the proof did not also require a finding in appellant's favor because Malin was exonerated from blame, nor because appellant did not actually make the affidavit. The rule in such cases is stated in 19 A. & E. Enc. of Law (2nd ed.) p. 692, title "Malicious prosecution," as follows:

"One who advises and procures a third person to institute a malicious prosecution may be held liable in damages therefor, and one who aided and abetted the prosecutor in such action is liable equally with the latter for damages therefor. Nor will the fact that the person who, at the defendant's instigation, made the complaint had probable cause for believing it to be well founded avail the defendant as a defense where he acted without probable cause."

The same authority also states the law to be:

"But it is not necessary to prove that the defendant was the originator of the proceedings complained of. If he participated voluntarily in the malicious prosecution, and it was carried on with his countenance and approbation, he will be liable."

But we are not called upon to approve the law thus broadly stated to uphold the findings of liability against appellant, for the proof here is that he, not only countenanced and gave approbation to the prosecution, but, that he, in fact instigated it. See cases cited in notes to the text quoted, and see also 26 Cyc. p. 17, and cases there cited.

(3) The majority of the court is of the opinion that the evidence supports the finding that appellant's wrongful act was wilfully done, in a wanton and oppressive manner and in conscious disregard of his civil obligations and of appellees' rights and, therefore, punitive damages were properly assessed. Newell on Malicious Prosecution, p. 524.

(4) But we are also of the opinion that excessive damages on this account were allowed in view of all the circumstances shown in the case and especially in view of the comparatively normal sum allowed as compensatory damages. No punitive damages could be assessed unless some compensatory damages were also assessed, although, of course, punitive damages might largely exceed the compensatory damages; but the disparity here is too great under the circumstances of this case, and the judgment for punitive damages will accordingly be reduced to the sum of $200 in each case and as thus reduced the judgment will be affirmed.

GERMAN NATIONAL BANK OF LITTLE ROCK v. YOUNG.

Opinion delivered April 17, 1916.

1. RECEIVERS—LIABILITY OF BONDSMEN—BREACH OF BOND.—There is no right of action on the bond of a receiver until a breach of his bond occurs in failing to comply with the orders of the chancery court, in which the receivership is pending.
2. RECEIVERS—BREACH OF BOND.—The breach consists in the refusal to pay over money in accordance with the directions of the court, and creditors who are injured by such breach can then maintain suit at law on the bond.
3. RECEIVERS—BREACH OF BOND—RIGHTS OF CREDITORS.—There is no injury to the individual creditor of the estate in the hands of a re-

ceiver, until there has been an order of distribution by the court, and each creditor has an independent right of action on the bond for the amount awarded to him in the distribution of the funds in the receiver's hands.

4. PLEADING AND PRACTICE—STATEMENT OF CAUSE OF ACTION.—The face of the complaint must alone be looked to to determine whether there is a cause of action stated.

5. RECEIVERS—ORDER OF COURT TO PAY OVER FUNDS.—The complaint alleged a finding by the chancery court that the receiver held a certain sum of money, and was justly indebted to plaintiff in that sum, *held*, tantamount to an allegation that the chancery court ordered the receiver to pay over to plaintiff that amount of the funds in his hands.

Appeal from Sebastian Circuit Court, Fort Smith District; *Paul Little,* Judge, reversed.

Hill, Fitzhugh & Brizzolara, for appellant.

1. Plaintiff had a right to sue. The order of the chancery court gave it that right. Smith on Receiverships, § 380; Brandt on Suretyship, § 154; 3 Enc. Pl. & Pr. 640; Bliss on Code Pl., § 58 (3 ed.); Pomeroy Code Pl. (4 ed.), § 79; 34 Cyc. 508; 112 Ark. 71; 58 *Id.* 593; 86 *Id.* 212; 21 *Id.* 140.

The question of defect of parties cannot be raised by motion. Kirby's Digest, § 6096. The motion could not be considered as a demurrer. The action was transitory. 70 Ark. 151; 103 *Id.* 151.

Holland & Holland and *R. W. McFarlane* for appellees.

Appellant had no legal capacity to sue. 79 Ark. 62; 112 *Id.* 71.

McCULLOCH, C. J. R. A. Young, one of the defendants and appellees, was receiver of the Hiawatha Smokeless Coal Company a corporation, and his co-appellees were sureties on his bond as such receiver. The plaintiff, German National Bank, was one of the creditors of said corporation, and this is an action instituted at law against the receiver and the sureties on his bond to recover the amount alleged to be due to the plaintiff out of the assets of said corporation, in the hands of the receiver, according to the adjustment of his accounts by the chancery court

of Sebastian County. It is alleged in the complaint that said chancery court "restated the account of said R. A. Young, as receiver of said coal company, and found by said judgment that the said R. A. Young had and now has in his hands as such receiver" the aggregate sum of $6,689.75, including interest, and that "said receiver has disposed of the assets of the said coal company and had filed his final account in said chancery court and that the account has been restated by said court as above set forth and that by judgment of said chancery court said defendant, R. A. Young, as such receiver, has been declared justly indebted to the plaintiff in the said sum of $6,689.75 together with the interest and cost mentioned in said judgment."

The defendants appeared and filed a motion to dismiss the suit on the ground that "said complaint shows that the plaintiff is not the only real party in interest and is therefore not entitled to prosecute this suit on behalf of itself to the exclusion of all other parties in interest; that it is necessary to a final determination and adjudication of the controversy that other persons be made parties to this suit; that plaintiff, if successful in the prosecution of this suit, and a judgment rendered in its favor would not be a bar to the prosecution of similar suits by other parties united in interest, and, therefore, to avoid a multiplicity of suits as provided by the statute, the defendants move the court to dismiss the cause." The court evidently treated the motion to dismiss as a demurrer and sustained it and dismissed the action. An appeal has been prosecuted to this court by the plaintiff.

(1-3) The decision of the circuit court is defended on the ground that the allegations of the complaint are not sufficient to show a breach of the bond by the defendants in the failure of the receiver to pay over the funds in accordance with the order of the chancery court. There is no right of action on the bond of a receiver until a breach of his bond occurs in failing to comply with the orders of the chancery court in which the receivership is pending. *State* v. *Gibson,* 21 Ark. 140. The breach

consists of the refusal to pay over money in accordance with the directions of the court, and creditors who are injured by such breach can then maintain suit at law on the bond. There is no injury to the individual creditor of the estate in the hands of a receiver until there has been an order of distribution by the court, and each creditor has an independent right of action on the bond for the amount awarded to him in the distribution of the funds in the hands of the receiver. High on Receivers, § § 129, 130; Alderson on Receivers, § 165; *Kirker* v. *Owings,* 98 Fed. 499; *French* v. *Dauchy,* 134 N. Y. 543.

(4-5) The face of the complaint must alone be looked to to determine whether there is a cause of action stated (*Euper* v. *State,* 85 Ark. 223); and we are of the opinion that the complaint contains a sufficient allegation as to an order made by the chancery court directing the receiver to pay over the sum of money sought to be recovered. The allegation is that the chancery court found that the receiver now has in his hands said sum of $6,689.75, and that the receiver had been declared by the chancery court to be justly indebted to the plaintiff in that sum which is tantamount to alleging that the chancery court ordered the receiver to pay over to the plaintiff that amount of the funds in his hands. Our conclusion therefore is that a cause of action is stated in the complaint and that the circuit court erred in deciding to the contrary. Of course the truth of the allegations of the complaint can be tested by the proof when the issue is raised by an answer.

Reversed and remanded with directions to overrule the demurrer.

UNITED STATES FIDELITY & GUARANTY COMPANY *v.* HODGINS.

Opinion delivered May 1, 1916.

1. ADMINISTRATION—ORDER OF PROBATE COURT—COLLATERAL ATTACK.—An order of distribution of an estate, made by the probate court, is not open to collateral attack, either on the ground that notice, was not given to the other distributees, or that the debts of the estate had not been paid.

2. ADMINISTRATION—ORDER OF DISTRIBUTION—CONCLUSIVENESS.—A probate court's order of distribution is conclusive, not only upon the administrator, but upon the surety, as to all matters which were adjudicated or which could have been adjudicated in the order of distribution.

3. ADMINISTRATION—RBEACH OF BOND—SETTLEMENT BETWEEN HEIRS.—It is no defense to an action upon an administrator's bond to allege that the heirs agreed to a certain settlement prior to the court's order of distribution. *Semble*, but the fact of a settlement subsequent to the order of distribution may be pleaded as a satisfaction of the order of distribution.

Appeal from Benton Circuit Court; *J. S. Maples*, Judge; affirmed.

Dick Rice, for appellant.

1. The complaint stated no cause of action. 47 Ark. 22; 107 S. W .170; *Ib.* 1177.

2. It was error to sustain the demurrer to the answer. It stated good defenses. Kirby's Digest, § § 163-4, 160-1; 55 Ark. 79; 17 S. W. 587; 57 Ark. 232; 21 S. W. 223; 97*Id.* 282; 17 Ark. 567; 35 *Id.* 137; 48 *Id.* 3; 57 *Id.* 352.

3. Family settlements are uniformly upheld. A family settlement was a good defense. 98 Ark. 93; 102 Ark. 658; 14 Cyc. 132.

W. N. Ivie and *C. A. Fuller* for appellee.

Every defense alleged was one that should have been alleged and litigated in the probate court. The order of distribution by that court is conclusive. 80 Ark. 304; 70 *Id.* 200; 19 *Id.* 421; 55 *Id.* 538; 94 U. S. 423; 46 *Id.* 260; 14 *Id.* 170; 50 *Id.* 102; 29 *Id.* 472; 51 *Id.* 205; 40 L. R. A. (N. S.) 712; 107 Ark. 41; 154 S. W. 198.

McCULLOCH, C. J. This is an action instituted by the plaintiff, Helen Rucker Hodgins, against the defendant United States Fidelity and Guaranty Company, on a surety bond executed by said defendant for the administrator of the estate of J. C. Rucker, deceased. It is alleged in the complaint that the plaintiff is one of the heirs and distributees of the estate of said decedent; that the accounts of the administrator had been adjusted by the

probate court of the county, and that an order had been made by said probate court directing the administrator to pay over to the plaintiff the sum of $2,121.50 as her distributive share of the funds of said estate in the hands of the administrator. It is further alleged that the administrator had failed and refused to pay over said sum of money to the plaintiff in accordance with the order of the probate court, and that the conditions of said surety bond executed by the defendant were therefore broken.

(1-2) Defendant filed an answer containing numerous paragraphs, to some of which the court sustained a demurrer. The only errors assigned here are those which relate to the decision of the court in sustaining the demurrer to the answer. The first assignment relates to a paragraph of the answer which challenges the validity of the order of distribution made by the probate court on the ground that there was no finding by the court that the debts of the estate had been paid, and that no notice was given by the plaintiff to the other heirs of the intention to apply for an order of distribution. Those assignments are to be disposed of by the statement that the order of distribution made by the probate court is not open to collateral attack, either on the ground that notice was not given to the other distributees or that the debts of the estate had not been paid. "The probate court being a court of superior jurisdiction," said Judge Battle, speaking for the court in the case of *Briggs* v. *Manning,* 80 Ark. 304, "and its record being silent as to notice of the application the presumption is that it was duly given." The order of distribution is conclusive, not only upon the administrator but upon the surety, as to all matters which were adjudicated or which could have been adjudicated in the order of distribution. *George* v. *Elms,* 46 Ark. 260.

(3) Another paragraph to which the demurrer was sustained undertakes to set up as a defense to this action an alleged settlement of the estate between the different heirs and distributees. That, too, is concluded by the judgment of the probate court ordering the distribution

and the payment to the plaintiff of the amount mentioned in the complaint as her distributive share. If that paragraph of the answer had set forth a settlement among the heirs subsequent to the order of distribution, then that fact could have been pleaded as a satisfaction of the order of distribution, and consequently a sufficient defense by the surety against the alleged breach of the obligations of the bond; but there is no allegation that this settlement occurred subsequent to the order of distribution, therefore the said order is conclusive of the right of the parties at the time the order was made.

We are of the opinion, therefore, that the paragraphs to which the court sustained demurrers did not set forth a defense to the plaintiff's action and that the court was correct in sustaining the demurrers.

Judgment affirmed.

CLIMER v. AYLOR.

Opinion delivered May 1, 1916.

1. REPLEVIN—FORM OF COMPLAINT.—Where the plaintiff does not ask for the delivery of the property at the commencement of the action, or at any time before judgment, the statute does not require that the complaint be filed in any particular form; it is only when the plaintiff desires the possession or delivery of the property prior to the judgment, that he is required to file an affidavit in compliance with Kirby's Digest,, § 6854.
2. REPLEVIN—FORM OF COMPLAINT.—When there is a statement of the facts constituting the cause of action in justice court, whether the pleading be designated as an affidavit or a complaint, it is sufficient to give the court jurisdiction of the subject matter in replevin.
3. REPLEVIN—COMPLAINT—DEMURRER.—The pleadings filed in the justice and circuit courts, *held*, on demurrer, to state a cause of action in replevin.
4. REPLEVIN—ALLEGATION OF OWNERSHIP.—In an action in replevin it is necessary that the complaint either expressly allege that plaintiff is the owner of the property, or it must contain sufficient allegations from which ownership in the plaintiff would be necessarily implied.
5. REPLEVIN—ALLEGATION OF OWNERSHIP—SPECIAL DEMURRER.—The defect of a complaint in replevin, in the matter of an allegation of special ownership, should be reached by special demurrer, in which

event the plaintiff may amend showing the character of his ownership.

6. REPLEVIN—ALLEGATION OF OWNERSHIP—"CLAIM" OF RIGHT OF POSSESSION.—An allegation in a complaint in replevin that plaintiff "claims" a certain horse, *held* to amount to an assertion of the right of ownership, and is good on general demurrer.

Appeal from Izard Circuit Court; *J. B. Baker*, Judge; reversed.

Bledsoe & Ashley, for appellant.

1. The complaint was sufficient. Kirby's Digest, § 6854. No delivery was asked. The affidavit was no part of the complaint. 34 Ark. 111. The wrongful detention and such general or special property in plaintiff as entitles him to the immediate possession are the essential facts necessary to support replevin. Shipman on Common Law Pleading; 107, 34 Cyc. 1464-5. No particular form is necessary, 75 N. Y., 1. Ownership need not be alleged in express terms if words of equivalent import are used. 34 Cyc. 1469; 61 Mo. App. 445; 49 N. Y. Supreme Court 178.

2. The amended complaint cured all defects and contained all necessary allegations. Kirby's Digest, § 6854; 44 Ark. 308; 34 Cyc. 1489. Amendments in furtherance of justice should be allowed. 62 Kans. 128; Kirby's Digest, § 6143, 6147-8.

The appellee, *pro se*.

1. The complaint was not sufficient to give plaintiff a right of action in replevin. Kirby's Digest, § 6854. It contained none of the requisites. 35 Ark. 175; 73 *Id.* 586.

2. Nor was the amended complaint sufficient. Kirby's Digest, § 6854; 35 Ark. 175; 73 *Id.* 589; 124 N. Y. 148; 77 Ark. 299; 93 *Id.* 272; 106 *Id.* 438; 34 Cyc. 1489; 85 Ark. 444. The affidavit is no part of the complaint, but if there be no statutory affidavit, the complaint must contain all the statutory requirements. Kirby's Digest, § 6854; 73 Ark. 589.

WOOD, J. Appellant instituted this suit against the appellee to recover the possession of a certain horse.

His amended complaint is as follows: "Comes the plaintiff and states that he claims a certain horse in this action; that it is an iron gray horse, about three years old and about 14½ hands high, and is worth about $130.00; and for the detention of said horse he believes that he ought to recover the sum of $25.00; that he is entitled to the immediate possession of said horse; that said horse is wrongfully detained by defendant, T. E. Aylor, and that according to the best knowledge, information and belief of plaintiff that said defendant detains said horse under false claim of being owner thereof; that said horse was not taken for tax or fine against plaintiff or under an order or judgment of court against his property and that his cause of action herein accrued within three years last past. The aforesaid property was taken under an execution sued out against W. R. Johnson by the aforesaid Tom Aylor and bought in at sale under said execution by said Tom Aylor."

The suit was begun in the justice court. The appellant filed therein the following affidavit:

"The plaintiff, Arthur Climer, states that he is entitled to immediate possession of the following described property, towit: (describing the horse) of which the defendant Tom Aylor has possession without right, and which he unlawfully detains from plaintiff. Wherefore, plaintiff prays judgment for the recovery of said property and for twenty-five dollars damages for detention thereof and all injuries thereto and other relief."

The judgment recites: "That on motion of the defendant the amended complaint filed in the action is struck from the files and the cause is dismissed," to which ruling the plaintiff duly excepted and prayed and was granted an appeal.

Evidently the court treated the motion to strike as a general demurrer to the complaint, and the only question is, does the complaint state a cause of action?

(1) All forms of civil actions are abolished under our code. Kirby's Digest, § 5980. Our replevin law,

Kirby's Digest, Chap. 136, contains no requirements for the form of a complaint to recover the possession of personal property where the plaintiff does not ask for a delivery of the property at the commencement of the action or at any time before judgment, but it is only when the plaintiff desires the possession or delivery of the property prior to the judgment that he is required to file an affidavit in compliance with section 6854 of Kirby's Digest.

No formal written pleadings are required to be filed in a justice court. A short written statement of facts on which the action is founded is all that is necessary. Kirby's Digest, § 4565.

(2) The pleading filed in the justice court did not purport to be an affidavit, but was designated as a complaint at law. It set up that the plaintiff was entitled to the immediate possession of the horse of which the defendant had possession without right and which he unlawfully detained from the plaintiff. Where there is a statement of the facts constituting the cause of action, whether the pleading be designated as an affidavit or a complaint, it is sufficient to give the court jurisdiction of the subject matter in replevin. See *Hanner* v. *Bailey*, 30 Ark. 681.

(3) The allegation that the plaintiff was entitled to the immediate possession of the horse of which the defendant had possession without right and which he unlawfully detained from the plaintiff, with a prayer for the recovery of the horse and damages for the detention thereof, was a sufficient statement of the facts constituting a cause of action to give the justice court jurisdiction of the subject matter, and on appeal to the circuit court the appellant filed an amended complaint which states that plaintiff "claims a certain horse in this action:" that he was entitled to the immediate possession of the horse; that the same was wrongfully detained by defendant who made the false claim of being the owner thereof, and that the horse was not taken from the plaintiff for tax or fine or under an order or judgment of court

against his property. The pleadings filed before the justice and the amended complaint filed in the circuit court were sufficient on demurrer to state a cause of action for the recovery of the possession of the horse in controversy.

The plaintiff could not have been entitled to the immediate possession of the property, and the defendant could not have been in possession thereof and have detained the property from plaintiff without right unless the plaintiff had general or special ownership in the property.

(4-5) As we have shown, there is no statutory requirement that a complaint in replevin should allege in specific words that the plaintiff is the owner of the property or has a special ownership or interest therein. It is necessary, however, that the complaint should either expressly allege that the plaintiff is the owner or contain sufficient allegations from which ownership in the plaintiff would be necessarily implied. Such is the complaint under review. True, it is not shown by the allegations of this complaint whether the plaintiff claims under a general ownership or special ownership, and in this respect the complaint was defective, but not wholly so. The defect could have been reached by special demurrer, in which case the appellant could have amended his complaint to show whether his ownership was general or special, and if special to set forth the facts upon which his claim of special ownership was based. If he claimed under a general or absolute ownership then it was only necessary for him to allege such title or ownership generally and the right of immediate possession. See *Person* v. *Wright & Montgomery,* 35 Ark. 169; *Perry County Bank* v. *Rankin,* 73 Ark. 589-593.

(6) The amended complaint in which the appellant alleges that he claims the property is the same in legal effect as if appellant had said he claims to own a certain horse, etc. The meaning of "claim" is "to demand on the ground of right; affirm to be one's own or one's due; assert a right to or ownership of, as to claim a title,

etc." Funk & Wagnall's New Standard Dictionary; Webster's Dictionary. Such is the sense in which the word should be construed as used in the amended complaint. As it is used it is intended to and does convey the idea that appellant was asserting a right to or ownership of the horse. The complaint was at least sufficient on general demurrer, and the court erred therefore in dismissing the same. The defects therein could and should have been reached by a motion to make more specific. Under our liberal rules of pleading the appellant should have been allowed to amend his cause of action, defectively stated, but the court erred in turning him out without giving him this opportunity.

The judgment is therefore reversed and the cause remanded with directions to overrule the demurrer.

MEMPHIS, DALLAS & GULF RAILROAD COMPANY v. YANDELL.

Opinion delivered May 1, 1916.

1. CARRIERS—MOVEMENT OF CARS—INJURY TO OWNERS OF FREIGHT AND EMPLOYEES.—It is the duty of a carrier to exercise ordinary or reasonable care and diligence in moving its cars, to prevent injury to owners of freight and their employees rightfully engaged in loading or unloading cars.
2. CARRIERS—MOVEMENT OF CARS—EMPLOYEES OF SHIPPER—INJURY—NOTICE.—Where the employees of the shipper of freight are engaged in loading a car, the carrier will not be liable for an injury to one of such agents, when notice that the car was to be moved was given in apt time, to have enabled plaintiff to reach a place of safety, or to have prepared for the movement.

Appeal from Hempstead Circuit Court; *George R. Haynie,* Judge; reversed.

J. W. Bishop, J. G. Sain, E. B. Kinsworthy and *R. E. Wiley,* for appellants.

A verdict should have been directed for defendants. There was no evidence showing liability. The law is well settled and the court erred in its instructions. 33 Cyc. 1141; 88 Ark. 531; 101 *Id.* 43, 433; 105 *Id.* 184;

Kirby's Digest, § 6607 as amended by Act May 26, 1911. Appellee was bound to the exercise of ordinary or reasonable care, and if by the exercise of such care he could have seen the approach of the cars in time to have avoided the injury and failed to do so, no recovery could be had. The question of contributory negligence was for the jury. 101 Ark. 43, 433.

McRae & Tompkins, for appellee.

There is no error in the instructions. 93 Ark. 15. The evidence sustains the verdict.

HART, J. Jim Yandell sued the Memphis, Dallas & Gulf Railroad Company and St. Louis, Iron Mountain & Southern Railroad Company, to recover damages for injuries received by him while loading a car on the side track of the defendants. The plaintiff charges that on the 5th day of March, 1915, while he was loading a car in the yards of the St. Louis, Iron Mountain & Southern Railway Company at Glenwood, the employees of the Memphis, Dallas & Gulf Railroad Company, who were permitted to use the side tracks of its co-defendants for the purpose of switching its cars, negligently ran one of its engines against the car in which the plaintiff was working, with such force as to injure him.

The case was tried before a jury which returned a verdict for the plaintiff and from the judgment rendered the defendants have appealed. The only question that needs consideration here is whether the court below erred in refusing to direct a verdict for the defendants.

On the day the plaintiff was injured he was engaged in loading a car of household goods at Glenwood, a station on the line of the St. Louis, Iron Mountain & Southern Railway Company. The car had been placed on the side track and turned over by the agent to be loaded with household goods to be shipped to Womble. The plaintiff and one H. T. Grant were employed by G. A. Driggars, a drayman, to load the car. Driggars said that he had backed his wagon up against the car and they had put into the car a big stove weighing about four or five hundred pounds; that the plaintiff and Grant were still in

the car and that he was on the wagon handing out goods to the plaintiff to be loaded in the car. That there was another person named Burk unloading a car of feed two or three cars ahead of him; that an employee of the Memphis, Dallas & Gulf Railroad Company hallooed to Burk that one of its engines was coming in on the side tracks to couple to the cars there; that Burke hallooed to him that the engine was coming in and he hallooed to the boys in the car that the engine was going to hit the car. At the same time he whipped up his horses. Just as soon as he got his wagon away from the car the engine hit it and coupled on to it. He also stated that Yandell was in the door of the car by the stove and could have stepped out of the car after he warned him. Grant stated that he was further back in the car and that the engine struck the car tolerably hard; that he heard some one say before that, to look out that the engine was going to hit the car; that this was just a few minutes before the engine did hit the car; that Yandell was sitting down, the first he saw of him after the engine struck the car; that the car was moved when the engine struck it but it was only moved a little bit.

The plaintiff testified that when the engine came back and struck the car he was taking things that Mr. Driggars was handing to him and placing them in the car; that the stove was right in the door of the car; that he never heard the engine coming and does not remember when it struck the car; that the last thing he remembered was picking up a box and did not remember anything more until three days afterwards. The plaintiff was treated for pneumonia after this and one of his physicians testified that pneumonia was some times caused by a fall or some injury.

(1) On the part of the defendants it was shown that its employees warned the persons engaged in loading the car before the engine coupled on to it. It was also shown by the defendants that in making the coupling that the engine did not strike the car with any unusual force. It is well settled in this State that it is the duty

of the carrier to exercise ordinary or reasonable care and diligence in moving its cars, to prevent injury to owners of freight and their employees rightfully engaged in loading or unloading cars. *St. Louis, I. M. & S. Ry. Co.* v. *Clements,* 93 Ark. 15; *Missouri & North Arkansas Rd. Co.* v. *Duncan,* 104 Ark. 409; *Little Rock & Hot Springs Western Rd. Co.* v. *Cross,* 78 Ark. 220; *Little Rock & Hot Springs Western Rd. Co.* v. *McQueeny,* 78 Ark. 22.

(2) The car had been turned over to the shipper by the railroad agent for the purpose of loading it. The plaintiff was employed by the drayman to assist in loading the goods into the car. Hence he was rightfully in the car and it was the duty of the defendants to exercise ordinary care in giving notice or warning of the intention to make the coupling. The undisputed evidence shows that this warning was given. From the principles announced in the authorities just cited, it is apparent that the defendant was not required to give notice to each one of the persons engaged in loading goods into the car. Notice given in apt time to one of those engaged in loading the car was sufficient.

Driggars, the drayman who was employed to haul the goods and load them into the car testified, that defendant's agents hallooed to a Mr. Burk who was unloading a car nearby that one of its engines was coming in on the side track to couple to the car; that Mr. Burk notified him of this fact; and that he at once notified the plaintiff and Grant who were both in the car; that he at the same time drove up his wagon and that plaintiff who was standing in the door of the car had time to get out of it before the engine struck the car.

Grant also testified that he heard the warning but was further back in the car than the plaintiff. The defendant's employees also stated that warning that the engine would be coupled on to the car was given. The plaintiff himself did not testify in regard to this precise point but it was not shown that he was deaf. He was standing in the door of the car when the warning was

given by the drayman who was only a few feet away. The warning was heard by another person further back in the car and plaintiff will have also be deemed to have heard it. The evidence showed that the warning was given in time for him to have jumped out of the car or to have braced himself if he elected to stay in the car. It is also claimed that even if the warning was given in time, that the engine was bumped into the car with unusual violence and this was an act of negligence subjecting it to liability for an injury to the person in the car. Here again however, the undisputed evidence shows that the engine did not strike the car with unusual violence.

The witnesses for the defendant testified that the coupling was made in the usual manner and that there was no unusual jolt or jar. Grant who was in the car with the plaintiff testified, that the engine struck the car tolerably hard; but this is not equivalent to saying that it struck it with unusual force. It is a matter of common knowledge that the engine would be required to strike it with some force in order to make the coupling. Grant was not thrown down or inconvenienced in any way by the impact of the engine against the car. There is nothing whatever in the testimony from which the jury might have inferred that an unusual or extraordinary jolt or jar was caused when the engine coupled on to the car. It follows that the verdict of the jury was without evidence legally sufficient to support it. Therefore, the court erred in not directing a verdict for the defendants. For that error, the judgment must be reversed and inasmuch as the plaintiff's case has been fully developed, his cause of action will be dismissed.

PORTER v. STATE.

Opinion delivered May 1, 1916.

CRIMINAL LAW—LARCENY—INDICTMENT—OWNERSHIP.—An indictment alleged the ownership of the property stolen to be in J. B. S. and W. A. J. S. The proof showed that W. A. J. S. was the sole owner. *Held*, the indictment was valid.

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

Wallace Davis, Attorney General, and *Hamilton Moses,* Assistant, for appellee.

1. There is no fatal variance between the indictment and proof. Kirby's Digest, § 2233. The indictment and proof sufficiently identifies the illegal act. 32 Ark. 205; 105 *Id.* 84; 113 *Id.* 112; 117 *Id.* 300; Kirby's Digest, § § 2243, 2228-9; 93 Ark. 408; 157 S. W. 935.

2. There is no error in the instructions. Kirby's Digest, § 2384; 90 Ark. 460; 64 *Id.* 253; 65 *Id.* 547; 52 *Id.* 187.

3. The testimony of the accomplice was sufficiently corroborated. 64 Ark. 253; 52 *Id.* 187; 101 *Id.* 142; 101 *Id.* 570; 39 Cal. 614; 84 *Id.* 480.

SMITH, J. Appellants were convicted of grand larceny under an indictment which alleged the ownership of the property said to have been stolen to be in J. B. Sturdivant and W. A. J. Sturdivant. The goods were stolen from a store operated by J. B. Sturdivant, but the proof shows he was conducting the store for his brother W. A. J. Sturdivant, who is the sole owner, and it is said there is a fatal variance between the allegations of the indictment and the proof at the trial. The motion for a new trial preserved other exceptions, but we think they are not of sufficient importance to require discussion.

Notwithstanding the fact that section 2233 of Kirby's Digest provides that if an offense is described with sufficient certainty to identify the act an erroneous allegation as to the person injured is not material, it has been frequently held that an erroneous allegation of ownership in an indictment for larceny is fatal. In the case of *Merritt* v. *State,* 73 Ark. 33, the property stolen was alleged to belong to W., whereas the proof showed it to be the property of W. and C., and it was there said that, in the absence of proof showing exclusive possession in W., the variance was fatal. In support of that holding

the court quoted with approval from section 723 of 3 Bishop's New Criminal Procedure. That entire section reads as follows:

"Sec. 723. 1. Where the ownership is joint—as in a business firm, or the like, it must be laid in all. Each name should be given in full; simply the partnership name, for example, not sufficing. Nor, where partners are the owners, need either the fact of the partnership, or the firm name, be averred. And if one of them has such a separate possession as gives him a special property, it will not be ill to lay the ownership in him alone. Where it is laid in three, it will be fatal variance to prove it in two only.

"2. Several—If the thing belongs to A, B, and C, not jointly, but each owning his several part, it is ill to say 'of the goods of A, B, and C,' which means a joint ownership."

The rule there announced states the requirements of a valid indictment except insofar as those requirements have been relaxed by statute. And that there has been a relaxation of this rigidity is shown by the decision of this court in the cases of *Davis* v. *State,* 117 Ark. 300, *Andrews* v. *State,* 100 Ark. 184, *Hughes* v. *State,* 109 Ark. 403; *Ivy* v. *State,* 109 Ark. 446. In these cases we held it not essential to allege the names of the partners composing a firm, and that where the firm name is correctly alleged an erroneous allegation of the names of the partners composing it is immaterial. The reason for the relaxation is stated in the opinion in the case of *Andrews* v. *State,* as follows:

"Now, in all of the cases on the point heretofore decided by this court the indictment charged ownership by individuals, and there was no other sufficient identification. In the present case, however, there is another description in stating the partnership name, and to that extent the proof conforms to the allegations of the indictment. The only variance is as to the name of one of the partners. If the statute (Section 2233 of Kirby's Digest) has any application at all to larceny and kindred

cases, and if any effect at all is to be given to it in such cases, we must hold that it applies, and that, there being a sufficient identification of the property in stating the partnership name, the statute applies and renders the erroneous allegation as to one of the persons injured immaterial. It is true that ordinarily in cases of this kind the rules of criminal pleadings require that the names of partners be given, but, so far as identification of the property is concerned, it is described by naming the partnership and, by operation of the statute, an error as to the individual names of the partners is immaterial."

The language was re-affirmed in the case of *Hughes* v. *State,* 109 Ark. 405, in which case it was pointed out that the view there expressed was in conflict with language in the opinion in the case of *McCowan* v. *State,* 58 Ark. 17, but in overruling that case, to the extent which was done, we merely gave effect to that language of the statute which applied to the facts recited.

While we do not intend to overrule or to impair the authority of the case of *Merrit* v. *State, supra,* we do not think the doctrine of that case should be extended to cover the facts of this case. In that case there was a failure to allege the name of one of the owners of the property stolen. There is no such failure here. It is true the indictment here alleges as an owner a person who has no interest in the property, but that allegation must be treated as surplusage, inasmuch as the indictment does correctly allege as an owner the name of the person who, according to the evidence, is the sole owner. In other words, an indictment must allege the names of the owners to enable the court to pronounce judgment, on conviction, according to the rights of the case and to prevent prejudice to the substantial rights of the defendant. If he is to be convicted he has the right to have named in his indictment all persons who are supposed to have been aggrieved by his act, so that he may prepare for his defense and plead the acquittal or conviction successfully should he be again indicted for the same offense, but when this has been done, and the indictment is otherwise

sufficient, he is not prejudiced by the insertion of the name of a person as an owner who, in fact, has no interest in the property alleged to have been stolen.

We conclude, therefore, that the indictment meets the requirements of sections 2228 and 2229 of Kirby's Digest as those sections have been construed in frequent decisions by this court. The judgment of the court below is, therefore, affirmed.

GLEASON v. BOONE.

Opinion delivered May 1, 1916.

1. NEW TRIAL—JUDGMENT ON CONSTRUCTIVE SERVICE—PRACTICE.—Where a judgment defendant, who has been constructively served, seeks a new trial under Kirby's Digest, § 6259, he can not have the judgment vacated on the motion; the judgment remains until the case is retried, to be then confirmed, modified or set aside.
2. NEW TRIAL—CONSTRUCTIVE SERVICE—SALES OF LAND—PRACTICE.—Where the suit in which the defendant was constructively served, was for the foreclosure of a mortgage, and pursuant to such foreclosure, the land was sold, the sale will not be set aside, upon the filing of a petition by the defendant for a new trial under Kirby's Digest, § 6259.
3. JUDICIAL SALE—INADEQUACY OF PRICE.—Mere inadequacy of price is no ground for setting aside a judicial sale unless it is so gross as to raise a presumption of fraud or unfairness.
4. JUDICIAL SALES—NOTICE—AMOUNT OF JUDGMENT—PUBLICATION.—The last clause of Kirby's Digest, § 4923, providing for the publication of notice in the matter of certain judicial sales, *held* to have no application to any publication except in matters involving amounts less than three hundred and fifty dollars.

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

O. M. Young and *Geo. C. Lewis,* for appellant.

1. Appellant literally complied with Kirby's Digest, § 6259 and was entitled to relief. 85 Ark. 277. No personal service was had, he had no notice and no bond was filed as provided by section 6254, Kirby's Digest. See also *Ib.,* § 4293; 74 Ark. 477.

2. The land was sold at an inadequate price, at a sacrifice. Until confirmation the entire proceedings

are *in fieri* and a redemption should have been allowed a nonresident defendant, without notice. This was a direct attack for want of proper service.

R. E. Wiley, for appellee.

There was no error in refusing to vacate the decree, nor in refusing the offer to redeem. There was no right of redemption; his offer came too late. There must be some point of time when defendants rights are foreclosed. The law fixes the time as the date of the sale. 66 Ark. 490; 105 *Id.* 40; 86 *Id.* 255, 258. The recitals in the decree show that a bond was filed. 57 Ark. 49, 54. No meritorious grounds were shown for vacating the decree or sale. 36 Ark. 591, 605; 90 *Id.* 156. Mere inadequacy of price is not sufficient. 77 Ark. 216; 65 *Id.* 152; 108 *Id.* 366; 111 *Id.* 158, 166. Kirby's Dig., § 4923 only applies to resident defendants. The chancellor had the parties before him; heard all the evidence and found that appellant made no showing to entitle him to relief against the decree or the sale. On the whole record the judgment is right. 103 Ark. 502.

McCULLOCH, C. J. The plaintiff, Mrs. Poynter, instituted an action in the chancery court of Arkansas County to foreclose a mortgage on real estate executed by L. J. Miller and his wife, Irene Miller. The amount of the original mortgage debt was $400, and with interest accrued up to the date of the decree amounted to $526.91. The action was against L. J. Miller and his wife and certain junior lienors, and against appellant, John C. Gleason, who was a subsequent purchaser from Miller. Appellant was a nonresident of the State and was duly summoned by publication of a warning order, an affidavit and proof of his nonresidency having been filed in the action. The other defendants were personally served with summons. The plaintiff complied with the statute concerning judgments and decrees against nonresident defendants and a final decree was entered in the cause foreclosing the mortgage and directing sale of the land by a commissioner of the court. The sale was subsequently made by the commissioner, appellee John H.

Boone being the highest bidder and becoming the purchaser at the sale, and the report thereof was made at the September term, 1915, of the chancery court. At that term of the court, which was within twelve months of the date of the original decree, and before the confirmation of the sale, appellant appeared by attorney and filed a petition to vacate the original decree and for retrial of the action. The petition contained no statement of facts tending to show a defense to the original action, and the court, after hearing the petition, refused to vacate the original decree. It does not appear from the record that the motion for a retrial of the cause was heard by the court.

At the same time appellant filed exceptions to the commissioner's report of sale on the ground that no notice of the sale was served on him, and that the land was sold for an inadequate price. He tendered in court the amount of appellee's bid and asked that appellee be required to accept the same in redemption of the lands from the sale. The court heard the exceptions upon affidavits concerning the market value of the land and entered a decree overruling the exceptions and confirming the sale. An appeal has been duly prosecuted to this court.

(1-2) The court did not err in refusing to vacate the original decree. The statute provides that a judgment defendant, who has been constructively summoned, "may at any time within two years, and not thereafter, after the rendition of the judgment appear in open court and move to have the action retried; and security for the costs being given, such defendant or defendants shall be permitted to make defense, and thereupon the action shall be tried anew as to such defendant or defendants as if there had been no judgment, and upon the new trial the court may confirm, modify or set aside the former judgment and may order the plaintiff in the action to restore to any such defendant or defendants any money of such defendant paid to them under such judgment." Kirby's Digest, section 6259. It has been repeatedly held by this court that such defendants "have no right,

however, to have the former judgment, meanwhile, vacated on motion. It remains until the case is retried, to be then confirmed, modified or set aside." *Porter* v. *Hanson,* 36 Ark. 592; *Pearson* v. *Vance,* 85 Ark. 272; *West* v. *Burks,* 90 Ark. 156. The sale resulted from the decree, and since it was improper for the court to set aside the original decree before a retrial of the cause on its merits its necessarily follows that it would not have been proper to set aside the sale or to refuse to confirm it. There was no right of redemption from the sale, and the only remedy of appellant was that afforded by the statute, to have a retrial of the cause and if successful therein to obtain an order on the plaintiff for restitution of the proceeds of the sale of the property.

(3) As to the exceptions to the confirmation, it may be said that the record shows that the sale was fairly conducted, and the evidence was sufficient to warrant the conclusion that the price received was adequate. However, it has been often held by this court that mere inadequacy of price is no ground for setting aside a judicial sale unless it is so gross as to raise a presumption of fraud or unfairness. *George* v. *Norwood,* 77 Ark. 216.

(4) It is also made grounds for exceptions to confirmation of the sale that there was no service upon appellant of the notice of sale. It appears from the report of the commissioner that notice of sale in the form prescribed by the decree was duly published by four insertions in a newspaper, the first insertion being twenty-three days before the date of sale, and that copies thereof were served upon the resident defendants, but it does not appear that there was any service upon appellant. The following statute is relied on as requiring service of the notice of sale on each of the defendants, or publication for thirty days as to nonresident defendants.

"All advertisements and orders of publication required by law or order of any court, or in conformity with any deed of trust or real estate mortgage, or chattel mortgage, where the amount therein received exceeds the sum of three hundred and fifty dollars, or power of

attorney or administrators' notices to be made, shall be published in some newspaper published and having a *bona fide* circulation in the county in which the proceedings are had, to which such advertisement or order of publication shall pertain; if there be no newspaper published in such county, then by posting five written or printed notices in five of the most public places in such county; provided, the provisions of this act shall not apply to sales under executions issued by justice of the peace; and provided further, that as to amounts under three hundred and fifty dollars notices, written or printed, may be posted in five conspicuous places in the county, and notice shall be served in all cases upon the debtor as summons are now served." Kirby's Digest, section 4923.

That statute has never been construed by this court except that in *Carpenter* v. *Zarbuck,* 74 Ark. 474, we said that if it applied at all to sales of land under decrees of foreclosure, the failure to comply with the statute was only an irregularity which could not be taken advantage of after confirmation. It will be observed that the main body of the statute relates to publication of notices in matters wherein amounts are involved in excess of the sum of three hundred and fifty dollars, and then follows a proviso concerning sales under execution issued by justices of the peace, and then the final proviso which it is evident refers only to proceedings wherein amounts under three hundred and fifty dollars are involved.

We do not decide in the present case whether the statute has any application at all to sales of land under foreclosure decrees of court, but it is evident that the last provision has no application to any publication except in matters involving amounts less than three hundred and fifty dollars. It was the purpose of the Legislature to exclude those matters from the operation of the first part of the statute and to permit notices to be given by posting in five conspicuous places in the county, and by service "upon the debtor as summons are now served."

The statute reads that "in all cases" this service must be had, but the language as used evidently referred

only to those cases in which the amount involved was under three hundred and fifty dollars, and has no application to cases involving more than that amount.

Decree affirmed.

CRAVENS & BOREN v. BARR.

Opinion delivered May 1, 1916.

1. DEBT—COLLATERAL—DUTY OF CREDITOR.—A creditor, to whom rent notes have been assigned, as collateral, is not required to collect the same, but may hold the debtor for the debt.
2. RENT NOTES—ASSIGNMENT AS COLLATERAL—RIGHT OF TENANTS—LIEN.—Where a landlord assigned certain rent notes to his creditor, the latter acquires no lien on the crops, and the tenants would be protected if they paid the creditor, who held their notes.

Appeal from Sebastian Circuit Court, Greenwood District; *Paul Little,* Judge; reversed.

R. A. Rowe and *C. A. Starbird,* for appellants.

1. The court erred in its instructions to the jury. There was no stipulation that the mortgagor should retain possession of the property, and the mortgagee had the legal title and the right to possession. Kirby's Digest, § 5410; 70 Cyc. 6; 18 Ark. 166.

2. There was no new consideration for the agreement to extend the time to pay the debt, and there was no such agreement. 80 Ark. 431.

3. It was error to give No. 5 for defendants and to refuse Nos. 10 and 11 for plaintiffs. 39 Ark. 248. Plaintiffs had no landlord's lien, and they could only demand the rent. Defendant's debt was due and his remedy was to pay it and collect the collaterals himself. 7 Cyc. 279; 39 Ark. 248.

R. W. McFarlane and *Covington & Grant,* for appellee.

1. Appellants were liable for the loss of the collateral notes placed in their hands. 50 Ark. 234; 74 *Id.* 248.

2. The judgment is right upon the whole record and there is no error in the instructions. 64 Ark. 238; 51 *Id.* 184; 14 *Id.* 114.

SMITH, J. Appellants were plaintiffs in the suit below, which was begun as an action in replevin to recover possession of two mules upon which they had a mortgage, possession being sought for the purpose of foreclosing that instrument. The suit was begun on the 23d of February, 1915, and the trial below was had July 24, 1915.

In his answer appellee alleged that there had been an agreement for an extention of the mortgage to October 15, 1915, and that subsequent to this agreement he had sustained damages as a result of its breach, which more than equaled the balance due by him under his mortgage. The mules were taken from his possession at the commencement of the suit and the jury awarded him damages covering their usable value, and made a finding that the damages equaled the debt.

Appellee defaulted in the payment of the debt on account of the low price received for cotton in the year 1914, and upon the maturity of his debt made an agreement with appellants which was evidenced by the following writing:

"We accept $100 cash and to get $150 before December 1, 1914, and are to carry the balance due us on mules, we to have mortgage on as much as twenty-five acres of cotton for the year 1915.

"Cravens & Boren."

Appellants say there was no other agreement in regard to the extension of time, and that this agreement was never performed by appellee. On the other hand, appellee says the $100 was paid in cash and it was later agreed that he should assign all the notes of his tenants for rent and should employ appellants' attorney to collect these notes and apply the proceeds to the mortgage indebtedness. Various reasons are given for the failure to collect the rent evidenced by these notes, the one assigned by appellees being that the tenants would not pay him the rent because he did not have the notes in his possession and appellants would not release the notes, even for the purpose of collection. In addition, 2,500 pounds of seed cotton was permitted to rot in a wagon in

which it had been loaded, because, as appellee says, appellants had threatened to attach it if it was moved from the place.

It is insisted that a verdict should have been directed in appellant's favor and that the court erred in submitting to the jury the question of their right to the possession of the mules, as the mortgage gave appellee no right to retain possession of them, and that error was committed in submitting to the jury the question of the extension of time for the reason that the consideration therefor failed. But we think no error was committed in the submission of this question, for it is admitted that a written agreement to this effect was made, and appellee says a new agreement was made under which appellants acquired the right to collect all demands due from appellee's tenants and became charged with the duty of making this collection. Appellants' responsibility for the failure to collect this rent presents the principal question in the case. Over appellants' objection the court gave an instruction numbered 5, which reads as follows:

"5. If you find by a preponderance of the evidence in this case that the plaintiffs instructed the makers of the notes set up in this action not to pay them to the defendant, but to pay them to the plaintiffs, that on account of such direction the defendant could not collect them, and the plaintiffs failed to collect them, then the defendant is entitled to a verdict upon the question of the notes."

Under this instruction the jury evidently charged appellants with the notes which appellee had taken from his tenants and thus extinguished the mortgage debt. We think this instruction is erroneous. It is contended only that appellants had the notes as collateral and they did not receive them as an absolute payment on the debt due them. While so holding the notes they had the right to demand that the makers pay the notes to them. Appellants did not acquire any lien on the crops by virtue of the assignment to them of the rent notes. The tenants would have been protected had they paid the rent to ap-

pellants. In the case of *Meyer* v. *Bloom,* 37 Ark. 43, it was said:

"And, though the assignment of the (rent) note did not in law carry with it the lien, it still subsisted, and as the note was held by M. Hanf & Co. only as collateral security, the delivery of the cotton to them, in payment of it, was virtually a delivery and payment to Levy, the same in effect as if Levy still held the note and the delivery and payment had been directly to him, and he had then turned the cotton over to them in discharge of his debt to them."

In support of the instruction numbered 5 set out above appellee cites and relies upon the case of *Grisard* v. *Hinson,* 50 Ark. 234, and in his brief he quotes the following language from that opinion:

"Whenever funds or securities are placed in the hands of a creditor by a principal for the security of a debt, and they are lost through the want of ordinary diligence of the creditor, the surety bound for the payment of the debt so secured is discharged to the extent of the loss."

We think, however, the principle there announced does not warrant the instruction given in this case. There was no negligence or want of ordinary care in this case. Appellants had the right to hold the notes placed with them as collateral and to demand of the makers that payment be made to them, and the assertion of this right imposed no duty to harvest the crop. Nor did the assertion of this right constitute a waste of the collateral. Appellee could have protected himself by requiring the tenants to pay the rent to appellants as holders of the notes. *Meyer* v. *Bloom, supra.* Or he could have taken up these notes from appellants by payment, if not otherwise. *Grisard* v. *Hinson, supra.* Appellants here merely remained inactive, but they were under no legal duty to take any affirmative action. *Maledon* v. *Leflore,* 62 Ark. 391; *Wilkerson* v. *Crescent Ins. Co.,* 64 Ark. 82; *First Nat. Bank* v. *Waddell,* 74 Ark. 249; *Loeb* v. *German Nat. Bank,* 88 Ark. 114. For an extended discussion of this subject

see note to the case of *First Nat. Bank* v. *Kittle,* 37 L. R. A. (N. S.) 699.

Had appellee taken up these notes from appellants his lien would have re-attached, whereupon he could have taken any action which he thought proper to enforce their payment. *Dickinson* v. *Harris,* 52 Ark. 58.

For the same reasons we think the court erred in submitting to the jury the question of liability for the value of the cotton which was lost by being left in the wagon. No reason for so doing existed except the fear the cotton would be attached, and this reason was not sufficient.

For the errors indicated the judgment will be reversed and the cause remanded.

JONES v. AINELL.

Opinion delivered April 10, 1916.

1. JUDGMENTS—COLLATERAL ATTACK—JURISDICTION—PRESUMPTION.—In a collateral attack upon a judgment, every presumption must be indulged in favor of the jurisdiction of the circuit court, and such an attack will fail, unless it affirmatively appears from the record itself that the facts essential to the jurisdiction of the court did not exist.
2. LIS PENDENS—RULE—FILING SUIT.—The common law and equity rule of *lis pendens* has been abrogated in this State by statute, and a suit affecting title or any lien on real estate is not *lis pendens* until notice of the pendency of the action is filed in accordance with the statute, Kirby's Digest, § 5149.
3. TITLE—JUDGMENT—PURCHASER PENDENTE LITE.—It is only when the judgment or decree affects the title to land, that it can be said that such judgment or decree ends the litigation, and that a purchaser thereafter can not be regarded a *pendente lite* purchaser.
4. TITLE—BONA FIDE PURCHASER—ATTACHMENT SUIT.—A. levied an attachment upon the land of a nonresident, and purchased the same at sheriff's sale, but never received a deed, neither was any *lis pendens* notice filed. *Held,* a *bona fide* purchaser of the land for value, after the said purchase acquired a good title.
5. DEEDS—CONSIDERATION—RECITALS.—The recitals in a deed, of the payment of a certain consideration is *prima facie* evidence of the payment of that amount.
6. EVIDENCE—PURCHASER OF LAND—MALA FIDES—BURDEN OF PROOF.—The burden is upon the party asserting that the purchaser of land did so with notice of facts which would defeat his purchase.

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

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

The chancellor erred in holding the judgment void on collateral attack, as the original judgment recited that the affidavit and bond for attachment were properly filed. 79 Ark. 16; 101 *Id.* 390; 105 *Id.* 5. The judgment was in due form and recites all jurisdictional facts necessary and is valid on its face and can not be attacked collaterally.

W. A. Cunningham, for appellee.

No proper affidavit for attachment was filed before the issue of the attachment. The attachment was void and the court had no jurisdiction. Kirby's Digest, § 345; Drake on Attachment (7 ed.), § 89, 89a; 101 Ark. 390. Jurisdiction must be shown by the record. The finding is sustained by the evidence.

HART, J. J. Bruce Ainell instituted this action in the chancery court against Chas. Jones to set aside and declare void as a cloud upon his title, the judgment and subsequent proceedings in an attachment suit instituted in the Lawrence circuit court, Eastern District, wherein Charles Jones was plaintiff and Geo. M. Neterer and Marguerite Neterer were defendants. The material facts are as follows:

Charley Jones instituted a suit by attachment in the Lawrence circuit court for the Eastern District, against Geo. M. Neterer and Marguerite Neterer alleging that they were nonresidents of the State of Arkansas and owed him the sum of $298 and accrued interest. The record show that the attachment suit was commenced on August 31, 1907, and on that day Charley Jones filed an affidavit stating that the defendants were nonresidents of the State. A warning order was also issued on the same day. On the 28th day of February, 1908, a general order of attachment was issued. The record shows that the plaintiff by leave of the court filed an affidavit for attachment on March 10, 1908, and the affidavit for attachment filed on that day appears in the record. The judg-

ment in the attachment case among other things, recites that an order of general attachment was issued and returned showing that the sheriff of Lawrence County had legally attached the land in this suit, the affidavit and bond having been executed and filed. The attachment was sustained and the land in controversy was ordered to be advertised and sold.

Charley Jones, the plaintiff in the attachment suit became the purchaser at the attachment sale for his debt and costs and the sheriff issued to him a certificate of purchase. No deed was ever executed to him. The lands were wild and unimproved and Charley Jones never went into the possession of them. On the 20th day of February, 1911, Marguerite Neterer by warranty deed conveyed the land in question to J. Bruce Ainell. The consideration expressed in the deed was $3,000, which was recited to have been paid by J. Bruce Ainell. The deed was duly acknowledged and filed for record.

The chancellor found that no affidavit for attachment was filed as required by law before the attachment was issued, and that the judgment in the attachment suit and the sale thereunder were void because no jurisdiction was acquired by the circuit court. Accordingly a decree was entered quashing all the proceedings in the attachment case and cancelling the same as a cloud upon the title of the plaintiff in the present suit. The defendant Jones has appealed.

(1) This is a collateral attack upon the judgment in the attachment case and every presumption must be indulged in favor of the jurisdiction of the circuit court. Unless it affirmatively appears from the record itself that the facts essential to the jurisdiction of the court did not exist, a collateral attack on the judgment will not prevail. *Boyd* v. *Roane,* 49 Ark. 397; *Crittenden Lumber Co.* v. *McDougal,* 101 Ark. 390.

It is the contention of counsel for the defendant that the recital of the judgment in the attachment case that an affidavit for attachment had been filed, raises the conclusive presumption that it was filed before the writ of attachment was issued and that if it should be held that

the affidavit contained in the record is a part thereof and of equal verity with the judgment itself, that there is a presumption that there was another affidavit filed before the writ of attachment was issued. The affidavit for attachment in the record was filed by leave of the court and the order of the court permitting it to be filed shows that it was filed subsequently to the date on which the writ of attachment was issued. There is nothing in the affidavit itself or the order of court allowing it to be filed tending to show that it was filed as a substitute for a previous affidavit.

Under this state of the record, it is contended by counsel for the plaintiff that an affirmative showing is made that the writ of attachment was issued before the affidavit of attachment was filed and that therefore the judgment of the circuit court in the attachment case was void.

We do not deem it necessary to decide this perplexing question, for under the views which we shall hereinafter express, the decree of the chancellor being correct, should be affirmed, even if an erroneous reason was given therefor. If it be considered that the judgment of the circuit court in the attachment case was valid, still we think the decree should be affirmed.

This court tries chancery cases *de novo* on the record made in the court below. Section 5149 of Kirby's Digest provides in effect that to render the filing of any suit at law or in equity affecting the title or any lien on real estate, constructive notice to a *bona fide* purchaser of any such real estate, it shall be necessary for the plaintiff to file for record notice of the pendency of the suit as provided by the statute.

Section 5152, the section that is applicable to the present case reads as follows: "It shall be the duty of the sheriff, United States marshal, or other officer levying upon any real estate under and by virtue of any writ of attachment, execution or other process, to file with the recorder of deeds of the county in which the real estate is situated, a certificate of such levy or seizure, together

with a correct and full description of the real estate levied upon or seized by him; and it shall be the duty of the recorder of deeds to index and record the same in the same manner as hereinbefore provided for notice *lis pendens.*"

(2-4) In construing section 5149, the court held that the common law and equity rule of *lis pendens* have been abrogated in this State by statute and that since the passage of the statute, a suit affecting the title or any lien on real estate is not *lis pendens* until notice of the pendency of the action is filed in accordance with the statute. *Hudgins* v. *Schultice,* 118 Ark. 139; *Henry Wrape Co.* v. *Cox,* 122 Ark. 445. The rule there applied is equally appropriate to section 5152. What purports to be the whole record in the attachment suit was filed in the present case and it shows that no *lis pendens* was filed as required by section 5152 of Kirby's Digest. Of course possession of land is notice of whatever right or title the occupant has, but the record shows that no deed was ever executed to Jones by the sheriff and that Jones never went into the possession of the land. It is true he purchased at the attachment sale before the deed was made to Ainell. For this reason counsel for Jones contended that he is protected under the rule announced in a case note to 10 L. R. A. (N. S.) 443. We do not think the rule contended for by counsel has any application to the facts in the instant case. It is only where the judgment or decree affects the title to the land, that it can be said that such judgment or decree ends the litigation, and that a purchaser thereafter can not be regarded a *pendente lite* purchaser. The title to the land was not involved in the attachment suit and the judgment rendered therein did not determine the title thereto nor in any wise affect it. No *lis pendens* notice was filed in the attachment suit as required by the statute and Ainell was not required to take notice of anything that occurred during the pendency of the attachment suit. As we have just seen the judgment did not terminate the suit because the title to the land was not affected thereby. The purchaser at the attachment sale could not acquire any rights against a *bona*

fide purchaser for value without notice until a deed was executed to him by the sheriff and placed of record, or until he had taken possession of the land. This brings us to the question of whether or not the plaintiff Ainell is a *bona fide* purchaser. A warranty deed from Marguerite Neterer to him was introduced in evidence. The consideration expressed in the deed was $3,000 which was recited to have been paid to Ainell.

(5) The recital in the deed of the payment of the consideration of $3,000 by Ainell was *prima facie* evidence that he paid that amount for the land. *Morton* v. *Morton,* 82 Ark. 492; *Dodwell* v. *Mound City Saw Mill Co.,* 90 Ark. 287; *Carwell* v. *Dennis,* 101 Ark. 603.

(6) The lands in suit were wild and unimproved and that was an adequate price to pay for them. The plaintiff in his complaint alleged that he was a *bona fide* purchaser of the land and it is shown that he paid a valuable consideration for it. The burden of showing that he purchased with notice was on the party alleging it or who relies on the notice to defeat the claim of *bona fide* purchaser. *Osceola Land Co.* v. *Chicago Mill & Lbr. Co.,* 84 Ark. 1.

The defendant did not discharge the burden thus imposed upon him. It follows that the decree of the chancellor was correct and it will be affirmed.

LIGHTLE *v.* LAWS.

Opinion delivered April 17, 1916.

1. TAX SALES—REDEMPTION BY MINORS.—Minors may redeem lands sold for taxes within two years from and after the expiration of their disabilities, and all the world must take notice of this right.

2. TAX SALES—INNOCENT PURCHASER.—There is no such thing as an innocent purchaser at a tax sale.

3. TAX SALES—RIGHT OF MINOR TO REDEEM—CONDITION SUBSEQUENT.—The right of a minor to redeem from a tax sale, is a condition subsequent to the tax deed executed to purchasers of the land. Conditions subsequent are those, by the nonperformance or failure of which, an estate already vested may be defeated.

4. TAX SALE—POSSESSION BY PURCHASER—REDEMPTION BY MINOR—LIABILITY FOR TIMBER.—The purchaser of land at a tax sale who went

into possession of the land, is not liable for timber cut, before a subsequent redemption of the land by a minor.

5. TAX SALES—REDEMPTION BY MINOR—WRIT OF ASSISTANCE.—A minor who redeems land under the statute, sold for taxes, is entitled as a part of the relief granted, to a writ of assistance.

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

Brundidge & Neeley, for appellants.

1. It is conceded that the void tax sale or title under which appellees ancestor held was sufficient interest in the land to permit him to redeem. Redeem means to get back, just what was lost by the tax sale. 89 Ark. 168; 39 *Id.* 580; 74 *Id.* 577; 42 *Id.* 221; 87 *Id.* 360; 92 N. E. 998; 206 Mass. 591; 57 S. E. 712; 128 Ga. 361; Cent. Dig., vol. 45. Col. 1951-3, 1973; 14 So. 661; 71 Ark. 569.

2. The appellee has only a lien for taxes and does not own the fee; he simply has a void tax title and can not recover for timber cut.

Cul L. Pearce, for appellee.

1. The right to redeem is clear. 39 Ark. 580; 42 *Id.* 215; 74 *Id.* 343; *Ib.* 572; 41 *Id.* 59; 104 *Id.* 108. By redemption appellee acquired title to the land, the title his ancestors held. The vendee at a tax sale is not a *bona fide* purchaser, but takes subject to the right of an infant to redeem. 104 Ark. 108; Ann. Cas. 1194 C, 421.

HART, J. This suit was instituted in the chancery court by W. H. Laws against W. H. Lightle and others to redeem from sale for taxes the lands described in his complaint. The plaintiff did not reach his majority until the 28th day of December, 1912. This suit was commenced on the 11th day of December, 1913.

Isaac Dugan, obtained a patent to the land from the United States in 1856 and owned the land until it was sold for taxes on June 12, 1873. J. J. Wilkins then obtained a tax title from the State and owned the land until it was sold for taxes on June 11, 1878. At that sale P. LaCook obtained a certificate of purchase and assigned it to J. B. Laws and two years later obtained a tax deed from the clerk to the land. Laws and other members of his family

paid taxes on the land from 1878 to 1892. G. W. Laws died in 1887 leaving a widow and two sons, J. F. Laws and W. H. Laws. J. F. Laws died in October, 1890, without issue. W. H. Laws died in September, 1891, leaving surviving him his widow and W. H. Laws the plaintiff herein as his sole heir at law. The lands were forfeited for taxes after the death of plaintiff's father and the defendants deraigned title from this tax sale.

It is conceded that the tax sale in the year 1878 was void. The chancellor found that the plaintiff had a right to redeem from the tax sale under which the defendants hold. It also appears from the record that a tax deed was executed to the defendants, and that thereafter certain timber was cut by them from the land. The chancellor found that the defendants were liable for the timber cut and removed from the land. A decree was entered in accordance with the opinion of the chancellor and the defendants have appealed.

(1-2) Our statutes authorize a sale of the land itself for nonpayment of taxes and our statutes also grant to minors the right to redeem land sold for the nonpayment of taxes within two years from and after the expiration of their disabilities. *Bender* v. *Bean*, 52 Ark. 132; *Pulaski County* v. *Hill*, 97 Ark. 450, and cases cited; *Bradbury* v. *Johnson*, 104 Ark. 108, and cases cited. It has also been uniformly held by this court that there can be no such thing as an innocent purchaser of land at a tax sale or from one who buys at such sale as against the statutory privilege of redemption. In other words the court has said that all the world must take notice of the statute granting to minors the privilege of redemption from a sale for taxes.

(3) The minor instituted this action within two years after becoming of age and under our statutes and the decisions above referred to as well as many others, was entitled to maintain this suit. In the same suit however, the minor sought to recover against the defendants the value of certain timber cut by them, and the chancellor entered a decree in his favor for the value of the

timber. In this respect we think the chancellor was wrong. The purchaser at the tax sale was entitled to a deed two years from the date of the sale. After the execution of this deed to him, the purchaser is entitled to the possession of the land. The records in the present case shows that the timber was cut after the tax deed was executed to the defendants. The extension of the right of redemption to minors until two years after they reach their majority has the effect of making such right a condition subsequent to the tax deed executed to purchasers of their lands, and the right is qualified only by the laws of its creation and those enacted to recover its just and proper exercise. *Burgett* v. *M'Cray,* 61 Ark. 456; *Bender* v. *Bean,* 52 Ark. 132. Conditions subsequent are those by the non-performance or failure of which an estate already vested may be defeated.

(4) The same law under which the purchaser acquires his right to the estate, also confers the privilege of redeeming upon the owner. In all cases a deed will be executed to the tax purchaser at the end of two years. The purchaser is then entitled to the possession of the land and the minor's interest in the estate depends exclusively upon a redemption. Without redeeming the minor has no present interest, the title being vested in the tax purchaser, subject to the minor's right of redemption, which is a mere statutory privilege that the minor may exercise or not, at his option, within the time limited by law. See *Bender* v. *Bean,* 52 Ark. 132; *Wright* v. *Wing,* 18 Wis. 50. It follows that the tax purchaser is not liable in the present case for the timber cut upon the land of the minor after such purchaser went into the possession of the land and before the minor sought to redeem it.

There is another reason why the plaintiff should not be allowed to recover the value of the timber cut by the tax purchaser. Under the authorities above cited and other decisions of this court, the void tax title under which plaintiff and his ancestors held title to the land was sufficient interest in the land to permit him to re-

deem, but it by no means follows that such void tax title was sufficient to enable him to recover the value of the timber cut and removed from the land. Section 7105 of Kirby's Digest provides that, "No person shall be permitted to question the title acquired by a deed of the clerk of the county court, without first showing that he, or the person under whom he claims title to the property had title thereto at the time of the sale, or that title was obtained from the United States or this State after the sale."

In the case of *Rhea* v. *McWilliams,* 73 Ark. 557, the court in construing this statute said, "This statute was passed for the protection of parties holding land under tax titles, and was intended to cure defects in such titles as against those having no interest in the land at the time of the sale. But, as it was passed to strengthen such titles, we do not think that it was intended to apply in case of conflicting tax titles. As to such titles, when both are invalid, the position of the defendant in possession of the land is superior to that of the plaintiff." So under the rule there announced the plaintiff could not use this statute for the purpose of recovering the value of the timber cut from the land by the defendants. It by no means follows, however, that the plaintiff is not entitled to a writ of assistance. If he was not entitled to this relief, the statute could have no effect whatever.

(5) As we have already seen the plaintiff had a right to institute this action to redeem the land and as a part of that relief he is entitled to a writ of assistance and under section 7105 of Kirby's Digest the defendants will not be permitted to question his title.

It follows that the court erred in allowing plaintiff to recover the value of the timber cut from the land and for this error the decree will be reversed and the cause remanded with directions to enter a decree in accordance with this opinion.

DURFEE v. DORR.

Opinion delivered April 17, 1916.

1. HOSPITALS—DUTY TO PATIENTS—LIABILITY FOR NEGLIGENCE.—The keeper of a hospital is liable for damages if he fails to perform some duty which he owes to the patient and the patient is injured as a result of this failure.
2. HOSPITALS—DUTY OF CARE TO PATIENT.—It is the duty of the keeper of a hospital to give to the patients who place themselves in his care, reasonable care and attention, and to have that knowledge of the necessities of the patients' case, which would result from this care and attention, and from the possession of ordinary skill in his treatment.
3. HOSPITALS—CARE OF PATIENT—NEGLIGENCE—QUESTION FOR JURY.—Where plaintiff's intestate entered defendants' hospital for treatment, and being left unattended, wandered from his room, sustaining a fall, which was followed by his death, *held*, under the evidence, it was error for the trial court to withdraw the case from the jury, and instruct a verdict for the defendants.

Appeal from Independence Circuit Court; *Dene H. Coleman*, Judge; reversed.

Hal L. Norwood and *W. K. Ruddell*, for appellant.

1. It was error to direct a verdict for the defendants. Where there is any evidence tending to establish an issue, it is error to take the case from the jury. 63 Ark. 94; 89 *Id.* 589; 77 *Id.* 556; 89 *Id.* 368; 33 *Id.* 350; 36 *Id.* 451; 39 *Id.* 413; 105 *Id.* 526; 35 *Id.* 147.

2. In reviewing the action of the trial court in directing a verdict for defendant the testimony must be given its strongest probative force in favor of the plaintiff's cause of action. 76 Ark. 520; 71 *Id.* 445; 73 *Id.* 561.

3. The question as to whether defendants were negligent should have been submitted, under proper instructions to the jury for determination. L. R. A. 1915 D. 334; 77 Ark. 458; 64 *Id.* 535; 75 *Id.* 479; 80 *Id.* 190; 100 *Id.* 53; 98 *Id.* 413; 95 *Id.* 359; 92 *Id.* 502; 94 *Id.* 246; 97 *Id.* 347; 97 *Id.* 553. There was evidence of negligence. L. R. A. 1915 D. 334; 35 Ark. 602, 614.

4. A patient is admitted to a hospital conducted for private gain, under the admitted obligation that he shall receive such reasonable care and attention for his safety

as his mental and physical condition, if known, may require. 7 N. C. C. A. 82, 88; 148 N. W. 582; L. R. A. 1915 D. 334. This was a clear case of negligence.

5. Defendants were bailees of the patient, had exclusive and actual possession and control of him for hire, and they agreed to care for him. 101 Ark. 75, 82; 28 L. R. A. 716. Injuries to patients by doctors is something that does not usually happen where due care is used. 5 R. C. L. 77; 166 N. Y. 188; 82 Am. St. 630; 189 Ill. 430; 52 L. R. A. 930; 2 *Id.* 820, 823; 2 Enc. of Ev. 194. Whether defendants used due care or were negligent was a question for the jury. L. R. A. 1915 D. 334, 341.

McCaleb & Reeder, for appellees.

1. The burden was on appellant to prove that deceased was in a feverish and delirious condition and that defendants knew, or should have known that it was dangerous to leave him alone or unattended; that he fell from the porch to the ground and that the death was the proximate result of a fall and not of disease or natural causes. Plaintiff wholly failed to make proof of any of these facts and a verdict was properly directed.

2. The burden was on appellant to show that the injury resulting in death was produced by some wrongful or negligent act of defendants. 8 R. C. L., p. 857-8 and notes; 79 Ark. 608; 97 *Id.* 469. A patient is generally admitted to a hospital under an implied obligation that he shall receive such reasonable care and attention for his safety as his mental and physical condition, if known, may require. 148 N. W. 575; *Ib.* 582; 17 L. R. A. (N. S.) 1167; 14 *Id.* 784; 174 S. W. 409; 14 N. Y. S. 881; 39 N. Y. St. 98; 104 N. Y. 434; 84 N. Y. 455; 14 N. Y. S. 884-5. Here there is no evidence of negligence whatever. 63 W. Va. 84; 59 S. E. 943; 105 Ark. 161; 179 U. S. 658; 222 Mo. 488; 87 Ark. 217; 82 *Id.* 372; 18 S. W. 172; 87 Ark. 321; 70 S. W. 376; 105 N. W. 197; 79 N. W. 76; 93 S. W. 868; 79 Ark. 76. The burden was on appellant to show that the defendants' negligence was the proximate cause of death. 63 Atl. 234; 61 *Id.* 189; 54 S. E. 784; 51 *Id.* 851; 52 Atl. 864; 81

S. W. 1019; 34 S. E. 986; 14 Fed. 558; 47 N. E. 434; 7 A. & E. Enc. L. 381; 81 S. E. 579; 89 Atl. 170; 63 Fed. 400; 71 N. E. 509; 74 N. W. 1046; 125 Pac. 1044; 188 N. W. 70 and many others. The court properly directed a verdict.

SMITH, J. Appellant, in his own right and as administrator of the estate of his deceased son, sued appellees who, as partners under the firm and style of Dorr, Gray & Johnston, are engaged in the practice of medicine and, in connection with their practice, operate a sanitarium in the city of Batesville. Appellant's intestate was his son, a young man twenty-five years old, who was received by appellees as a patient on July 26, 1915. Appellees performed an operation for abscess of the liver on their patient on Tuesday, and the patient died on the following Saturday.

The complaint alleges that appellees accepted deceased as a patient in their sanitarium and agreed to furnish him nurse, board, room, and medical attention, but the patient was left in the room by himself while in a feverish, nervous, delirious, or unconscious condition and that he "while in such condition walked out of the upstairs door to the sanitarium and fell over the banisters and that he suffered from said fall and died from the effects thereof. That the defendants were guilty of carelessness and negligence in not having some one to keep watch or guard over the said Dolph Durfee (the patient) while he was in such condition, and that the pain, suffering and death was due to the negligence of the defendants."

Appellees demurred to the complaint and answered denying any negligence, or that Dolph Durfee was in a delirious condition, or that they had contracted to keep a nurse in constant attendance or that it was customary to do so, and, further answering, they alleged that the said Dolph Durfee was dangerously and critically ill and could have lived but a few hours at most, and that any injuries received in his fall, if he fell, could not have been the proximate cause of his death.

At the conclusion of the evidence the court directed the jury to return a verdict in appellees' favor, and this appeal is duly prosecuted from the verdict so rendered.

We are required, therefore, to give the evidence its highest probative value in appellant's favor, and when we have done so this evidence may be summarized as follows: Appellant placed his son in the sanitarium with the direction that he be given proper attention, and it was agreed that a fee of $50 should be paid for the operation and, that, in addition, $28 per week should be charged for the hospital fees and nurse. There was no agreement for any individual or special nurse. The operation was performed for abscess of the liver and an incision five inches long was made and a part of a rib removed, and the incision was sewed up except for drainage. No hope of recovery was held out, and the prognosis was that death would ensue. The city of Batesville was visited by an unusual flood in August, 1915, and as a result thereof the electric light plant had been out of commission and the entire city was in darkness except for such light as the moon afforded, but the night in question was within a few days of the full moon. A Mr. Hardy testified that he saw young Durfee lying on the ground in a white night-shirt directly under the upstairs hall door under a platform which was fourteen feet high and which was enclosed with banisters, which were two feet four inches high, but that the stairs and platform were entirely on the outside of the building and that Durfee was lying on a pile of weeds or grass which had been cut and raked there, and that his night-shirt was slightly damp. That witness and the night marshal took Durfee upstairs and found none of the doors fastened and all of the upstairs was dark and no one was in sight, and they saw nothing of a nurse until they had carried Durfee to his room, which was only ten feet from the platform and stairway. Witness' attention was attracted by the voice of Durfee, calling, "Come here." Durfee was interrogated as to how he came to be where he was found, but could give no explanation and answered that he did not

know. He walked a few steps after he had been assisted to his feet but was too weak to walk any distance and was carried to his room, he himself giving the information as to its location. A Mr. Ivey testified that he was at his hotel directly across the street from the sanitarium and that he was sitting in front of the hotel when he saw Hardy go to Durfee. That he had been there for possibly half or three quarters of an hour before Hardy came up and that he was in plain view of the stairs leading down from the sanitarium and that he saw no one on the stairs. He also testified that he saw no one fall from the platform. The undertaker who prepared the body for burial testified that there were skinned places on one knee and that the other knee was bandaged up and that there were other small scratches on the body, but no broken bones were found. There was other evidence as to the wounds and scratches found and that Durfee's hands were covered with earth and that the nurse washed them after he was placed back in bed. A physician testified that one might have fallen over the banisters on to the pile of hay below without leaving any external evidences of injuries and yet be seriously hurt internally, and that if an internal injury had been sustained the drawing up of the legs would be an indication of that fact, and it was shown that Durfee remained in that position after his return to his room when he was placed in his bed.

Appellees made no attempt to explain the occurrence but present the theory that Durfee walked down the stairs and out of the building and stumbled and fell over the pile of grass, which was shown to be from six to eight inches high.

We are, of course, not concerned about the plausibility of any theory which excuses or tends to excuse appellees of the charge of negligence. We have only to consider whether, under the evidence offered, the jury would have been warranted in finding that appellees were guilty of a breach of their duty to Durfee which resulted in his injury. As novel as the case appears to be there are a number of cases dealing with the duty of keepers of hos-

pitals to their patients. A number of these cases are cited in the notes to the following cases: *Phillips* v. *St. Louis & S. F. Rd. Co.,* 111 S. W. (Mo.) 109, 17 L. R. A. (N. S.) 1167; *Broz* v. *Omaha, M. & G. Hospital,* 148 N. W. 575, L. R. A. (N. S.) 1915, D. 334, and in other annotated cases there cited.

(1-2) The principle of law which controls is one which has been applied to many situations. The keeper of the hospital is liable for damages if he fails to perform some duty which he owes to the patient and the patient is injured as a result of this failure. The extent and character of this duty depends on the circumstances of each particular case. A jury would be warranted in assuming that a patient will need some care and attention from the very fact that he placed himself, or is placed, in the institution, and as appellees were in sole charge of this sanitarium, and Durfee was their patient, it was their duty to give him reasonable care and attention and to have that knowledge of the necessities of his case which would result from this care and attention and from the possession of ordinary skill in his treatment, there being no representation here on appellees' part of extraordinary skill. Appellant had not contracted for the services of a special or individual nurse, but that fact did not absolve appellees from the discharge of their duty to Durfee. It is true it would have been the duty of a special nurse to have given Durfee individual attention, but it was nevertheless the duty of appellees to see that Durfee had such attention as his condition apparently made necessary. In the case of *Harris* v. *Woman's Hospital,* 14 N. Y. Supp. 881, it is said:

"The hospital authorities, in making rules for night attendance by physicians, and for personal inspection, and watching of patients, in providing the force of night nurses, was bound only to the degree of care proportionate to the danger to be apprehended, judged by the condition of affairs before the happening of the accident."

(3) When this test has been applied to the facts of this case we can not say that a jury must necessarily

have found that appellees did not fail in the discharge of their duty to young Durfee. Here was a man for whom, according to appellees, no hope of recovery was entertained or who, at any rate, was very desperately sick. The electric lights were off and the building was in darkness except for the light of the moon. Doors were unlocked and the patients apparently could go about as they pleased, or as their delirium carried them, without attracting the attention of the nurse or nurses who were supposed to be on duty, and the jury might have found, in the absence of explanation, from the manner in which the nurse who finally appeared on the scene was dressed, that she had been asleep. It is said, however, that according to the evidence of appellant, who saw his son during the afternoon before the injury, that the patient was then conscious and that he was conscious when found and that appellees were not chargeable with knowledge that the patient had become delirious. We think, however, the case presents the question for the jury to determine whether appellees discharged their duty to a patient who, according to their own contention, was *in extremis*. And for the error of the court in directing the verdict the judgment will be reversed and the cause remanded.

KIRBY, J., dissents.

WARD v. FORT SMITH LIGHT & TRACTION COMPANY.

Opinion delivered May 1, 1916.

1. APPEAL AND ERROR—ANSWER TO QUESTION—PREJUDICE.—No prejudice is shown where the trial court refused to permit a witness to answer a question propounded to him, where it is not shown in the record what the answer of the witness would have been.
2. APPEAL AND ERROR—REVERSAL OF CAUSES—PREJUDICE.—The Supreme Court will reverse a cause for an error only which is prejudicial.
3. APPEAL AND ERROR—QUESTION—PREJUDICE.—In an action for damages where plaintiff was struck by a moving street car, it is not prejudicial error for the trial court to refuse to permit a witness to state how fast the car was going when it passed witness's house, which was several blocks from the scene of the accident, when it was not shown that the car had not been stopped between plaintiff's house and the scene of the accident.

4. EVIDENCE—SPEED OF CAR—PERSONAL INJURY ACTION.—In an action for damages for personal injuries resulting from a collision with a street car, evidence of the speed attained by cars of the company other than the one involved in the collision, *held* inadmissible.
5. EVIDENCE—PERSONAL INJURY—TESTIMONY AS TO WHERE PARTIES HAD BEEN.—In an action for damages for personal injuries, when deceased and a companion were struck by a street car, while riding in an automobile, where the companion had testified where he and deceased had been that evening, without objection, it is not error for the court to permit the automobile driver to testify where the parties had been.
6. APPEAL AND ERROR—REVIEW—FAILURE TO EXCEPT.—The action of the trial court will not be reviewed on appeal where no exceptions were saved at the tral.
7. APPEAL AND ERROR—REPETITION OF INSTRUCTIONS.—The trial court is not required to multiply or repeat instructions.
8. NEGLIGENCE—COLLISION BETWEEN STREET CAR AND PUBLIC AUTOMOBILE —INJURY TO PASSENGER IN LATTER.—Deceased was riding in a public automobile when he was struck by a moving street car and killed. *Held*, if deceased was killed by the concurrent or combined negligence of the defendant car company, and of the driver of the automobile, the car company would be liable; no negligence of the driver of the automobile affected the right of recovery, unless such negligence was the sole cause of the accident.
9. STREET RAILWAYS—SPEED OF CARS—NEGLIGENCE—VIOLATION OF CITY ORDINANCE.—The mere fact that a street car was driven at a rate of speed forbidden by the city ordinances, will not be considered proof of negligence, as a matter of law, it is but an evidential fact tending to prove negligence and the question of negligence is one of fact for the jury.

Appeal from Sebastian Circuit Court, Fort Smith District; *Paul Little*, Judge; affirmed.

STATEMENT BY THE COURT.

Appellant instituted this action against appellee to recover damages for personal injuries which he alleges were sustained by his decedent by reason of the negligence of appellee. The material facts proved by appellant are as follows:

On the 24th day of August, 1915, Jim Crowe, a driver of a public taxicab received a call to go to 219 First Street, for Joe Ward, Jr. and Carroll Milton. He received them in his automobile and started home with them. It was raining very hard at the time and the wind

shield was down. He started east on North C Street and drove at the rate of twelve or fifteen miles an hour. When he came to the alley on C Street between Fourth and Fifth Streets, he brought his car practically to a stop because Ward told him that he had lost his keys and would like to return for them. Ward announced that he had found his keys and the machine then proceeded up C Street towards Fifth Street. Crowe looked as far as he could see in each direction and did not see any street car approaching. There was a street car track on Fifth Street and the automobile started across the street car track and the car was within fifteen feet before the driver of the automobile saw it. His machine could have been stopped in twenty feet at the rate it was traveling. The street car was being propelled at a very high rate of speed. As soon as the driver of the automobile saw it he tried to turn his machine up Fifth Street in order to avoid the collision, but was unable to do so. The street car struck the automobile with great violence and the automobile was carried about 150 feet after it was struck by the street car. Crowe testified that neither he nor Ward nor Milton had been drinking any that evening; that neither Ward nor Milton exercised any control over the automobile; that they simply gave him directions to take them home for which they paid him; that C Street ran at right angles with Fifth Street; that there was an arc street light at the intersection of C and Fifth Streets and that this tended to obliterate the light on the street car; that no bell or gong was sounded by the motorman on the street car as it approached; that the street car was traveling over twice as fast as the automobile and was right on them before they saw it. Ward died from the effects of the injuries received by him in the collision. The physicians who attended him testified that he suffered great pain before he died and that he was conscious of the pain.

Carroll Milton, in all essential respects corroborated the testimony of the driver of the automobile. Other witnesses who resided in the neighborhood of the place

where the collision occurred or who happened to be on the streets there, testified that the street car was coming at a very high rate of speed when it struck the automobile. Some of them stated that it was going at the rate of over forty miles an hour. One witness stated that he was at the intersection of D and Fifth Streets about a block away from where the accident occurred and that he saw the street car for some distance before it passed him; that it was going at an exceedingly high rate of speed and that it did not check its speed before the collision with the automobile. It was shown on the part of appellant that the street car was going down grade for several blocks before it reached the scene of the accident and that it did not stop or check its speed as it approached the street crossing.

Leonard Baker, the motorman on the street car the night of the accident, a witness for appellee, testified: I have had four years experience as motorman. The car which ran into the automobile on the night in question was car number 22. It was a forty passenger, double brake car, equipped with air brakes and was known as the owl car. It leaves the car barn at 12:15 A. M. and runs to Electric Park, then returns to the car barn, picks up the car men who have come in from runs and takes them into Fort Smith, going south on Fifth Street to Garrison Avenue, around on Third and Second Streets, loops back to Garrison Avenue to Eleventh Street and then to the car barn. On the night of the accident I had three men on the car in addition to the conductor and myself. It was raining hard and the track was slick. As I crossed D Street and approached C Street, I sounded the gong and shut off the power. I saw the automobile approaching. In my judgment, I was running only eighteen miles an hour. I was standing in the proper place on the car with my face close to the window shield looking ahead. When I got to the intersection of C and Fifth streets, I saw an automobile coming from the west up C street. It was about fifteen feet from the street car track when I first saw it. I put on the air brakes and the emer-

gency brake. The car collided with the automobile and the accident happened at exactly 12:35 o'clock on the morning of August 24, 1915. After I applied the emergency brake the wheels became locked at the distance of about fifteen feet and the car traveled after that 110 feet before it stopped.

Other witnesses for the defendant corroborated the testimony of the motorman. Other witnesses for the defendant testified that they had made a test of the speed of car number 22 and found that it could not run at a greater rate of speed that twenty-six or twenty-seven miles an hour. The test also showed that the motorman stopped the car on the night of the accident as soon as it could have been stopped.

Other facts will be referred to in the opinion. From a verdict and judgment in favor of appellee appellant prosecutes this appeal.

Read & McDonough and *Winchester & Martin,* for appellant.

1. The court erred in excluding the evidence of witnesses tending to show the high rate of speed of the street car. 92 Atl. 185; 42 App. D. C. 532; 93 Atl. 666; 108 N. W. 271; 116 *Id.* 933; 235 Ill. 275; 47 S. E. 850; 115 Ky. 883; 118 Wis. 210.

2. It was error also to exclude the evidence of E. F. Creekmore. 99 Ark. 597; 66 S. E. 817; 92 Ark. 569; 74 Atl. 519; 124 S. W. 140; 74 Atl. 401; 235 U. S. 429; 44 Ark. 468; 69 N. E. 486; 112 Ark. 589; 128 Mich. 149; 171 *Id.* 180; 215 Mo. 394, etc.

3. The evidence of Jim Crowe and Carrol Milton as to where deceased had been was inadmissible. Elliott on Ev., § § 156-7, 975 to 978.

4. The traffic ordinances were admissible in evidence to show negligence. 27 A. & E. Enc. Law, 62 to 66; 121 S. W. 690; 67 So. 278; 108 Pac. 211; 113 S. W. 1126; 128 S. W. 5; 69 N. E. 1123 and many others. 27 R. I. 499; 71 S. W. 565; 172 *Id.* 843; 174 S. W. 1170; 68 So. 509; 218 Mass. 52; 168 S. W. 247; 167 *Id.* 471.

5. Review the instructions contending there was error and cite 95 Ark. 108; 196 Ill. 410; 87 Minn. 280; 150 N. W. 31; 92 Atl. 185; 92 *Id.* 1015; 93 *Id.* 666; 42 App. D. C. 532; 92 Ark. 350; 86 *Id.* 289; 91 *Id.* 260; 88 *Id.* 181, 292; 90 *Id.* 326. A violation of an ordinance creates liability. 112 Ala. 425; 123 Cal. 275; 43 Md. 534; 40 Mo. 506; 40 Neb. 29; 27 A. & E. Enc. L. 61-2 note 5, 478. It is error to give conflicting instructions. 79 Ark. 12; 82 *Id.* 424; 83 *Id.* 202; 87 *Id.* 76; 94 *Id.* 282; 112 *Id.* 305. See also 116 Ark. 125; 117 Ark. 337. Mere repetitions of instructions is erroneous. No. 17 is a mere comment on the evidence. It is the duty of a motorman to use due care at all times. 167 S. W. 924; 116 Ark. 25; 117 Ark. 337; 105 N. E. 609.

The defendant's instructions conflict with those given for plaintiff. The negligence of a driver could not be imputed to deceased. 72 Ark. 572; 137 Pac. 31; 145 N. W. 923; 141 Pac. 868; 91 Atl. 405; 150 N. W. 164; 93 Atl. 666 and many others.

Hill, Fitzhugh & Brizzolara and *Oglesby, Cravens & Oglesby,* for appellee.

1. It was not error to exclude the testimony of Sailor and others as to the speed of the car. 106 Ark., *King* v. *State;* 88 Ark. 562; 97 *Id.* 564. Testimony as to the speed of the car at other places was properly excluded. Patterson Ry. Acc. Law, § 364; 58 Ark. 468; 81 *Id.* 596; 58 *Id.* 468.

2. It was not error to exclude Creekmore's evidence as to a race he had with a car a month before the accident. 1 Elliott on Ev., § 157; 1 Greenl. on Ev., § 14a.

3. There was no error in admitting the testimony of Crowe and Carroll. At all events it was harmless. 112 Ark. 401; 103 *Id.* 315, 318; 84 *Id.* 16; 85 *Id.* 123; 99 *Id.* 302; 103 *Id.* 318.

4. Every ordinance offered was admitted in evidence. The remark of the court was not a ruling, and the remark was not objected to. 116 Ark. 125.

5. There is no error in the instructions. Taken together they correctly state the law. 89 Ark. 300; 84 *Id.* 74; 92 Atl. 185, 1015; 93 *Id.* 666; 89 Ark. 574; 96 *Id.* 531; 101 *Id.* 433; 108 *Id.* 99. The record presents no prejudicial errors.

HART, J., (after stating the facts). (1-2) I. It is insisted by counsel for appellant that the court erred in excluding the testimony of certain witnesses tending to show the high rate of speed of the street car at places along the track on Fifth street before the car reached C street. The witnesses referred to are W. H. Sailor, Louis Adams and Mrs. Ed. Haglin. The record shows that on the night of the accident, W. H. Sailor resided at 929 N. Fourth street. His residence was therefore about eight blocks from the scene of the accident and one block from the street car line. He testified that he observed the car as it passed prior to the time of the accident but he stated that he did not know anything about the speed of a street car or a railway train. He said of course he could tell whether a car was running fast or slow. He was then asked if the car in question was traveling at a high or low rate of speed and an objection was made and sustained to the question. While the witness was not permitted to answer the question, it was not shown what his answer would have been. No effort was made to prove any specific fact by the witness in response to the question. This court only reverses for prejudicial errors and in order to obtain a review of the ruling of the trial court, it was necessary to show what the answer of the witness would have been. *Boland* v. *Stanley,* 88 Ark. 562; *New Hampshire Fire Ins. Co.* v. *Blakely,* 97 Ark. 564.

(3) Louis Adams lived at 410 N. E street. He was permitted to testify that he was awakened by a car going by just before the time of the accident, but stated he could not tell at what rate of speed the car was going by the noise it made. The court stated that it would permit him to testify as to whether or not he knew that the car was going at a high or low rate of speed. The witness again stated that he could not tell the rate of the speed

at which the car was going by hearing it. He was asked the direct question "Could you tell by hearing it pass whether it was passing at a high or low rate of speed?" His answer was, "I could not tell anything about the speed of the car on account of the fact that I do not know how far it got from me before I got wide awake." Then he was asked: "If you heard that car pass your house couldn't you tell whether or not it was traveling at a high or low rate of speed?" This question was objected to and the objection sustained. Here again no attempt was made to show what the answer of the witness would have been and the action of the court was not reversible. Moreover, the witness had already stated that he could not tell at what rate of speed the car was going by hearing it pass. He had made this answer twice and it was in the discretion of the court not to allow a repetition of the same question. Mrs. Haglin resided at the corner of Fifth and D streets. She was first permitted to state that it seemed to her that she had never heard the owl car going by as fast as it did just before the accident. She further stated that she did not pay attention to the car after it passed her house but that she heard it approach. It was then offered to prove by her that the car which came into collision with the automobile was going by at a high rate of speed when it passed her house and the court refused to permit this testimony to go to the jury. At the time the testimony was offered there was no showing as to whether or not the car was stopped after it passed her house or checked its speed before it reached the scene of the accident. She stated that she did not pay any attention to the car after it passed her house. Under these circumstances, the action of the court was not reversible error. Afterwards appellant was permitted to show that the car was going at a high rate of speed for several blocks before it reached the crossing at C street. Doubtless if the counsel had again offered the testimony, the court would have permitted it to go to the jury.

(4) II. Counsel for appellant insists that the court erred in refusing to permit the witness Creekmore to testify that he had had a race with one of the cars of appellee at another time and place and that this car had passed his automobile while his automobile was going at the rate of thirty-eight miles per hour. Appellee had shown by two witnesses that car number 22, being the car that collided with the automobile, was geared for twenty-three miles an hour; that they had made a test of the speed of this car on a straight track and the car had made twenty-three miles per hour in one direction and twenty-seven miles per hour in the other one, the latter course being slightly down grade. Counsel for appellee confined the testimony of its witnesses to the speed of car number 22 and did not ask with reference to the speed of any other of its cars. On cross-examination counsel for appellant asked about the speed of other cars, but it was not shown that these cars were geared in the same way as car number 22, or were so constructed that they would naturally have the same speed. Under these circumstances the court was right in excluding the evidence because the excluded evidence related to collateral transactions and would tend to confuse the issues. Greenleaf on Evidence, volume 1, section 14a; 1 Elliott on Evidence, section 157. If the appellee had brought out that its other cars could not run faster than a given rate of speed, then there might be much force in the argument of counsel for appellant and it might be said that the evidence should have been admitted in rebuttal.

(5) III. It is claimed by counsel for appellant that the court erred in admitting the testimony of Jim Crowe, the driver of the automobile, as to the place Ward and Milton had been just prior to the accident. It is a sufficient answer to this assignment of error to say that Carroll Milton, the companion of Ward, testified without objection as to the place they had been when they called the automobile. Therefore, no prejudice could have resulted to appellant on this account and we need not consider

further this assignment of error. *Crowley* v. *State,* 103 Ark. 315.

(6) IV. The next error assigned by counsel for appellant is the alleged refusal of the court to permit certain traffic ordinances of the city of Fort Smith to be read in evidence. The record shows that the court permitted to be read to the jury, the ordinances offered by counsel for appellant. It is true the court limited the purpose for which the jury might receive one of the ordinances introduced, and the record does not show that counsel for appellant excepted to the action of the court in this regard. It follows that the assignment of error is not well taken.

V. It is next contended that the court erred in refusing to give instruction number 1 asked for by counsel for appellant. The instruction reads as follows:

"1. The complaint charges that the defendant was guilty of negligence (1) by running the street car at a high, excessive and terrific rate of speed over the streets of the city of Fort Smith, and that without warning, and that it was also negligent in not keeping a proper and careful lookout ahead for persons that might be upon its track in said city, and that it was also negligent in not stopping the street car after the operatives of said street car had observed the perilous position of the plaintiff, and that defendant wilfully and wantonly ran said car down upon the deceased, and killed him. Each of these acts of negligence is denied by the defendant, and it also alleges contributory negligence on the part of the deceased. These are the issues to be tried by the jury." The court however gave instruction A which reads as follows:

"A. The plaintiff seeks recovery upon three alleged grounds of negligence of the defendant's employees operating the street car, towit: (1) That they were operating the street car at an unlawful, violent and terrific rate of speed and without warning by bell or otherwise. (2) That they were not keeping a proper lookout for persons and property upon the tracks. (3) That the

motorman, after he had discovered the dangerous and perilous position of the automobile in which Ward was riding failed to use reasonable efforts to stop said car and prevent the injury. Before the plaintiff can recover he must establish by a preponderance of the testimony that the defendant was guilty of some one of said alleged acts of negligence, and further, that said act of negligence, if proved, was the direct cause of the injury."

(7) It will be seen that the issues presented by instruction number 1 are clearly stated in instruction A and it is well settled that the court is not required to multiply or repeat instructions.

VI. It is next insisted that the court erred in refusing to give instructions numbered 3 and 5. The instructions read as follows:

"3. If Joe N. Ward, Jr. was a passenger in the automobile, and if the driver of the automobile was negligent, and if the operatives of the street car were negligent, and if the negligence of said driver and operatives combined and caused the death of said Ward, then the jury should find for the plaintiff."

"5. If the street car was negligently operated, and if that negligence either alone or combined with the negligence of the driver of the automobile, caused the death of Joe N. Ward, Jr., then it will be the duty of the jury to find for the plaintiff."

The court, however, gave instructions numbered 2 and 4, at the request of counsel for appellant. They read as follows:

"2. If the deceased, Joe N. Ward, Jr., was at the time of the collision a passenger in the automobile and if he was not at the time directing or controlling its movements, then the negligence of the driver of the automobile, if there was such negligence, can not be imputed to said Joe N. Ward, Jr., and if under those circumstances the driver of the automobile was negligent, that negligence if it existed, can not defeat a recovery by the plaintiff herein; provided the negligence of the defendant, if there was such negligence, caused the death of said Joe N.

Ward, deceased. But if you find that the negligence of the driver of the automobile was the sole cause of the accident, you will find for the defendant."

"4. If the jury should find that the death of Joe N. Ward, Jr., was caused by the combined negligence of the driver of the automobile, and the street car operatives, the fact that the owner of the automobile and the driver thereof are not joined as defendants, will not defeat the right of the plaintiff to recover against the defendant, if the latter was negligent as herein defined, if you find under the other instructions that plaintiff is entitled to recover."

(8) The issues embraced in three and five are clearly presented in instructions 2 and 4. The contributory negligence of decedent was not submitted as an issue to the jury. No instruction authorizes the jury to pass upon that question. The court plainly told the jury in a number of instructions that no negligence of the driver of the automobile could be imputed to the decedent. The instructions when considered as a whole plainly told the jury that if decedent was killed by the concurrent or combined negligence of appellee and of the driver of the automobile that appellant had a right to recover; that no negligence of the driver of the automobile affected appellant's right to recover unless the negligence of the driver of the automobile was the sole cause of the accident.

The car track ran along Fifth street, and C street crossed it at right angles. The accident occurred at the junction of Fifth and C streets. There was evidence tending to show that the street car approached the crossing at a high rate of speed and that the motorman failed to give the signal of the approach to the crossing. According to the evidence of appellant, the street car was going faster than allowed by the traffic ordinances of the city. It also appears from the evidence adduced by appellant that the automobile very nearly stopped as it approached the crossing and the occupants of the automobile were in

a position where they could and naturally would have heard the signal for the crossing if it had been given by the motorman operating the street car.

(9) The evidence was sufficient to carry the case to the jury upon the question of defendant's negligence. There is an irreconcilable conflict in the decisions as to the effect of the violation by a street railway company in the operation of its cars of regulatory ordinances, designed to promote the public safety. Our court has already taken a position on this question. According to our decisions, the mere fact that the street car was driven at a rate of speed forbidden by the city ordinances would not be considered proof of negligence as a matter of law. It is but an evidential fact tending to prove negligence and the question of negligence is one of fact for the jury. *Bain* v. *Fort Smith Light & Trac. Co.*, 116 Ark. 125.

In the case of *Pankey* v. *Little Rock Ry. & Elec. Co.*, 117 Ark. 337, the court held, "A street car company has the paramount or preferential right-of-way along the place occupied by its tracks, whenever the point arises that one must yield, either the company in the operation of its cars, or the traveler along or across the street; but the duties of all who use the streets are reciprocal, and the paramount right of the street railway company is subject to the reciprocal rights and duties of others, and no one user of the street has a right to pursue his course without anticipating the possibility of danger to others."

The court in the instant case instructed the jury in accordance with the principles of law laid down in the Bain and Pankey cases just referred to. Other assignments of error in regard to the giving and refusal of the court to give instructions, and alleged errors in modifying some of the instructions are pressed upon us for the reversal of the judgment. It would unduly extend the length of this opinion to discuss separately and in detail all of these alleged assignments of error. We deem it sufficient to say that we have not overlooked them, but have considered them in a careful manner. Numerous instructions were given by the court at the request of

counsel on both sides. Both parties to this law suit were represented by skilled attorneys. The record is voluminous and shows that the case was carefully tried. We think that the instructions given by the court fully presented the theories of both parties to the jury. We think that the refused instructions, so far as they were applicable to the issues presented by the pleadings, were covered by the instructions given by the court. The jury has said by its verdict that it believed the witnesses for appellee.

We have found no error in the record calling for a reversal of the judgment, and it will be affirmed.

McCONNELL v. CITY OF BOONEVILLE.

Opinion delivered May 8, 1916.

1. CRIMINAL LAW—VIOLATIONS OF CITY ORDINANCES—WRITTEN PLEADINGS.—No written information or pleadings are required in prosecutions for violations of by-laws or ordinances of a city or town.
2. CRIMINAL LAW—VIOLATION OF CITY ORDINANCE—SIGNATURE TO WARRANT.—In a prosecution for the violation of a city ordinance of a city of the second class, the failure of the mayor to sign his name to the affidavit does not affect the jurisdiction of the court to proceed.
3. CRIMINAL LAW—VIOLATION OF CITY ORDINANCE—BOND FOR COSTS.—The statute providing for the giving of bond for costs in prosecutions before a justice of the peace does not apply to prosecutions for violations of municipal ordinances.
4. CONTINUANCES—ABSENT WITNESS—DILIGENCE.—A continuance on the ground of the absence of a witness is properly refused where diligence in the procurement of the witness's attendance is not shown.
5. LIQUOR—SALE—EVIDENCE.—Evidence held to show defendant guilty of the sale of intoxicating liquors.

Appeal from Logan Circuit Court, Southern District; *James Cochran,* Judge; affirmed.

Jno. P. Roberts, for appellant.

1. A city of the second class has no authority to create the office of city attorney and elect an officer to said office. 53 Ark. 205; *Willis* v. *Fort Smith,* 121 Ark. 606; Kirby's Dig., § § 5465, 5591, 5596; 103 Ark. 534; 58 *Id.* 494; 25 S. W. 499; 74 Ark. 194; 85 S. W. 775.

2. No affidavit nor bond for costs was filed. Kirby's Digest, § 2490; 111 Ark. 51; Kirby's Dig., § § 2079, 2080.

3. The court erred in its instructions. It is error to instruct the jury upon the weight of the evidence or assumed facts which are for the consideration of the jury. 43 Ark. 289; 45 *Id.* 165; *Ib.* 292; 49 *Id.* 165.

Wallace Davis, Attorney General, and *Hamilton Moses*, Assistant, for appellee.

1. Appellant's motion to dismiss was properly overruled. A private citizen could make the affidavit. Kirby's Digest, § § 2488, 2490, 2482. The affidavit was sufficient. 29 Ark. 299; 45 *Id.* 536; 86 *Id.* 436.

2. No bond for costs was necessary. Kirby's Digest, § § 2476, 2480; 84 Ark. 554; McQuillin on Mun. Ord., § 333; 23 Ill. 533; Kirby's Dig., § 2476; 111 Ark. 53; 37 *Id.* 407.

3. The motion for continuance was properly overruled. 79 Ark. 594; 82 *Id.* 204; 94 *Id.* 169; 100 *Id.* 132; 95 *Id.* 555; 86 *Id.* 317.

4. There was no error in the court's charge. 114 Ark. 399; 74 *Id.* 265; 95 *Id.* 409; 102 *Id.* 186; 109 *Id.* 523.

5. The verdict is sustained by the evidence. 109 Ark. 130, 138.

McCULLOCH, C. J. The appellant, James McConnell, is prosecuted for the offense of selling intoxicating liquors without a license, in violation of an ordinance of the City of Booneville, a city of the second class. The prosecution was instituted before the mayor by an attorney claiming to act as the city attorney. He filed with the mayor a written information in the form of an affidavit. The information purports to be on oath, but the blank form of jurat appended to the information was not signed by the mayor. A warrant of arrest was issued, and when appellant was brought before the mayor he was tried and found guilty, and he prosecuted an appeal to the circuit court where on a trial *de novo* he was again convicted. When the cause reached the circuit court, and before the trial began there, appellant filed a motion to

dismiss the cause on the ground that no affidavit or bond for costs had been filed by the prosecutor. No such objection was raised in the mayor's court. The circuit court overruled the motion to dismiss and ordered that the trial proceed.

It is contended here that the circuit court erred in refusing to dismiss the cause. The contention with respect to the omission to file an affidavit is based on the ground that a city of the second class is not authorized to elect a city attorney, and that one acting in that capacity has no authority to file an official information in a prosecution under the ordinances of the city.

(1) There are many reasons why the motion to dismiss the cause ought not to have been sustained. In the first place, the statute expressly provides that no written information or pleadings are required in prosecutions for violation of by-laws or ordinances of a city or town. Kirby's Digest, section 2482-3. After an accused has been brought before the mayor, regardless of the manner in which he is brought there, he may be prosecuted on an oral charge. There is another provision of the statute that upon information or oath by a peace officer or a private person, a judge of the city court or mayor may issue a summons or a warrant of arrest against an offender. Kirby's Digest, sections 2488-90. That provision, however, relates only to the issuance of a warrant to bring the offender into court, but a written information, either by a peace officer or a private person, is not essential to the prosecution when the accused has been brought into court, for, as above stated, the statute expressly authorizes a prosecution for violation of city and town ordinances without written information or pleadings.

(2) In the next place, the information found in the record is in the form of an affidavit, and the only imperfection about it is that the jurat is not signed by the mayor. The affidavit was delivered to the mayor and a warrant was issued upon it, and the failure of that officer to sign his name to it does not affect the jurisdiction of the court to proceed with the prosecution.

(3) As to the failure of the prosecutor to give bond for costs, it is sufficient to say that the statute providing for the giving of bond for costs in prosecutions before a justice of the peace does not apply to prosecutions for violations of municipal ordinances. *Emerson* v. *McNeil,* 84 Ark. 552.

This prosecution was instituted before the mayor on May 20, 1915, and the information charges that the offense was committed on that day. Appellant was engaged in the grocery business within the city limits of Booneville, and the evidence adduced on the part of the prosecution tends to show that he was engaged in selling intoxicating cider. His place of business was raided by an officer, who took samples of the cider and caused the same to be analyzed by a professional chemist, and the analysis disclosed the fact that the cider contained 5 per cent. pure alcohol. There was considerable testimony adduced by the prosecution which tended to show that the cider sold by appellant was intoxicating in its effect. On the other hand, the appellant adduced testimony tending to show that the cider which he sold had no intoxicating effect whatever. His contention was that the prosecution was framed up on him by the city marshal, who hired a man named Joe Ed Roberts to surreptitiously pour alcohol into the barrel of cider, and that as soon as that was done the raid was made and the cider which contained the alcohol was taken and analyzed.

(4) Appellant asked for a continuance in order to procure the attendance of the witness Roberts, who was absent, but the court overruled the motion, and that ruling is one of the errors assigned, but it does not appear that appellant had exercised any diligence to procure the attendance of the witness, and we can not, therefore, say that the court abused its discretion in refusing to grant the continuance.

(5) There was sufficient evidence to warrant a finding that defendant sold the cider, and that it contained 5 percentage of alcohol and was intoxicating. The testimony of appellant himself tended to show that the cider

he sold was not intoxicating, but that some one without his knowledge or consent poured alcohol into the cider which was subsequently analyzed, but the jury found against him upon that issue upon legally sufficient evidence.

The court gave an instruction, over appellant's objection, which in effect told the jury that the analysis made by the chemist showed that the cider contained about 5 percentage of alcohol. It is contended that it was error to give that instruction containing the assumption as to the quantity of alcohol. That fact, however, was not disputed and there was no error in its statement by the court in the instruction. The contention of appellant was that some one else put the alcohol in the cider, but he did not dispute the fact that the cider taken from his place of business was analyzed and that the analysis showed that it contained five percentage of alcohol.

We are of the opinion that the defendant received a fair trial of the cause and that there is no prejudicial error in the record. The judgment is therefore affirmed.

STATE v. SEAWOOD.

Opinion delivered May 8, 1916.

1. LIQUOR—SELLING OR GIVING AWAY—PENALTY.—Under Act 30, p. 98, Acts of 1915, the sale or giving away of intoxicating liquors constitutes a felony, and it repeals all prior statutes so far as they fix a penalty for that offense.
2. CRIMINAL LAW—WORDING OF INDICTMENTS—STATUTORY CRIMES.—In indictments for statutory offenses it is only necessary to use the language of the statute, unless it is apparent that there are elements of the offense not described in that language.
3. LIQUOR—SALE—INDICTMENT—AVERMENT OF FELONIOUS INTENT.—An indictment charging the crime of selling or giving away liquor under Act 30, p. 98, Acts of 1915, is good, although it does not charge that the act was done with a felonious intent.
4. CRIMINAL LAW—INDICTMENTS—AVERMENT OF FELONIOUS INTENT.—An averment that an act was done with a felonious intent is not necessary in an indictment for the commission of a statutory crime, where a felonious intent constitutes no part of the crime.

Appeal from Cross Circuit Court; *W. J. Driver,* Judge; reversed.

Wallace Davis, Attorney General, *Hamilton Moses,* Assistant, and *M. P. Huddleston,* Prosecuting Attorney, for appellant.

The Act No. 30, 1916, does not repeal all other laws on the subject and the penalty prescribed is cumulative.

McCULLOCH, C. J. The grand jury of Cross County returned an indictment against defendant, charging him with the unlawful sale of intoxicating liquors, and the court sustained a demurrer to the indictment and rendered a judgment discharging the defendant, from which judgment the State has prosecuted an appeal to this court. The record does not disclose the reasons which controlled the circuit judge in sustaining the demurrer, but it is assumed here in the argument of the Attorney General that the decision was based upon the view that the State-wide prohibition statute enacted by the General Assembly of 1915, making the sale or giving away of intoxicating liquors a felony, repealed prior criminal statutes on that subject, and that the offense being a felony the indictment was defective because it failed to allege that the act was feloniously done.

(1) We think the court was correct in holding that under the law as it now stands, since the Act of 1915* went into effect, the sale or giving away of intoxicating liquors as set forth in sections 2 and 3 of that statute constitutes a felony, and that it repeals all prior statutes so far as they fix a penalty for that offense. Those sections read as follows:

"Section 2. After January 1, 1916, it shall be unlawful for any person, firm or corporation to manufacture, sell or give away, or be interested, directly or indirectly, in the manufacture, sale or giving away of any alcoholic, vinous, malt, spirituous or fermented liquors or any compound or preparation thereof, commonly called tonics, bitters or medicated liquors within the State of Arkansas.

*Act 30, Acts 1915 (Rep.)

"Section 3. Any person, firm or corporation who shall violate any of the provisions of this act shall be guilty of a felony, and upon conviction shall be imprisoned in the State penitentiary for a period of one year. No court shall suspend sentence or permit a plea of guilty to be entered and continue the cause for a second offense of the provisions of this act."

The contention of the Attorney General is that the intention of the Legislature was to make the penalty prescribed by the Act of 1915 merely cumulative to the penalties prescribed in the former statutes and not to repeal the same. His contention is, in other words, that all the penalties for selling or giving away intoxicants are preserved, and that the State can elect whether it will treat the offense as a misdemeanor punishable by fine or as a felony punishable by imprisonment in the penitentiary according to the terms of the last statute. Section 4 is relied on as sustaining that view. That section provides as follows: "All parts of laws providing for the issuance of liquor license in the State of Arkansas that are in conflict herewith are hereby repealed, and this act is intended to be cumulative to all present liquor laws prohibiting the issuance of liquor licenses in the State of Arkansas."

Section 4 refers only to prior statutes providing for the issuance of liquor license and has no express reference to prior statutes imposing penalties for illegal sales of intoxicants. Section 2 of the statute makes it unlawful to manufacture, sell or give away intoxicants or to be interested therein, and section 3 declares a violation of those provisions to be a felony. It is within the power of the lawmakers to prescribe the penalty for all criminal offenses, and there may be a graduated penalty running from a single fine to the highest punishment; but in the last statute the Legislature has declared that the commission of the offense shall be a felony punishable by imprisonment in the penitentiary, and that necessarily operates as a repeal of statutes fixing other penalties for the same offense. The last statute, being broader than the

prior statutes on the subject, necessarily submerges them and operates as an implied repeal. Of course, there are statutes fixing penalties for other offenses, related in more or less degree to the offense of selling or giving away of intoxicants or being interested therein, which are not necessarily repealed by this statute; but we are of the opinion that the penalty prescribed by the Act of 1915 for the particular offense mentioned in section 2 is exclusive and that the offense is now a felony, punishable only under indictment.

(2) The question then arises whether or not it is necessary for the indictment to charge that the offense was feloniously committed. The statute does not, in describing the offense, use the word "felonious." The rule is well settled in this State that in indictments for statutory offenses it is only necessary to use the language of the statute, unless it is apparent that there are elements of the offense not described in that language. There are many decisions of this court to that effect, but nearly all of them are cases where only misdemeanors were charged, and the particular question we have now is whether or not the same rule applies to felony cases.

(3-4) There appears to be some conflict in the authorities on this subject, but we have a decision of this court directly on the point. In *State* v. *Eldridge,* 12 Ark. 608, which was a felony case, Chief Justice Johnson, speaking for the court, said: "In all cases of felonies at common law and some also by statute, the felonious intent is deemed an essential ingredient in constituting the offense, and hence the indictment will be defective, even after verdict, unless the intent is averred. The rule has been adhered to with great strictness, and properly so where this intent is a material element of the crime. * * * But in cases where this felonious intent constitutes no part of the crime, that being complete under the statute without it, and dependent upon another and different criminal intent, the rule can have no application in reason however it may be upon authority."

In later decisions by this court the rule has been broadly laid down that in cases of felonies it is necessary to charge that the act was feloniously done in order to constitute a good indictment, but those were cases of common law felonies or where the felonious intent was an essential part of the crime.

We are not left without substantial authority from other quarters supporting this view. The Supreme Court of the United States reached the same conclusion in the case of *United States* v. *Staats,* 8 Howard 41, where, after reviewing the common law rule on the subject with respect to the necessity for the use of the word "felonious" in an indictment, the court said: "This view accounts for the necessity of the averment of a felonious intent in all indictments for felony at common law; and, also, in many cases when made so by statute; because, it is used, in the sense of the law, to denote the actual crime itself, the felonious intent becomes an essential ingredient to constitute it. The term signifying the crime committed, and not the degree of punishment, the felonious intent is of the essence of the offense; as much so as the intent to maim, or disfigure, in the case of mayhem, or to defraud, in the case of forgery, are essential ingredients in constituting these several offenses. But, in cases where this felonious intent constitutes no part of the crime, that being complete, under the statute, without it, and depending upon another and different criminal intent, the rule can have no application in reason, however it may be upon authority."

In a later case (*Bannon* v. *United States,* 156 U. S. 464), the Supreme Court of the United States announced the same conclusion, and, after referring to the former decision just cited, said: "In the opinion it was admitted that, in cases of felonies at common law, and some also by statute, the felonious intent was deemed an essential ingredient, and the indictment would be defective, even after verdict, unless such intent was averred; but it was held that, under the statute in question, the felonious intent was no part of the description, as the offense was

complete without it, and that the felony was only a conclusion of law, from the acts done with the intent described, and hence was not necessary to be charged in the indictment."

The following authorities also announce the same conclusion: *Bolen* v. *People,* 184 Ill. 338, 56 N. E. 408; *Wagner* v. *State,* 43 Neb. 1.

Our conclusion, therefore, is that the indictment in this case stated a public offense within the jurisdiction of the circuit court, and that it was error to sustain the demurrer. The judgment is reversed and the cause remanded with directions to overrule the demurrer, and for further proceedings.

SMITH, J., dissents.

RURAL SPECIAL SCHOOL DISTRICT NO. 17 *v.* SPECIAL SCHOOL DISTRICT NO. 56.

Opinion delivered May 8, 1916.

SCHOOL DISTRICTS—ANNEXATION OF TERRITORY TO SINGLE SCHOOL DISTRICT—DISCRETION OF COUNTY COURT—REVIEW.—The county court, under Kirby's Digest, § 7695, is given a discretion to determine judicially whether adjoining property should be annexed to a single school district, and the judgment of the county court will not be controlled, unless the evidence shows an abuse of that discretion.

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

Elmer J. Lundy, for appellant.

The county court had no discretion to refuse the petition and its only office was to grant the annexation as prayed for in the petition, and the circuit court should have made such an order as the county court should have made in the first instance. Appellees, after remonstrating and successfully inducing the court to refuse annexation, could not take advantage of their own acts of remonstrating and by inducing the court to order an election in School District 56 to defeat the jurisdiction of the circuit court on appeal. Kirby's Digest, § 7695; 105

Ark. 47, 49-50; 104 *Id.* 145, 149; 76 *Id.* 48; 134 Ill. 603; 3 Corp. Jur. 1255, 1258; 29 Ark. 81; 23 Cal. App. 627; 138 Pac. 917; 110 N. W. 16.

Minor Pipkin, for appellee.

The remonstrance of Frachiseur was properly treated as a request for the withdrawal of his name from the petition. 40 Ark. 290.

This is simply a case where after the first trial and before it reaches a higher court on appeal, a new defense has arisen which defendant had the right to urge. 66 Ark. 93; 24 Cyc. 737. The court had the discretion to grant or refuse the petition and no abuse is shown. The judgment is right and should be affirmed.

McCULLOCH, C. J. Appellant is a rural single school district established under Act 321 of the General Assembly of 1909, which authorizes the formation of rural single school districts in the same manner as such districts are created in cities and towns. The present proceeding is one instituted in the county court to annex certain contiguous territory to appellant district. The statute on that subject reads as follows: "The county court shall annex contiguous territory to single school districts, under the provisions of this act, when a majority of the legal voters of said territory and the board of directors of said single district shall ask, by petition, that the same shall be done." Kirby's Digest, section 7695.

The territory sought to be annexed covers several contiguous tracts of land aggregating 560 acres embraced within the boundaries of appellee district, which was at the time of the institution of this proceeding a common school district, and it appears from the record before us that there was only one legal voter residing in that territory. The petition was filed by the directors of appellant district and the single voter residing in the territory to be annexed. It was filed on May 18, 1915, and it appears that on the preceding day a petition had been field with the county court by a majority of the electors of Common School District No. 56, asking that an election be called for the purpose of constituting a single school district

out of the territory of that school district. It appears, however, that the original petition for the creation of the new single school district was abandoned, and while the annexation proceedings were pending in the county court a new petition was filed by a majority of the voters of the common school district to create a single school district out of that territory, except eighty acres of land therein which is a part of the territory sought to be annexed. The voter residing in the territory sought to be annexed signed the petition for the creation of the single school district, and the county court treated the petition for the creation of that district as a protest against the annexation of the territory to District No. 17, and held that it in effect constituted a request of the single voter to withdraw his name from the petition for annexation, and entered an order dismissing the petition, from which order an appeal was prosecuted to the circuit court.

While the cause was pending in the circuit court on appeal, the county court ordered an election pursuant to the petition of the voters of Common School District No. 56, and the election was held and a majority of the voters having cast their ballots in favor of the project the new district was created. When the annexation petition came on for hearing in the circuit court, that court adjudged that the prayer of the petition be denied as to all of the territory except the eighty acres of land which had not been included in the new single school district. The eighty acres in question was, but the judgment of the circuit court, annexed to District No. 17, and from that judgment District No. 17 prosecuted an appeal to this court.

There are several questions suggested, concerning the power of the court to annex territory to District No. 17, which we do not deem it proper to decide now for the reason that no appeal has been prosecuted from that part of the order which annexed a certain portion of the disputed territory of District No. 17. In the first place, it is debatable whether the statute authorizing the annexation of adjoining territory to single school districts in cities

and towns applies to rural single school districts created under the Act of 1909. Another disputed question is as to which petition takes precedence, the one to annex territory or the one to create a new single school district to include the territory sought to be annexed; this court having recently held that the territory embraced within a petition for the creation of a new single school district can not, after the election has been ordered, be invaded by an attempt to create another district out of a part of that territory. *Special School District No.* 79 v. *Special School District No.* 2, 121 Ark. 581. Still another question suggested by the record is whether or not the county court has the power to annex part of the territory set forth in the petition without annexing the whole of the territory sought to be annexed. All of these questions we deem it improper to decide at this time for the reason, as before stated, that no appeal has been prosecuted from that part of the order which annexes a portion of the territory, and we find another solution which does not involve the determination of either of those questions.

The only point we find it necessary to decide here is whether or not the statute authorizing the annexation of adjoining territory to single school districts gives the county court any discretion in passing upon a petition, or whether the order must be made as a matter of course upon presentation of the petition. That question has not heretofore been decided by this court. We held in *Bonner* v. *Snipes,* 103 Ark. 298, that the creation of a single school district was consummated by the affirmative vote of a majority of the electors, and that no order of the county court was required to complete the organization. It does not follow, however, from that decision that the county court has no discretion in the matter of making an order for the annexation of territory. We have held in several cases that the county court exercises discretion with respect to change of the boundaries of common school districts. *Hale* v. *Brown,* 70 Ark. 471; *Stephens* v. *School District,* 104 Ark. 145; *Carpenter* v. *Leather-*

man, 117 Ark. 531, 176 S. W. 113; *School District, No.* 45 v. *School District No.* 8, 119 Ark. 149. The same reason would apply for holding that the county court has discretion in annexing territory to a single school district. The statute provides that an order of the county court shall be necessary, and that implies that the court acts judicially in determining whether or not the order for the annexation should be made. If it had been intended that the annexation should be accomplished merely by the filing of a petition, the lawmakers would have so stated without providing for the county court to act upon the petition. If the county court acts judicially in passing upon the petition, then it has discretion in determining the propriety of making the order.

The fact that the language used is mandatory in its terms amounts to nothing in the construction further than to indicate that the county court must grant the order if the proper petition is filed and the conditions favor it. It does not mean, however, that the county court is bound to make the order, regardless of the circumstances of the case, when contrary to the court's judgment as to the best interest of those concerned. There is nothing strained in this construction, for single school districts are not entirely beyond the control of county courts, notwithstanding the fact that they are created merely by vote of the electors of the district. We have held that the statute authorizing the transfer of children and property from one district to another applies to single school districts (*District No.* 33 v. *Eubanks,* 119 Ark. 117); also that the general statute providing for dissolution of school districts by orders of the county court applies to single school districts as well as to common school districts. *Hughes* v. *Roebuck,* 119 Ark. 592.

We hold, therefore, as a more reasonable view of the statute, that the Legislature meant to lodge in the county court some discretion in determining judicially whether or not the order of annexation should be made, and the judgment of the county court on that subject will not be controlled unless the evidence shows an abuse of the dis-

cretion. In the present case there is no bill of exceptions and we are, of course, unable to determine what influenced the circuit court in reaching the conclusion that this territory which had been formed into a single school district should not be taken away from that district and added to another adjoining district. We indulge the presumption that the circumstances shown to the court made it appear to be inexpedient to thus dismember the new school district, even if we hold that the court had the power to do that.

The judgment of the circuit court is therefore affirmed.

LEFKER v. HARNER.

Opinion delivered May 8, 1916.

1. CORPORATIONS—PURCHASE OF OWN CAPITAL STOCK—TRUST COMPANY.—A trust company is without authority to purchase its own shares with its own capital stock.
2. CORPORATIONS—USE OF CAPITAL STOCK.—The capital stock of a corporation is a trust fund that must be devoted to its debts, and neither the corporation nor an individual stockholder can divert it directly or indirectly from that purpose.
3. CORPORATIONS—CAPITAL STOCK OF TRUST COMPANY.—The capital stock of a trust company is a fund that must be procured for the benefit of all creditors.
4. CORPORATIONS—REDUCTION OF CAPITAL STOCK—ACT OF SHAREHOLDER—LIABILITY TO CREDITOR.—Where a shareholder of a corporation enters into a transaction with the officers of the corporation by which the capital stock of the corporation is reduced below the minimum required by the law, his act is a legal fraud upon the creditors of the corporation, and he is liable to the extent of the amount that he has received in return for the shares of stock sold to the corporation and paid for out of its capital stock.

Appeal from Washington Chancery Court; *T. H. Humphreys,* Chancellor; affirmed.

STATEMENT BY THE COURT.

Appellee instituted this suit against appellant, alleging that on June 20, 1911, appellant and others organized a corporation under the name of Ozark Trust Company, (having a paid-up capital stock, according to

its articles of association, of $50,000 divided into five hundred shares of the value of $100 each, of which appellant owned 239 shares), for the purpose of engaging in the business of a trust company, as provided by chapter 31, subdivision V, sections 887 to 891, inclusive, of Kirby's Digest; that the corporation so formed had its office and principal place of business in the City of Siloam Springs, where it solicited and received from the general public deposits of money in trust, subject to check or sight draft or order of depositors; that in August, 1911, appellant sold all his stock to the corporation in which he was a stockholder, transferring his certificates of stock to the corporation and endorsing on the certificates of stock that same were transferred to the corporation for value received; that such corporation paid to appellant for his stock an amount of money which appellee alleges amounted to not less than $20,000; the exact amount she was unable to state; that neither at the time of this transaction nor at any other time before or after did the corporation have any surplus above its original capital, and that the money which was paid to appellant therefore came out of and depleted its capital stock; that by such purchase of stock from appellant the capital stock of the corporation was reduced to less than $30,000; that such depletion of the capital stock of the corporation resulted in its failure; that no certificates of the transfer of stock from appellant to the corporation was deposited with the clerk of Benton County, and there was no record of such transaction, and therefore no notice to the public; that no steps were taken as provided by section 860 of Kirby's Digest to reduce the capital stock of the corporation; that appellee, in September, 1911, deposited with the corporation the sum of $800; that some months thereafter the corporation became insolvent, paid over all its assets to its numerous creditors and ceased to do business; that appellee had been unable to reduce her claim to judgment against the corporation, and if she had been able to do so such course would be expensive and fruitless; that appellee believed at the time she made the de-

posit that the corporation was solvent and operating in full compliance with the law; that she had no knowledge to the contrary until its failure, and no knowledge of the sale of the stock of appellant to the corporation until some time during the year 1914; that appellant, after the sale of his stock to the corporation as above set forth, left the State and remained away for more than three years, his whereabouts during said period being unknown to the plaintiff, and that she exerciesd due diligence to locate him and was unable to do so; that the appellant and the corporation concealed from the appellee the fact that appellant had sold his stock to the corporation, as above alleged, and that hence appellee hitherto had been prevented from commencing any suit against him; that the sum of $500 of the amount deposited had never been paid to appellee. Wherefore she prayed judgment against the appellant in that sum.

The appellant demurred to the complaint. The court overruled the demurrer, and appellant, electing to stand upon his demurrer, the record recites as follows: "Whereupon the cause was submitted to the court and the court having heard the evidence and being fully advised in the premises, finds that the allegations of the bill are true, and that the plaintiff should have and recover of and from the defendant the sum of $500, with interest, making a total sum of $620." Appellant duly prosecutes this appeal.

A. L. Smith, for appellant.

The complaint stated no cause of action. (1) It does not allege insolvency at the time of, or that the corporation was rendered insolvent by the purchase of the stock. (2) No bad faith or fraud is alleged. The corporation was authorized to buy and sell stocks, etc. The purchase of its own stock was not forbidden. No intent to defraud creditors was shown. Appellant was not liable under the allegations of the complaint and proof. 1 Cook on Corp. (8 ed.), § § 311, 313; 75 Ark. 148; 77 *Id.* 12; 80 Ia. 380; 45 N. W. 1037; 11 Ariz. 334; 95 Pac. 95; 111 Wisc. 387; 87 N. W. 226; 1 Cook on Corp. (8 ed.), §

311, p. 850; 97 Ark. 374; 114 Ark. 344; 28 S. W. 431. An actual intent to defraud must be shown.

Williams & Williams, for appellee.

1. A stockholder has no right to surrender his stock and receive payment out of the capital fund unless such right is distinctly specified in the charter. Kirby's Digest, § 839; Cook on Corp. (7 ed.), § § 309, 311; 101 U. S. 71; 139 *Id.* 24; 86 Fed. 742; 95 Ark. 368; Kirby's Dig., § § 888, subd. 9, 838, 848, 849, 858, 860-1, etc.; 54 Ark. 576; 91 U. S. 56; 69 Conn. 29; 48 Minn. 174; Morawetz on Corp. (2 ed.), § 112; 126 Ala. 449; 73 Pac. 364; 96 Ark. 1; etc.

2. Purchases of stock of its own by a corporation are illegal and the vendor is liable. 54 Ark. 576; 96 *Id.* 1; 84 Fed. 392; 68 S. W. 1026. The "trust fund" theory has been adopted in Arkansas. 139 U. S. 417; 160 Fed. 573; 201 *Id.* 647; 96 Ark. 1; 97 Ark. 248 and many others.

3. As against creditors without notice corporations which have no surplus, can not purchase their own stock. Cook on Corp. (7 ed.), § 311; 96 Ark. 1; 212 Fed. 357. The fact that the corporation was solvent does not justify such purchase when it impairs its capital. 104 Ill. 26; 28 So. 531; 44 *Id.* 592; 73 Pac. 364; 203 Fed. 720; 84 *Id.* 392; 212 *Id.* 357.

4. Specific intent to defraud is unnecessary to render the selling stockholder liable to creditors. 95 Ark. 368; 130 S. W. 162; 75 Ark. 148; 104 Ill. 26; 126 Ala. 449; 102 Md. 608; 212 Fed. 357, etc. Subsequent creditors who have no knowledge have recourse on the selling stockholder. 75 Ark. 148; 97 *Id.* 374; 114 *Id.* 344; 135 N. W. 329; 97 Ark. 248; 191 Fed. 97; etc.; Kirby's Digest, § § 6127, 7823; 31 Ark. 441; 32 *Id.* 562; 35 *Id.* 565, etc.

WOOD, J., (after stating the facts). The law under which the Ozark Trust Company was organized provides that in no event shall the paid-up capital stock of such corporations be less than $50,000. Kirby's Digest, section 889.

(1) The allegations of the complaint show that the transaction under review resulted in a depletion or reduction of the capital stock of the Ozark Trust Company to less than the amount required under our law. The transaction was therefore invalid. The purposes for which trust companies may be organized are set forth in chapter 31, subdivision V, section 888 Kirby's Digest. The ninth subdivision is as follows: "To buy and sell all kinds of government, State, municipal and other bonds, and all kinds of negotiable and non-negotiable paper, stocks and other investment securities." This statute does not authorize a transaction of the character set forth in the complaint, but refers to investments made by corporations in shares of stock of other corporations. The purpose of the law was to allow a trust company to make investments and to add to its assets, thereby increasing the value of the capital upon which it does business. But manifestly an investment of the capital stock of a corporation in its own shares of stock where these shares are not again reissued and sold, can have no other effect than to deplete or reduce the paid-up capital of the corporation by the shares thus taken up. While the transaction may be in the form of a sale, in reality it is an extinguishment of the company's capital by the amount turned over to the shareholder for his stock, and is, in legal effect, but a gift of the amount paid for the capital stock of the corporation to the individual shareholder whose shares are taken up in this way.

As is said by Mr. Morawetz: "A purchase by a corporation of shares of its own stock, in effect, amounts to a withdrawal of the shareholder whose shares are purchased from membership in the company, and a repayment of his proportionate share of the company's assets. There is no substitution of membership under these circumstances, as in case of a purchase and transfer of shares to a third person, but the members of the company and the amount of its capital are actually diminished. * * * Every continuing shareholder is injured by the reduction of the fund contributed for the common venture;

and the creditors who have trusted the company upon the security of the capital originally subscribed, or who are entitled to expect that amount of security, are entitled to complain." Morawetz on Private Corp., § 112.

Mr. Thompson, quoting from a well known law writer, says:

"There is a great difference between dealing in the shares of other companies and in its own. The former is ordinary business, attended only with the usual risks of ordinary transactions but the latter tends inevitably to breaches of their duty on the part of the directors, and to fraud and rigging the market on the part of the corporation itself. Consequently, a corporation, to possess such power, must have it conferred by the plainest and most explicit language." 4 Thompson on Corp., section 4076; Green's Brice Ultra Vires, 95.

We are aware of the fact that where neither the charter nor the statute prohibits a corporation from purchasing its own shares of stock, and where there is no statute expressly authorizing it to do so, there is great contrariety among the authorities as to whether it may do so. 4 Thompson on Corp., section 4075. Whatever may be the rule in other jurisdictions, under our statute requiring trust companies to have a paid up capital of not less than $50,000, such companies have no power to purchase the shares of its own shareholders with its capital stock. For, as we have seen, such a transaction, where the stock is not reissued or resold and the amount brought into the corporate treasury, but depletes or reduces the capital stock below the minimum amount required by our statute.

The statute contemplates that this amount of capital shall be in the treasury for the protection of those doing business with such company at all times. And this statutory requirement is tantamount to an express prohibition against paying out the funds constituting the capital stock to a shareholder for his shares of stock. In such case the corporation would have the surrendered certificate and the shareholder the money, and to the extent of the amount given him the corporate capital

would be correspondingly reduced. See *Kom* v. *Cody, Etc. Co.,* 76 Wash 540, 136 Pac. 1155. Such a transaction is but in legal effect a refunding to the shareholder.

Our statute also requires that the purpose for which corporations are organized shall be specified by the stockholders in their articles of association, and that the amount of capital stock shall be stated therein and the amount actually paid in, the names of the stockholders and the number of shares owned by each, and that these shall be filed in the office of the county clerk where the corporation has its principal place of business, and that the president and secretary shall annually make a report showing the amount of capital stock paid in, the name and number of shares of each shareholder, and the business of the corporation. Kirby's Digest, sections 839, 845, 848. All these provisions show that the capital stock of corporations, under our law, is intended to be kept intact for the benefit of those who have business dealings with the corporation. Any transaction which results in a diminution of this capital stock at any time in any way is detrimental not only to existing and subsequent creditors, but to the shareholders themselves.

(2) The allegations of the complaint are sufficient to show that the transaction under review reduced the capital stock of the Ozark Trust Company and rendered it insolvent. This court long ago recognized the doctrine that the capital stock of a corporation is a trust fund that must be devoted to its debts, and that neither the corporation nor the individual stockholder can divert it directly or indirectly from this purpose. *Carter* v. *Union Ptg. Co.,* 54 Ark. 580; *Tiger* v. *Rogers Cotton Cleaner & Gin Co.,* 96 Ark. 1-5.

In the latter case, we quoted from Mr. Cook on Corporations, section 311, as follows: "If the corporation is insolvent at the time of the purchase it is clearly an invalid transaction and will be set aside. The rule goes still further and declares that if a corporation, by a purchase of shares of its own capital stock thereby reduces its actual assets below its capital stock and debts, or if the

actual assets at that time are less than the capital stock and debts, said purchase may be set aside and the guilty corporate officers, as well as the vendor of stock, may be rendered liable thereon at the instance of the corporate creditor." See also *Jones* v. *Dodge,* 97 Ark. 248.

Appellant contends that there is no allegation in the complaint of the insolvency of the trust company at the time the transaction under consideration took place, and that there is no specific allegation that it was done with the intent to defraud the appellee, who was a subsequent creditor. The recitals of the decree show that the cause was heard upon the evidence. Under such recital, in the absence of a showing to the contrary, we would have to presume that the evidence proved every issue of fact essential to the correctness of the court's conclusion of law. Therefore, if it were necessary, we would have to assume that it was proved that the corporation was insolvent at the time of the transaction or that the transaction itself rendered it so. We would also have to assume that this transaction was made by the appellant and the officers of the corporation with the specific intent to defraud existing and subsequent creditors.

(3) The capital stock of a trust company, under our law, is a fund that must be preserved for the benefit of all creditors. The statute was designed to give assurance to the public dealing with such companies that this capital stock would be always on hand for their protection. As was said in *Sanger* v. *Upton,* 91 U. S. 56, 60, 61, quoted in *Carter* v. *Union Ptg. Co., supra*: "The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private co-partnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied otherwise than upon their demands, until such demands are satisfied * * * It is publicly pledged to those who deal with the corporation, for their security."

(4) The shareholder of a corporation especially should be bound by the law of its creation and the stat-

utes by which it is governed, and if such shareholder enters into a transaction with the officers of the corporation by which the capital stock is reduced below the minimum required by the law his act is at least a legal fraud upon the creditors of the corporation and he is liable to the extent of the amount that he has received in return for the shares of stock sold to the corporation and paid out of its capital stock. A similar question arose in *Tait* v. *Pigott,* 32 Wash. 344, 73 Pac. 364. In that case the receiver of an insolvent corporation sued a stockholder of the corporation for assets received by him in payment for a sale of his stock to the corporation, and the complaint failed to allege that the corporation was insolvent at the time of the alleged sale. The court held that such an allegation was immaterial, "since the thing which was unlawfully done reduced the available resources of a now insolvent company, and if such reduction had not been made the amount should not be on hand for the benefit of creditors." See also *Union Trust Co.* v. *Amery,* 67 Wash. 1, 120 Pac. 539; *Atlanta, Etc. Association* v. *Smith,* 141 Wis. 377, 123 N. W. 106; *Tierney* v. *Ledden,* 143 Iowa 286, 121 N. W. 1050.

The allegations of the complaint show that neither pre-existing nor subsequent creditors consented to the transaction under consideration. They had no opportunity to do so, for it is alleged that no certificate of the transfer of stock was recorded as the law requires and that no notice was given to the appellee.

It follows that the decree of the court was in all things correct and it is therefore affirmed.

SLIM AND SHORTY *v.* STATE.

Opinion delivered May 8, 1916.

1. RESISTING ARREST—ACTS OF OFFICERS—QUESTION FOR JURY.—Where defendants were charged with resisting an arrest, the issue of whether the officers complied with the terms of Kirby's Digest, § 2124, requiring the officers to inform the persons about to be arrested of their intention to make the arrest, and of the offense with which they were charged, is for the jury under the facts.

2. RESISTING ARREST—IDENTITY OF OFFICERS—KNOWLEDGE.—The issue of whether defendants knew that the parties making the arrest were officers, was, under the evidence, for the jury.
3. CRIMINAL LAW—ARREST—WARRANT.—The statute authorizes an arrest by a peace officer without a warrant, where he has reasonable grounds for believing that the person arrested has committed a felony.
4. CRIMINAL LAW—RESISTING ARREST—ASSAULT WITH INTENT TO KILL—EVIDENCE—ARTICLES FOUND ON ACCUSED.—When indictments charging the crime of resisting an arrest and assault with intent to kill, are tried together, testimony showing that defendants at the time of their arrest had on their persons the paraphernalia of burglars and robbers is competent as throwing light upon the motive or intention of the defendants, in threatening to draw, and in drawing their guns upon the officers.
5. TRIAL—CONDUCT OF COUNSEL—DISCRETION OF COURT.—A wide discretion is lodged with trial judges to see that the examination of witnesses is conducted fairly, and that the attorneys representing the opposing sides of the cause observe a proper decorum toward each other, as well as toward the court, and, as attorneys are officers of the court, the presiding judge is under a reciprocal duty to treat them with fairness and becoming courtesy, while they are conducting their client's cause, which they have a right to, and must, do.
6. TRIAL—ACTION OF COURT—ADMONITION TO WITNESS AND COUNSEL.—It is not error for the trial court to admonish a witness that he has taken an oath to tell the truth, the whole truth, and nothing but the truth, and in stating to the witness that he must answer the question propounded to him; nor in saying to appellants' counsel that the witness was able to take care of himself.
7. CRIMINAL LAW—TRIAL—REASONABLE DOUBT—INSTRUCTION.—Two defendants were indicted and tried together for the crimes of resisting arrest and assault with intent to kill. *Held*, an instruction that "there are two separate charges and two defendants. Take up each charge against each defendant separately and carefully consider them and return your verdict according to what you believe is right under the evidence," is proper, when the court otherwise properly instructed the jury on the question of reasonable doubt.
8. APPEAL AND ERROR—INSTRUCTION ON ISSUE OF INTENT IN CRIMINAL CASE.—An instruction on the issue of defendants' intention in a prosecution for resisting an arrest, held valid in the absence of a specific objection thereto.
9. TRIAL—INSTRUCTION AFTER ARGUMENT—CRIMINAL TRIAL.—It is within the discretion of the trial court to instruct the jury, after the conclusion of the argument, at their request on the question of accessories.

Appeal from Little River Circuit Court; *Jefferson T. Cowling,* Judge; reversed in part; affirmed in part.

STATEMENT BY THE COURT.

Appellants were indicted jointly for the crime of an assault with intent to kill. They were also jointly indicted for the crime of resisting an officer. By consent the causes were tried together. Appellants were both convicted on the charge of resisting an officer, and appellant Shorty was convicted of an assault with intent to kill. From these convictions appellants have duly prosecuted this appeal.

The facts are substantially as follows: Robert Pierce, a deputy sheriff of Little River County, had information to the effect that there were two men coming in on a certain train who were suspected as being men who figured in the holdup of train No. 1 at Rich Mountain. He was requested by an official of the Kansas City Road to meet the train and take off the men. Pierce went to meet the train on which he was informed that these men were traveling and was told by the conductor that they had gotten off a few miles back. Pierce and two other deputies then went in an automobile to capture the men. When they had proceeded about two and a half miles they met the men and the driver of the car stopped for them to get out. The driver of the car ran within from six to ten feet of the men and stopped the car, when Pierce said, speaking to the men, "Boys, we want you; put up your hands." The men started for their guns. Pierce asked them not to pull their guns. Pierce saw that one could not get his gun out as it was hung, and told one of the deputies to watch that man (who was called Slim). The other man (called Shorty) was pulling his gun and Pierce asked him not to pull it, but he reached around and caught hold of it with his left hand and jerked his gun out with his right hand, and when he did that the gun came in a certain position (which witness Pierce indicated) and Pierce then fired. Pierce told Shorty not to pull his gun, that if he did he would kill him, but Shorty did not heed the request, but jerked his gun and it came out in the position indicated by the witness, when Pierce fired. Shorty was pointing his gun right at the

face of another deputy named Finley. Finley and Pierce fired about the same time. When they fired Shorty fell. Pierce then wheeled around to look at Slim, and at that time his hands were going up, and his gun fell out in front of him. Pierce then turned to see what Shorty was doing. He sat up and looked at his gun. While Shorty was attempting to draw his gun he was gritting his teeth.

Slim and Shorty were searched. They had a box of cayenne pepper, nearly a full box of cartridges, a mask, whistles and rings, and two pistols. One of the pistols was a 38 Special and the other a 41 Special. Both were loaded. Shorty was shot, and in a conversation with him Pierce remarked that he regretted that it happened, but told Shorty that he was to blame for it. Shorty said, "Yes, you had it to do all right." Shorty refused to give any name. At the time he refused to give his name he was shot and in a very critical condition, not in much shape to talk. Neither of the appellants had given witness Pierce their names. The officers were looking for train robbers, and it had been reported to them that they had bad men to contend with. Pierce kept hallooing at Shorty to throw up his gun or he would kill him, but Shorty continued to pull it until he got it out and had it pointed right at Finley's face, when both Pierce and Finley fired.

Appellant Slim was a witness and testified that his real name was Willie Willis. While he was being cross-examined by the prosecuting attorney in regard to Shorty's name, the record shows that he did not answer the questions readily and his attorney, Mr. Morrell, who was standing, objected to the questions being propounded by the prosecuting attorney, whereupon the court remarked: "Sit down, Mr. Morrell. The witness is able to take care of himself." To which remarks of the court appellant excepted. While the witness was being further interrogated the court remarked: "You took an oath awhile ago to tell the truth, the whole truth and nothing but the truth. You must answer." To which remarks of the court the appellants excepted.

Appellant Slim testified that he did not refuse to give his name; that he had worked with Shorty for six weeks and had been with him four or five days before they were arrested, and that he had not found out anything more about his name than that he was named Shorty; that he could not swear to Shorty's real name. He testified that he did not know that the men who arrested them were officers; that they did not advise him that they were officers; that he put his hands up when they told him to do so and did not intend to resist them.

Appellants contend that the court erred in giving certain instructions, which we will comment upon in the opinion.

June R. Morrell, for appellants.

1. The verdict is contrary to the evidence. The officers did not comply with Kirby's Digest, § 2124. Appellants were not advised that they were officers, nor of the offense charged.

2. There was error in admitting testimony as to what was found on appellants and their refusal to give their names, etc.

3. The court erred in its remarks to counsel and in refusing to hear objections to improper cross-examination. 83 Ark. 379; 90 S. W. 933; 51 *Id.* 149; 27 Cal. 300.

4. The court erred in its instructions and in giving additional instructions after the jury retired.

Wallace Davis, Attorney General, *Hamilton Moses,* Assistant, for appellee.

1. The verdict is responsive to the evidence. The words used by the officers could convey no other meaning than that they were arrested by officers for crime. This was for the jury. 49 Ark. 453.

2. It was not error to admit the testimony as to what was found on appellants and their refusal to give their names. 84 Ark. 119; 72 Ark. 598; 1 Greenl., Ev., § 53; 1 Bishop on Crim Pro., § 1126; 46 Ark. 141; 56 *Id.* 4; 58 *Id.* 513; 66 *Id.* 53.

3. There was no error in the remarks of the court, or in the refusal to sustain objections to alleged improper cross-examination. 71 Ark. 65; 85 *Id.* 179; 84 *Id.* 87.

4. There is no error in the instructions. 21 Ark. 357; 58 *Id.* 353; 24 *Id.* 264; 64 *Id.* 247; 66 *Id.* 588, 601; 82 *Id.* 64; 78 *Id.* 147; 85 *Id.* 179; 74 *Id.* 377; 77 *Id.* 97.

5. The court did not err in giving additional instructions after the jury had retired. 102 Ark. 506; 79 *Id.* 53.

WOOD, J., (after stating the facts). I. Section 2124 of Kirby's Digest requires an officer making an arrest to inform the person about to be arrested of the intention to arrest him and of the offense charged against him for which he is arrested. Appellants contend that the evidence is not sufficient to show that the officers complied with these requirements.

(1) The testimony was sufficient to warrant the court in submitting to the jury the issue of fact as to whether or not appellants were advised by the language used by the officers in making the arrest of their official character. The testimony shows that the officer said to the appellants "Boys, we want you; put up your hands." This language was sufficient to convey to the appellants the idea that they were being arrested by officers. At least the jury were justified in so finding. The officers' posse were in an automobile and it was in daylight and on the public highway, and there was nothing in the mode of conveyance or the manner in which appellants were approached by the officers to indicate that the latter were attempting to hold up appellants for the purpose of robbery or other unlawful detention. The language used was such as officers might be reasonably expected to use in arresting criminals. The officers had been informed that the appellants were dangerous men, and the facts show that at the time the arrest was made the officers did not have time to announce the fact that they were officers before the arrest was made and to formally notify them of the offense for which they were being arrested.

If the officers, addressing the appellants, had said: "Boys, we want to arrest you; we have a warrant for you," or "Boys, we want to arrest you," there could be no doubt that such language would have been sufficient to advise appellants of the official character of the parties making the arrest. The language, "Boys, we want you," was but tantamount to the expressions used above.

(2) The issue as to whether appellants knew that the parties making the arrest were officers was, under the evidence, one for the jury. See *Putman* v. *State,* 49 Ark. 449-453.

In a conversation between Shorty, one of the appellants, and Pierce, Pierce stated that he regretted that he had to shoot Shorty and told Shorty that he was to blame for it, whereupon Shorty replied "Yes, you had it to do." This language of itself shows at least that appellant Shorty knew that Pierce was an officer.

(3) The statute authorizes an arrest by a peace officer without a warrant where he has reasonable grounds for believing that the person arrested has committed a felony. The appellants were convicted under section 1962 of Kirby's Digest, which makes it a felony for any person to resist the execution of any criminal process by threatening to draw or by actually drawing a pistol upon the sheriff or other officer authorized to execute process.

There is conflict in the testimony as to whether or not the appellant Slim threatened to draw or actually drew his pistol. Pierce testified that the men started for their guns, and that he saw that one could not get his gun out as it was hung, and told one of the deputies to watch that man, who was called Slim, and that when Shorty fell he, Pierce, wheeled around to look at Slim and at that time his hands were going up and his gun fell out in front of him. This testimony was sufficient to warrant the finding that Slim was threatening to draw and had drawn his weapon. The undisputed evidence shows that Shorty persisted in using his weapon after being warned that he would be killed if he did so.

(4) II. It was competent to show that appellants had on their person at the time of the arrest pistols, masks, whistles, rings, pepper and cartridges. It is a matter of common knowledge that these are but a part of the usual paraphernalia of burglars and robbers. The testimony as to this equipment was competent as throwing light upon the motive or intention of the appellants in threatening to draw and in drawing their guns upon the officers. See *Howard* v. *State,* 72 Ark. 598; *Woodward* v. *State,* 84 Ark. 119.

III. There is nothing in the record indicating the manner assumed by the circuit judge when he made the remarks directing the attorney of appellants to "Sit down; witness is able to take care of himself." The record indicates that the attorney for appellants was objecting to questions being propounded by the prosecuting attorney. These questions were proper. The record does not reveal the manner of the attorney of appellants in making the objections to them.

(5) Wide discretion is necessarily lodged with the trial judge to see that the examination of witnesses is conducted fairly, and that the attorneys representing the opposite sides of the cause observe a proper decorum towards each other as well as toward the court. And, as attorneys are officers of the court, the presiding judge is under a reciprocal duty to treat them with fairness and becoming courtesy while they are conducting their client's cause which they have a right to and must do. The trial judge must hold the scales of justice in equipoise, and when it becomes necessary to rule upon the conduct of the attorneys who are conducting the trial for their respective clients he should do so in such manner as not to impress the jury that he is biased or prejudiced for or against either side to the controversy. This imposes upon the court a delicate duty, but one which, in the interest of justice, he should firmly and scrupulously perform. This record does not disclose any error upon the part of the trial judge in this respect. See *Dallas Elec. St. Ry.* v. *McAllister,* 90 S. W. (Tex.) 933;

McMinn v. *Whelan,* 27 Cal. 300; *Sharp* v. *State,* 51 Ark. 147-155; *Tuttle* v. *State,* 83 Ark. 379.

(6) The court did not err in admonishing the witness that he had taken an oath to tell the truth, the whole truth and nothing but the truth, and in stating to the witness that he must answer the question; nor in saying to the appellants' attorney that the witness was able to take care of himself. These remarks were all elicited by the manifest hesitation and reluctance of the witness to answer proper questions and the interference of his counsel while the questions were being propounded.

The remarks of the trial judge and the manner of their utterance, so far as the record shows, were not such as to indicate any prejudice in his mind against the appellants, and they were not calculated to influence the jury to return a verdict against them.

IV. The court, in one of its instructions, No. 3, among other things told the jury as follows: "There are two separate charges and two defendants. Take up each charge against each defendant separately and carefully consider them and return your verdict according to what you believe is right under the evidence."

(7) Appellants contend that this instruction deprived them of the benefit of a reasonable doubt, but we do not so construe it. The instruction was but cautionary in form. It admonished the jury that each charge should be carefully considered, and the effect of the instruction was to tell the jury that their conclusion must be based upon the evidence. The jury were not authorized, under this instruction, by the words "what you believe is right" to erect their own standard of right regardless of the evidence, but they were instructed to base their belief as to the right and proper verdict upon the evidence in the cause. The instruction when taken in connection with the other instructions in which the court correctly defined "reasonable doubt" and told the jury that the evidence must convince them of the guilt of the defendants beyond a reasonable doubt or they should acquit, could not have been prejudicial.

After the instructions had been given and the argument of counsel had been concluded the jury retired to consider their verdict and after some deliberation returned into the court room and requested further instruction on the question of accessories. Whereupon the court proceeded to instruct them, and after correctly defining what it takes to constitute an accessory, the court used this language: "The only way you can tell a person's intentions is by their acts, and so it is proper for you to take into consideration all the circumstances in determining whether or not either of the defendants aided and abetted or was ready and consenting to aid and abet, before, at the time and since the time; anything in your judgment that would throw any light on the intent of the parties, together with all the other facts and circumstances. They may take into consideration in determining whether or not they were aiding and abetting or ready and consenting to aid and abet his acts," etc.

Appellants objected to the giving of further instructions and saved a general exception to the giving of the instruction.

Counsel for appellants single out the language above quoted and contend that it was erroneous. The instruction standing alone would perhaps be erroneous and prejudicial, but when the instruction is considered is connection with the charge of the court taken as a whole we conclude that it is not calculated to prejudice the appellants. The effect of the instruction, when considered in connection with the other parts of the court's charge, was to tell the jury that they might take into consideration the conduct of the appellants prior to and since the alleged commission of the offense, as shown by the evidence, that would tend to throw any light upon the intent of the appellants at the time the alleged offense was committed.

(8) The use of the language "it is proper for you to take into consideration anything in your judgment that would throw any light on the intent of the parties," etc., evidently was intended to convey to the jury the fact that

they had a right to consider anything growing out of a consideration of the evidence that would throw any light upon the intent of the parties. The objection to this instruction, the same as the objection to the word "right," as discussed in the instruction above, should have been made specific in order to avail appellants, for, when the language is interpreted in connection with the other portion of the court's charge in which the jury are told that they could not convict the defendants unless they were convinced from the evidence beyond a reasonable doubt, etc., it is clear that the court meant to confine the jury, and did confine them, to a consideration of the evidence in the case, and that they were not authorized to consider anything that was not in evidence. So the correctness of the instructions must not be tested by fragmentary excerpts, but the charge must be taken and considered as a whole and when so considered we conclude that it is free from prejudicial error. *Dunnahoe* v. *Williams,* 24 Ark. 264; *Kent* v. *State,* 64 Ark. 247-250; *Satterwhite* v. *State,* 82 Ark. 64.

(9) It was within the discretion of the court to instruct the jury, after the conclusion of the argument, at their request on the question of accessories. *Pless* v. *State,* 102 Ark. 506. See also, *Chocataw, Okla. & G. Ry. Co.* v. *Craig,* 79 Ark. 53.

There was testimony tending to show that when the officers approached the appellants the driver ran the motor car up within a few feet of them and the officers jumped out with their guns presented towards the appellants before anything was said by the officers. A majority of the court is of the opinion that the testimony is not legally sufficient to sustain a conviction of appellant Shorty for the crime of assault with intent to kill, and that the court erred in not granting his motion for a new trial as to this offense.

The judgments of conviction for resisting officers will be affirmed. The judgment convicting appellant Shorty of the crime of assault with intent to kill will be reversed and the cause is dismissed.

BRUNSON v. TEAGUE.

Opinion delivered May 8, 1916.

1. APPEAL AND ERROR—BILL OF EXCEPTIONS—STENOGRAPHERS' NOTES.—A bill of exceptions contained a call for the clerk to copy the stenographer's report of the testimony, the record showed that a correct copy of the stenographer's transcript of the testimony was filed on a certain day. The bill of exceptions was signed by the judge and filed with the clerk on the same day. *Held*, it will be presumed that the circuit judge had the transcript of the stenographer's notes before he signed the bill of exceptions, and that the call referred to the transcript of the stenographer's notes which had already been filed on the same day, before he signed the bill of exceptions.

2. COUNTERCLAIM AND SET-OFF—SEPARATE TRANSACTION.—Under Kirby's Digest, § 6099, providing that a counterclaim must be a cause of action, "arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action," damages for breach of one contract can not be counterclaimed in an action on another contract.

3. COUNTERCLAIM AND SET-OFF—UNLIQUIDATED DAMAGES.—Unliquidated damages, even for the breach of the contract, can not be the subject of a set-off.

4. LIENS—LANDLORD'S LIEN—RENT AND SUPPLIES.—The lessor of farm land has a lien on crops for the rent due and for supplies furnished the tenant.

5. LANDLORD AND TENANT—RENT—COVENANT TO MAKE IMPROVEMENTS—COUNTERCLAIM.—A tenant may set up as a counterclaim, against the landlord, in an action for the value of supplies furnished, damages resulting from a breach of an agreement to make certain improvements.

6. LANDLORD AND TENANT—COVENANT TO REPAIR—MEASURE OF DAMAGES.—On the breach of the covenant of the landlord to make repairs, where the repairs are extensive and costly in comparison with the rent of the land, the measure of damages to which the lessee is entitled, is the difference between the rental value of the premises as they were, and what it would have been if the premises had been put and kept in repair, taking into consideration the purposes for which they were to be used.

7. APPEAL AND ERROR—CONFLICTING INSTRUCTIONS.—A cause will be reversed when conflicting instructions have been given upon a single issue.

Appeal from Crawford Circuit Court; *James Cochran*, Judge; reversed.

Winchester & Martin, for appellant.

1. The counter-claim set up damages for the breach of a separate and independent contract. No such right exists. Kirby's Digest, § 6099; 17 Ark. 245; 27 *Id.* 489; 32 *Id.* 281; 40 *Id.* 75; 48 *Id.* 396; 89 *Id.* 368; 55 *Id.* 312.

2. No loss or damage is shown because the new dwelling and barn were not built, nor that if the ditch were dug the cultivation would have been less expensive. All these claims for damages arose out of separate and distinct contracts.

3. There was error in the court's instructions.

C. A. Starbird, for appellee.

1. No sufficient bill of exceptions was filed in the court below. 101 Ark. 555.

2. The whole matter was a transaction between landlord and tenant and grew out of the same contract. Kirby's Digest, § 6099; 71 Ark. 408; 64 *Id.* 221. There is no error in the court's charge, nor in the verdict.

HART, J. L. J. Brunson sued Will Teague before a justice of the peace to recover $30, ten dollars of which was alleged to be due for the rent of two acres of land sewed in oats and the remaining twenty for two tons of alfalfa hay furnished him as supplies. There were no written pleadings but the defendant Teague, admitted owing the plaintiff, Brunson, the amount sued for and set up as a counter-claim against plaintiff's demand certain items which will be hereinafter stated, making a total of $300. The justice of the peace rendered judgment in favor of the defendant for $140 as a balance due him on the counter-claim. The plaintiff appealed to the circuit court. The material facts are as follows:

The plaintiff had a farm comprising about one hundred and ten acres of land which the defendant was cultivating during the year 1912. In the fall of that year, the plaintiff rented the land to the defendant for the year of 1913. The defendant agreed to pay as rent one-third of the corn and one-fourth of the cotton. The defendant also testified that the plaintiff agreed to build him a new dwelling house of four or five rooms, and a new barn

sufficient to accommodate six horses and the feed for them and also to dig a ditch sufficient to drain thirty-five acres of the land; that the plaintiff failed to build the dwelling house and that he was compelled to live in a house on the farm which was out of repair; that a house like the one the plaintiff agreed to build was reasonably worth for rental purposes $5 per month; that a barn like the one the plaintiff agreed to build had a rental value of three or four dollars per month; that thirty-five acres of the land needed ditching and that it cost him $2 more per acre to cultivate it than it would have cost if the ditch had been dug. Defendant admitted that the plaintiff furnished him two tons of alfalfa as supplies which was worth $10 per ton. He also stated that some time in February, 1913, that the plaintiff told him he had some land situated about one-fourth of a mile away which the defendant might plant in oats; that the defendant planted two acres in oats and that nothing was said about the rent; that $5 per acre was a reasonable rental for the two acres; that defendant had cut and used the oats for supplies. The defendant also testified that he raised forty-four bales of cotton and that plaintiff's part of the rent was eleven bales; that the farm was situated near the town of Alma; that he hauled the rent cotton there for plaintiff and the hauling was worth $20; that he also hauled some lumber for the plaintiff to be used on the farm which was worth $5.

The plaintiff testified in his own behalf and denied that it was in the contract that he should pay for hauling the cotton to the town of Alma; that the defendant had the cotton ginned in the town of Alma and that it was a part of his contract to haul the cotton to the gin. He also denied that he agreed to build the barn or to ditch the land. He testified that the year of 1913 was a dry year and that none of the land needed ditching that year. He admitted that he agreed to build a new dwelling house provided the defendant would haul the lumber and that defendant failed and refused to do so.

The jury found for the defendant in the sum of $130 less the $30 owed by the defendant to plaintiff leaving a balance due the defendant of $100. The court rendered judgment upon the verdict and the plaintiff has appealed.

Counsel for defendant moved the court to dismiss the appeal for the reason that no sufficient bill of exceptions has been filed in the court below. To support his contention counsel relies upon the case of *Grand Lodge A. O. U. W.* v. *Dreher,* 105 Ark. 677. In that case as here there was a skeleton bill of exceptions. There was a call in the bill of exceptions in the *Dreher case* for the clerk to insert the testimony. The bill of exceptions was signed by the circuit judge and filed with the clerk before the date of what purported to be the testimony was filed in the office of the clerk. There was nothing in the record to show that what purported to be the testimony had been examined or authenticated by the circuit judge. There was nothing in the record by which it could be determined that the purported testimony was that referred to in the call in the bill of exceptions.

(1) Here the facts are essentially different. The call is for the clerk to copy the stenographer's report of the testimony. The record shows that a true and correct copy of the stenographer's transcript of the testimony was filed on the 13th day of September, 1915. The bill of exceptions was signed by the judge and filed with the clerk on that day. It will be presumed that the circuit judge had the transcript of the stenographer's notes before he signed the bill of exceptions and that the call referred to the transcript of the stenographer's notes which had already been filed on the same day before he signed the bill of exceptions. The defendant's motion to dismiss the appeal will therefore be denied.

(2-3) Counsel for the plaintiff insists that the judgment should be reversed because the court refused to tell the jury as a matter of law that the counter-claim set up by the defendant arose from a breach of a separate and independent contract. Under Kirby's Digest, section 6099, providing that a counter-claim must be a cause

of action, "arising out of the contract or transactions set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action," damages for breach of one contract can not be counter-claimed in an action on another contract. The court further held that unliquidated damages, even for the breach of the contract, can not be the subject of a set-off. *B. A. Stevens Co.* v. *Whalen,* 95 Ark. 488.

(4-5) Counsel for plaintiff claims that the rent due on the two acres of land, sowed in oats arose from an independent contract and is not the subject of counter-claim, but we do not agree with them in this contention. The plaintiff leased to the defendant his farm comprising 110 acres of land. Under our statutes he had a lien not only for the rent but for the supplies which he might furnish his tenant. He furnished his tenant as supplies two tons of alfalfa hay. Then he allowed his tenant to plant two acres of land in oats, not included in the first contract. It may be inferred from the record that this was done for the purpose of raising oats to be used in feeding the tenant's stock while making and gathering the crop. This was not an independent contract. It was simply an addition to the first contract. It was connected with the first rent contract, and the whole matter grew out of the same transaction. The tenant entered into and retained possession of the rented premises under an agreement upon the part of the landlord that he would make certain improvements, which he claims the landlord failed to make. Under such circumstances the tenant when sued for the rent may set up as a counter-claim the damages resulting from such breach of the covenant. Such counter-claim arises out of the contract sued upon as the foundation of the landlord's claim and is connected with the subject of the action. Taylor's Landlord and Tenant (9 ed.), volume 1, section 331, and section 374; Underhill on Landlord and Tenant, volume 1, 565; 24 Cyc., pages 1159 and 1160; *Pioneer Press Co.* v. *Hutchinson* (Minn.) 65 N. W. 938; *Rubens* v. *Hill,* 213 Ill. 523, 72 N. E. 1129. It follows that the ruling of the circuit court in this respect was correct.

(6) The general rule is, on the breach of covenant of the landlord to make repairs, where the repairs are extensive and expensive in comparison with the rent of the land, the measure of damages to which the lessee is entitled, is the difference between the rental value of the premises as they were, and what it would have been if the premises had been put and kept in repair, taking into consideration the purposes for which they were to be used. *Young* v. *Berman,* 96 Ark. 78; 24 Cyc. 1097; Landlord's and Tenant—Tiffany, volume 1, page 589; Underhill on Landlord and Tenant, volume II, page 879.

In the instant case the repairs testified to by the defendant were extensive and he was not required to subject himself to the expense entailed by them in order to save plaintiff from damages resulting from his own breach of duty. The rented premises were to be used for farming purposes. The defendant remained in possession of the premises and made a crop on them. The alleged wrongful act or omission of the landlord tended merely to diminish the beneficial enjoyment of the premises and the measure of damages to the tenant was the difference between the rental value of the leased premises with the improvements and the rental value without the improvements.

The court gave an instruction on the measure of damages in accordance with this rule. The court, however, gave another instruction which laid down a different measure of damages and counsel for plaintiff objected to all instructions given by the court.

The court in its instructions stated to the jury the claim of the defendant on each item of damages and what his testimony in respect thereto had been, and told the jury that if it believed the testimony of the defendant it should find for him with respect to these items.

(7) Again, the court after stating the claim of defendant with respect to the different items of damages, told the jury that it might find for the defendant whatever damages he may have sustained by reason of the plaintiff failing to build the dwelling house provided it

found by a preponderance of the evidence that the defendant had performed his part of the contract. It will be noted that these instructions on the measure of damages are wrong and are in direct conflict with the correct rule on the subject given by the court. We can not know which rule the jury followed in arriving at its verdict and for that reason the judgment must be reversed. *Helena Hardwood Lumber Co.* v. *Maynard,* 99 Ark. 377; *St. Louis, I. M. & S. Ry. Co.* v. *Hudson,* 95 Ark. 506; *Merchant's Fire Insurance Co.* v. *McAdams,* 88 Ark. 550; *Doyle* v. *Kavanaugh,* 87 Ark. 364; *Darling* v. *Dent,* 82 Ark. 76; *McCurry* v. *Hawkins,* 83 Ark. 202; *St. Louis, I. M. & S. Ry. Co.* v. *Thompson-Hailey Co.,* 79 Ark. 12. Where conflicting instructions are given, the instructions can not be read as a harmonious whole. Neither can it be known whether the jury followed the incorrect instruction or the correct one. We can not know in the present case whether the jury followed the correct instruction on the measure of damages or the incorrect one. Therefore the giving of conflicting instructions on the measure of damages was misleading and prejudicial.

As we have already seen the measure of damages to which the defendant was entitled, if the jury should find in his favor, was the difference between the rental value of the premises without the improvements and their rental value with them. There was no evidence to show this difference either offered or received. The evidence received by the court on the measure of damages was not competent within the rule just announced but it was not objected to by the plaintiff and we can not reverse the judgment for the error in admitting it. There was no evidence whatever tending to establish the defendant's claim for damages within the rule announced, and this of itself constituted reversible error. For the errors indicated, the judgment will be reversed and the cause remanded for a new trial.

WATSON *v.* HILL.

Opinion delivered May 8, 1916.

1. DEEDS—DELIVERY.—There is a consummated delivery of a deed when it has passed from the grantor, without right of recall, to the grantee or to some third person for his use.
2. DEEDS—DELIVERY—INTENTION.—The evidence held to show that deceased, in executing deeds to his lands to his children, and delivering the same to a bank, intended a delivery to the grantees.

Appeal from Clay Chancery Court; *Charles D. Frierson,* Chancellor; affirmed.

G. B. Oliver, for appellant.

1. The testimony of Williams as to his *understanding or opinion* was incompetent.

2. The deeds were never delivered. Devlin on Deeds, 263b; 88 Pac. 806; 100 Ark. 427, 431; 74 *Id.* 104; 77 *Id.* 89; 51 *Id.* 530; 63 S. E. 82; Devlin on Deeds, 275, 275b; 83 S. W. 747; 58 N. E. 439; 90 *Id.* 402; 85 S. W. 474; 77 Ark. 89; 74 *Id.* 104; 98 *Id.* 466; 93 *Id.* 324; 84 *Id.* 610; 110 *Id.* 425; 81 Pac. 1120.

C. T. Bloodworth, for appellees.

1. The deeds were delivered. A delivery to a third party to be held for the grantee is a sufficient delivery. 51 Ark. 530; 48 A. L. R. 136; 75 S. W. 321; 175 S. W. 623; 13 Cyc. 565.

2. The deeds were left at the Bank of Corning to be delivered to the grantees and Watson had no further dominion over them. 82 Ark. 492; 51 *Id.* 530; 96 *Id.* 589; 113 Ark. 289; 108 *Id.* 53; 134 S. W. 626; 13 Cyc. 569; 116 Ark. 487.

HART, J. Maggie Watson instituted this action in the chancery court against Mary Hill, *et al.,* to cancel certain deeds executed to them by her husband and have homestead and dower awarded her in the lands described in the deeds.

On the 15th day of March, 1915, Samuel Watson died in Clay County, Arkansas, leaving surviving him his widow, Maggie Watson, and Mary Hill and four children by a former wife. In October, 1914, Samuel Watson and

Maggie Watson were married. At that time he owned about two hundred acres of land, including his homestead, in Clay County, Arkansas. Maggie Watson also had children by her former husband. She disagreed with her husband because he ordered her children around and left him about two weeks after they were married. Mr. Watson was in ill health at the time and sent for a married daughter to come and live with him. His ill health continued and his wife also came back and stayed with him a part of the time. On the 3d day of March, 1915, Samuel Watson executed five deeds conveying to each of his children forty acres of land. His wife joined with him in the execution of the deeds. By direction of Mr. Watson, the justice of the peace, who wrote the deeds and took the acknowledgments thereto, delivered them to the cashier of a bank in Clay County. Watson died twelve days after executing the deeds. After his death his children went to the cashier of the bank and demanded the deeds. The deeds were delivered to them and by them filed for record. Subsequently the widow of Samuel Watson instituted this action to cancel the deeds and to have set aside to her, her dower and homestead in said lands.

The chancellor found for the defendants and it was decreed that the complaint of the plaintiff be dismissed for want of equity. The plaintiff has appealed.

The correctness of the decision of the chancellor depends upon whether or not there was a delivery of the deeds. It is well settled that there is a consummated delivery of a deed when it has passed from the grantor, without right of recall, to the grantee or some third person for his use. *Fine* v. *Lasater,* 110 Ark. 425. In the present case, H. H. Williams, the justice of the peace testified: I knew Samuel Watson for thirty-three years prior to his death and lived near him. He owned two hundred acres of land and lived on part of the land. I prepared the deeds and took the acknowledgments thereto at the request of Mr. Watson. He deeded a forty acre tract to each of his children. His wife understood all about the transaction. Mr. Watson directed me to

deliver the deeds to the Bank of Corning. I put the deeds in an envelope and delivered them to the bank and took a receipt therefor. The receipt read: "Received of H. H. Williams one sealed envelope said to contain valuable papers, the property of Samuel Watson, or belonging to Samuel Watson one of the two." I took this receipt on my own motion. Later I handed it to Watson, at the time, telling him that it was a receipt for the deeds. He called one of his daughters and told her to put it in his pocket book with other papers back of the stove. She did so. He was several times asked, if Mr. Watson had not directed him to put the deeds in the bank for his children to be delivered to them after his death. He replied that Watson did not say that; that Mr. Henry, the cashier of the bank had asked him the same question. We quote from his testimony as follows:

"Q. When you brought the deeds to the Bank of Corning and delivered them there, that ended yours and Mr. Watson's connection with them so far as you know?

A. Yes, sir.

Q. And the only duty of the bank was delivering them to the children after his death?

A. He did not instruct me about that. About what was to be done with them. I supposed so. I had nothing to do with that. Mr. Henry asked me about that, and I said I had nothing to do with that. It was the purpose of making the deeds. He talked with me freely about it."

(2) Mrs. Williams testified that she had a conversation with Mrs. Watson after she had signed the deeds. She said that Mrs. Watson told her that she was willing to sign the deeds because she did not live with her husband very long and had not helped him to make anything; that therefore she did not feel like she was entitled to the land but thought the children ought to have it. Two of Mr. Watson's children also testified that they heard their step-mother ask their father to make the deeds and said she stated that she would sign them. Another daughter stated that Mrs. Watson told her that she had signed the deeds and that she did not want the land that

their father and mother had worked and paid for. Another witness stated that Mr. Watson told them after he had executed the deeds that he had made a mistake and had given the wrong forties to two of his children but that they could correct this mistake. It sometimes happens as in *Battle* v. *Anders,* 100 Ark. 427, that a grantor makes a voluntary conveyance of his property and holds the deed under circumstances showing that he had no intention that it should be effective during his life time but holds it under a mistaken belief that the deed will operate in lieu of a will. Such, however, is not the case here. The facts of this case brings it within the rule announced in *Fine* v. *Lasater, supra.* We think the chancellor was warranted in finding that the grantor parted with all control over the deeds with intention to pass title to the lands and that there was a delivery of the deeds. Delivery is largely a question of intention. Here it was shown that it was the intention of the grantor to give his lands to his children. His wife was consulted about the matter and agreed to join with him in the execution of the deeds. It is true the justice of the peace stated that Watson gave him no other directions than to deliver the deeds to the Bank of Corning but he does state that Watson had talked freely to him about making the deeds and that the purpose of excuting them was to pass the title in the lands to his children. The other evidence tends to corroborate this.

Watson stated that he had made a mistake in two of the deeds, that he had given to one of his children land that he had intended to give to another but stated that his children could correct that. This was a circumstance tending to show that he realized that he had vested the title to the lands in his children when he executed the deeds. It was shown by others of his children that Mrs. Watson had asked him to execute the deeds and knew that it was his purpose to vest the title to his lands in his children by executing the deeds. Therefore the decree will be affirmed.

FIRST NATIONAL BANK OF VAN BUREN v. CAZORT & MCGEHEE COMPANY.

Opinion delivered May 8, 1916.

CHATTEL MORTGAGES—CROPS—DESCRIPTION.—One S. executed a mortgage to appellee covering "15 acres of growing cotton * * * and all other crops or produce I may in any manner have an interest in for the year 1914 * * *." It appeared that S. planted 25 acres of cotton. *Held*, the description was sufficient to constitute a valid lien under the mortgage.

Appeal from Crawford Circuit Court; *James Cochran*, Judge; affirmed.

STATEMENT BY THE COURT.

This appeal comes from a judgment against appellant in a controversy over four bales of cotton raised by Ed Smart and delivered to the appellant to apply upon a debt secured by a mortgage held by it. The appellee brought replevin for the property claiming the right to the possession thereof, under a mortgage executed by said Smart. On appeal the case was tried by the circuit court upon an agreed statement of facts, as follows:

Ed Smart raised a crop of twenty-five acres of cotton on the Anderson farm in Crawford County in the year 1914. He executed a mortgage to appellee company on February 24, 1914, which was filed in the recorder's office on the 26th of February, 1914. The property described therein included plow tools, certain farming implements, a buggy and harness, "and fifteen acres of growing cotton, also seed in said cotton and four acres of growing corn, and ..... acres of growing wheat, and ..... acres of growing oats, and all other crops or produce I may in any manner have an interest in for the year 1914, to be planted and grown on the Anderson farm in Van Buren township, controlled by Louis Bryan, or anywhere else in Crawford County."

He executed on April 1, 1914, to appellant bank, a mortgage which was filed in the recorder's office on the 2d day of April, 1914, the property described therein being "ten acres of cotton to be grown season of 1914 on

Anderson's farm in Richland township," and "cotton, horses, and other personal property in Richland township," and cotton, horses and other personal property.

The mortgagor raised a crop of twenty-acres of cotton on the said Anderson farm in 1914 and gathered the cotton in controversy from said field and delivered it to appellant bank to be applied on its mortgage, and the bank was in possession thereof when the suit was commenced. The cotton was sold by agreement and the net proceeds amounting to $100.16 is now in the hands of appellant; the debt due by mortgagor to each party exceeds the amount of the proceeds of the cotton sold.

E. L. Matlock, for appellant.

1. Appellee's mortgage is void for uncertainty. 35 Ark. 169; 41 *Id.* 70; 43 *Id.* 350; 108 *Id.* 162. The words, "all other crops," does not cure the uncertainty. 21 A. & E. Enc. Law (2 ed.) 1011; 54 Cal. 357; 54 N. J. Eq. 471; 62 S. E. 473; 87 Pac. 583; 11 Ark. 455; 1 Leigh (Va.) 610.

C. A. Starbird, for appellee.

1. Appellee's mortgage was a valid lien on all crops. It was sufficiently definite. 51 Ark. 410; 52 *Id.* 371. Appellant is a junior incumbrancer and took with full notice.

KIRBY, J., (after stating the facts). Appellant contends that appellee's mortgage is void for uncertainty of description of the property conveyed and that appellant is entitled to retain the cotton delivered to it under its mortgage notwithstanding it is also void for insufficient description.

The mortgage to appellee covered fifteen acres of growing cotton and the seed therein "and all other crops or produce I may in any manner have an interest in in 1914, to be planted and grown on the Anderson farm in Crawford County." There can be no doubt but that fifteen acres of growing cotton and the seed therein would have been a sufficient description of such property raised on the Anderson place for the year 1914, if no more than that quantity had been planted and the fact that the mortgagor planted twenty-five acres of cotton instead of fifteen, could not operate to make the description insuffi-

cient, the mortgage not disclosing that it was in contemplation of the parties that more than fifteen acres would be planted together by the mortgagor. Of course, a description of fifteen acres out of twenty-five acres to be planted would have been so indefinite as to have been ineffectual as a conveyance or security, but the clause "and all other crops or produce I may in any manner have an interest in, for the year 1914," to be grown on said farm, tended to make the description more definite and certain.

Descriptions in mortgages of "all my crop of corn, cotton, or other produce I may raise, or in which I may have in any manner an interest" for the particular year in a designated county and "my entire crops of cotton and corn to be raised by me the present year or contracted by me," have been held sufficient. *Johnson* v. *Grissard,* 51 Ark. 410; *Henderson* v. *Gates,* 52 Ark. 371. The words "and all other crops or produce I may in any manner have an interest in" following the specific description of "fifteen acres of growing cotton and the seed therein and four acres of growing corn, etc.," are not confined in meaning to other or different kinds of crops, but included all other crops whether of the same or a different kind, to those specifically designated, additional thereto. The description in the mortgage being sufficient, it constituted a valid lien on the property in controversy from the date of its filing and was superior to the claim of appellant and entitled the appellee as against it to the possession of the cotton delivered by the mortgagor to the bank. The judgment is correct and it is affirmed.

BROOKS v. GOODWIN.

Opinion delivered May 8, 1916.

1. HOMESTEAD—LIFE TENANT IN POSSESSION.—A. was life tenant of certain land, of which B., his son, was remainderman. *Held,* A., as life tenant in possession, had a homestead interest in the land which he might have as exempt against any of his creditors who sought to subject the land to the payment of his debts.

2. HOMESTEAD—CLAIM BY REMAINDERMAN.—A remainderman can not claim homestead in the land, during the life and occupancy of the life tenant.

Appeal from Randolph Circuit Court; *J. B. Baker,* Judge; reversed.

Campbell, Pope & Spikes, for appellant.

1. Appellee's interest in the land is not sufficient to carry with it the privilege of exemption as a homestead. A future estate will not support the claim of homestead. 87 N. C. 79; 26 Ky. L. Rep. 157; 80 S. W. 1097; 62 *Id.* 381; 23 Tex. Civ. App. 87; 56 S. W. 572; 57 *Id.* 990; 21 Cyc. 503; 74 Wis. 490; 43 N. W. 507; 20 S. E. 736; Const., art. 9, § 4.

2. His occupancy was not sufficient to impress upon the land the character of a homestead. 76 Ark. 577; 51 *Id.* 84; 42 *Id.* 175; 21 Cyc. 621.

SMITH, J. This cause was tried in the court below upon an agreed statement of facts, from which it appears that appellee was the owner of a fee simple estate in the lands sought to be subjected to sale under an execution against him subject to the life estate of his father. But although the land was so owned there was an agreement that the lands be occupied and treated as partnership lands and that appellee, acting under such understanding and agreement with his father, entered on said lands and cleared and improved them. But it was also recited in the agreed statement that the life tenant had never made any written relinquishment of his life estate to appellee, but continued to assert that interest in the land.

There was evidence that appellee was not residing on the land at the time of the levy of the execution but was a resident of another county, where he was served with process. But the court no doubt accepted his explanation that his absence was only temporary and that he had not, therefore, abandoned his right of homestead if he had ever acquired it, and we can not say that the evidence does not support this finding.

We think no showing is made that the life estate had become merged by the agreement for joint occupancy, and while the remainderman was enjoying the joint occupancy he was doing so subject to the life estate of his father.

(1) The father, as a life tenant in possession, therefore, had a homestead interest in the land which he might have claimed as exempt against any of his creditors who sought to subject the land to the payment of his debts. *White Sewing Machine Co.* v. *Wooster,* 66 Ark. 382. The question to be decided is, whether the remainderman also had this right.

(2) In 21 Cyc. 503, under the title of "Homestead," it is said:

"Future or Contingent Estates. The interest in land sufficient to carry with it the privilege of exemption must be such as involves a present right of occupancy. Future estates, therefore, whether vested or contingent, will not support the claim; yet when the particular estate is determined, and the remainderman is entitled to immediate possession, he may claim his homestead in the premises, if his contingent interest has not been sold in the meantime by his creditors."

And, under the same title in 15 A. & E. Enc. of Law (2 ed.) 556, the law is stated as follows:

"Possessory Interest Necessary—a. In General.—To entitle a debtor to a homestead exemption he must, at least, have a possessory interest in the land claimed. There must be at least a present right of occupancy. b. Remainder or Reversion.—A homestead can not exist in a remainder or reversion, since in such case there is no present right of occupancy. But it has been held that a remainderman may claim a homestead after determination of the particular estate, as against creditors who have failed to sell his interest on execution before determination of the particular estate."

In Waples on Homestead and Exemption, page 488, it is said:

"The fee can not be sold under execution so as to leave the homestead unsold when *homestead* means exempt realty."

In Modern American Law, volume 5, page 297, the law on the subject is stated as follows:

"384. Estate to support homestead.—A homestead right may commonly be claimed in any kind of an estate, whether in fee, or for life, or any other interest liable to seizure for debts, provided the interest is a present right of occupancy. For example, there can be no homestead in a remainder or a reversion, although there are situations where the remainderman may claim a homestead after the close of the particular estate, if the creditors have failed to complete their levy by sale. A homestead may be claimed in a life estate as the life tenant is the owner within the meaning of the law, and the homestead estate terminates with his life estate. It follows from this that the homestead may be claimed by a tenant by curtesy, and also by a widow having a dower interest."

Numerous cases on the subject will be found cited in the text, quoted from.

In *Roach* v. *Dance,* 80 S. W. 1097, the facts were that Roach, the testator, devised lands to his wife for life, remainder to his children. Subsequent to Roach's death, the widow and children resided together upon the land and were so residing when the creditors of one of the sons of the testator sought to subject this son's interest as remainderman to sale under execution. The remainderman claimed the land as his homestead and alleged that he resided with his wife and children upon the land with his mother at the time of the levy and that his interest being of less value than that allowed by law was exempt as a homestead. The court said in part:

"It was decided in *Robinson* v. *Smithey,* 80 Ky. 636, that a party holding the title to a tract of land for life, with remainder to her children, and in the occupancy of the land, was entitled to a homestead therein as against her creditors. In *Merrifield, etc.,* v. *Merrifield's Assignee,* 82 Ky. 526, it was further held that the life tenant

and remainderman could not have a homestead in the same tract of land at the same time. In the opinion in that case this court said: 'This court has never gone so far as to determine that both the widow and remainderman can at the same time have a homestead in the same land, nor do we think the statute can be so applied and extended. The theory of the homestead exemption is that the debtor requires a prescribed amount in value of land to be set apart for the support of himself and dependent family, but to accomplish such a beneficent object he must have a right to occupy and use it; and hence it is indispensable requisite that the party claiming the exemption must be in the actual possession. But a party having merely an interest in remainder is without any right to the possession, and, in the meaning of the law, not in possession."

In the case of *Davis* v. *Brown,* 62 S. W. 381, the syllabus is as follows:

"A remainderman who is permitted to occupy land with a life tenant under a parol surrender of her interest is not in possession in his own right, since the parol surrender does not merge the life estate and remainder, nor bind the life tenant; and hence he is not entitled to claim a homestead in the land as against his execution creditor."

The homestead here sought to be asserted is conferred by section 4, of article 9, of the Constitution. Its language is:

"The homestead outside of any city, town or village owned and occupied as a residence shall consist of not exceeding, * * * etc."

It is apparent that the occupancy must be accompanied by a present claim of a right to occupy, and one can not occupy an estate in remainder as a residence. The owner of a particular estate alone has that present right of occupancy essential to impress the homestead character upon land.

The judgment of the court below will, therefore, be reversed and the cause remanded with directions to quash the supersedeas which had been ordered issued.

VANDEVENTER v. SMITH.

Opinion delivered May 8, 1916.

USURY—ACT OF AGENT—KNOWLEDGE OF LENDER.—A loan will not be held usurious where the lender was not aware that a sum greater than the legal rate of interest was exacted from the borrower by the agent or broker.

Appeal from Benton Chancery Court; *T. H. Humphreys,* Judge; affirmed.

Rice & Dickson, for appellant.

The loan was usurious and void. Cates was the agent of the lender. 62 Ark. 378; 51 *Id.* 544; Kirby's Digest, § § 5390-1.

McGill & Lindsey, for appellee.

To sustain the plea of usury, it must be shown that the bonus or commission was paid with the knowledge of the lender to the agent of the lender, and that such bonus when added to the interest exceeds the lawful rate. 51 Ark. 534; *Ib.* 546; 62 *Id.* 370; 83 *Id.* 31; 91 *Id.* 458; 105 *Id.* 653; 60 *Id.* 288; 98 U. S. 103; 51 Ark. 546. Cates was not appellee's agent and she had no knowledge of any bonus being paid.

SMITH, J. Appellant brought suit to cancel a mortgage and a note which it secured upon the ground that the debt there secured was usurious. The note was for the sum of $700, due twelve months after date, and bore interest at 10 per cent. after maturity. It was alleged that the agreement under which the loan was made was an unlawful and usurious one whereby appellee was to, and did, retain, $100 for the use of the remaining $600 for one year. The answer denied all the material allegations of the complaint and in a cross-bill the foreclosure of the mortgage was prayed. In the answer it was alleged that, although the note had been assigned to one G. D. Cates, this was done only for the purpose of collection.

Cates testified that he was the president of the People's Bank, of Southwest City, Missouri, and that he made the loan through representatives of appellant who ap-

plied to him for the loan for her. The mortgage was given on an undivided two-thirds interest in a brick building in Gravette, Arkansas, and for some reason, for which no satisfactory explanation is given, a fire insurance policy on this building was taken out and assigned to the bank. Cates testified, however, that the bank had no interest in the loan and made it only for appellee, who was one of its depositors, and that he had never seen the insurance policy and did not know it had been made payable to the bank, and that appellee knew nothing of any of the negotiations except that she was making a loan on which she would receive, and did receive, interest at 8 per cent. paid in advance, and that he was acting for Austin and appellant's son, who were her representatives, and that had appellee turned the application down he would have applied to some one else. Interest for one year in advance was charged at 8 per cent. and appellee's account with the People's Bank was charged with $644, which amount represented the face of the note less the year's interest which was charged and deducted in advance. The transaction was closed so far as appellant was concerned by a draft for $600, which was drawn by the First National Bank, of Gravette, on the People's Bank. Witness and one Yeargain, who appears also to have been acting for appellant in the transaction, divided the excess of the 8 per cent., but appellee was not a party to and knew nothing of this arrangement. A Mr. Austin testified that he was the president of the First National Bank at Gravette and had talked with Cates over the 'phone about the loan and that it was at Cates' suggestion that the policy was made payable to the People's Bank. That he did not represent appellant in getting the loan, but talked with her about it and told her she was being robbed and advised her not to pay the $100. A Mr. Havens testified that he was the acting cashier of the People's Bank, and that Yeargain in applying to this bank stated that he could make $100 if he could secure a loan for appellant for $600. Appellee was not present at the time and knew nothing of this conversation. This witness admitted

writing a letter in which he demanded $84 for the second year's interest on this loan, and no explanation of that fact is offered.

Appellee testified that she had taught school in Southwest City and had some money in the People's Bank there which she told Cates she wanted to loan, that Cates had made certain loans for her, but that in making this loan she drew a check on the First National Bank of Hamilton, Missouri, for $644, which she made an exhibit to her deposition, and which was used in closing up the loan by the People's Bank. She testified that she never paid the People's Bank, or Cates, any commission for making this loan, and that neither the bank nor Cates represented her in the matter, but represented appellant. Her explanation of drawing the check on the bank at Hamilton was that that bank did not allow her as much interest on her deposits as did the People's Bank at Southwest City, and that she knew nothing of the transactions except that she was making a loan of $700 at 8 per cent., with the year's interest paid in advance. A Mr. Yeargain testified that Austin applied to him for the loan, but he stated to Austin that he did not have the money, but would try to get it, and that he made application to Cates for the loan. That the check which was received from appellee was for $644, and he telephoned to Austin and Van Deventer when the check had been received at the People's Bank, and when it was cashed he got $44. A son of appellant testified that he went to Southwest City to arrange for a loan of $700, and asked Yeargain if he could make the loan, but Yeargain said he could not, but would get it from Cates or the bank, and that he arranged with Cates for the loan, and that Cates retained $100. It was not contended, however, that appellee was present at nor that she was a party to any of these negotiations.

The court dismissed the complaint for want of equity and made a finding that the note was not usurious and decreeed a foreclosure of the mortgage, and this appeal has been duly prosecuted.

It is manifest that some one has required appellant to pay $100 for the use of $600 for one year; but we can not say that appellee was a party in any manner to this agreement. Indeed, it is admitted that appellee only received $56, which was a year's interest in advance at 8 per cent. and that transaction, of course, was not usurious.

It is insisted, however, that the loan was either made for and by the People's Bank for itself and subsequently sold to appellee, or that if it was made for appellee, Cates was her agent in the exaction of the usurious interest and received as his compensation for making the loan for her the sum of money which makes the loan usurious. But we can not say that the chancellor's finding to the contrary is against the preponderance of the evidence.

The parties cite and rely upon the cases of *Thompson* v. *Ingram,* 51 Ark. 546, and *Vahlberg* v. *Keaton,* 51 Ark. 534. In these cases it is said that if the person making the loan acted as the agent of the borrower alone, whether he received or did not receive a bonus is immaterial on the plea of usury. That what the borrower pays to his own agent for procuring a loan is no part of the sum paid for the loan or forbearance of money. Where the person who negotiates the loan acts for the lender the rule is announced in the cases cited as follows:

"The lender may receive for the forbearance of money 10 per cent. per annum and no more. In excess of that his agent can receive no bonus from the borrower. If the agent do receive from the borrower a bonus in excess of the highest lawful interest, either with his knowledge, or under circumstances from which the law will presume he had knowledge, then the transaction is usurious; while, if the agent received the excessive bonus without his knowldge, and under circumstances from which his knowledge could not be reasonably presumed, the transaction would not be usurious. What circumstances will raise the presumption of knowledge must be determined in each case, in accordance with the principle by which knowledge is imputed to persons, in controversies generally."

Other facts than those recited are testified to in behalf of the respective parties, but we have set out the salient features of the evidence.

Although the proof shows a scheme to exact more than 10 per cent. for the use of this money, we can not say that the proof shows appellee was a party to it, and under the test announced in the cases cited we think appellee should not be charged with the responsibility for Cates' participation in that scheme, and the decree of the court below is, therefore, affirmed.

McDONALD, ADMR. *v.* NORTON, ADMR.*

DISSENTING OPINION.

McCULLOCH, C. J. The Act of 1909 does not enlarge the rights of an attorney so far as concerns the subject-matter of the cause of action or the recovery thereon, but merely protects him by giving him a lien on the cause of action of his client as well as on the recovery in which the cause of action is merged. The statute does not even give the attorney the right to control the cause of action, but merely fixes a lien on the fruits of the litigation. *St. Louis, I. M. & S. Ry. Co.* v. *Blaylock,* 117 Ark. 504; *St. Louis, I. M. & S. Ry. Co.* v. *Kirtley,* 120 Ark. 389, 179 S. W. 648.

In the case last cited, this court said that the lien "attaches to any proceeds realized out of such claim or cause of action resulting from the litigation, either through a settlement, compromise, or judgment, and of which he (the attorney) can not be deprived by the parties to the action by any settlement they may make."

The statute under consideration shows very clearly on its face that it was only intended to fix a lien on the fruits of the litigation, that is to say on the subject-matter of the litigation which is recovered or which may be recovered in the action, and that it was not intended to

*The opinion of the court is reported on page 473 of this volume.

give a lien merely for the preservation or protection of the client's interest in the property involved. An attorney who merely defends a right of his client has no lien on the subject-matter of the litigation because it constitutes no cause of action and nothing is recovered. In this respect the statute is the same as the pre-existing statutes on the subject, and they have been construed by this court to confer no rights unless some kind of property is recovered.

In *Hershy* v. *Du Val,* 47 Ark. 86, the court held that an attorney had no lien on his client's land for services rendered in an action to remove a cloud from the title. In construing the statute, Mr. Justice Smith, speaking for the court, said: "The lien on the specific property recovered, * * * is limited to cases where there has been an actual recovery, and can not be extended to professional services which merely protect an existing title or right to property. * * * It (the statute) does not give the attorney a lien on the estate he has rescued from an unjust claim, and saved for his client, but only on the property he has actually recovered.

Reeves did not sue to recover the timber, but sued only to remove a cloud from his title and to protect the interest which he already possessed. It was merely a suit to remove the cloud cast on his title by the deed executed by Moore, his grantor, to the latter's son, and was not in any sense a suit to recover the timber, for that had passed to Reeves under the conveyance to him by Moore, and all the relief that he needed was to remove the cloud from the title. There is nothing in the record to show that Frierson Moore was in possession of the timber, but he was merely asserting a claim to it under his father's deed, which constituted a cloud upon Reeves' title.

Mr. Justice KIRBY concurs.

APPENDIX

I.

OPINIONS NOT REPORTED.

National Life and Accident Co. *v.* Langford; appeal from Nevada Circuit Court, Geo. R. Haynie Judge; affirmed March 20, 1916, *per* Wood, J.

Texas & Pacific Railway Co. *v.* Krieger; appeal from Miller Circuit Court, Geo. R. Haynie, Judge; affirmed March 20, 1916, *per* Wood, J.

Board of Improvement of Water and Light Improvement District of Sulphur Springs *v.* Galbraith; appeal from Benton Chancery Court, T. H. Humphreys, Chancellor; reversed March 20, 1916, *per* Wood, J.

Rye *v.* McCord, Trustee; appeal from Sebastian Chancery Court; W. A. Falconer, Chancellor; affirmed April 3, 1916, *per* Wood, J.

Felker *v.* John F. Meyer & Sons Milling Co.; appeal from Washington Chancery Court; T. H. Humphreys, Chancellor; affirmed April 3, 1916, *per* McCulloch, C. J.

Moline Lumber Co. *v.* Henegar; appeal from Hot Spring Circuit Court; W. H. Evans, Judge; reversed April 3, 1916, *per* Hart, J.

Russell *v.* Russell; appeal from Lafayette Circuit Court; Geo. R. Haynie, Judge; affirmed April 3, 1916, *per* Kirby, J.

Gladish *v.* Bryant; appeal from Mississippi Circuit Court, Osceola District; J. T. Coston, Special Judge; affirmed April 3, 1916, *per* McCulloch, C. J.

Scott *v.* Cook; appeal from Logan Circuit Court, Southern District; James Cochran, Judge; affirmed April 3, 1916, *per* Smith, J.

Riggs *v.* Blythe; appeal from Crittenden Circuit Court; W. J. Driver, Judge; reversed as to the Bank of Commerce, and affirmed as to Blythe and Hamilton April 10, 1916, *per* Kirby, J.

Thompson *v.* Sharp County; appeal from Sharp Circuit Court, Southern District; J. B. Baker, Judge; affirmed April 10, 1916, *per* McCulloch, C. J.

Barton *v.* Hines; appeal from Hempstead Chancery Court; James D. Shaver, Chancellor; affirmed April 10, 1916, *per* Hart, J.

Monroe Hardware Co. *v.* Tucker; appeal from Union Chancery Court; James M. Barker, Chancellor; affirmed April 17, 1916, *per* Kirby, J.

Wilhoit *v.* Flack; appeal from Benton Chancery Court; W. A. Falconer, Chancellor; affirmed April 17, 1916, *per* Kirby, J.

St. Louis, I. M. & S. Ry. Co. *v.* Davis; appeal from Pulaski Circuit Court, Third Division; G. W. Hendricks, Judge; affirmed April 17, 1916, *per* McCulloch, C. J.

Fee *v.* White; appeal from Marion Circuit Court; J. I. Worthington, Judge; affirmed April 17, 1916, *per* Smith, J.

Cunningham, Admr., *v.* National Americans; appeal from Pulaski Circuit Court; G. W. Hendricks, Judge, Third Division; affirmed April 24, 1916, *per* Hart, J.

Memphis, Dallas & Gulf Rd. Co. *v.* Atlas Powder Co.; appeal from Howard Circuit Court; Jefferson T. Cowling, Judge; affirmed April 24, 1916, *per* McCulloch, C. J.

Benson *v.* Arkansas Abstract Co.; appeal from Calhoun Circuit Court; C. W. Smith, Judge; affirmed May 1, 1916, *per* McCulloch, C. J.

Davidson *v.* Rieff & Son; appeal from Pulaski Chancery Court; John E. Martineau, Chancellor; affirmed May 1, 1916, *per* Kirby, J.

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CASES DISPOSED OF ON MOTION.

Dr. A. A. Marquess *v.* Josephine Clayborne; Phillips Circuit Court; J. M. Jackson, Judge; appeal dismissed March 20, 1916, on appellee's motion, for noncompliance by appellant with rule 9; *per curiam.*

The J. H. Hamlen & Son Company *v.* J. T. Crenshaw and E. M. Halbert (consolidated cases); Grant Circuit Court; W. H. Evans, Judge; settled and appeal dismissed March 27, 1916, on appellant's motion; *per curiam.*

M. S. Branstetter *et al. v.* Charley Branstetter *et al.*; Arkansas Chancery Court, Southern District; John M. Elliott, Chancellor; appeal dismissed April 3, 1916, on appellee's motion on the ground that if the decree was final, the time for appeal had expired before the same was granted by the clerk, and if it was not final, the appeal was premature; *per curiam.*

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